

**FACT FINDER'S REPORT
AND
RECOMMENDATION**

IN THE MATTER OF:

City of North Canton

and

Ohio Patrolmen's Benevolent Association

Case Number:

17-MED-10-1312 (Full-time Dispatchers and Lead Dispatcher)

PRESENTED TO:

Timothy L. Fox
Attorney for City of North Canton
145 North Main St.
North Canton, Ohio 44720

and

Mark J. Volcheck
Attorney for Ohio Patrolmen's Benevolent Association
92 Northwoods Blvd., Suite B-2
Columbus, Ohio 43235

and

Donald M. Collins, General Counsel
State Employment Relations Board
65 East State Street, 12th Floor
Columbus, Ohio 43215

Thomas J. Nowel was appointed to serve as Fact Finder in the above referenced case by the State Employment Relations Board on November 28, 2017 in compliance with Ohio Revised Code Section 4117.14 (C)(3).

Hearing was held on January 9, 2018 at North Canton City Hall. The parties submitted pre-hearing statements in a timely manner. The Fact Finder inquired if the parties were willing to engage in mediation of the issues submitted at Fact Finding, and settlement discussions ensued. At the close of the hearing, the parties stipulated to all outstanding issues as contained in this Report and Recommendation with the exception of the Employer's proposal on medical marijuana, item #4 herein. Both parties were heard on such issue. The parties then stipulated that they would forward the resolved articles to the Fact Finder for inclusion in his Report and Recommendation. There was agreement that the Fact Finder would write each recommendation without rationale with the exception of item #4 herein, medical marijuana.

The OPBA is the exclusive representative of the bargaining unit which is comprised of seven Full-time Dispatchers and the Lead Dispatcher.

Those participating for the City at hearing include the following:

Timothy L. Fox, Director of Law
Patrick A. DeOrio, Director of Administration
Laura Brown, Director of Finance

Those participating for the OPBA at hearing include the following:

Mark J. Volcheck, OPBA Attorney
Randy Freas, Negotiating Committee
Megan Scheffer, Negotiating Committee
Anita Cardwell, Negotiating Representative

BACKGROUND

In analyzing the positions of the parties regarding each issue at impasse and then making a recommendation, the Fact Finder is guided by the principles that are outlined in ORC Section 4117.14 (G) (7) (a-f).

1. The past collectively bargained agreements between the parties.
2. Comparison of the issues submitted to fact finding relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved.

3. The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service.
4. The lawful authority of the public employer.
5. The stipulations of the parties.
6. Other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact finding, or other impasse resolution procedures in the public service or in private employment.

The Fact Finder indicated that, by agreement of the parties, the Report and Recommendation would be transmitted on January 18, 2018 by way of electronic mail.

RECOMMENDATIONS AND STIPULATIONS

1. **ARTICLE 17 – OVERTIME PAY ALLOWANCE**

Section 17.01. Employees working in excess of their normal shift shall receive credit for time worked in one-quarter hour increments. All overtime is subject to the Chief's approval. There shall be no pyramiding of overtime.

Section 17.02. Employees called out for duty shall receive a minimum of two (2) hours work or two (2) hours pay, in lieu thereof, if not needed to work the total of two (2) hours.

Section 17.03. All time worked in excess of forty (40) hours in one calendar week shall be compensated at one and one-half (1-1/2) times the hourly rate. Employees have the choice of either overtime pay or compensatory time off on the same basis as provided by Section 3 of Article 18 of this agreement in respect to holidays.

Section 17.04. Employees shall be compensated at their hourly rate of pay for hours worked on Sunday. In addition, each officer shall receive four (4) hours of compensatory time for each Sunday worked. The compensatory time shall be held in a Compensatory Time Bank and paid once each quarter in cash. This section shall be void and without effect upon the date this collective bargaining agreement is signed by the parties.

2. ARTICLE 27, WAGES

Section 27.01. Effective the full pay period following 1/1/2018, and thereafter, the full pay period that includes January 1, all employees shall be paid in accordance with the following schedule:

	Effective 1/1/2018	Effective 1/1/2019	Effective 1/1/2020
Lead Dispatcher	1.15 times greater rate than Dispatcher A (After 2 Years)	1.15 times greater rate than Dispatcher A (After 2years)	1.15 times greater rate than Dispatcher A (After 2 Years)
Dispatcher A (After 2 Years)	\$21.49	\$22.13	\$22.79
Dispatcher A (After 1 Year)	\$20.66	\$21.18	\$21.71
Dispatcher B (2nd 6 months)	\$18.47	\$18.93	\$19.40
Dispatcher B (1st 6 months)	\$17.50	\$17.94	\$18.39

Note: The position of Lead Dispatcher is properly subject to SERB’s jurisdiction and that the bargaining unit of full-time Dispatchers and Lead Dispatcher is lawfully and properly comprised under R.C. 4117. The Lead Dispatcher is not a supervisor as that term is defined by R.C. 4117.

Section 27.02. All employees shall receive a shift differential in the amount of thirty-five cents (\$.35) per hour for afternoon shift and fifty cents (\$.50) per hour for midnight shift, for hours actually worked.

Section 27.03. Each employee assigned the duties of Communications Training Officer shall receive an additional on dollar (\$1.00) per hour, for each hour in which these duties are performed.

Section 27.04. Each Dispatcher A, not on probation, shall receive a Senior Communication Officer stipend of \$350.00 annually. Each Dispatcher A must have completed at least three years of service to be eligible for the stipend.

Section 27.05. Each Bargaining Unit Employee who has successfully completed basic communications training shall receive a stipend of two hundred fifty dollars (\$250.00) annually.

Section 27.06. One Bargaining Unit Member shall be assigned to be the TAC Officer. This person shall receive a stipend in the amount of \$450.00 annually.

Section 27.07. All stipends will be paid during the first half of August of each year.

3. ARTICLE 28, LONGEVITY PAY

Section 28.01. Subject to Article 28.02, employees shall receive a longevity pay at the rate of seventy dollars (\$70.00) dollars per year of full-time employment with the Employer. Annual longevity payments shall be made during the first half of the month of December to all employees who have completed at least five (5) years of continuous service and who are employed by the Employer on November 30 of the year in which the longevity payment is made. Determination of longevity pay shall be from December 1st to November 30th.

Section 28.02. Employees hired after August 1, 2011, shall not receive longevity pay.

4. ARTICLE 36, DRUG TESTING

EMPLOYER POSITION: The Employer proposes to add a new Section 36.06 to Article 36. State of Ohio statute allows for the cultivation and distribution of marijuana solely for medical reasons. Local political jurisdictions in the state are deciding how to manage this new industry and how it may impact employees. The City of North Canton City Council is considering legislation, at this point in time, to ban the cultivation, processing and dispensing of medical marijuana in city limits. Further, the Employer refers to Ohio Revised Code Section 3796.28 which permits public employers in the state to ban the use of medical marijuana among its employees. The statute permits an Employer to promulgate a zero tolerance drug policy if it so chooses. Paragraph 5 of the statute potentially bans the right of appeal of a discipline based on issues involving medical marijuana. The Employer proposes contract language which bans a bargaining unit employee from possessing or using medical marijuana pursuant to this statute.

UNION POSITION: The Union rejects the Employer's proposal. The Union states that the use of medical marijuana is a matter to be determined by an employee's physician. It is not a decision to be determined by the Employer. Further, the Union states that the collective bargaining agreement provides for a just cause provision. The Union argues that the proposal is in conflict with the just cause principle. The Union argues that the proposed language is unnecessary. The Union proposes current contract language.

RECOMMENDATION: Ohio Revised Code Section 3796.28 allows public employers in Ohio to ban the use of medical marijuana among its employees. In addition, the statute allows for the discharge and discipline of employees for the use of medical marijuana without appeal. It must be emphasized that the statute is permissive, not mandated. Although the North Canton City Council is considering legislation banning medical marijuana from city limits and the use of it by its employees, the proposed legislation had not been passed by the legislative body at the time of the fact finding hearing. The parties have negotiated and agreed to existing provisions of Article 36, Drug Testing. This provision allows for reasonable suspicion drug testing, and the parties have agreed that the use of drugs are prohibited as defined by Ohio Revised Code Section 3719. The parties have further agreed, in Article 36, that an employee who tests positive for a banned substance has an opportunity at rehabilitation. Section 36.05 requires bargaining unit employees to execute a medical release for the Employer. These provisions have been bargained between the parties including an opportunity at rehabilitation. To include the new section, as proposed by the Employer, should require agreement by the parties as opposed to a neutral fact finder recommending it. This is especially true regarding language which may impact the just cause provision as found in Articles 7 and 9 of the collective bargaining agreement. The Management Rights provision of the Agreement, Article 7, states that the Employer may "Promulgate and enforce reasonable work rules." Nothing prohibits the Employer from adopting a work rule, separate and apart from the collective bargaining agreement, regarding the possession and use of medical marijuana among bargaining unit employees although its enforcement may be tested by appeal to the grievance and arbitration procedure. This is, of course, what the parties have historically agreed. Arbitrator David L. Gregory has addressed the relationship of the just cause principle and a zero tolerance policy.

Even assuming arguendo, however, that the Employer has a zero-tolerance policy, such a policy cannot, and does not, have the summary and absolute effect urged here by the Employer, compelling the discharge of the Grievant without regard to extenuating, mitigating circumstances In any event, a zero-tolerance policy cannot, and does not, override and trump the express just cause and related protections of the collective bargaining agreement against wrongful discharge. *120 LA 356 358, Interstate Brands Company and Bakery Drivers Local 550. Arbitrator David L. Gregory*

The Union is not in a position to agree to insert language in the collective bargaining agreement which may limit the right of its members to a just cause determination. The Employer, nevertheless, has the

right to promulgate a policy knowing that it may be challenged on a case by case basis. **The Union's position is recommended. Current contract language in Article 36.**

5. ARTICLE 37, DURATION OF AGREEMENT

Section 37.01. This Agreement is effective from January 1, 2018 through December 31, 2020. This Agreement shall continue from year-to-year after January 1, 2021, unless a party to this Agreement gives sixty (60) days written notice of intent to negotiate a new Agreement. In the event such notice is given by a party, the procedures for negotiations contained in R.C. 4117 shall apply.

6. Any issues or sub-issues not specifically addressed in this Report and Recommendation are intended to remain current language for the purposes of this Report and Recommendation and for the successor collective bargaining agreement. It is stipulated that prior to the execution of this report and recommendation that the parties did not execute any tentative agreements and/or other agreements for inclusion in the successor agreement and/or modification of the successor agreement.

SUMMARY

After review of the pre-hearing statements of the parties, all facts presented at hearing and the stipulations and agreements of the parties, the Fact Finder recommends the provisions, stipulations and agreements contained in this Report and Recommendation. The foundation of this is based on criteria enumerated in Ohio Revised Code Section 4117.14 (G) (7) (a-f).

Respectfully Submitted and Issued at Cleveland, Ohio this 18th Day of January 2018.



Thomas J. Nowel, NAA
Fact Finder

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th Day of January 2018, a copy of the foregoing Report and Recommendation of the Fact Finder was served upon Timothy L. Fox, Esq. representing the City of North Canton; Mark J. Volcheck, Esq. representing the Ohio Patrolmen's Benevolent Association; and Donald M. Collins, Esq., General Counsel, State Employment Relations Board, by way of electronic mail.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

Thomas J. Nowel, NAA
Fact Finder