

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
FACT-FINDING PROCEEDINGS**

CASE NO. 98-MED-09-0790

**DANIEL N. KOSANOVICH
FACT-FINDER**

JUN 22 1 44 PM '99
STATE EMPLOYMENT
RELATIONS BOARD

IN THE MATTER OF: :
CITY OF XENIA :
AND :
FRATERNAL ORDER OF POLICE :
OHIO LABOR COUNCIL, INC. :

REPORT AND RECOMMENDATIONS OF THE FACT-FINDER

APPEARANCES

On Behalf of the FOP, Ohio Labor Council, Inc.:

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On Behalf of the City of Xenia:

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REPORT AND RECOMMENDATIONS

I. Background and Procedural History

The bargaining unit in question consists of 3 Lieutenants. The unit description contained in the contract identifies the FOP, Ohio Labor Council (referred to as the Lodge) as the sole and exclusive bargaining representative for all sworn police personnel in the rank of Lieutenant and excluding the Chief, Sergeants, Patrol and all other employees as specified in the SERB Directive Certifying Exclusive Representation in CASE NO. 95-REP-04-0081.

Following the certification of the bargaining unit, the parties negotiated a collective bargaining agreement which became effective on December 31, 1995. The collective bargaining agreement, by its terms, expired on December 26, 1998. However, the parties have extended the contract terms while they continue their efforts to negotiate a successor agreement.

According to the information supplied at the fact-finding hearing, the parties met in October and November, using IBB or Interest Based Bargaining methods, in an effort to reach a final agreement. Unfortunately, efforts to resolve the economic issues resulted in an impasse. Thereafter, the parties agreed to follow the statutory processes to resolve the impasse. The City and the Lodge also agreed to "waive the fiscal year restrictions" and that any resultant settlement would retroactive to January 1, 1999.

Daniel N. Kosanovich was appointed the Fact-Finder in a letter dated November 25, 1998. Following the Fact-Finder's appointment the parties mutually agreed to extend the date for the submission of the fact-finding report until January 22, 1999.

The fact-finding hearing was conducted on January 7, 1999. At the outset of the hearing the Fact-Finder offered to mediate the outstanding disputes between the parties. This offer was declined.

At the outset of the fact-finding session, the parties identified 5 issues as being in dispute.¹ More specifically, there is a dispute about Article 15, Section 4, Compensatory Time; Article 20, Section 6, Vacation Cash Out; and Article 16, Section 1, 2, and 3, Wages, Pay for Performance, Excellence Awards and Employee Contribution to Pension Fund. While the parties are not disputing the proper duration for the collective bargaining agreement, both parties requested the Fact-Finder to make a specific recommendation on the term of the agreement.

II. CRITERIA

In compliance with Ohio Revised Code Section 4117.14 (G) (7) and Ohio Administrative Code 4117-9-05 (J), the Fact-Finder considered the following criteria in making the Recommendations contained in this Report:

1. Past collectively bargained agreements between the parties;
2. Comparison of unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
3. The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the affect of the adjustments on the normal standard of public service;
4. The lawful authority of the public employer;
5. Stipulations of the parties; and
6. Such other factors not confined to those listed above which are normally or traditionally taken into consideration.

¹The parties are in agreement that the Articles from the previous collective bargaining agreement not identified as disputed issues in the fact-finding session should be perpetuated in the new collective bargaining agreement and incorporated by reference into the fact-finding report.

III. ISSUES AND RECOMMENDATIONS

A. Compensatory Time

Union's Position

The Union's position is relatively straight forward. The Lodge has made a proposal to include Article 15, Hours of Employment, Section 4. Compensatory Time (Comp Time) as it appeared in the 1995-1998 contract in the new collective bargaining agreement, with the exception of paragraph 3.

City's Position

The City's position is equally straight forward. It is the City's proposal to eliminate compensatory time and, in particular, the cash out provision. The City asserts that under the Fair Labor Standards Act the Lieutenants are exempt managerial employees. As such, it is the City's view that the Lieutenants are not entitled to participate in comp time. Furthermore, the City contends that because the Lieutenants are characterized as managerial employees under the City's Employee Handbook, treating the Lieutenants just as any other managerial employee of the City of Xenia will tend to provide a certain equity in the opportunities for overtime and other earnings among managerial employees.

Findings and Recommendations

Of all of the factors considered by the Fact-Finder, four stand out. Those factors are: (1) the history of collective bargaining between the parties (albeit short) on this particular matter; (2) the comparison of the treatment that would be given to the Lieutenants under the proposals offered and members of other bargaining units within the police department; (3) the fact that the City of Xenia is not claiming an inability to finance the economic proposals made by the Lodge; and (4) and the application of the FLSA.

The record indicates that the Lieutenants employed within the police department for the

City of Xenia sought union representation, in substantial part, because of the inequities that had developed with respect to economic and earning opportunities in relation to other police department personnel who were subject to contracts. For instance, the Communications Operators, Patrol Officers, and Sergeants employed by the City are all entitled to accrue substantial amounts of compensatory time and cash out a substantial portion of that compensatory time. On the other hand, prior to the execution of the 1995-98 collective bargaining agreement the Lieutenants were unable to take advantage of such overtime and economic opportunities.

In the 1995 collective bargaining, the effort was made to secure a more equitable posture for the Lieutenants when compared with the other police bargaining units in the City. The parties agreed to the Comp Time provision contained in the 1995-98 contract. By operation of that provision the Lieutenants could accumulate a maximum of ninety-six (96) hours of compensatory time and cash out up to forty (40) hours of the accumulated comp time. By comparison, the Sergeants may accumulate a maximum of one hundred twenty (120) hours of comp time and cash out all of it in a given year. The Communications Operators and Patrol Officers may accumulate ninety-six (96) hours of compensatory time and cash out the unused hours each year. A further comparison demonstrates that the Sergeants, Communication Operators and Patrol Officers accrue comp time at a rate of 1 and 1/2 hours for every hour of overtime work. The Lieutenants accrue comp time on the basis of 1 hour of comp time for each hour of overtime.

While the parties attempted to provide a certain equity in treatment between police personnel on the comp time issue the other groups fare somewhat better than the Lieutenants. However, the Lieutenants are not seeking to increase the benefit. Rather, the Lodge is seeking to maintain the comp time benefit.

Interestingly enough, the City is not advancing an inability to finance the comp time benefit. Nor has the City made a claim that its continuation will produce a financial hardship. Instead, the City argues that the Lieutenants are exempt from overtime under the FLSA and, therefore, should be treated as other managerial employees with City government. Assuming that the City would prevail on this assertion, the resultant benefit is a claimed equity in earnings and

economic benefits between the Lieutenants and other managerial employees.

In 1974 Congress extended the application of the Fair Labor Standards Act to virtually all public sectors and, in 1985 the United States Supreme Court found the extended application of the FLSA consistent with the Tenth Amendment in the case of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985 (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976))). Even under the application of the FLSA certain employees are exempt from the overtime and comp time provisions. Salaried employees such as professional employees, administrative employees and executive employees are exempt. The City contends that the Lieutenants are exempt under the FLSA and, therefore, not entitled to receive compensatory time.

The record is devoid of any evidence, information or data which would demonstrate that the Lieutenants are exempt from the application of the FLSA. To the contrary, the Fact-Finder has only the bald assertion by the City that the Lieutenants are listed as managerial employees in the City's employee handbook. This bit of evidence standing alone is an insufficient basis upon which to draw the conclusion that the Lieutenants are exempt under the FLSA.

Moreover, the City's assertion must be analyzed with an eye toward the SERB proceedings giving rise to the certification of this particular bargaining unit and the Secretary of Labor's "no deduction/no adjustment" in compensation test developed to assist in determining whether an employee is exempt from the application of the FLSA.

There is no indication on the record that the City challenged the certification of the Lieutenants as a unit appropriate for collective bargaining when representation was initially sought through SERB. If the City had raised the issue, SERB would have spoken on the matter. If the Lieutenants possessed the indicia of managerial employees, in all likelihood, the unit would not have been certified. Such a determination would be very persuasive in assessing whether the Lieutenants were exempt from the application of the FLSA. Moreover, the record does not

reflect any attempt by the City to use the SERB processes to, in effect, amend the certification or obtain a finding that the Lieutenants were improperly certified.

The record is also devoid of any indication that the City sought to have the issue of the exempt status of the Lieutenants determined by the DOL or through the courts. In fact the Secretary of Labor uses the following test to determine whether one is exempt from the FLSA. An employee is not exempt from the application of the provisions of the FLSA if the employee's compensation is subject to being reduced and/or adjusted based upon a variation in the quality or quantity of the work performed. On its face the 1995-98 collective bargaining agreement between the City and the Lodge indicates that a Lieutenant may indeed have his/her compensation reduced and/or adjusted because of a variation in the quality or quantity of work. (See *e.g.*, Article 9, Section 5 and 10, Article 12, Sections 1 and 2, and Article 19, Section 3) Once again it would appear that the Lieutenants are subject to the provisions of the FLSA.

Finally, it is significant to this Fact-Finder that other communities have bargaining units of police personnel above the rank of Sergeant.

All of these factors coupled with the lack of evidence to support the City's assertion, lead the Fact-Finder to conclude that the Lieutenants are not exempt from the application of the FLSA provisions regarding overtime and comp time. Based on the record, the Lieutenants are entitled to take advantage of the application of the FLSA provisions through collective bargaining.

The Lieutenants employed by the City of Xenia have been certified by SERB as a bargaining unit for purposes of collective bargaining. In their first contract the Lieutenants bargained for a compensatory time provision and were successful in an effort to bring about a certain economic equity with other police department personnel in accomplishing this task. The Lieutenants seek only to continue the benefit, not to add to it and the City is not claiming an inability to fund the benefit. Therefore, it is the recommendation of this Fact-Finder that the Union's proposal be adopted.

The fact that the City seeks a certain equity between the Lieutenants and other City "managerial" employees is an appropriate consideration. However, it must be balanced against the right of the Lieutenants to collectively bargain. It is not sufficient standing alone to extinguish the bargaining ability of the Lieutenants. There must be a compelling reason advanced and presumably a proper trade off to warrant such an equity consideration being determinative of the issue.

It is recommended that the contractual language read as follows:

Section 4. Compensatory Time (COMP-TIME)

When an employee elects to accrue compensatory time for hours worked beyond or outside regularly scheduled hours, such compensatory time will be accrued on an hour for hour basis.

When an employee elects to take compensatory time off, such time off shall be granted by the Chief at a time mutually convenient to the employee and the Chief or his designee.

The maximum accumulation of compensatory time shall be Ninety-six (96) hours. Employees may "cash out" up to forty (40) hours of accumulated compensatory time in December of each year covered by this Agreement.

The hours to be "cashed out" of accumulated unused compensable time shall be reimbursed between December 1 and December 20, as determined by the Finance Director, at the employee's regular hourly rate of pay. The employee may carry over up to 96 hours from the previous year.

B. Vacation Cash Out

Union's Position

Once again, the Union seeks to have the prior contract language included in the new collective bargaining agreement. Any Lieutenant who accrues more than 120 vacation hours is entitled to cash out up to 60 hours of unused vacation. The Union wants to continue this benefit.

City's Position

It is the City's contention that the vacation cash out should be eliminated. The City, understandably advances the position that vacations are designed to allow employees time away from work so that one can be re-energized and rejuvenated. Therefore, the City encourages employees to take their vacation rather than to hoard those days. Finally, the City contends that the elimination of the vacation cash out entitlement will place the Lieutenants in a position that is similar to that of the other police department personnel.

Findings and Recommendations

The history of collective bargaining with respect to this provision is instructive. The Lieutenants received the vacation cash out benefit as part of an overall package designed to produce a certain level of equity within the police department personnel. While the Sergeants, Patrol Officers and Communications Operators do not have this benefit, their respective collective bargaining agreements provide a far greater cash out benefit for comp time, than the cash out benefit provided the Lieutenants. (Cf., Sergeants are entitled to cash out 120 hours of compensatory time which they accrue at time and one half. The Lieutenants are entitled to cash out 40 hours of comp time. The Patrol Officers and Communications Personnel are entitled to cash out 96 comp time hours which they also accrue at the rate of time and one half for every overtime hour.) The parties chose the vacation cash out to provide the Lieutenants with a total

cash out benefits (combining comp time and vacation time) roughly the equivalent of the other members of police bargaining units in the City.

The Union simply wants to maintain the benefit. On balance, the Union has the more persuasive argument. The City has not advanced an argument that it is unable to afford the benefit. Therefore, it is the recommendation of the Fact-Finder that the Union's proposal be adopted. The language of the prior contract Article 20, Section 6 should be perpetuated.

C. Wages, Pay for Performance, Excellence Awards, and Employees Contribution to Pension Fund

Union's Position

The Union's proposal eliminates the Pay for Performance provision of the 1995-98 agreement. In turn, the Union proposes a three (3) step wage scale. Newly promoted Lieutenants receive Step A pay which is a salary of \$54,293.66.² Step B is \$56,508.84 and Step C is \$58,724.03. These are the salary steps for the first year of the contract and include a 3.5% wage increase. A Lieutenant moves from Step A to Step B after the completion of one year of service in the initial step. In the second and third years of the Union's proposal, each of the Steps would each be increased by 3.5%.

The Union is indifferent to the Excellence Awards in its proposal. On the other hand, the Union is adamant about the continuation of the pension "pick-up" provision in Article 16, Section 3 of the current contract. In the initial collective bargaining agreement the City and the Lodge agreed that the City would "pick-up" a percentage of the pension contribution that the Lieutenants would otherwise be required to pay.

The pension "pick-up" represents a benefit that is not received by any other employee

²The Union proposal is calculated by taking the current minimum base salary and adding 3.5% as the proposed wage increase. Step C is the current maximum plus 3.5% and Step B is arrived at by taking the difference between Steps A and C and dividing it in half.

group or bargaining unit. It was designed as part of the overall economic package negotiated by the Lieutenants and the City in an effort to provide the Lieutenants with a certain equity when compared to other police department bargaining groups, and, particularly the Sergeants. Once again, the Union stresses that it is not seeking to change the pension "pick-up" formula that is currently being used and the City has not claimed an inability to finance the benefit. Therefore, the Lodge asserts that the provision should remain in a new agreement.

City's Position

The City proposes to eliminate the Pay for Performance and Excellence Awards provisions of the current contract and provide for a three (3) step wage structure in the new agreement. Step A in the first year of the new contract would be \$54,293.66 (which the same base minimum as the Union has proposed). Step C is \$58,724.03 (which is the same as the Union has proposed). Step B is slightly different from the Union's proposal and it sets the salary at \$56,465.41.³ For the second and third years of a new contract, the City proposes a 1.7% increase in wages. The proposal is designed to allow the Lieutenants to "maintain the base differential with Sergeants" in the first year of the new agreement but not the second or third years. The 1.7% increases in the second and third years are proposed as an effort by the City to "control" labor costs.

In regards to the pension "pick-up", the City asserts that the provision should be eliminated. It is the City's contention that it was going to realize certain benefits from agreeing to include the pension "pick-up" provision in the 1995-98 contract, but quickly realized it had been misled. It is time now, in the City's view, to correct the problem and eliminate its responsibility for the pension "pick-up".

Findings and Recommendations

The record indicates that the parties never developed standards by which to implement the

³The City arrived at Step B in its proposal by adding 3.5% to the Maximum Base Rate contained in the Lieutenants' current contract.

Pay for Performance and Excellence Awards provisions of the current agreement and the City certainly has no intentions of doing so. Therefore, based upon the positions of the parties, it is the recommendation of the Fact-Finder that both the Pay for Performance and Excellence Awards provisions of the current agreement be eliminated from the new collective bargaining agreement. To do otherwise would be to leave the parties with language which could potentially become an irritant and which could result in unrealized expectations within the bargaining unit fostering discontent.

With respect to the wages of the Lieutenants, the Fact-Finder recommends that the parties establish a three (3) step pay scale, consistent with the Union's proposal for the first year of the agreement. This recommendation should not come as a surprise because the parties have agreed in principle on the three (3) step pay scale and a 3.5% raise in the first year of the contract. The only difference between the parties' wage proposals for the first year of a new agreement can be found in Step B and the difference is insignificant.⁴

In addition, the Fact-Finder recommends that the Lieutenants receive a 3.5% wage increase in each of the next two years of the contract. It is significant that the police department employees will receive a 3.5% increase in wages the next two years under the terms of their respective contracts. Moreover, the City has not raised inability to finance the increase, but rather a desire to "get control" of the wages. A 3.5% increase is certainly in line with other public sector employees and no claim was advanced by the City that the Lieutenants were, in effect, "overpaid" in relation to their colleagues in other similar communities.

Finally, it is the recommendation of the Fact-Finder that the pension "pick-up" provision continue into the new collective bargaining agreement. The City has asserted that it did not gain the benefit of the bargain that it struck with the Lodge in negotiating this provision into the initial agreement. However, no specific information, evidence or data was supplied to the Fact-Finder in support of this proposition. In a situation such as this one, it is important for the party moving to eliminate an economic benefit to illustrate the need for the change and the balance between the interests of the Union and the City. Remember, this provision was

⁴The Union proposal is \$56,508.84 and the City's proposal is \$56,465.41.

negotiated by the City and the Union in an effort to treat the Lieutenants in a more fair and reasonable manner in relation to other police personnel. There was an exchange between the parties. If the exchange was not realized, then the party moving to change the responsibilities must demonstrate the economies of scale related to the proposed change.

As noted by the Union in its Fact-Finding presentation, to adopt the economic package offered by the City would be to reduce the differential between the Lieutenants and other police personnel to a point very similar to that which was corrected in negotiating the initial contract. Absent compelling reasons such a retreat is inappropriate.

Term of the Agreement

Union's Position

The Union representative raised the issue of the term of the new agreement and pointed out that the parties had been operating on the belief that the new agreement should be 3 years in duration. However, the Union indicated its willingness to seriously consider a shorter term for the contract, if recommended by the Fact-Finder.

City's Position

The City's representative also voiced an interest in considering a contract term of a shorter duration, provided it was recommended by the Fact-Finder.

Findings and Recommendations

A standard 3 year agreement is appropriate in a situation such as the one presented herein. First of all, the City maintained throughout the fact-finding process that it had a sincere interest in gaining control over the wages paid to City employees and in providing a certain level of economic balance as between work groups. The Communications Operators, Patrol Officers and

Sergeants all have approximately two years remaining until the expiration of their current collective bargaining agreements. Placing the expiration of the Lieutenants contract in December of 2001 will allow the City to address this concern first with the larger bargaining units.

Therefore, it is the recommendation of the Fact-Finder that the term of the new collective bargaining agreement be for a period of 3 years. The effective date of the agreement would be January 1, 1999⁵ and expire at midnight on December 31, 2001.

Incorporation by Reference

Positions of the Union and the City

Both the City and the Union agree that there is no dispute with respect to any of the other provisions of the the 1995-98 contract and that they have a mutual desire to include the undisputed terms of that agreement in their new collective bargaining agreement. As a result the Fact-Finder incorporates by reference herein the following provisions of the 1995-98 contract for inclusion in the successor agreement:

- Article 1, Sections 1 & 2
- Article 2, Section 1
- Article 3, Sections 1 & 2
- Article 4, Section 1
- Article 5, Sections 1, 2, & 3
- Article 6, Section 1
- Article 7, Sections 1, 2, & 3
- Article 8, Sections 1, 2, 3, & 4
- Article 9, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, & 11
- Article 10, Sections 1, 2, 3, 4, 5, 6, & 7
- Article 11, Section 1

⁵The parties entered into a stipulation providing that the terms of the Report dealing with compensation shall be applied retroactively to January 1, 1999.

Article 12, Sections 1 & 2
Article 13, Sections 1, 2, 3, 4, 5, 6, 7 & 8
Article 14, Sections 1 & 2
Article 15, Sections 1, 2, & 3⁶
Article 16⁷
Article 17, Sections 1, 2, & 3
Article 18, Sections 1, 2, & 3
Article 19, Sections 1, 2, 3, 4, 5, 6 & 7
Article 20, Sections 1, 2, 3, 4, 5, 7, 8, & 9⁸
Article 21, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, & 11
Article 22, Sections 1, 2, 3, 4, 5, 6 & 7
Article 23, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 & 12
Article 24, Sections 1, 2, 3 & 4
Article 25, Sections 1, 2, 3, 4, 5, 6 & 7
Article 26, Sections 1, 2, 3, & 4
Article 27, Section 1
Article 28, Sections 1, 2, 3 & 4
Article 29, Sections 1, 2, 3 & 4

⁶Article 15, Section 4 deals with Comp Time and is addressed above. This section of the Report is designed to incorporate by reference undisputed provisions of the 1995-98 contract.

⁷Wages and pension "pick-up" are dealt with directly in the Report and, therefore those sections are not referenced here.

⁸The question of vacation cash out is addressed directly in this Report and, therefore is not referenced here.

Article 30, Sections 1 & 2

Article 31⁹

Respectfully submitted,



Daniel N. Kosanovich

Fact-Finder

January , 1999

⁹The recommended duration of the new contract is dealt with directly in this Report and, therefore, not referenced here.