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**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
FACT-FINDING PROCEEDINGS
CASE NOS. 98-MED-09-0798 and 98-MED-09-0799**

**DANIEL N. KOSANOVICH
FACT-FINDER**

IN THE MATTER OF :
 :
FRATERNAL ORDER OF POLICE :
OHIO LABOR COUNCIL, INC. :
OHIO VALLEY LODGE NO. 112 :
 :
and :
 :
MIAMI TOWNSHIP TRUSTEES :
(CLERMONT COUNTY) :

REPORT AND RECOMMENDATIONS OF THE FACT-FINDER

APPEARANCES

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

Debra A. McCormick
Staff Representative
10979 Reed Hartman Highway
Suite 311
Blue Ash, OH 45242

On Behalf of Miami Township Trustees:

John C. Korfhagen, Esq.
Burreson, Bradford & Hill
40 South Third Street
Batavia, OH 45103

REPORT AND RECOMMENDATIONS

I. Background and Procedural History

The bargaining unit in question consists of the following classifications of employees: Patrol Officer; Corporal; and Sergeant. The unit description contained in the contract identifies the FOP, Ohio Labor Council , Ohio Valley Lodge No. 112 as the sole and exclusive representative of the employees in the bargaining units certified by the Ohio State Employment Relations Board in Case Nos. 84-RC-05-1093 and 84-RC-05-1094, respectively. There are 24 employees within the classification of Patrol Officer, three (3) of whom are not eligible for collective bargaining as they have not completed their probationary periods. There are five (5) employees in the classification of Sergeant and one (1) employee in the classification of corporal.

The most recent collective bargaining agreement between the parties became effective on January 1, 1996, and remained in effect until December 31, 1998. In accordance with the Administrative Code, Section 4117-9-05, the undersigned was appointed as the Fact-Finder on December 1, 1998. The parties mutually agreed to extend the date for the fact-finding report until April 15, 1999.

According to the information supplied at the fact-finding hearing, the parties met on October 29, November 12, December 3, 1998, January 4, 18, 28 and February 4, 1999, in an effort to secure a tentative agreement on a collective bargaining agreement. Unfortunately, efforts to resolve a number of the issues resulted in impasse. However, the parties have waived the provisions of 4117.14(G)(11) in regard to all matters of compensation or with cost implications which may be awarded by a conciliator in

accordance with Chapter 4117 O.R.C. and agree that a conciliator may award wage increases or other matters with cost implications retroactive to January 1, 1999.

The fact-finding hearing was conducted on March 26, 1999. At the outset of the hearing, the Fact-Finder offered to mediate the outstanding disputes between the parties. Some of the outstanding issues were successfully mediated and tentative agreements were reached on those matters. Other unresolved issues were processed through fact-finding. More specifically, there is a dispute about Article 9, Section 9.7 (Discipline); Article 15, Section 15.1 (Wages); Article 15, Section 15.9 (Wages); Article 16, Section 16.4 (Court Time); Article 17, Section 17.3 (Holidays); Article 18, Section 18.8 (Vacations); Article 22, Section 22.1 (Insurances); Article 23, Section 23.2 (Clothing Allowance); Article 35, Section 35.4 (Tuition and Education); Article 36, Section 36.3 (Employee Rights); and a new article on drug testing. Issues resolved prior to the hearing and after the offer of mediation include: a new article on bargaining unit work; Article 4, FOP Representation; Article 7, Section 7.1 (Labor-Management Meetings); Article 21, Section 21.5 (Injury Leave) and Article 28, Section 28.1 (B)(3) (Unpaid Leaves of Absence).¹

II. CRITERIA

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

¹ The parties are in agreement that the articles from the previous 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. In addition, the parties are in agreement that those articles upon which they have reached tentative agreement should be included in the new collective bargaining agreement and incorporated by reference into the fact-finding report.

1. Past collectively bargained agreements between the parties;
2. Comparison of unresolved issues relative to the employees in the bargaining units 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 normal standard of public service;
4. The lawful authority of the public employer;
5. Stipulations of the parties; and
6. Such factors not confined to those listed above, which are normally or traditionally taken into consideration.

III. FINDINGS AND RECOMMENDATIONS

A. Mediated Agreements

1. Bargaining Unit Work (New Article)

The parties agreed prior to commencement of fact-finding to include in a new article entitled "Bargaining Unit Work" the two (2) sections reflected below:

Section 1. Non-bargaining unit employees shall not be assigned to perform bargaining unit if such assignment would cause a job abolishment, layoff or displace bargaining unit employees from their regular job assignments.

Section 2. Available work or overtime shall be offered to bargaining unit personnel prior to the assignment of non-bargaining unit personnel.

2. Article 4, FOP Representation

The Employer proposed to add the following language to the current collective bargaining agreement:

Use of Departmental supplies, materials and computer equipment to conduct union business is strictly prohibited.

Prior to the fact-finding session, the parties agreed that the Employer would withdraw its proposal on Article 4.

3. Article 7, Section 7.1

The Union's counterproposal to the most recent response from the Employer was accepted and the language shall include a sentence which indicates that Labor-Management meetings will include not more than two (2) FOP employee representatives.

4. Article 21, Section 21.5, Injury Leave

Based upon the Union's response, the Employer withdrew its proposal to add new language which read:

The Employer is not required to offer or require any limited duty to any employee.

5. Article 28, Section 28.1(B)(3)

The Union agreed to the Employer's proposed language in Section A, which now will read:

Employees who have used all their accrued sick leave, vacation leave, personnel leave, compensatory time and any other form of paid leave and who remain incapacitated from the performance of their duties shall request disability leave.

The Employer agreed to the Union's proposal on Section B, which will now read:

Employees who are approaching the termination of an unpaid leave of absence and who may qualify for disability leave shall receive a notice from the Employer within ten (10) calendar days of the expiration of the unpaid leave. This notice shall set forth the employee's requirement to secure a form of leave. This notice shall also include the employee's leave options and a description of the total hours of unpaid leave remaining. Said notice shall be delivered to the employee's last known address. A copy of the notice shall also be delivered to the Union. The family member or Union representative of a seriously ill or injured employee may submit a leave request on behalf of the employee. Failure of the employee or the representative of the employee to timely submit a leave request, once notified to do so, may place the employee in an absent without leave status and the employee may be deemed to have voluntarily resigned from the Department.

B. Issues in Dispute

1. Article 9, Discipline, Section 9.7

Township Position

The Township Trustees expressed concern with the arbitration process as it relates to resolving disputes over the termination of employees. According to the Township's representative, in the past six (6) years, the Township has had three (3) occasions to terminate police officers. Two occasions arose out of the same set of facts and circumstances. Each of the three (3) matters was grieved and each of the three (3) arbitrators who were called upon to make final determinations reinstated the formerly discharged employees.

The Township points to a number of articles and letters to the editor concerning the arbitration process in general and, more specifically, the arbitration results from two (2) highly publicized Cincinnati 911 Operator cases. It is the position of the Township that trust is lacking in the arbitral process as it relates to resolving termination matters. Moreover, it is time for someone who is responsible to the community to review termination issues. The Township suggests that issues regarding the discharge of employees are better handled by a judge in the Court of Common Pleas. The Township was very careful to note that it has a process that provides the utmost due process and that the Township is not suggesting arbitration be eliminated for any other part of the grievance procedure except those matters related to the termination of one's employment.

Union Position

Obviously the Union took issue with the assertion by the Township that in each of the discharge cases, the arbitrators overlooked or excused the misconduct on behalf of the officers in reinstating them. It is the Union's view the arbitral process is not flawed but, rather, the Employer's judgment is impaired.

The Fact Finder's attention was directed to a number of sections of Elkouri & Elkouri, How Arbitration Works, 5th Ed. for support of the Union's contention. In addition, the Union notes over 97% of the statewide collective bargaining agreements contain clauses for binding arbitration and, in large measure, this is true because of the fact that safety forces do not have the right to strike. Arbitrators are provided through a selection process which is fair and rational, according to the Union. Arbitration provides privacy and avoids political interference in the process. Finally, the Union notes that the Township just agreed to final and binding arbitration for disciplinary matters in its firefighters' bargaining unit.

Findings and Recommendations

On balance, the undersigned finds the Union view more persuasive. As noted in the seminal decision rendered by the United States Supreme Court in the case of Steelworkers v. Warrior & Gulf Navigation Co., 80 S.Ct. 1347, 1352-55 (1960):

A labor arbitrator performs functions which are not normal to the courts. The considerations which help him fashion judgments may indeed be foreign to the competence of courts... The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences on the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the

arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreements serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon a termination of a grievant because he cannot be similarly informed.

At the heart of the Supreme Court's analysis is the recognition that the collective bargaining process culminates with a contract which contemplates the need to manage conflict. There is no possible way for the parties to a collective bargaining agreement to anticipate each and every dispute that will arise. Rather, collective bargaining agreements attempt to capture as many of the rights and obligations attendant to the parties' relationship as possible. However, in some areas, the parties establish a standard such as "just cause" without more definition and they rely upon the good services of a neutral third party to resolve any dispute as to the interpretation of the standard.

The Employer in the present case is complaining about the predictability of arbitration results, not the arbitration process. Shifting the decision making to an elected official --- the judge --- is simply not the solution. As noted by the Supreme Court, the court generally lacks the considerations to properly address the discharge of an employee. Furthermore, a Common Pleas Court judge serves a six (6) year term. During his/her term on the bench, the judges make very few decisions that have anything to do with labor-management relations. In fact, it is not reasonable to believe that the voters in the community will evaluate a judge based upon the minimal number of labor-management decisions made by that particular individual.

The arbitrator, on the other hand, operates in a fishbowl as noted by the Union in its fact-finding submission. They are selected on the basis of acceptability. Their results are generally mainstream and consistent with one another. In addition, arbitrators have a

great deal of experience with the law of the shop and can entertain those considerations that may be foreign to the competence of the court.

Arbitration is also cost effective and efficient when compared to the litigation track. It must be noted that some argument can be made that arbitration is becoming increasingly more litigious and the economies simply are not realized. Such argument begs the question. The parties are responsible for designing the process. From the selection of the arbitrator to when the award is rendered, the parties are in control. Collective bargaining agreements typically contain provisions identifying the timeframe for processing claims, the selection of an arbitrator and the timeframe within which the arbitrator has to render his/her decision. Perhaps, the parties would be better served by creating a panel of neutrals who could serve as arbitrators in discharge cases. If the selection process for the panel of arbitrators is thorough and thoughtful, chances of a certain level of predictability will be provided in the arbitration process. In addition, if both parties "know the arbitrator", then they will know what pre-discharge activities he/she will consider important.

In light of the circumstances, the Fact-Finder is not empowered to select arbitrators for a panel. Therefore, absent mutual agreement by the parties to take this step, the Fact-Finder recommends that no change be made in the collective bargaining agreement with respect to this issue.

2. Article 15, Wages and Compensation, Section 15.1

Union Position²

The Union proposes the following across the board wage increases:

Retroactive to 1-1-99	11%
Effective 1-1-2000	4%
Effective 1-1-2001	4%

The Union asserts that when compared to other Clermont County agencies, the Miami Township Police Officers are 11% below average in compensation. Given the fact that the Miami Township population is growing, workloads are increasing for members of the bargaining unit and the Township has a real desire to be recognized as “the leading agency in law enforcement in Clermont County, and among the leading law enforcement agencies in Greater Cincinnati”, the proposal is justified. Being 11% below average in compensation doesn’t bode well for maintaining the present level of professionalism in the Department, nor does it bode well for the recruitment of the “best of the best”, according to the FOP/OLC.

Township Position

The Employer on the other hand, points out that the cost-of-living adjustment is approximately 2% and it is anticipated to creep slightly higher in coming years. Moreover, the average wage increase given to safety forces as gleaned from 189 contracts throughout the State of Ohio for years 1996 through the year 2000 is 3.346%. In addition, the Employer’s comparable data indicates that of 21 townships with FOP/OLC

² There was no contention that the Employer faced an inability to pay for any of the wage proposals suggested.

labor contracts, the average wage increase between 1996 and the year 2000 is 3.4% of the base rate.

Finally, the Township argues that Loveland is an aberration which “blows up the average” in the Union’s comparable data. The Employer went on to submit comparable data within Clermont County absent consideration of Loveland.

Findings and Recommendations

The Union freely admitted at the fact-finding hearing that its requests, especially in year 1 (11%), is rather unusual. A review of the comparable data from throughout the State of Ohio and of the agencies within Clermont County supports this conclusion.

However, the Union has put before the Fact-Finder a persuasive argument to support its demand. Both the need to maintain the high standard within the Police Department of Miami Township and the recruitment of equally skilled and qualified officers will be driven, in large measure, by the compensation package available. The nagging concern related to the FOP/OLC’s position is the effect of including Loveland within the local comparables and its resistance to looking beyond Clermont County for comparables.

The Township makes the point that Loveland skews the comparable wage scale beyond an acceptable norm. This point is well taken. Moreover, according to the comparable data supplied by the Township, the average wage increases between 1996 and the year 2000 is 3.46% and 3.4%.

In order to balance the tension between the positions taken by the parties and attempt to accommodate their respective interests, it is the recommendation of the Fact-Finder that an across the board wage increase be as follows:

Retroactive 1-1-99	7%
Effective 1-1-2000	5%
Effective 1-1-2001	4%

There is no question that a substantial adjustment must be made to the wages of all police officers in Miami Township. However, this adjustment must be based upon a fair and reasonable standard, not an unfairly skewed comparison. The Fact-Finder's recommendation accommodates both needs. For instance, a 7% wage increase for a patrol officer retroactive to January 1, 1999, will raise that officer's five (5) year base rate to \$38,812.00. Using the comparable data found in Employer's Exhibit 10³, the patrol officer's wage rate would rank third among the five (5) local agencies and slightly below average. The second year increase of 5% will place a patrol officer at \$40,752.00 or second among the five (5) local agencies and slightly above their average wage. The third year will place the officer's annual compensation at \$42,380.00, number one among the five (5) local agencies and slightly above average.

3. Article 15, Section 15.9, Wages and Compensation

Union Position

The Union proposes that the D.A.R.E. Officer, the Field Training Officers, the Community Policing Officers, the School Resource Officer, and the Investigator receive compensation in addition to the base rate increases set forth in Section 15.1. Specifically, the Union proposes the following language:

Section 15.9 Selected specialized positions shall be paid additional compensation according to the following criteria:

- a. Any officer(s) whose principle duty assignment is the D.A.R.E. Officer shall be paid specialized assignment pay as follows:
 1. For D.A.R.E. Officer's duties performed January 1 through June 30, the assigned D.A.R.E. officer(s) shall be paid the sum of \$1,000.00 in the first July payroll.
 2. The D.A.R.E. Officer's duties performed July 1 through December 31, the assigned D.A.R.E. officer(s) shall be paid the sum of \$1,000.00 in the first January payroll.
 3. To qualify for payment, the Officer must be a qualified D.A.R.E. Officer, must have been assigned as the D.A.R.E. Officer for the period involved and performed the D.A.R.E. duties for at least three (3) months of that period.
 4. The Officer shall be considered qualified after completing the following training courses:
 - (a) the 80-hour D.A.R.E. instructor course, or equivalent approved by the Chief of Police; and
 - (b) an additional 32 hours of annual retraining in D.A.R.E. related topics, approved by the Chief of Police.
 5. Specialized assignment pay for the D.A.R.E. Officer shall be retroactive to July 1, 1997 and through December 31, 1998.
- b. Any officer(s) whose temporary duty assignment is the Field Training Officer (FTO), School Resource Officer (SRO), Investigator (INV), or Community Policing Officer/Supervisor (CPO) shall be paid specialized assignment pay as follows:
 1. Any assigned FTO, SRO, INV or CPO shall be paid an additional sum of \$1.00 per hour for each hour in the performance of FO, SRO INV or CPO duties.
 2. To qualify for payment, the officer must be a qualified FTO, SRO, INV or CPO and must have been assigned as the FTO, SRO, INV or CPO for the period involved and perform FTO, SRO, INV or CPO duties.

³ All calculations are absent PERS offset.

3. The officer shall be considered a "qualified" FTO after completing the following training courses:

- (a) basic FTO training course of at least 24 classroom hours.

Township Position

The Township has maintained the position that the D.A.R.E. Officer and the Field Training Officer should receive some additional compensation. In a non-contractual offer, the Employer agreed to compensate the D.A.R.E. Officer in the additional amount of \$2,000.00 per year. In addition, the Employer proposes to compensate the FTO at a rate of \$.50 per hour for each hour worked in that capacity. The Employer is resisting any attempt to compensate the Community Policing Officers, the School Resource Officer or the Investigator at an additional hourly rate. According to the Employer, the D.A.R.E. Officer and the Field Training Officer require a certain skill set as evidenced by their required training qualifications. Moreover, the D.A.R.E. Officer in particular is not necessarily able to avail himself/herself of overtime opportunities. In addition, it is very difficult to recruit and maintain the D.A.R.E. Officer position.

Findings and Recommendations

Unquestionably, it is difficult to recruit, train and maintain the employment of a qualified D.A.R.E. Officer, particularly, in light of the fact that the D.A.R.E. Officer does not normally avail himself/herself of overtime opportunities. Thus, the Fact-Finder recommends that the D.A.R.E. Officer should receive the additional sum of \$2,000.00 per year while performing D.A.R.E. duties. The collective bargaining agreement should

reflect this additional compensation in Section 15.9 and the language submitted by the Union in its proposal is hereby incorporated by reference.

The issue of the Field Training Officer stands on all fours with the D.A.R.E. Officer. Of particular note is the fact that the Field Training Officer must undergo significant training to develop a skill set which is then utilized to mentor new employees. The Employer's proposal of an additional \$.50 per hour for the FTO is recommended by the Fact-Finder. This additional compensation should be reflected in Section 15.9(B) of the collective bargaining agreement and read:

Any Officer(s) whose temporary assignment is the Field Training Officer (FTO) shall be paid a specialized assignment rate as follows:

1. Any assigned FTO shall be paid an additional sum of \$.50 per hour for each hour in the performance of FTO duties.
2. To qualify for the payment, the Officer must be a qualified FTO and must have been assigned to FTO duties for the period involved and performed FTO duties.
3. The Officer shall be considered "a qualified" FTO after completing the field training courses:

- (a) a basic FTO course of at least 24 classroom hours.

This language is recommended for inclusion in the collective bargaining agreement.

The Community Policing Officer/Supervisor, School Resource Officer and Investigator do not square with the other officers receiving additional compensation in these recommendations. There is a lack of information with respect to the necessary training to provide qualified officers in these areas. Moreover, these officers share in some level of overtime opportunities. Finally, their skill set, while unique, is not necessarily specialized to the extent of the D.A.R.E. Officer or the FTO. Therefore, the Fact-Finder

recommends no additional compensation for the School Resource Officer, the Investigator or the Community Policing Officer/Supervisor.

4. Article 16, Court Time, Section 16.4, Call-Out Pay

Union Position

It is the Union's position that an employee called into work at a time outside of his/her regularly scheduled shift, and such call-out does not abut his regular shift, should be paid a minimum of three (3) hours at the overtime rate. The Union points to the fact that comparables indicate that the call-out pay for the Clermont County Sheriff's Office is three (3) hours; Loveland's call-out is three (3) hours; and Union Township's call-out is 2.5 hours. It is the Union's view that while police work is a function performed 24 hours a day 7 days per week, the minimum reasonable amount of compensation an employee should receive for being called into work on their off-duty hours is three (3) hours at time and one-half.

Township Position

The Employer on the other hand submits that the current level of compensation of two (2) hours at the overtime rate is sufficient. The Employer offered its own comparables and asserts that its comparables demonstrate the minimum call-in pay is approximately 2.1 hours.

Findings and Recommendations

Considering all of the comparables offered, it is evident that the call-out compensation received by the Miami Township Police Officers is below the average

received by other local agencies. The comparison across the State yields a similar result. However, in keeping with the effort to provide reasonable compensation for the officers, it is the Fact-Finder's recommendation that the officers receive 2.5 hours of overtime when called in outside the regularly scheduled shift for work which does not abut the regularly scheduled shift.

5. Article 17, Holidays, Section 17.3

Union Position

Employees covered by the collective bargaining agreement are entitled to ten (10) paid holidays. Of these ten (10) holidays, four (4) are paid at time and one-half if the employee works that holiday. The Union proposes that all holidays be paid in this manner if the employee works the holiday. The Union submitted comparables which show that it is unusual to pay only a few holidays at time and one-half. According to the comparables, the Clermont County Sheriff's Office, Loveland and Milford pay time and one-half for all holidays worked. Union Township pays five (5) of the 11 holidays in this manner. Thus, the Union proposes to change Section 17.3 to read as follows:

Employees working on a holiday are entitled to one and one-half (1-1/2) times their hourly rate in addition to their scheduled hours.

Township Position

It is the Township's position that the compensation provided to Miami Township officers on the four (4) holidays in question is sufficient reimbursement for the imposition of working on those holidays and that no additional compensation is necessary on the other six (6) holidays. Employer Exhibit 13 suggests that Pierce Township does not pay

any additional compensation to its officers on any of the ten (10) holidays but does recognize that others pay additional compensation on some or all holidays worked. Loveland, Milford, the Clermont County Sheriff's Office and Union Township pay additional compensation on more holidays than Miami Township.

Findings and Recommendations

Employer Exhibit 13 suggests that the average "bonus days" (additional compensation for work on holidays) for the local Clermont County agencies is 6.67. Miami Township is clearly below this average. Therefore, the Fact-Finder recommends that two (2) additional holidays be added to the list of holidays for which the Miami Township officers are paid at a rate of time and one-half in addition to their scheduled hours. Consistent with the Fact-Finder's recommendation, Section 17.3 should read:

Only employees working New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas are entitled to one and one-half (1-1/2) times their hourly rate in addition to their scheduled hours.

6. Article 18, Vacations

Union Position

The Union submits that it is appropriate at this time to include in Article 18 new language which would constitute Article 18, Section 18.8 and read as follows:

Any employee who is injured or takes ill while on vacation shall, upon request by the employee and upon submission of sufficient evidence, be entitled to change his/her vacation leave status to sick leave status for all days necessary to recover from the injury/illness. Any vacation leave charged to the employee for the duration of the injury/illness shall be restored to his/her vacation credit.

This proposal is being made because it is impossible to predict or plan for injuries and illnesses. Moreover, according to the Union, this proposal reflects current departmental practice.

Township Position

The Township takes the position that it is not a guarantor of vacations. Moreover, in the Township's view, the language proposed by the Union does not reflect the current departmental practice. Finally, the Township expresses a concern about the impact of the proposed language on Article 18, Section 18.4.

Findings and Recommendations

Based upon the evidence and information submitted during the fact-finding hearing, it is the view of the Fact-Finder that the matter in question has not presented a major problem for the parties. Under the circumstances, the parties would be well advised not to borrow trouble. Therefore, the Fact-Finder recommends that the language remain the same and that no additional language be added to this section of the collective bargaining agreement.

7. Article 22, Insurances, Section 22.4

Union Position

The Union adopted a position and presented a proposal suggesting that the amount of life insurance death benefit provided to police officers be increased from \$10,000.00 to \$40,000.00. According to the Union's information, the average death benefit is \$42,400.00.

Township Position

The Township's position is that it is willing to provide a death benefit in the amount of \$25,000.00 for each of the officers in the bargaining unit. The Township's view is that the \$10,000.00 benefit currently provided should be increased, but there is no necessity to make the benefit \$40,000.00.

Findings and Recommendations

In keeping with the attempt to be fair and reasonable in the recommendations related to compensation and benefits, the Fact-Finder views the Employer's proposal as reasonable. It is 2.5 times the amount provided at the moment and is a significant effort to adjust the benefit for the officers in question. Therefore, the contract should be adjusted to reflect the death benefit being changed from \$10,000.00 to \$25,000.00.

8. Article 23, Clothing Allowance, Section 23.

Union Position

At the fact-finding hearing, the Union modified its proposal as follows:

A clothing allowance in the first year of \$1,000.00 and in the amount of \$700.00 each year thereafter. As for undercover officers, the collective bargaining agreement would remain unchanged.

The Union views this proposal as being a reasonable proposal. It has been eight (8) years, according to the Union, since the last increase in the clothing allowance. The comparable data, according to the Union, supports its proposition.

Township Position

It is the Township's view that the clothing allowance is already equal to or exceeds the average clothing allowance offered in local Clermont County agencies. Moreover, there is no urgent need at the moment to address this particular issue.

Findings and Recommendations

The Fact-Finder is not persuaded by the comparables presented by the Union. Nor does there appear on the record to be any problem with the current clothing allowance. Under the circumstances, it is the recommendation of the Fact-Finder that the clothing allowance remain the same.

9. Article 35, Tuition and Education Incentives, Section 35.4

Union Position

The Union indicated during the course of the fact-finding hearing that prior to collective bargaining, it invites the members of the bargaining unit to rank their proposals. The Union also indicated that the proposal with respect to increasing the tuition and education incentives contained in Article 35, Section 35.4 was prioritized as a very high proposal by the bargaining unit members. The Union proposes to increase the Associate degree educational incentive from two (2%) percent of the base pay to three (3%) percent of the base pay; the Baccalaureate degree from three (3%) percent of the base pay to four (4%) percent of the base pay; the Masters degree from four (4%) percent of the base pay to five (5%) percent of the base pay; and the Doctorate degree from five (5%) percent of the base pay to six (6%) percent of the base pay.

Township Position

The Township, as might be expected, resists the Union's effort to increase the educational incentives. The Employer offered comparable data which suggests that Miami Township stands alone in this area, however, it must be noted that the Union disputes the comparable data.

Findings and Recommendations

Once again, in an effort to bring some fairness and balance to the recommendations which have economic impact upon the parties, the Fact-Finder is persuaded by the Employer's view. While the bargaining unit members might prioritize this particular Union proposal and rank it highly, that ranking in and of itself does not support an increase in the benefit. Therefore, it is the recommendation of the Fact-Finder that the educational incentive remain the same.

10. Article 36, Employee's Rights, Section 36.3

Union Position

Prior to the fact-finding hearing, the Union proposed that the language of Article 36, Section 36.3 be modified to include the following sentence: "The employee may request the presence of an OLC and/or legal representative, in which case questioning may be postponed for up to forty-eight (48) hours (or other mutually agreed period of time)." At the hearing, the Union, in attempting to address the Employer's concern about a delay hampering the effect of a civilian investigation, proposed the following language:

The employee may request the presence of an OLC and/or legal representative, in which case questioning may be postponed up to twenty-four (24) hours (or other

mutually agreed to period of time). Postponement may not be authorized if the Employer has a reasonable belief that such delay will seriously jeopardize the investigation. In such cases, the employee shall be given a reasonable amount of time to contact a representative who can respond promptly. Employees who choose to exercise their Miranda rights shall be afforded all rights as set forth in Miranda.

The attempt to mediate acceptable language for the parties failed. However, the Union submitted the mediated language as its final position. That language would read as follows:

An employee who has reason to believe that answering questions may lead to discipline, may request the presence of an OLC and/or legal representative, in which case the questioning may be postponed for up to twenty-four (24) hours (or other mutually agreed period of time). Postponements may not be authorized if the Employer has a reasonable belief that such a delay would seriously jeopardize the investigation. In such cases, the employee shall be given a reasonable amount of time to contact a representative who can respond promptly. Employees who are the focus of a criminal investigation and who choose to exercise their Miranda rights shall be afforded all rights as set forth in Miranda.

The obvious thrust of the Union's proposal is to protect the rights of employees both in investigation of employment misdeeds as well as criminal investigations.

Township Position

The Township indicated at fact-finding that the current language has been in three (3) successive collective bargaining agreements. The Township also voiced concern that the Union's proposal could impact the ability to investigate cases and lead to grievances.

Findings and Recommendations

On balance, the Union's proposal (as modified during mediation) appears to be the most reasonable approach. It serves to protect the rights of employees and provides the benefit of representation while allowing the Employer to minimize the impingement upon

the investigation. The Fact-Finder does not accept the bald assertion that providing representation to employees will lead to grievances. In fact, the contrary would be true if properly represented. Under the circumstances, the Fact-Finder recommends that Article 36, Section 36.3 should now read:

Any interrogation, questioning or interviewing of a bargaining unit member will be conducted at hours related to his shift, preferably during his work shift. Interrogation sessions shall be for reasonable periods of time and time shall be allowed during such questioning for attendance to physical necessities. An employee who has a reasonable belief that answering questions may lead to discipline may request the presence of an OLC representative, in which case, questioning may be postponed for up to twenty-four (24) hours (or other mutually agreed period of time). Postponements may not be authorized if the Employer has a reasonable belief that such a delay would seriously jeopardize the investigation. In such cases, the employee shall be given a reasonable amount of time to contact a representative who can respond promptly. Employees who are the focus of a criminal investigation and who choose to exercise their Miranda rights shall be afforded all rights as set forth in Miranda.

11. Drug Testing (New Article)

Union Position

During the course of the negotiations, the Employer proposed a new article on drug testing. The Union countered with an article that with few exceptions was acceptable to the Employer. Several major differences appeared to drive the parties fact-finding presentations. First of all, from the Union's perspective, it would be inappropriate to conduct random testing on the officers of the Miami Township Police Department. Secondly, the Union argued that any test results should remain confidential and not be used in criminal proceedings. The combination of these two (2) elements of the drug testing program as proposed by the Employer place the employee in the impossible position of being assumed to be guilty rather than presumed innocent and of giving

evidence against himself/herself unwillingly. In addition, the Union asserts that post-accident testing in and of itself is not the equivalent of reasonable suspicion testing. From the Union's perspective, testing may follow any accident, if attendant circumstances demonstrate that reasonable suspicion exists as defined by the collective bargaining agreement.

Township Position

The Township's position is that random testing is lawful. Not only is random testing lawful, random testing is necessary to assure the public that it can have trust and confidence in its safety forces. Moreover, there is an overriding concern that the Township needs to satisfy its obligation to report improper, unlawful activities. Thus, the Employer cannot agree to any sort of confidentiality clause as proposed by the Union.

Findings and Recommendations

The public has a right to expect members of the safety forces to be free from the effects of drug and alcohol while serving the community. Any substance abuse in the bargaining unit ranks poses a direct threat to public safety and to the welfare of fellow employees, as well. Public trust and confidence in the integrity of the police department can be threatened by even the suspicion of officer drug use. In an ideal world, drug testing programs serve to detect and deter prohibited drug use by police officers and, as a result, preserve the public trust and confidence in the police department itself.

However, the need to build and maintain public confidence in the police department cannot be accomplished by trampling the rights of the officers involved. A

balance must be struck between the rights of the employees and the compelling government interest in maintaining a workplace free of illegal drugs.

In many areas governed by federal government regulation, random drug testing has been deemed to be both appropriate and lawful. It appears that limited random testing for police safety forces is also appropriate in maintaining public trust and confidence. Therefore, the Fact-Finder recommends that the parties include in the collective bargaining agreement a provision dealing with random drug testing.

It is also the view of the Fact-Finder that reasonable suspicion testing should be included in the drug testing provision. However, post-accident testing is subject to a great deal of abuse. An accident can be considered to be anything from a minor mishap to a major collision between vehicles. In the minor mishap circumstance, there is simply no justification for testing an officer. Therefore, the Fact-Finder is unpersuaded and it is the undersigned's recommendation that reasonable suspicion testing should not include post-accident testing. If, however, following an accident there are other observable factors which would lead one to reasonable suspicion that drugs or alcohol were involved, then testing is appropriate and the contract provision should provide so.

Finally, with respect to the issue of confidentiality, the Fact-Finder has struggled. It is very difficult to provide for an effective drug testing program the results of which do not remain confidential. The purpose of the testing program should be to maintain a drug-free workplace and assist those individuals in the workplace in maintaining that posture. It should not be disciplinary and, therefore, revealing drug testing results to third parties serves to undercut the true purpose of the process. On the other hand, the public employer has certain obligations to make reports where illegal conduct occurs. Therefore,

it is the recommendation of the Fact-Finder that the results of the drug and alcohol testing should be revealed only to a third party only upon subpoena by a court of competent jurisdiction. Otherwise the testing procedure should be considered to be for administrative purposes only.

Because the Employer indicated that it could accept the Union's counterproposal with few exceptions, the Fact-Finder recommends the following language be included in the new Article 37 of the collective bargaining agreement.

Article (New), Drug Testing

Section 1. It is the policy of the Miami Township Police Department that the public has the absolute right to expect persons employed by the Police Department will be free from the effects of drugs and alcohol. The Township, as the Employer, has the right to expect its employees to report to work fit and able for duty and to set a positive example for the community. The goals of this policy shall be achieved in such a manner as not to violate any employee's administrative or constitutional rights.

Section 2. Employees are prohibited from consuming or possessing alcohol at any time during, or just prior to the beginning a workday except as may be necessary in the performance of their lawful duties. Employees are further prohibited from possessing, using, selling, or delivering any illegal drug at any time or at any place except as made necessary in the lawful performance of their duties.

Section 3. Each employee may be subject to random testing once per calendar year. Employees shall be selected using a scientifically valid method which employees will have an equal chance of being tested each time selections are made. Dates for testing shall be unannounced and spread throughout the calendar year.

Section 4. The Employer may test employees for drug or alcohol use when it has a reasonable suspicion to suspect the use of drugs or alcohol.

Reasonable suspicion that an employee used or is using drugs or alcohol in an unlawful manner may be based upon, but not limited to:

1. Observable phenomenon, such as direct observation of drug or alcohol use or possession and/or the physical symptoms of being under the influence of drugs or alcohol;

2. A pattern of abnormal conduct or erratic behavior;
3. Arrest or conviction of a drug or alcohol related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug or alcohol possession, use or trafficking;
4. Information provided either by reliable and credible sources or independently corroborated;
5. Evidence that an employee has tampered with a previous drug test; and
6. Facts or circumstances developed in the course of an authorized investigation of an accident or unsafe working practice.

Section 5. Drug/alcohol testing shall be ordered by the Employer. The testing shall be conducted solely for administrative purposes. Results obtained shall be held in complete confidence and may not be used in criminal proceedings other than by subpoena from a court of competent jurisdiction. This procedural shall not preclude the Employer from other administrative action, but such action shall not be based solely upon the initial testing results alone.

Section 6. All drug screening tests shall be conducted by medical laboratories meeting the standards of the National Institute of Drug Abuse and the National Institutes of Health. No test shall be considered positive until it has been confirmed by gas chromatography/mass spectrometry full scan test. The procedures utilized by the Employer and the testing laboratory shall include an evidentiary change of custody. All samples collected shall be collected in two (2) separate containers for use in the prescribed testing procedures. All procedures shall be outlined in writing and this outline shall be followed in all situations arising under this Article. A Medical Review Officer shall review all confirmed positive test results from the laboratory.

Section 7. All alcohol testing shall be done in accordance with the laws of the State of Ohio to detect drivers operating motor vehicles under the influence.

Section 8. The results of tests shall be delivered to the Employer and the tested employee. The employee whose confirmatory test results are positive, shall have the right to request certified copy of the test results in which the vendor shall affirm that the test results were obtained by using the approved protocol methods. The employee shall provide a signed release for disclosure of the testing results to the Employer only. A representative for the bargaining unit shall have a right of access to the results upon request to the Employer, with the employee's consent. Refusal to submit to the testing provided for under this Agreement shall be grounds for discipline, up to and including termination.

Section 9. If a drug screening test is positive, a confirmatory test shall be conducted utilizing the samples collected in the manner prescribed above.

Section 10. After the testing required above has produced a positive result, the employee shall be permitted to participate in any rehabilitation or detoxification program covered by his insurance or of his choice. A discipline allowed by the positive findings provided for above shall be deferred pending successful rehabilitation of the employee within a reasonable period. An employee who participates in rehabilitation or detoxification program shall be placed on medical leave of absence for the period of the rehabilitation or detoxification program. Prior to being placed on leave without pay, the employee may use any accrued leave. Upon satisfactory completion of the program as verified in writing by the treating facility and upon receiving the results from a retest demonstrating the employee is no longer abusing a controlled substance, the employee shall be returned to his former position. Such employee may be subject to random testing upon his return to his position for a period of two (2) years from the date of his return. Any employee in a rehabilitation or detoxification program in accordance with Article, will not lose any seniority or benefits, should it be necessary for the employee to be placed on medical leave or absence with/without pay, for a period not to exceed twelve (12) weeks.

Section 11. If the employee refuses to undergo rehabilitation or detoxification or if tests positive during a retesting after his return to work from such a program, the employee shall be subject to disciplinary action, including removal from his position and termination of his employment.

Section 12. Costs of all drug screening tests and confirmatory tests shall be borne by the Employer except that any tests initiated at the request of the employee shall be at the employee's expense.

Section 13. Any member may voluntarily present themselves as an alcohol abuser, or a person with tendencies towards drug abuse, can volunteer for rehabilitation or detoxification or any other relevant/applicable employee assistance without fear of punitive action.

Section 14. The provisions of this Article shall not require an Employer to offer rehabilitation or detoxification program to any employee more than once.

As noted above, all other articles tentatively agreed to by the parties are incorporated by reference herein and included within the fact-finding report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Kosanovich', written in a cursive style.

Daniel N. Kosanovich, Fact-Finder
29 East Rahn Road, Suite 100
Dayton, Ohio 45429
(937) 291-9339