



## **I. APPEARANCES**

### **FOR THE UNION:**

Richard K. Griffing (President), Gary L. Machin (Secretary-Treasurer), John C. Foley (chief negotiator), Terry Lipstrew (assistant negotiator).

### **FOR THE CITY:**

Gary Cicero (Director of Human Resources), Brian M. Massucci (Personnel Supervisor).

## **II. BACKGROUND**

This proceeding involves collective bargaining negotiations between the Warren Management Association and the City of Warren, Ohio. This is an initial contract. The parties mutually agreed that any settlement would be retroactive to January 1, 1997. On May 10, 1997 the parties began negotiations to achieve a first contract. Prior to the Fact-Finding session, the parties had met numerous times and negotiated to impasse.

The parties were provided the opportunity to engage in mediation but they mutually agreed that a formal fact-finding hearing was preferred. In that respect, a fact-finding hearing was scheduled for and conducted on July 14, 1997 at the Community Service Building in Warren, Ohio.

The Warren Management Association was recognized as an official bargaining unit by SERB on April 10, 1997. The unit consists of various white collar positions, totaling twenty-three (23) employees in all.

## **III. ISSUES**

During the course of good-faith negotiations, the parties tentatively agreed to most issues and those mutually resolved provisions of the contract are hereby recognized and adopted by the Fact-Finder (as introduced at the hearing, and labeled Union Exhibit-2).

At the hearing, the parties mutually agreed that ten (10) articles remained at impasse, to wit:

- 1: Article 5 – Employee Rights.
- 2: Article 14 – Pay Rates.
- 3: Article 15 – Pay Variations.
- 4: Article 16 – Longevity.
- 5: Article 17 – Severance Pay.
- 6: Article 19 – Grievance Procedure.
- 7: Article 23 – Vacations.
- 8: Article 25 – Personal Days.
- 9: Article 30 – Health Care.
- 10: Article 31 -- Life Insurance.

#### **IV. FACT-FINDER'S REPORT AND RECOMMENDATIONS**

In issuing this Report and Recommendations, the Fact-Finder took notice of all the oral and written testimony presented by, and as stipulated by, the parties, as well as those six factors which the State Employment Relations Board requires, including but not limited to:

1. Prior collective bargaining agreements, if any, between the parties.
2. Comparison of the issues in the instant case with those issues involving other public and private employees doing comparable work, giving consideration to the factors peculiar to the area and classification involved.
3. The public interest and welfare, the ability of the employer to finance and administer the items involved, and the effect of the adjustments on the normal standard of public service.
4. The lawful authority of the public employer.
5. Any stipulations of the parties.
6. Such other factors, which are normally or traditionally considered in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

In the preparation of this Report and Recommendations, the Fact-Finder did in fact consider these six (6) factors.

As an aside, the Fact-Finder wishes to take a moment to recognize the professional manner in which Mr. Cicero and Mr. Foley represented their respective party's interests during the Fact-Finding hearing. Not only were their presentations cogent and well reasoned, but their supporting documentation, particularly the Union's, was thorough as well. This Fact-Finder takes notice of the fact that the City and the Union have an initial bargaining relationship marked by mutual respect and harmonious relations, and that both sides made a sincere effort to reach agreement during negotiations. This Report and Recommendations attempts to recognize this fact by setting forth recommendations which are reasonable and fair and which both parties can

recommend, although acceptance of the same will involve some degree of mutual sacrifice on the part of both parties.

Opening Statements:

The Union opened the hearing by recounting the history of this unit, its formation and recognition by SERB, and its composition. It concluded by pointing out that the contract terms it has requested are based both on what other, similarly situated Warren City employees receive, as well as what other Ohio municipal employees, e.g., Cleveland, receive.

The City, which did not raise “ability to pay” as an issue, emphasized that its offers were based on both what it believes to be an appropriate settlement, as well as certain concerns it had with compliance with the Fair Labor Standards Act (FLSA). Because of its compliance concerns, as explained in its opening statement as well as its case presentation, it wished to treat four or five Warren Management Association employees differently under certain provisions of the contract, depending on whether they were believed to be “exempt” or “non-exempt” employees under the FLSA, and its proposals reflected this difference.

In that regard, the Fact-Finder commends the City for its efforts to be in compliance with the FLSA. However, because of the political realities inherent in contract approval and administration, and the compelling expectation of employees to have members of their bargaining unit treated uniformly (after all, it’s often unequal treatment that precipitates the formation of unions to begin with), the Fact-Finder believes that it would be in the parties’ best interests to not have disparate treatment written into certain provisions of the contract. In any event, it would be impossible for the Fact-Finder to determine, on a case-by-case basis, the FLSA status of individual employees, particularly where there was no evidence presented as to their actual job duties and the FLSA tests relevant thereto. Therefore, the Fact-Finder’s recommendations, as outlined below, propose equal treatment of all unit members, i.e., as hourly employees, under the contract, irrespective of their FLSA status.

## **Article 5 – Employee rights.**

### Union:

The Union proposed adoption of the proposed Article 5 of the draft contract, Union Exhibit-2, in its entirety. As to the first sentence, it asserted the need to have language therein recognizing that a number of terms and conditions of employment are not specified in the contract. In Union Exhibit-3, it provided language from the OPBA contract with the City in support of its contention that the last sentence was needed which guaranteed the protection of just cause and due process in matters of discipline and discharge.

### City:

The City proposed deleting the first and last sentences. As to the first recognizing that certain terms and conditions were not specified in the contract, it contended that to leave this in is unnecessary since it is obvious that there are items in every contract that are unintentionally overlooked, and, in any event, Ohio law already requires negotiation of any changes in terms or conditions of employment.

As to the last sentence, just cause and due process, the City points out that the same is already covered in Article 20, Discipline and Discharge, and to mention it here would be redundant.

### Finding and Recommendation:

The Fact-Finder finds that closure, particularly in a first contract, is important to the parties in contract negotiations and contract administration; that is why so many contracts contain “zipper clauses” indicating that the contract represents the full agreement of the parties. Therefore, the Fact-Finder recommends that the first sentence, referencing open terms and conditions, is unnecessary and should be deleted from Article 5.

As to the need to include “just cause and due process” in this article, the Fact-Finder finds that not only is this language appropriate in an employee rights section of a contract, but is often standard procedure. Further, the City has already provided due process guarantees to the members of the OBPA in its 1997 contract with that unit (Union Exhibit-3). Therefore, the Fact-Finder recommends that the last sentence be included.

#### **Article 14 – Pay Rates.**

##### Union:

The Union proposes that in any negotiated pay increase, that all of its members be treated as hourly employees.

In addition, it suggests annual increases of 5%-5%-5% to hourly rates over three years, retroactive to 1-1-97. In support of its position, it offered three arguments; evidence that management increases have traditionally exceeded the raises of other City employees (Union Exhibit-4); that others in the City have recently received substantial increases; and that the traditional differential between senior police and management pay is closing.

##### City:

The City points out that in its most recent contract settlements, it settled with its four other units for 4%-4%-4% over three years. It admitted that it had provided an extra increase to its senior fire and police (4-4-5%) and that it traditionally provided an additional 1% in the third year of agreements. However, as to the Mayor’s increase, it pointed out that he had not received an increase in two years. In addition, the City proposed different treatment for what it believed to be the FLSA exempt members of the unit.

##### Finding and Recommendation:

The Fact-Finder notes that ability to pay was not an issue. However, this Fact-Finder is certainly cognizant of this City's statutory duty to manage its finances responsibly.

The Union presented sound arguments in support of the equity of its proposed adjustments, particularly in light of the history of past increases to management. However, this must be weighed against the fact that with a contract and all of its attendant protections against arbitrary treatment at hand, members of management will now be afforded protections for the duration of the agreement in many other economic areas. With this in mind, but recognizing that other, economic improvements are being recommended later in this Report, the Fact-Finder recommends wage adjustments of 4%-4%-5% over three years, retroactive to 1-1-97, consistent with the adjustments recently guaranteed police management. And, as stated earlier in this Report, the adjustments should be the same for all unit members and determined on an hourly wage basis, even for the Executive Director of Community Development, the Director of Engineering, etc., the Administrative Coordinator and Manager of Data Process Systems.

The Fact-Finder recognizes that these recommended increases are less than the adjustments that the Union formally requested, and exceed what the City proposed. While accepting these recommended increases will require some compromise by both sides, the Fact-Finder believes this recommendation to be appropriate as to both internal and external equity concerns, consistent with comparable municipal contracts, and within the range of other Ohio municipal settlements.

#### **Article 15 – Pay Variations.**

##### Union:

The Union proposed that employees working out of classification (higher) for three (3) hours or more receive 50% of the difference between the two rates of pay.

The Union also proposed that certificate/license/degree holders receive the following monthly adjustments to their pay: Class I -- \$45/mo.; Class II -- \$95/mo.; Class III -- \$155/mo.; Class IV -- \$205/mo.; Associates degree -- \$155/mo.; College degrees -- \$205/mo. In support of its position, it points out that it already receives, under 1994 City policy, adjustments of \$45/mo., \$50/mo. and \$60/mo., for class I-III licenses, respectively.

[The matter of appropriate monthly adjustment for the supervisor of the Public Health Nurse was mutually resolved by the parties and withdrawn from the list of open issues].

The Union proposes that fairness demands that Hazardous Environment Pay for unit employees be at least equal to, if not greater than, the hazard pay paid to the employees which they supervise (\$.20-\$.70/hour).

The Union proposes that the Tuition Assistance Program, established by Executive Order 88-2, is still in effect and so should be continued in the contract.

The Union proposes treating all bargaining unit members as hourly and to maintain the overtime provisions of current practice.

[As to call-out pay, the parties agreed that the current practice would continue and that the City would agree to pay call-out pay for all unit employees the Fact-Finder recommends be treated as hourly employees].

[As to stand-by pay, the Union agreed to adopt the City's position relevant thereto].

City:

As to pay for working out of class, the City agreed to paying for over 4 hours out of class for all non-exempt employees, but for over 8 hours out of class for all exempt unit employees.

As to certificate/license/degree compensation, the City contended that the rates it had proposed, i.e., Class I -- \$15/mo.; Class II -- \$35/mo.; Class III -- \$60/mo.; Class IV -- \$90/mo.; Associates degree -- \$0/mo.; College degrees -- \$90/mo., were fair and appropriate.

As to hazard duty pay, the City's argument was similar, that is, it was proposing eliminating the same to reflect additional adjustments that management had received in pay in the second of their last three year pay increase.

As to tuition assistance, the City believes that it should retain the flexibility to amend the program as it sees fit via executive order, and not be tied down by contract language, and that in any event, as a matter of practice, no-one is approved for this benefit anyway.

As to overtime, the City agreed to continue the practice for all hourly unit employees, but not for salaried, non-exempt unit employees.

As to call-out pay, the City agreed that if unscheduled, and not planned, call-out pay would be appropriate for all hourly unit employees, at the rate of 1 ½ their normal hourly pay for all hours actually worked.

#### Finding and Recommendation:

As to working out-of-class pay, the Fact-Finder finds no credible reason to treat members of this unit any differently than any other City unit employee. Therefore, it is recommended that any employee of this unit who is assigned to work in a higher class for more than four (4) hours should receive 50% of the difference between the two rates of pay, as is the benefit afforded other employees.

As to monthly pay adjustments for certificate/license/degrees, in spite of the City's evidence and arguments to the contrary, the Fact-Finder can find no credible reason to not pay these unit members the same differential for Class I-III licensure, i.e., Class I -- \$45/mo., Class II -- \$95/mo. and Class III -- \$155/mo., as AFSCME is currently receiving. The Fact-Finder

also recommends a \$175/mo. adjustment for any unit member achieving his/her Class IV licensure.

However, having recommended these adjustments, the Fact-Finder also can find no credible reason for recommending adoption of the Union's request for monthly pay adjustments for attainment of a college education, even though arguably additional education benefits both the individual and the City.

As to hazardous duty pay, this premium is normally granted to compensate individuals who are exposed to unusual hazards on the job. Since the Union did not provide evidence that its unit supervisors work directly with these unusual hazards, the Fact-Finder finds that such pay is not warranted at the present time and so does not recommend adopting the same.

As to tuition assistance, the Fact-Finder finds that while it is a mutually beneficial benefit, it would be preferable that the City retain the discretion to amend the same without the need to negotiate the same with each of its unions. Therefore, the following language is recommended:

“Members of the bargaining unit shall be eligible for the City’s Tuition Assistance Plan, pursuant to the provisions set forth in Executive Order 88-2, or as such Order may be amended or superseded by subsequent City action.”

As to overtime, the Fact-Finder takes note of the City’s offer to continue the practice for all hourly unit employees, and having previously found that for purposes of this Fact-Finding, all unit employees should be treated consistently, i.e., hourly, the Fact-Finder recommends that the practice be continued.

As to call-out pay, the Fact-Finder also takes note of the City’s offer to continue the practice for unscheduled call-outs, and again, having previously found that all unit employees should be treated as hourly employees, the Fact-Finder recommends that employees on call-out be paid at the rate of 1 ½ their normal hourly pay for all hours actually worked.

#### **4: Article 16 – Longevity.**

##### **Union:**

The Union asks that all full-time unit employees receive longevity pay, based on the following schedule: 1997 -- \$6.50/mo. for each year of service; 1998 -- \$7.00; 1999 -- \$7.50. It pointed out that some units in the City now receive more longevity pay than management, and that AFSCME has their longevity built into their base rate.

##### **City:**

The City counters with the following proposal: 1997 -- \$3.00/pay period for each year of service; 1998 \$3.23/pay period; 1999 -- \$3.46/pay period. It points out that all other units are at \$4.50/mo., and that fire is at \$5.00/mo. now, and \$5.50 and \$6.00 in 1998 and 1999.

##### **Finding and Recommendation:**

The Fact-Finder takes notice of the fact that the City pays all of its employees some sort of longevity bonus; for most City unit employees it's currently \$4.50/mo., but in the 1-1-97 contract with the firefighters it's \$5.00, \$5.50 and \$6.00/mo. In recognition of the fact that the City has traditionally maintained a differential between management and labor, the Fact-Finder recommends that the City's proposal be adopted, i.e., longevity pay of \$6.00 increase per month for each year of service in 1997, \$6.50 for 1998 and \$7.00 for 1999. Not only does an increase of this magnitude constitute an increase, but it is well above the \$4.50/mo. most employees receive and still above the negotiated AFSCME schedule for all three years of their contracts. The Fact-Finder further recommends that this pay be provided on the same pay schedule as that currently received by AFSCME.

## **5: Article 17 – Severance Pay.**

### Union:

The Union requests that when a qualified employee retires from City employment, they should be eligible for severance pay and a retirement incentive option. In that regard, the Union proposes that the hourly rate used to calculate the amount of the retirement incentive option be 100% of the member's prevailing rate of pay at the time of the payment.

### City:

The City concurs with the severance proposal, but differs as to the retirement incentive option calculation. Instead of the 100% of the prevailing rate suggested by the Union, the City proposes 90% of the prevailing rate should the Union receive pay increases of 4-4-4%, and 95% of the prevailing rate should it receive increases of a lesser amount. The City points out that while it is paying AFSCME's 8.5% pension payments and using 90% of the prevailing rate (for a total of 98.5%), AFSCME agreed to only a 4-4-4% pay increase over the next three years and so should the Union receive an increase greater than 4-4-4, the incentive option calculation should be somewhat less than what AFSCME receives.

### Findings and Recommendation:

The retirement incentive option available to AFSCME employees provides that the hourly rate used to calculate the amount of the payment is 90% of the employee's prevailing rate at the time of the payment. While the Union contended that it warranted an incentive greater than AFSCME's 90%, (98.5% if one were to include PERS payments made on its behalf), the Fact-Finder does not find the argument persuasive that a 100% rate is appropriate simply because of what AFSCME receives since, because of their substantial costs, retirement benefits and incentives are often traded off by unions for adjustments in other expensive benefits like health insurance and wage increases. Since it has already been recommended that this Union receive a three year wage adjustment greater than AFSCME's, along with other substantive

economic improvements, without greater documentation and rationale than that provided in the hearing, the Fact-Finder can not recommend that the Union receive a greater benefit than that received by AFSCME. Rather, it is recommend that this Union receive the same retirement incentive option as that received by AFSCME, i.e., 90% of an employee's prevailing wage.

**6: Article 19 – Grievance Procedure.**

Union:

The Union wishes to include “or violation of the past practice of the parties” in the listed definition of grievable issues. It suggests that since this is a first contract, the only reasonable way to deal with omissions or items not specifically addressed in the contract would be by past practice.

City:

The City believes that since this is a recently recognized unit, it has no past practices. Not only that, but to leave “past practice” in the definition of grievable issues would require it to negotiate every change in practice, and would place it in jeopardy of having grievances filed on things allowed to happen over time in other departments it wasn't even aware of.

Findings and Recommendation:

In collective bargaining, grievances are defined as formal complaints by employees who feel they have been wronged. In practice, the definition of what is grievable is that which the parties say it is under the contract. And, there may also be occasion where unwritten practices and customs over time become so long-standing that they modify and become part of the contract (past practices), although these are rare.

Having said that, it is the Fact-Finder's finding that adding past practices to the definition of a grievance is unnecessary since not only is this not the usual practice in contracts, but the

parties have already agreed to limit arbitrability to “the interpretation, application, enforcement or compliance of specific articles of this contract” (emphasis added). In the event that a past unwritten practice or custom would ever rise to the level of a formal past practice, an arbitrator would have the authority to consider that in his/her award. Therefore, the Fact-Finder recommends that the phrase “or violation of the past practice of the parties” not be included in 2. Of Article 19.

**7: Article 23 – Vacations.**

**Union:**

The Union proposes adopting the article, which it stated recognizes an extra week of vacation as given in the past in lieu of a pay increase, as drafted and signed-off on by the parties.

**City:**

The City proposes withdrawing its tentative agreement.

**Findings and Recommendations:**

The Fact-Finder finds that since the City was unable to provide convincing reason to drop the extra week of vacation, and since the article was already signed off by both parties on 6-10-97, it is recommended that the same be adopted as it now reads.

**8: Article 25 – Personal Days.**

**Union:**

The Union proposes that employees should not be paid for personal days not except for those enacting Retirement Incentive Option, Article 17, II.

City:

The City proposes that language referencing the Retirement Incentive Option be deleted.

Findings and Recommendations:

The Fact-Finder finds that since the Union was unable to provide convincing reason to include personal days in the Retirement Incentive Option, it is recommended that the City's proposal be adopted.

**9: Article 30 – Health Care.**

Union:

The Union proposes increasing eye care assistance by expanding coverage. It calculated that it would cost approximately \$345/mo. or \$4,000 additional per year. It indicated a preference for this coverage rather than the hearing aid assistance granted to Local 74 employees.

City:

The City proposed covered services and maximum lens payments of significantly less than the Union requested. The City calculated that the Union's proposal would cost \$30/mo. per family and \$12/individual, as opposed to its proposal which would cost \$15 and \$6/mo., respectively. It indicated that it now pays AFSCME benefits of \$7.25/mo. per employee.

Findings and Recommendation:

The Fact-Finder can find no convincing reason for providing benefits to this Union which would significantly exceed the coverage offered to AFSCME, particularly since no other City units even currently receive vision care. With the City's offer at the hearing to add disposable

contact lens coverage, the Fact-Finder recommends that the City's proposal, with this addition, be adopted.

**10: Article 31 – Life Insurance.**

**Union:**

At the hearing, the Union proposed having retiring employees be able to continue existing life insurance coverage (without medical) post-retirement by having the employees assume the premiums, or possibly having the City help contribute towards costs.

**City:**

The City proposed keeping the language as it now stands, i.e., \$20,000 life and \$20,000 ADD, with no changes. It explained that it had explored the Union's proposal with its insurer but that the insurer would not allow it to convert an existing life policy without medical. Further, it pointed out that were the Union's proposal be adopted, current rates for all City employees would rise. It said that since currently almost all employees retire before dying, to allow them continue coverage post retirement would increase payouts and this would translate into higher premiums than the City now enjoys.

**Finding and Recommendation:**

Since the Union is being offered the same benefits as those currently enjoyed by all other City employees, and since adoption of the Union's proposal would more than likely cause a rise in the premiums paid by all other City employees, the Fact-Finder recommends adoption of the City's proposal.

Issued: July 19, 1997

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jared D. Simmer', written over a horizontal line.

Jared D. Simmer

Fact-Finder

**CERTIFICATE OF SERVICE**

I hereby certify that the above Fact-Finder's Report and Recommendations were served upon the following parties, to wit, the City of Warren, Ohio (via Mr. Gary Cicero) and the Warren Management Association (via Mr. John C. Foley) by overnight mail service, and upon the Ohio State Employment Relations Board (via G. Thomas Worley) by first class mail, this day of July 19, 1997.



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Jared D. Simmer  
Fact-Finder