IN THE MATTER OF FACT-FINDING
BETWEEN

CITY OF AVON	)	**CASE NO. 2016-MED-09-0998**
	)	
	)	
AND	)	
	)	**FINDINGS**
	)	**AND**
AVON FIRE FIGHTERS,	)	**RECOMMENDATIONS**
IAFF LOCAL 4310	)	

JAMES M. MANCINI, FACT-FINDER

APPEARANCES:

FOR THE UNION

Ryan J. Lemmerbrock
Attorney at Law

James Fischer
President Local 4310

FOR THE CITY

Michael D. Esposito
Attorney at Law

Sandy Conley
Clemans Nelson & Associates

SUBMISSION

This matter concerns fact-finding proceedings between the City of Avon (hereinafter referred to as the Employer or City) and the Avon Fire Fighters, IAFF Local 4310 (hereinafter referred to as the Union or IAFF). The State Employment Relations Board (SERB) duly appointed the undersigned as fact-finder in this matter.

The fact-finding proceedings were held on February 24 and March 1, 2017. The fact-finding proceedings were conducted pursuant to the Ohio Collective Bargaining Law as well as the rules and regulations of SERB. During the fact-finding proceeding, this fact-finder attempted mediation of the issues at impasse. The issues remaining for this fact-finder's consideration are more fully set forth in this report.

The bargaining unit consists of all full-time employees of the Avon Fire Department occupying the positions of Captain/Paramedic, Lieutenant/Paramedic, and Firefighter/Paramedic. There are currently approximately thirty members in the bargaining unit consisting of four Captains, four Lieutenants and twenty-two Firefighters.

This fact-finder in rendering the following findings of fact and recommendations on the issues at impasse has taken into consideration the criteria set forth in Ohio Revised Code Section 4117(G)(6)(7). Further, this fact-finder has taken into consideration all reliable evidence presented relevant to the outstanding issues before him.

1. ARTICLE 20, WAGES

The Employer proposes to increase hourly pay rates by 2% effective with the first full pay period following acceptance of the Agreement or the fact-finding recommendation or conciliation award. The City further proposed to increase wages by 2% with the first pay period in January 2018, and 1% the first full pay period in calendar year 2019. The City also proposes to delete obsolete signing bonus language found in the previous agreement.

The Union proposes increases of 3.5% effective the first pay period of 2017, 3% effective on the first pay of 2018, and 3% effective on the first pay of 2019.

The Employer cites internal comparisons in support of its wage proposal. Since 1991, internal equity and pattern bargaining have been key considerations for the City in its negotiations with all of its bargaining units. In the instant case, the City points out that all other bargaining units have agreed to 2% pay increases or the equivalent thereof for 2017 and 2018. This will be the first Agreement to address calendar year 2019. The City's Finance Director, Bill LeSan, stated that even though revenues are expected to increase for the foreseeable future, the City still has a significant amount of long term debt which means that expenditures must be closely monitored. Therefore based upon internal comparisons, the City maintains that its proposals of 2% wage increases in the first two years of the Agreement are justified.

The Union cites external comparable data in support of its wage proposal. The Union claims that Avon firefighters' wages fall below the area average wage. At ten

years of service, the Avon firefighters make nearly $1,000 less per year than that paid to comparable firefighters in Solon, Westlake, and Middleburg Heights. After annual premium costs for health insurance are subtracted from the total compensation, Avon firefighters are taking home the least amount of compensation among comparable professional firefighters/paramedics in the region. The Union argues that given the fact that Avon is in the midst of an economic boom, there is no justification for the Avon firefighters' wages to be below the average area firefighters' wages.

ANALYSIS – Based upon a careful review of the evidence presented, this fact-finder would recommend 2.5% increases in each year of the Contract effective on the first pay of those years.

External wage comparables supports the wage recommendation herein. It was shown that firefighters' wages in Avon fall below that of the comparable jurisdictions of Westlake and Middleburg Heights. The base salary for a ten year firefighter in Avon is $71,655 compared to the base salary in Westlake of $76,181, and in Middleburg Heights of $73,032. Even when one looks at the wages here for a fifteen year or twenty year firefighter, they still fall below that paid to firefighters in these comparable cities.

Moreover when one considers total compensation, after insurance premium payments are considered, Avon firefighters make about $1,000 less per year than the area average. Currently, Avon firefighters' pay 20% of the insurance premiums. Considering such insurance premium expenses for firefighters, their annual compensation falls well below that found in Westlake, Middleburg Heights as well as other fire departments in

the area. Such evidence provides further support for the pay increases of 2.5% recommended herein.

There is also evidence presented regarding the raises provided to comparable firefighters in the area. For 2017 and 2018, the Westlake firefighters will be receiving 2.5% increases. For Middleburg Heights, the salary increases for firefighters will be 2.33% in 2018, and 2.66% in 2019. Such comparable pay increases provide additional support for this fact-finder's recommendation herein.

This fact-finder recognizes the City's argument that internal comparisons show that the other bargaining units will be receiving 2% increases for 2017 and 2018. However, additional wage increases in those years beyond those provided to the other bargaining units are warranted for the firefighters for several reasons. First as previously discussed, when one considers total annual compensation after insurance premium expenses, the Avon firefighters are taking home less compensation than many of the other comparable firefighters in the area. Moreover, the Avon Fire Department's run volume has continued to grow along with more fire inspection work and community outreach. In that the workload has increased for the Avon firefighters and considering that their wages fall below that found in comparable jurisdictions, this fact-finder finds that it would be reasonable to provide the Avon firefighters with an increase beyond those provided to other bargaining units in the City.

It was also established that the City has the ability to fund the pay increases recommended herein out of currently available revenues. Even the City's Finance

Director acknowledges that the City's General Fund will have a significant cash balance at the end of the current year. Likewise, the Avon Fire Fund's revenue has continued to outpace expenditures which has resulted in the Fire Fund reaching nearly a $1 million balance at the end of 2016. Considering that the City's income tax revenue has continued to grow and that there will be significant year-end balances in both the Fire Fund and the General Fund, it is clear that the City has the ability to pay for the recommended wage increases.

This arbitrator would also recommend the elimination of the signing bonus language found in the prior agreement. Deletion of the expired provision under Section 20.05 pertaining to signing bonus would be appropriate.

RECOMMENDATION

This fact-finder recommends the following Wage increases:

ARTICLE 20 - WAGES

Effective First Pay 2017 – Two and one-half percent (2.5%) increase.
Effective First Pay 2018 – Two and one-half percent (2.5%) increase.
Effective First Pay 2019 – Two and one-half percent (2.5%) increase.

Section 20.05 – Delete expired signing bonus language.

2. ARTICLE 2, MANAGEMENT RIGHTS

The Union proposes to modify Section 2.02 to allow any rule or policy that is unreasonable or in violation of CBA to be grieved. The Union also proposes to modify Section 2.04 which would obligate the City to bargain over changes that "affect" wages, hours, and terms and conditions of employment, not just changes that "effect" those items.

The City is opposed to any change in the current Management Rights Provision.

The Union in support of its proposed changes to Article 2 claims that well-settled labor law provides that the Union should have the ability to grieve unreasonable work rules. The Union cites various arbitrable rulings found in Elkouri and Elkouri. It would only be reasonable to allow the firefighters to exercise their rights under well-established labor law to challenge work rules through the grievance process.

The Union cites RC 4117.08 in support of its position that the City is obligated to bargain changes that "affect" wages, hours, terms and conditions of employment. Moreover, it is well-settled that the waiver of a statutory right to bargain must be established by clear action by the waiving party. The Union presented the testimony of those who were involved in negotiating the parties' first CBA who indicated that there had been no clear waiver of the Union's bargaining rights under RC 4117.08. As such, Section 2.04 must be modified to reflect the City's obligations under RC Chapter 4117.

The Employer is adamantly opposed to any change which would diminish any of its rights and authority under the current Agreement. The City points out that the

Management Rights Provision found in the Firefighters' Contract is the same as that contained in all of the other City's labor agreements. The Employer submits that there is no reason to treat this bargaining unit any differently than others on this issue.

The Employer further points out that current language under Section 2.04 pertaining to the requirement to bargain over any subject which "effects" wages, hours, terms of conditions of employment has been in the parties' CBA since the very first contract. At that time, negotiators from both sides agreed to this particular language. There was no justification established by the Union to change this particular provision found under the Management Rights Article.

ANALYSIS – Upon careful review of the evidence, this fact-finder has determined that a modification to Section 2.04 is necessary in order to clarify the City's obligation to bargain changes that "affect" wages, hours, terms and conditions of employment. Currently, the provision states that the City's bargaining obligation is to bargain changes that "effect" wages, hours, terms and conditions of employment. RC 4117.08 expressly provides that "public employers are required to bargain on subjects reserved to the management and direction of the governmental unit except as those which affect wages, hours, terms and conditions of employment…" It is apparent that Section 2.04 of the parties' CBA provides that the City's bargaining obligation with the Union over the matters indicated is less than that which is required by State law. The City in this case is claiming that by agreeing to the language in question, the Union waived the statutory right to bargain. However, such a waiver of bargaining rights must be clear and

unequivocal. In the instant case, the evidence presented falls short of clearly establishing that the Union was aware that it was waiving statutory bargaining rights by agreeing to the language set forth in Section 2.04. As a result, this fact-finder recommends that the language involved be modified to reflect the City's obligation under RC Chapter 4117.

This fact-finder would not recommend the other change to Section 2.02 sought by the Union to include language that any rules or policies that it deems to be unreasonable may be grieved. This fact-finds that the Union should have the right to grieve any rule which it deems to be unreasonable. However, it would be more appropriate to amend Section 7.03 of the parties' Agreement pertaining to rules and regulations to allow the Union to file a grievance over any work rule which it deems to be unreasonable. As a result, it is not necessary to include such language under the Management Rights Provision

RECOMMENDATION

With respect to the Management Rights Provision, this fact-finder would recommend the following:

ARTICLE 2 - MANAGEMENT RIGHTS

Section 2.04 – "The Employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as to those which affect wages, hours, terms and conditions of employment…"

Section 2.02 – Retain current language.

3. ARTICLE 7, RULES AND REGULATIONS

The Union proposes modifications to Section 7.01 and 7.03 which would allow the Union to grieve unreasonable work rules or work rules that violate the CBA. The Employer is opposed to any change in Article 7.

The Union contends that under well-settled labor law, it should have the ability to grieve unreasonable work rules. However, Section 7.03 prohibits such challenge by requiring any challenge to be undertaken by discussion in a labor/management meeting. Therefore, Section 7.03 and 7.01 must be modified as proposed by the Union to allow the Union to exercise their rights under well-established labor law.

The Employer is opposed to any change in Article 7 which would diminish any of its rights and authority. The City points out that the work rules language found under Article 7 is the same as that which is contained in all of the other City's labor agreements in that any decision or action of the Employer may be questioned by the Union at a labor/management meeting. There is no reason to treat this bargaining unit any differently than any other within the City on this particular issue.

ANALYSIS – This fact-finder finds that it would be appropriate to modify Article 7 to allow the Union to have the ability to grieve work rules which it deems to be unreasonable, arbitrary or discriminatory. It is well settled arbitrable authority that a Union or employees have the right to challenge work rules through the grievance process. The current language found under Section 7.01 and 7.03 basically states that the Union can only challenge any work rules established by the City at a "labor/management

meeting." This fact-finder finds that it would be unreasonable to prohibit the Union from challenging any newly issued work rule through the grievance process. As a result, Sections 7.01 and 7.03 should be modified to reflect the Union's right to challenge any rule as being unreasonable, arbitrary or discriminatory.

RECOMMENDATION

It is the recommendation of this fact-finder with respect to the Rules and Regulations Provision, Article 7 that it be modified as follows:

ARTICLE 7 – RULES AND REGULATIONS

Section 7.01 – Delete 2nd paragraph.

Section 7.03 – Delete current language and substitute the following:

"Any decision or action of the Employer pursuant to Section 1 above may be challenged by the Union by the filing of a grievance at Step 2 of the Grievance Procedure set forth in Article 23."

4. ARTICLE 8, PROBATIONARY PERIOD

The Employer proposes to add a provision to establish that extended absences of two workweeks or more during initial or promotional probation shall extend the probationary period by the actual number of days of absence. The Union proposes to maintain current contract language.

The City maintains that its proposal is reasonable and will allow the Employer sufficient time to determine whether an employee has successfully completed the initial or promotional probationary period. The City points out that it is a routine practice with four out of the six other bargaining units to extend probationary periods by the number of days of absence when an absence extends for ten working days or more. The City seeks to treat this bargaining unit similarly to all others for reasons of consistency and standardization.

The Union claims that there is no basis to change the existing terms of Article 8. There was no showing made that there have been any instances which would necessitate the change proposed by the City.

ANALYSIS – This fact-finder would recommend the modification to the current language as proposed by the City. That is, the current provision should be modified to add a provision to establish that extended absences of two weeks or more during the initial or promotional probation shall extend the probationary period by the actual number of days of absence.

This fact-finder finds that the proposal of the City is reasonable. Such language would allow the City with sufficient time to determine whether an employee has successfully completed the initial or promotional probationary period. Moreover, internal comparisons support the City's proposal. It has been the practice of the City with four out of the six other bargaining units to extend probationary periods by the number of days of absence when an absence extends for ten working days or more. It should be noted that as the City indicated, due to the combination of forty hour employees and shift employees within the Department of Fire, the Employer's proposal is based upon work weeks (work weeks run from Sunday to Sunday).

RECOMMENDATION

With respect to Probationary Period, Article 8, this fact-finder would recommend the adoption of the City's proposed modification as follows:

ARTICLE 8 - PROBATIONAR PERIOD

> Modify to add language to establish that extended absences of two (2) work weeks or more during initial or promotional probation shall extend the probationary period by the actual number of days of absence.

5. ARTICLE 9, SICK LEAVE

The Union proposes to delete Section 9.06 to remove the maximum sick leave accumulation of 2,400 hours and to allow for unlimited accumulation. The Union also proposes to modify Section 9.07 to state that for an employee charged with fraudulently obtaining or attempting to obtain sick leave, and for excessive use of sick leave they may be disciplined instead of the current "shall" be disciplined. The Union also proposes adding additional language which would require discipline for alleged sick leave abuse or misuse to be for just cause.

The Employer seeks to retain current contract language with respect to Article 9.

The Union maintains that there is justification for removing the current 2,400 hours limitation on the accumulation of sick leave. First, the current restriction arbitrarily cuts the firefighter's accumulation of sick leave off at 2,400 hours. Thus, any firefighter who suffers a serious injury or illness, necessitating prolong use of sick leave, could exhaust their accumulative sick leave thereby leaving the firefighter with inadequate sick leave for any subsequent injury or illness.

Moreover, the Union points out that no other bargaining unit in the City has a limit on the amount of sick leave their employees may accumulate. The City's patrol officers, police supervisors and service employees all have the ability to accumulate unlimited sick leave. Also, the majority of comparable fire departments in the area have no limitation on the amount of sick leave employees may accumulate.

The City contends that the current 2,400 hour maximum for the accumulation of sick leave has existed since the parties' first CBA. The provision allows bargaining unit members to accrue sick leave that would allow for sick leave with pay for approximately eleven months if needed, as well as the ability to convert sick leave in excess of established threshold to cash annually as well as at the time of retirement.

Moreover, the City points out that the current provision allows for an annual conversion of sick leave to cash for hours in excess of 1,200. This threshold was reduced to 1,200 hours from the previous 2,400 hours during the last negotiations. Based upon the current 50.3 hour workweek, up to 100.6 hours of sick leave may be converted to one workweek of pay annually.

As indicated, the Union also proposes to modify Section 9.07 to remove terms mandating discipline and to add language requiring "just cause" for discipline for alleged sick leave abuse. The Employer seeks to retain the current contract language.

The Union in support of its proposal points out that the City in 2015 issued a letter announcing that it would begin to apply a "no fault" sick leave policy to bargaining unit members. The Union objected, arguing that the "no fault" policy was not applicable to the Union because of the terms governing bargaining unit members use of sick leave set forth under the parties' CBA. However, the City has applied the "no fault" policy, and in April 2016 reprimands were issued to three Union members for alleged "abuse" of sick leave in the first quarter of 2016. Those members had used 31 hours of sick leave in the first three months of 2016. The Union maintains that there was no abuse of sick leave

by bargaining unit members using 31 hours of sick leave over a three month period. However under the terms of the parties' CBA, the Union and its members were unable to arbitrate the reprimands because the CBA prohibits such reprimands from being arbitrated.

The Union takes exception to the City's claim that it had merely supplemented the terms of the CBA by implementing its "no fault" policy. The Union points out that the current Sick Leave Article does not state that a Union member can be disciplined merely because that member uses a certain amount of sick leave within a certain period of time. As a result, it cannot be said that the City had merely supplemented the CBA but actually had fundamentally changed the clear terms of the Sick Leave Article. As a result, the Union was compelled to propose language specifying that the mere usage of sick leave does not constitute cause for discipline of sick leave abuse and that such discipline must be for just cause. Unless the Union's language is recommended, bargaining unit members will continue to be unfairly subjected to discipline merely because they have used sick leave in accordance with the terms of the CBA.

The City contends that the current CBA includes language in the applicable Sick Leave Article which gives it the ability to discipline employees for fraudulent or excessive use of sick leave. It is imperative that the City maintains this right to discipline employees for such reasons. Moreover, the City points out that it has had a city-wide attendance/absence abuse policy since 1996 and that policy was incorporated into the city-wide personnel manual. The excessive use of sick leave has been defined for the fire

department shift personnel. The Employer further notes that absences have been greatly reduced due to the enforcement of the city-wide attendance/absence abuse policy. The City also maintains that there is no justification for treating the fire department employees any differently from other city employees who are subject to the same policy. The Employer cites other neighboring jurisdictions which have similar language in their sick leave provisions. The Employer submits that the Union failed to carry its burden of proving that there is any basis for a change in the current Sick Leave language.

ANALYSIS – First with respect to sick leave accumulation, this fact-finder finds that the evidence presented supports the removal of the cap of 2,400 hours on bargaining unit members ability to accumulate sick leave. Internally, no other bargaining unit in the City has a limit on the amount of sick leave employees may accumulate. The City's patrol officers, police supervisors, service employees, dispatchers, and building inspectors all have the ability to accumulate unlimited sick leave. There was no showing made by the City why the current cap for the firefighters' unit should be retained.

Moreover, a review of the comparable fire departments in the area establishes that the vast majority have no limitation on the amount of sick leave employees may accumulate. Out of eleven comparable fire departments cited by the Union, eight have no limitation. Therefore, both internal as well as external comparisons support this fact-finder's recommendation that the cap of 2,400 hours for sick leave accumulation be removed.

With respect to the second issue raised pertaining to discipline for sick leave abuse, this fact-finder would recommend retaining current language under Section 9.07 except to add language to make it clear that discipline for excessive use of sick leave or for sick leave abuse must be for just cause. Such additional language would not in any way interfere with the City's right to investigate an employee who is suspected of abusing his sick leave privileges.

This fact-finder also finds merit to the Union's contention that firefighters should have the right to grieve any discipline including reprimands for violating the provision in question. As more fully discussed under Article 24, Discipline, this fact-finder would recommend that firefighters be allowed to appeal through the grievance process any discipline including reprimands which they may receive for violating this provision.

RECOMMENDATION

It is the recommendation of this fact-finder that Sick Leave, Article 9 be modified as follows:

ARTICLE 9 – SICK LEAVE

Section 9.06 – Delete language which states that there is a limitation of 2,400 hours for the accumulation of sick leave.

Section 9.07 – Current language except to add a sentence stating that "Discipline for sick leave abuse or excessive use of sick leave must be for just cause."

6. ARTICLE 11, EMERGENCY LEAVE

The Employer seeks to delete this article in its entirety. The Union proposes to retain the current Emergency Leave Provision.

The City maintains that the provision was first incorporated into the parties' CBA when shift employees were intended to be treated as salary employees. In that shift employees are no longer truly treated as salaried, it does not make sense to retain the current provision. Moreover, no other City employee group receives emergency leave, and the external comparisons do not support such a provision.

The Union contends that the current Emergency Leave Provision is reasonable. It allows bargaining unit members to request leave so that employees can attend to emergencies involving immediate family members. The City did not cite any instances of abuse of this provision which would support a change in the Emergency Leave Provision. The Union points out that emergency leave is granted at the discretion of the Chief or his designee.

ANALYSIS – This fact-finder has determined that the current Emergency Leave Provision should be retained. There was insufficient basis established for deleting this provision. The current Emergency Leave article appears to be reasonable in that bargaining unit members can request up to four hours of emergency leave but only upon the approval of the Fire Chief or his designee so that they can attend to emergencies involving the employee's immediate family. In that emergency leave is granted only at

the discretion of the Fire Chief or his designee, this fact-finder finds that the current provision should be retained.

RECOMMENDATION

This fact-finder finds that the current Emergency Leave Provision found under Article 11 should be retained without any change.

ARTICLE 11 – EMERGENCY LEAVE

Current language, no change.

7. ARTICLE 17, HOLIDAYS

The Union proposes to replace the Veteran Day holiday with the day after Thanksgiving. The Union also proposes under Section 17.02 to grant Union members one additional floating holiday.

The City seeks to retain current language with reference to the Veterans Day holiday. The Employer also proposes to reduce the amount of holiday time for bargaining unit members from five tours to four tours per year, and the amount of floating holiday time for shift employees from three to two tours for 48 hours. Finally, the Employer proposes under Section 17.02 regarding Reconciliation, to include language requiring an employee to reconcile through his final pay or separation payment any used but unearned holiday time.

The Union in support of its proposal to increase holiday leave cites external comparable data. The Union claims that Avon firefighters receive less annual leave as compared to the average annual leave provided to firefighters in the area. The Union also points out that by replacing the Veterans Day holiday with the day after Thanksgiving there would be no additional cost to the City and is consistent with the holidays granted to other employees in Avon working forty hour schedules. The Union further states that it would agree to the City's proposed terms concerning reconciling the final pay or separation payment for any used but unearned holiday time. However, it would want the additional terms incorporated into the CBA.

The Employer maintains that internal consistency requires that the current Veterans Day holiday be retained without any change. The bargaining agreements between the City's other safety force units do not recognize the day after Thanksgiving as a holiday. With respect to the proposal to reduce the amount of holiday time for the bargaining unit members, the Employer points out that currently the firefighters' unit enjoys more paid time off than any other unit in the City. Its proposal to adjust the amount of holiday time for firefighters would result in bringing this unit in line with the other City's bargaining units with respect to paid time off. Finally, the City claims that its reconciliation language is reasonable and provides consistency with other City employees.

ANALYSIS – This fact-finder would not recommend any change in the current Holiday Provision except for the additional language pertaining to reconciliation which the parties tentatively agreed upon during the fact-finding proceedings.

First, this fact-finder finds insufficient basis to switch the current Veterans Day holiday with the day after Thanksgiving. The bargaining agreements with the City's other safety force units do not recognize the day after Thanksgiving as a holiday. Internal consistency should be maintained with respect to the holidays.

This fact-finder has further determined that there was insufficient basis established for increasing the number of floating holidays from three to four for the firefighters. This fact-finder also finds no merit to the Employer's proposal to reduce the amount of holiday time for bargaining unit members from five tours to four tours per

year. It was shown that bargaining unit members currently enjoy more paid time off than any other unit in the City. Therefore an increase in the number of floating holidays is not justified. At the same time, comparable data does not support a decrease in the firefighters' existing leave benefits. Therefore, it would be reasonable to retain the current provision with respect to holiday leave.

RECOMMENDATION

It is the recommendation of this fact-finder that the current Article 17, Holiday Leave Provision be retained without any change.

ARTICLE 17 – HOLIDAYS

Current language, no change except in Section 17.02:

Section 17.02 - Incorporate tentative agreement to include language requiring an employee to reconcile through his final pay any used but unearned holiday time.

8. ARTICLE 19, HOURS OF WORK

The Union proposes language which clearly states that the City can restructure the firefighters' schedules so long as it does not conflict with the terms of the CBA. The Employer opposes any change in the current language found under Section 19.01.

Finally, the Union proposes to increase the amount of compensatory time that IAFF members can accrue and use during a calendar year from 120 hours to 192 hours. The Union also proposes to increase the amount of compensatory time that can be cashed in on an annual basis from 50 hours to 100 hours. The Employer opposes any change in the current compensatory time provision.

The Employer proposes to move back to an average 51.7 hour workweek in 2018. The Union proposes to maintain the current 50.3 hour workweek.

The Employer also proposes to exclude sick leave from the calculation of hours worked for overtime purposes. The Union seeks to maintain current terms which provides that all hours worked or in active pay status count for overtime purposes.

The Union also proposes to incorporate into the CBA the MOU signed in April 2016 pertaining to holdover pay. That MOU provides that an employee held over for 15 minutes or more shall be paid one hour of holdover pay.

The Employer proposes to address the issue of emergency holdover by including language that if a bargaining unit employee is required to work beyond his regularly scheduled shift due to an emergency call, the employee will be paid in quarter hour increments, up to one hour for holdover time between 8 minutes and 60 minutes.

The Union in support of its first proposal to modify existing language in Section 19.01 and 19.02 points out that the terms of the current CBA specifically sets forth the firefighters' work hours. As a result, the Union takes the position that the City cannot unilaterally change the employees' hours of work. For that reason, it proposes language clearly stating that the City can restructure the employees' schedules so long as it does not conflict with the terms of the CBA.

The Union opposes the City's proposal to increase the firefighters' work hours from 50.3 to 51.7 hours. The Union points out that there is no comparable data either internally or externally that supports the City's proposal.

With respect to the City's proposal to exclude sick leave from time in "paid status" that count for purposes of overtime, the Union points out that this issue has been addressed in the past. During the negotiations for the 2011-13 CBA, the Union agreed to give up seven premium holidays in return for language specifying that all hours in "paid status" count as hours worked for purposes of overtime. Also subsequently in 2014 as part of an agreed upon conciliation award, sick leave remained as time in "paid status" that counted as hours worked for purposes of determining overtime eligibility.

The Union's proposal to increase the amount of compensatory time that firefighters can accrue and use during a calendar year is supported by external comparable data. The modest increase would allow Union members a greater ability to take leave when able as opposed to receiving overtime compensation. The Union submits that its proposed modest increases in compensatory time are reasonable.

The Employer is opposed to any modification to Section 19.01 which would prevent the City from restructuring the firefighters' work schedules. The right to schedule and manage the workforce are clearly reserved to the City.

The Employer argues that a move back to an average 51.7 hour workweek beginning next year is reasonable. The City points out that the firefighters' workload has increased during the current CBA. As a result for purposes of the efficiency of the department, the Employer seeks to increase the availability of its fulltime firefighting staff.

The Employer cites internal comparisons in support of its position to exclude sick leave from the calculation of hours worked for overtime purposes. The Employer points out that such a provision is found in all other City bargaining unit agreements.

With respect to its holdover pay proposal, the Employer points out that all other City personnel are compensated based upon the same schedule proposed for this bargaining unit. The Employer believes that its proposal is reasonable in that it more accurately ties the amount of excess hours worked to the appropriate quarter hour increment than the current MOU which addresses this issue.

ANALYSIS – This fact-finder has determined that with respect to the first issue raised under Article 19, he does not recommend any change in Section 19.01 of the Agreement as proposed by the Union. The Union proposes to add language which would state that the Employer could restructure work schedules so long as it does not conflict with the terms of the CBA. The current provision makes it clear that the Union

member's normal shift schedule is twenty-four hours on duty followed by forty-eight hours off duty. There has been no attempt by the City to change the work schedule of firefighters. This fact-finder believes that RC Chapter 4117 would preclude the City from unilaterally changing the employee's hours of work. Therefore, this fact-finder would not recommend any change in the current contract language set forth in Section 19.01.

This fact-finder finds no basis to the Employer's proposal to increase the firefighters' work hours from the current 50.3 hour workweek to a 51.7 hour workweek beginning in 2018. There was no comparable data submitted both internally or externally which would support the City's proposal. In fact, comparable data indicates that the Avon Firefighters' work hours are in line with those found in neighboring jurisdictions. This fact-finder would not recommend any change as proposed by the Employer to move to a 51.7 workweek.

This fact-finder also finds no merit to the Employer's proposal to exclude sick leave from the calculation of hours worked for overtime purposes. It was shown that during the negotiations in 2011-2013, the Union agreed to certain concessions regarding holidays in order to obtain language specifying that all hours in "paid status" count as hours worked for purposes of overtime. The City has attempted to exclude sick leave from time in paid status in the past and on each occasion duly appointed SERB neutrals have rejected the City's prior attempts to remove hours in "paid status" from overtime eligibility. It is noted that the City's police units agreed to exclude sick leave from hours

in paid status but they have maintained holiday benefits which are greater than that provided to the firefighters. Therefore, this fact-finder has determined that consistent with the parties' bargaining history, sick leave should continue as time in "paid status" that counts as hours worked for overtime purposes.

With respect to the holdover pay issue, this fact-finder would recommend that the Memorandum of Understanding which was entered into by the parties in April 2016 be incorporated into the Agreement. That basically provides that if a bargaining unit employee is held over and required to work fifteen minutes or more beyond their regular schedule, the employee will be paid one hour of holdover time. However if the employee is required to work less than fifteen minutes beyond their regular schedule, the employee will not be compensated any additional time. This MOU appears to be reasonable and should be incorporated by the parties into their CBA. This fact-finder also does not recommend the Employer's proposal regarding a rounding method for holdover compensation.

This fact-finder would recommend an increase in the compensatory time that bargaining unit members can accrue and use during the calendar year from the current 120 hours to 192 hours. Annual comp time accruals provided to firefighters in neighboring jurisdictions indicates that the 192 hour proposal made by the Union herein for compensatory time accrual is reasonable. It was shown that the average annual comp time accrual in comparable jurisdictions is about 191 hours. For example in Middleburg Heights, firefighters are allowed 240 hours of annual comp time accrual, and 192 hours in

Brook Park. This fact-finder however does not find any basis with respect to the Union's other proposal to increase the amount of compensatory time that can be cashed in on an annual basis from 50 hours to 100 hours. There simply was insufficient evidence produced to support such a proposal.

RECOMMENDATION

It is the recommendation of this fact-finder that the only modification to Article 19, Hours of Work would be to include the Memorandum of Understanding pertaining to holdover which is dated April 12, 2016 and to increase the amount of compensatory time that Union members can accrue and use during a calendar year from 120 hours to 192 hours. All other provisions are to remain the same without any change.

ARTICLE 19 – HOURS OF WORK

Section 19.01, Hours and Schedules – Current language, no change.

Section 19.02, Work Shifts and Assignments – Current language, no change.

Section 19.04, Call Back (Holdover Pay) – Incorporate Memorandum of Understanding dated April 12, 2016 regarding Holdover Pay.

Section 19.05, Compensatory Time – Modify to state that employees may not accrue or use more than 192 hours of compensatory time at any one time, or use more than 192 hours in any calendar year. Otherwise, current language.

9. ARTICLE 23, GRIEVANCE PROCEDURE

The Union proposes to modify Section 23.01 to provide that any disciplinary action is grievable and arbitrable, not just discipline that results in a loss of position or pay as currently stated. The Employer rejects this proposal and proposes current contract language.

The Union contends that the current provision is unreasonable because it prevents employees from enforcing a very basic requirement of all labor agreements, namely that discipline be for just cause. Lesser forms of discipline such as reprimands and paid suspensions currently cannot be appealed to arbitration. However, those forms of discipline may also adversely affect an employee's career. For that reason, Section 23.01 should be modified to make all discipline including lower level discipline subject to arbitration.

The Employer contends that arbitrating lower level discipline is costly and inefficient. Currently, all other City bargaining unit agreements provide that only a reduction in pay, position or termination is arbitrable. The Employer wishes to maintain consistency with other bargaining units.

The Union has also proposed to remove existing language which allows the Mayor to have the Step 4 hearing heard by "his designee" rather than the Mayor himself. The Employer is opposed to any change to current language.

The Union argues that it is important to have person to person discussions between Union representatives and the City's administration at Step 4 of the grievance

process. The Union is simply asking that at Step 4, the Mayor actually meet with the Union to discuss the dispute as opposed to the Mayor handing it off to an outside labor consultant.

The Employer points out that the right to have a designee to fill-in for the Mayor is included in all other City bargaining unit agreements. Since 1991, there have been three Mayors and all have used a designee at Step 4 of the grievance process.

The Union proposes to strike certain current language limiting an arbitrator's authority to resolve grievances. Under the current provision, arbitration awards are subject to being overturned on a much wider scope than that allowed under RC Chapter 2711 and on one-sided grounds solely in the favor of the City. The Union cites for example that if the City unilaterally changed the firefighters' schedule from the three current platoons to four platoons on different shifts, the Union could grieve the matter but the City could claim the arbitrator is without authority to grant the grievance.

The City contends that the current language found under Section 23.06(E) regarding restrictions on the arbitrator's authority are reasonable and have been fully negotiated between the parties in the past. The Employer also notes that such language is found in its other bargaining agreements.

ANALYSIS – With respect to Article 23, Grievance Procedure, this fact-finder has determined from the evidence presented that Section 23.01 should be modified to allow any disciplinary action including lower level discipline to be grievable and arbitrable. In addition, this fact-finder would recommend that the tentative agreement

reached between the parties regarding Section 23.06(E) pertaining to Ohio arbitrators and that the parties can reject up to two lists be incorporated into the parties' Agreement. This fact-finder would not recommend any other changes under Article 23.

This arbitrator finds merit to the Union's contention that lesser forms of discipline such as reprimands and paid suspensions should be grievable and appealable to arbitration. As the Union noted, these lesser forms of discipline could serve as a basis for further more severe discipline. Such lesser discipline may also adversely affect the employee's ability to advance within the Fire Department. The Union pointed to the firefighters who recently had received reprimands for violating the City's "no-fault" sick leave policy and could not appeal their suspensions to arbitration. This arbitrator finds that it would be reasonable to allow such discipline to be grievable and arbitrable.

This arbitrator recognizes the City's argument that the language in question under Section 23.01 is found in other bargaining agreements in the City. However at the same time, it was shown that such language is not commonly found in other agreements in similarly situated jurisdictions in the area. For example, the cities of Westlake and Bay Village do not prohibit grievances over lesser forms of discipline such as written reprimands. External comparisons support the recommendation herein for a change in Section 23.01 of the Agreement whereby any disciplinary action would be grievable and arbitrable.

This arbitrator would not recommend any change in Section 23.06 which allows the Mayor to use a designee at the Step 4 level of the grievance process. There was

insufficient basis established to eliminate the Employer's right to have the Mayor use a designee at the Step 4 level of the grievance process.

With respect to the other proposal made by the Union regarding the arbitrator's authority, it was shown that the current language set forth under Article 23 is found in all of the City contracts. It also was not clearly shown that the current language pertaining to the arbitrator's authority is unreasonable. Therefore, this fact-finder would not recommend any change in the arbitrator's authority language currently found under Article 23.

RECOMMENDATION

With respect to Article 23, Grievance Procedure, this fact-finder would recommend the following changes:

ARTICLE 23 – GRIEVANCE PROCEDURE

Section 23.01 – Modify to state that "Any disciplinary action, including lower level discipline such as written reprimands, are grievable and arbitrable.

Delete last two sentences of Section 23.01 which would be replaced by the above provision.

Section 23.06(E) – Incorporate tentative agreement reached which provides that a request for arbitrators are to include only "Ohio" arbitrators and that each party may reject up to two (2) lists.

All other language under Article 23 is to remain the same, current language.

10. ARTICLE 24, DISCIPLINARY PROCEDURE

The Union proposes to modify Section 24.02 so that an employee would receive a predisciplinary hearing anytime an employee is reduced in pay, benefits, privileges or position, not just reduced in pay or position. The Union also proposes to modify Section 24.03 to allow an employee to grieve any form of discipline. Finally, the Union proposes to modify Section 24.04 so that an employee is found "not guilty" rather than "innocent" of criminal charges and subsequent return to work would be made whole for the period of administrative leave.

The Employer rejects each of the Union's proposals regarding Article 24. The Employer proposes modifying the discipline "force and effect" language found under Section 24.07 to include all documented discipline as intervening and not simply related discipline.

The Union contends that any discipline that lacks just cause adversely effects an employee. As such, employees should be permitted to appeal any form of discipline, not just discipline that results in the loss of pay or position. The Union also maintains that the language found under Section 24.04 needs to be modified to indicate correctly that employees facing criminal charges are not found "innocent" but rather "not guilty." It should also be made clear that an employee who returns to work after being found not guilty of the criminal charges should be made whole including restoration of any leave used while on administrative leave.

The Employer once again objects to allowing all levels of discipline to be subject to arbitration. The Employer finds no benefit in the arbitration of lower level discipline and seeks to maintain consistency with their other bargaining units. The Employer does note that it is agreeable to changing the term "innocent" to "not guilty" under Section 24.04.

ANALYSIS – This fact-finder would recommend a modification in the language found under Article 24 to require that a predisciplinary hearing be held when an employee is reduced in pay, benefits, privileges or position (i.e. suspended, demoted or discharged for just cause). As previously discussed, this fact-finder finds merit to the Union's argument that any form of discipline, including lesser forms of discipline such as reprimands, should be grievable and arbitrable. As such, it would be reasonable to also include language which would allow an employee who has been reduced in pay, benefits or privileges to have a predisciplinary hearing.

This fact-finder has determined that there was insufficient basis established for modifying the current language found in Section 24.01 or 24.02 of the Disciplinary Procedure Provision. The current Section 24.01 clearly provides that the Employer may take disciplinary action against any employee in the bargaining unit only for just cause. The provision then sets forth the forms of disciplinary action which may be taken including a written reprimand, suspension without pay, demotion and discharge. There was no justification established to support the Employer's position that further language should be included under Section 24.01 regarding disciplinary actions.

This fact-finder also finds that under Section 24.02, the provision adequately provides that a predisciplinary hearing is to be provided whenever an employee may be suspended, demoted or discharged for just cause. Internal comparisons support the current language. The same type of language pertaining to predisciplinary hearings is found in other CBAs in the City.

This fact-finder does find justification for modifying the current Section 24.03 of the Agreement. As previously discussed in Article 23, this fact-finder believes that bargaining unit members should be able to grieve and appeal to arbitration any disciplinary action including lesser forms of discipline such as written reprimands. Reprimands, transfers, orders to attend training or counseling, and paid suspensions should all be allowed to be appealed to arbitration. These forms of discipline may serve as a basis for further more severe discipline. As such, it would be reasonable to allow a bargaining unit member to appeal through the grievance process these forms of discipline. The language suggested by the Union for Section 24.03 appears to be appropriate and would merely state that any disciplinary action may be appealed through the grievance procedure set forth therein.

With respect to Section 24.04, it appears that the parties are in agreement to modify this provision to reflect that an employee found "not guilty" rather than the current "innocent" of criminal charges and subsequently returned to duty is to be made whole for the period of administrative leave. Therefore, this fact-finder would recommend this particular modification in the language found under Section 24.04.

However, this fact-finder does not find any basis to further modify Section 24.04 as proposed by the Union.

RECOMMENDATION

With respect to Article 24, Disciplinary Procedure, this fact-finder recommends the following:

ARTICLE 24 – DISCIPLINARY PROCEDURE

Section 24.01 – Current language, no change.

Section 24.02 – Current language, no change.

Section 24.03 – Modify first sentence to state – "Any disciplinary action may be appealed through the Grievance Procedure set forth herein." Otherwise, current language, no change.

Section 24.04 – Modify by substituting the words "not guilty" rather than the current word "innocent" in the provision.

11. NEW ARTICLE, ANNUAL RESPIRATORY EVALUATIONS

The Union proposes to add a new article to the CBA establishing the procedure for the annual respiratory evaluations implemented by the City in 2015. The Union's proposal would include language which would specify when and how medical questionnaires are completed and handled by the City; the procedure for in-person respiratory evaluations; procedure if an employee is not clear to use a respiratory device; and to clarify that any discharge must be for just cause.

The City opposes any new article to the Collective Bargaining Agreement.

The Union contends that it would be appropriate to incorporate the basic terms governing the annual respiratory evaluations. In 2015, the City unilaterally implemented mandatory respiratory evaluations for all IAFF bargaining unit members. The Union attempted to grieve the matter but the City claimed that the grievance was not arbitrable because it was controlled by law external to the CBA and therefore outside the authority of any arbitrator. The Union now seeks to add a new article addressing the annual respiratory evaluations for bargaining unit members.

The Employer claims that the Union's proposal as written is non-mandatory subject to bargaining. The Union's proposal interferes with the Employer's right to establish and implement policy. The City points out that its annual medical evaluation for SCBA use is required for any employee who might be required to use respiratory protection equipment. There is no dispute between the parties that the employees must

be able to utilize a SCBA in order to engage in fire prevention/suppression/rescue activities.

ANALYSIS – This fact-finder has determined that there should be no new article addressing the Annual Respiratory Evaluations for bargaining unit members. The annual respirator evaluations for SCBA use is addressed not only by departmental policy but also OAC 4123 which states that annual medical evaluations for SBA use is required for any employee who might be required to use respiratory protection equipment. There is no dispute between the parties that bargaining unit employees must be able to utilize SCBA in order to engage in fire prevention/suppression/rescue activities. The Union has raised several legitimate concerns about the current respiratory evaluation policy and what would happen if an employee is not cleared to use the respiratory device. However, it appears that the Ohio Administrative Code which pertains to firefighting safety measures adequately protects any firefighter who for whatever reason fails the respiratory evaluations. One Section of the Ohio Administrative Codes specifically addresses the situation where there is involuntary disability separation because an employee is unable to perform the essential job duties of the position. A pre-separation hearing is provided for any employee who is involuntarily separated from employment.

Moreover, there were no other firefighter contracts in comparable jurisdictions which have annual respiratory evaluations language included in their contracts. There simply was insufficient basis established to now include the new article proposed by the Union pertaining to annual respiratory evaluations.

RECOMMENDATIONS

This fact-finder does not recommend any new article pertaining to Annual Respiratory Evaluations.

No New Article regarding Annual Respiratory Evaluations

12. ARTICLE 36, DURATION OF AGREEMENT

The Union proposes that the CBA be effective January 1, 2017 to December 31, 2019, and to modify Section 36.02 to state that a notice to negotiate shall be served by electronic mail instead of certified mail. The Union also proposes to delete the Zipper Clause found under Section 36.03 of the CBA.

The Employer proposes that the Agreement be effective upon ratification by both parties or final dispute resolution and that it terminate on December 31, 2019. The Employer also agreed to the modification of Section 36.02 which would require notice to negotiate to be served by electronic mail rather than the current certified mail. The Employer is opposed to any deletion of the Zipper Clause.

The Union argues that deletion of the Zipper Clause provision is needed in order to clarify that there is no misunderstanding regarding enforcing the past practices. The Union maintains that during the most recent CBA, the City told the Union that Fire Department past practices were unenforceable and that arbitrators are without authority to award any relief on past practices. The Union argues that in the past, it unwittingly signed off on the Zipper Clause with no understanding that it was waiving the ability to enforce past practices. A waiver of a right to bargain over past practice must be established by clear action by the waiving party. This did not occur here and for that reason it should be made clear that the Union did not waive any right to enforce past practice.

The Employer notes that the same Zipper Clause language found in the CBA here is included in all other City bargaining unit agreements. Moreover, the Union's proposal is not supported by external comparables. The majority of the comparable contracts include a Zipper Clause. The Employer indicates that it always strives to maintain consistency among all bargaining unit agreements.

ANALYSIS – First, this fact-finder would recommend that the CBA be effective January 1, 2017 and terminate on December 31, 2019. There was no reason established to not make the CBA effective on January 1, 2017.

This fact-finder would also recommend the change to Section 36.02 to state that a Notice to Negotiate shall be served by electronic mail. This would be consistent with the applicable Ohio Administrative Code.

This fact-finder has further determined that there should be no deletion of the Zipper Clause currently contained in the CBA. It was established that all other City agreements contain similar Zipper Clause language. Likewise, it was shown that the Union's proposal to delete the Zipper Clause is not supported by the external comparables. It was shown that the majority of the comparable fire department contracts in the area include a Zipper Clause. For example, Westlake and Bay Village have Zipper Clauses in their CBAs. Therefore internal as well as external comparables support this fact-finder's recommendation to maintain the current Zipper Clause language. There simply was insufficient basis established for the deletion of the Zipper Clause language.

RECOMMENDATION

This fact-finder recommends the following with respect to Article 36, Duration of Agreement:

ARTICLE 36 – DURATION OF AGREEMENT

Section 36.01 – The Agreement is to be effective January 1, 2017 and remain in effect until December 31, 2019.

Section 36.02 – Modify – Notice to negotiate shall be served via electronic mail rather than by certified mail.

Section 36.03 – Zipper Clause - current language, no change.

C O N C L U S I O N

In conclusion, this fact-finder hereby submits his recommendations on all of the outstanding issues presented. It is also the recommendation of this fact-finder that all previously agreed upon tentative agreements be incorporated into the parties' new Contract.

AUGUST 2, 2017

James M. Mancini /s/
JAMES M. MANCINI, FACT-FINDER

JAMES M. MANCINI
ATTORNEY AT LAW - ARBITRATOR

JEFFERSON CENTRE, SUITE 306
5001 MAYFIELD ROAD
LYNDHURST, OHIO 44124

216 382-9150 Fax 216 382-9152 ManciniJM@aol.com

August 2, 2017

IN THE MATTER OF FACT-FINDING BETWEEN:

CITY OF AVON	)	
	)	CASE NO. 2016-MED-09-0998
AND	)	
	)	
AVON FIRE FIGHTERS	)	
IAFF LOCAL 4310	)	

FEE STATEMENT: