

STATE OF OHIO

**STATE EMPLOYMENT
RELATIONS BOARD**

STATE EMPLOYMENT RELATIONS BOARD 2000 NOV 31 A 10: 23
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IN THE MATTER OF:

**CASE NOS. 99-MED-04-0360
00-MED-06-727**

**OHIO PATROLMEN'S BENEVOLENT
ASSOCIATION,**

"Employee Organization"

and

**CUYAHOGA COUNTY SHERIFF'S
DEPARTMENT (Sheriff Gerald T. McFaul),**

"Employer"

**REPORT OF FACT-FINDER
AND RECOMMENDATIONS**

DATE OF REPORT AND DATE OF MAILING: NOVEMBER 30, 2000

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I. INTRODUCTION

This matter comes before the Fact-Finder as a result of a referral on May 28, 1999 by the State Employment Relations Board ("SERB") pertaining to fact-finding protocol between the Ohio Patrolmen's Benevolent Association (Correction Officers) (hereinafter referred to as "Association" or "Employee Organization") and the Cuyahoga County Sheriff's Department (Sheriff Gerald T. McFaul) (hereinafter referred to as "Employer" or "Sheriff"). Initially, the parties had executed a joint extension of fact-finding to July 12, 1999 pursuant to Ohio Administrative Code 4117-9-05(G) which was further extended to October 15, 1999.

Thereafter, on or about November 18, 1999, the Sheriff filed a Motion with SERB to stay negotiations and any further fact-finding proceedings pending disposition of certain representation issues. In his Motion to stay, the Sheriff stated: "Based upon the representation filing(s), the Employer questions whether the Incumbent Employee Organization represents a majority of the units in the bargaining unit." Apparently, an organization called "Ohio Public Safety Officers Association" had filed a representation election petition with SERB to represent the correction officers. By letter dated November 18, 1999 from legal counsel for OPBA to legal counsel for the Sheriff, a copy of which was provided to the Fact-Finder, counsel stated: "In light of these filings [Petition for Representation], it would be pointless for us to proceed with fact-finding next week as previously scheduled."

On December 16, 1999, SERB granted the Sheriff's Motion to stay negotiations, and in its "Directive Granting Motion to Stay Negotiations," the Board, in pertinent part, stated: "The Motion to Stay is granted. Accordingly, the negotiations are stayed in Case No. 99-MED-04-0360 pending disposition of Case No. 99-REP-11-0254. The processing of the representation case is to

be expedited. Upon issuance of the directive disposing of the related representation matter, the stay no longer will be in effect.”

On September 12, 2000, the Fact-Finder, *sua sponte*, contacted SERB regarding the disposition of the Petition for Representation, at which time SERB advised the Fact-Finder that on June 15, 2000, the Board had entered an Order indicating that as a result of a secret ballot election held on April 27, 2000, the Ohio Patrolmen’s Benevolent Association received a majority of the ballots cast and was certified as the exclusive representative of the correction officers, being the unit involved. The Bureau of Medication then advised the Fact-Finder that as a result of the Board’s certification of June 15, 2000 in Case No. 99-REP-11-0254, the stay of negotiations previously entered by the Board on December 16, 1999 in Case No. 99-MED-04-0360 was no long in effect. As a result of the break in the fact-finding protocol necessitated by SERB’s stay of negotiations, after the SERB’s certification of election results on June 15, 2000, the instant fact-finding was also designated as Case No. 00-MED-06-727.

A fact-finding hearing was then conducted for the taking of evidence, submission of issues and presentation of the parties’ respective positions, by mutual agreement, on October 17 and 18, 2000, with the hearing being conducted in the Conference Room of the Sheriff’s Department, The Justice Center, Cleveland, Ohio. No post-hearing briefs were submitted and the hearing was considered closed as of October 18, 2000.

The Fact-Finder received and has taken into consideration numerous exhibits and extensive material presented by both parties, including the parties’ respective Pre-Hearing Position Statements.

Included in the material presented and received by the Fact-Finder was the parties’ current Collective Bargaining Agreement covering the period from August 8, 1996 through June 30,

1999, which also included the Decision and Report of Conciliator Dana F. Castle issued on July 6, 1998 in Case No. 97-MED-05-0605. A number of the exhibits and documents submitted by the parties will be referenced in more detail, *infra*, as they relate to the specific issues under review. In addition, the Fact-Finder has taken into consideration the statutory guidelines enunciated in Revised Code §§4117.14(C)(4)(a) through (f), the guidelines set forth in Revised Code §4117.14(G)(7)(a) through (f), and SERB Regulations, Ohio Administrative Code 4117-9-05(J) and (K)(1) through (6).

Appearing on behalf of the parties, in addition to the respective legal representatives designated on the face sheet of this Report, were the following:

On Behalf of the Association

Daniel Neff, Correction Officer
Charles Westbrook, Correction Officer
Joseph Cusweil, Correction Officer
Curtis Shruggs, Correction Officer

On Behalf of the Sheriff's Department

Robert B. Pace, Director of Corrections, Sheriff's Department
Patricia Cresly, Executive Assistant, Sheriff's Department
Mary Ellen Cabot, Employee Relations Section, Sheriff's Department
Ken Kochevar, Chief of Jail Security
Ron Shobert, Special Project Sergeant
David Wervey, Roster Sergeant
William E. Cook, Employee Administrator, Sheriff's Department

II. BACKGROUND

The Bargaining Unit consists of all full-time correction officers employed by the Cuyahoga County Sheriff's Department and numbering approximately 600, although that number fluctuates "up and down" because of employee turnover. The correction officers are essentially civilians, not deputy sheriffs, who exercise the supervision and control over the County's jail which houses approximately 2,200 inmates, which number, of course, fluctuates. As noted by the parties,

the County jail, which is physically located within the "Justice Center" of Cuyahoga County located in Downtown Cleveland, is actually two jails that are physically joined together. Jail I was opened in 1977 and Jail II was opened in 1995. As noted by the Association, approximately two-thirds of the correction officer staff are assigned to what is referred to as "jail security" which involves the direct supervision of jail inmates. The other one-third of the correction officer staff is assigned to what is referred to as "specialty areas," including such things as access control, commissary, food services, safety, sanitation and the like. Essentially, these are security and support to the direct supervision activities. It was further indicated that the correction officers who work jail security get to bid on the basis of their seniority for the particular post that they want, including their shift and days off. One of the issues and concerns permeating the fact-finding hearing, which will be discussed further, was the matter of morale, scheduling and excessive overtime necessitated for a variety of reasons but required because, for obvious reasons, the jail facility is operated on a 24 hour, 7 day week, 365 day year basis.

Preliminarily, it should be noted that at the commencement of the fact-finding, there were two potential issues, one dealing with "Union rights" and the other dealing with "grievance procedures." Those two issues were withdrawn by the Union on the basis of continuation of current contract language. In light of the withdrawal, those two issues will not be discussed by the Fact-Finder nor included as part of his Recommendations.

A labyrinth of material has been presented to the Fact-Finder, and he would be remiss if he did not commend the representatives of both the Association and the Sheriff for presenting their respective positions in an articulate, detailed and highly professional manner. The numerous issues presented herein are not easily resolved, as is evident by the fact of the parties' actual impasse, but the thoroughness of the parties' presentations significantly assisted the Fact-Finder in his task. In

preparing this Report and Recommendations, the Fact-Finder has attempted to summarize the salient aspects involved. Brevity, therefore, should only be construed as an attempt to contain the length of this Report and not to diminish the significance of each issue or the volume of material presented in support thereof. This Report and Recommendations would be of inordinate size if all of the arguments, pro and con, and all of the material were discussed at length. Additionally, the Fact-Finder is cognizant of the *caveat* expressed by Justice Douglas in *Johnson v. University Hosp. of Cleveland* (1989), 44 Ohio St.3d 49, 58, wherein he stated: "Our occupational duty continuously requires us to balance rights and responsibilities of persons regardless of their color, sex, position, or station in life. We accomplish that balancing in this case while recognizing that our decision will be something less than universally accepted."

III. RECOMMENDATIONS

Parking:

The current Contract provides that "parking will be available to Employees on the same basis as other County Employees except where those other Employees' job duties and/or job status justifies a different arrangement."

The Association has proposed that each Employee should receive a parking stipend of \$5.00 for each tour of duty worked except in those instances where the Sheriff has actually permitted the employee to park for free. It was indicated that certain positions, e.g., nurses, corporals, sheriff's deputies and cooks, are allowed to park free and that the correction officers are required to pay a parking fee when they have to park in a commercial parking lot situated around the Justice Center. It is suggested that this situation is particularly acute on those days when there is an athletic or community affair, such as a football game, when the parking fees are raised, thus causing the correction officers to incur an even larger expense. It was indicated that there are

approximately 100 parking places allocated to the Sheriff's Department of which 47 are used by fleet vehicles under the Sheriff's jurisdiction. Additionally, there are approximately 25 spaces that are used by corporals, sheriff's deputies, nurses and cooks. It was also indicated that there are parking spaces in a section of the Justice Center referred to as "The Courts Tower" but that such parking is under the jurisdiction of the Cuyahoga County Commissioners and not under the Sheriff's jurisdiction. Thus, the Sheriff has no authority to unilaterally allocate that parking for correction officer availability. The Sheriff has proposed retention of present contract language.

The Fact-Finder appreciates that parking expenses are an additional item to be incurred by the correction officers. Also, public transportation may not be readily available at the hours that the particular correction officer starts or finishes his or her work shift. On balance, however, the Fact-Finder recommends retention of current language on the basis that the contract clause permits availability of parking. In the event that it is suggested that the Sheriff is engaging in discriminatory allocation, such issue might well rise to the level of a grievance. Also, within the Sheriff's administrative and management prerogative, it may be suggested that he confer with the County Commissioners to explore possible availability of parking at a time when the parking spaces are not otherwise used. However, with the problem of providing parking for approximately 600 correction officers, the Fact-Finder can easily see a potential situation of suggested favoritism in that, for example, correction officers on a daytime shift would not be able to have available parking whereas, perhaps, correction officers on a midnight shift might be able to have parking available. Then you get into the problem of selectivity in that some employees are getting benefits not available to others. On balance, the Fact-Finder is of the view that the present contract language should be retained.

Shift and Days Off Selection:

The present Contract provides that the selection of shift and off days is made in November of each year with the Sheriff developing a list of all shifts, presently a first, second and third shift, from which the officers make their selection and that the listing is done on the basis of seniority. This is also the process for the correction officers determining their "off days." The annual roster of shifts, days off and vacation schedule becomes effective in January of each year.

The Sheriff has proposed converting the present system of three shifts of eight hours per shift to two shifts each of twelve hours. Of all the issues that were presented during the fact-finding protocol, this issue of shift allocation appeared to be one of the most contentious. The Association has proposed maintaining the present contract format.

During the fact-finding, the Sheriff's Department indicated that it had undertaken a project referred to as "Red Zone Project," formatting twelve hour shifts for Jail No. 1 and "Blue Zone Project" for Jail No. 2. There was an indication that the change in shift would increase the jail cell time for inmates suggesting that, whereas the inmates presently have "outside" time of approximately eleven hours per day, under the proposed change, the inmates would only have approximately six hours per day outside of their cells. The Project also proposes a change resulting in approximately 42 officers to 26 officers per floor. It was also indicated that at the present time, approximately one-fourth to one-third of the correction officer staff are presently assigned to support or "specialty areas" covering such items as access control, commissary, food services, safety, sanitation and the like and that the remaining portion of the correction officer unit are assigned to actual jail security, i.e., direct supervision of the inmates. Many of the support services now work ten hour shifts (e.g., cooks) because of their job positions and that the shift arrangement is not for a 24 hour basis. The Sheriff's proposal would be to structure the shift arrangements on a two week

cycle of 84 hours, one week the employee being on a three day schedule of twelve hours per day, or 36 hour shift, and the second week being on a four day schedule of twelve hours per day, or 48 hour shift, resulting in an overall time allocation of 84 hours of which 4 hours would be at overtime pay. (For example: 1st Week - Working Monday, Wednesday and Friday; 2nd Week - Working Sunday, Tuesday, Thursday and Saturday).

The Fact-Finder is painfully sensitive to the significant change reflected in this present proposal going from three eight hour shifts to two twelve hour shifts each day. To say that this is dramatic is certainly an understatement. However, some employees are already operating on a ten hour shift. Also, the utilization of twelve hour shifts is not unheard of, particularly in those types of institutions which, by the nature of their service, are required to operate on a 24/7/365 basis. Although the present proposal is certainly a significant deviation from that presently set forth in the present Contract, it is not so irrational or unreasonable to be called ridiculous. The Fact-Finder appreciates that any new proposal, by the very nature of its newness, creates a level of discomfort, suspicion and difficulty for adjustment. The Fact-Finder, however, does not believe that the present proposal is so irrational that its very suggestion justifies a rejection. In part, one of the continuing problems, expressed both by the Sheriff and the Association, has been the problem of employee morale and excessive overtime which has caused employees to use their sick leave. Although covered in another portion of this Report, there is a proposal to limit the number of overtime hours that the Sheriff can unilaterally require a correction officer to work. The Fact-Finder does not profess to be prophetic nor omniscient as to whether this twelve hour shift format will or will not succeed and produce the desired result of lessening the demands on manpower and address, to some degree, the issue of employee morale. However, to maintain the present proposal and to reject out of hand the suggestion of a conversion to twelve hour shifts constitutes a total rejection of any type

of innovation seeking to address problems of morale and manpower. It appears to the Fact-Finder that if a twelve hour shift were formatted, which results in an indication that the proposal is an absolute failure, it would seem that the Sheriff's Department would be the first to suggest a modification.

The Fact-Finder, therefore, recommends that the present contract language be retained except for Section 1 which shall read as follows:

"The selection of shift and off days will occur in November of each year. The Employer will develop a listing of all shift openings from which correction officers may select. This listing will also include days off. Seniority will be the sole criterion in determining shift and days off."

Hours of Work:

For reasons set forth in the "Shift and Days of Selection," *supra* at Page 7, the Fact-Finder recommends that the "Hours of Work" section of the Contract be amended by deleting Section 3 and substituting in lieu thereof the following Section 3 and a new Section 4 to read as follows:

Section 3. For those Employees working seven (7) shifts within a fourteen (14) day period, the normal workday shall consist of twelve (12) hours and fifteen (15) minutes.

Section 4. Employees shall receive a thirty (30) minute lunch period, fifteen minutes of which will be noncompensable, and for the purpose of overtime calculation not counted as hours worked. The Employee will make a reasonable effort to schedule the break during the middle one-third of each Employee's shift."

Overtime:

The current Contract language pertaining to overtime, set forth at Pages 13 and 14 of the Contract, sets forth a number of provisions including the allowance of the accumulation of compensatory time to the maximum permitted under the Federal Fair Labor Standards Act, which

compensatory time must be used within 180 days of its accrual. Additionally, the Contract provides that an employee may use up to 24 hours of compensatory time each year for personal needs upon a three day notice unless there is a family or personal emergency preventing such notice.

It should be noted that at the commencement of the fact-finding, the Sheriff's Department had submitted a proposal addressing this issue of overtime but, during the fact-finding, a language modification was proposed which was prepared to address the question of the maximum number of overtime hours that could be mandated by the Sheriff in the event that the employee was working a twelve hour shift. The amended proposal was submitted to resolve questions in the event that a twelve hour shift schedule was permitted.

The Fact-Finder recommends that Sections 1 and 2 of the overtime provision, as existing in the present Contract, be retained but that Sections 3, 4, 5 and 6 be rewritten as follows:

Section 3. All Employees shall be eligible to work overtime on their scheduled workdays up to a maximum of twelve (12) hours per calendar week for employees who work twelve hour shifts or twenty-four hours per calendar week for any other employees, provided that Employees who start an overtime shift with less than the maximum referenced above, but who exceed the maximum during the shift for which they volunteered shall be required to finish said shift. However, except in the case of an emergency, an Employee will not be permitted or required to work a consecutive period exceeding sixteen hours and fifteen minutes. It shall be the responsibility of the Employee to notify the roster sergeant on a daily basis at the beginning of the Employee's shift of his intention to work overtime, if overtime is available. Failure of an Employee to notify the roster sergeant of his desire to work overtime shall result in the Employee not being placed on the overtime availability list for that particular day. An Employee who notifies the roster sergeant of the desire to work daily overtime may still opt out of overtime for that day by giving notice to the roster sergeant not less than four (4) hours prior to the end of the shift.

Section 4. The Employer shall equitably offer daily overtime to Employees based on seniority using a rotating list method. Employees who work voluntary overtime will be credited with the hours worked on the voluntary overtime list. Employees who don't

volunteer will be credited with the number of overtime hours the employee was eligible to work up to a maximum of eight hours on the voluntary overtime list. Employees who volunteer for overtime on a particular day but whose services are not required for overtime work will not be credited with overtime for that day. During a shift, officers on duty who have volunteers for overtime that day will be contacted in order of fewest hours on the voluntary overtime list and offered an overtime assignment, if available. If the Employee declines the overtime assignment, the Employee will be credited with twice the overtime hours he was offered.

Section 5. In the event that the number of overtime assignments exceeds the number of Employees who have volunteered for daily overtime, the Employees who are on a scheduled off day and present at Roll Call shall be assigned by seniority. The Employer shall also maintain a list of Employees who have volunteered to be called in on off days to work overtime and the Employer may utilize this list to fill available overtime opportunities. Hours worked by an Employee on scheduled off days shall not be considered when calculating the weekly maximum referenced in Section 3, above. Such overtime hours worked shall not be credited on the voluntary overtime list.

Section 6. If additional Employees are still necessary, on-duty Employees shall be required to work overtime in inverse order of seniority using a rotating list method. However, if an Employee has already reached the maximum hours described in Section 3 at the time he would otherwise be required to work mandatory overtime, such Employee shall be passed over for mandatory overtime until such time as an assignment is not barred by the maximum hours limit described in Section 3. Employees working twelve (12) hour shifts will not be required to work more than four (4) hours of mandatory overtime in a week. Any other employees will not be required to work more than one (1) overtime shift in a week.”

The Fact-Finder further recommends that the present Section 6 of the Contract be renumbered but that the provision itself be retained dealing with the posting of the overtime list and that the Association be provided with a copy if it so requests.

It is further recommended that the present Section 7 be deleted and a new Section 7 read as follows:

“It shall be the responsibility of any Employee who suspects that he has been overlooked for overtime or that this Article has been misapplied to report to the Roster Sergeant at the conclusion of his shift to attempt to correct any errors or misapplications.”

The Fact-Finder further recommends that Section 8 of the present Contract be deleted and that a new Section 8 read as follows:

“The overtime assignment procedure set forth in Sections 3 through 6 shall not apply to overtime opportunities in specialized work assignments or when the employee is required to finish a work assignment. In the event an emergency occurs, the Employer reserves the right to assign officers to temporarily meet the emergency requirements, regardless of the overtime assignment policy.”

Retirement:

Based on discussions which occurred during the fact-finding, the Fact-Finder recommends that Section 1 be rewritten as follows:

“When employment is terminated with a bargaining unit employee through either resignation or removal, he shall receive full compensation for accrued vacation, holiday, and compensatory time. When an employee retires with ten or more years of service time with the Cuyahoga County Sheriff’s Department, he may elect to be paid for unused accumulated sick leave in accordance with the following schedule:

Years of Service

10 to 15	25% up to 240 hours
16 to 20	25% up to 480 hours
21 +	25% up to 720 hours.”

Probationary Period:

The present Contract provides that employees maintain a probationary status for a period of 150 days with the further provision that the probationary employee is afforded Union representation after his or her 60th day of employment with the further provision that an employee discharged for cause between the 60th and 150th day of employment is not subject to arbitration. The

Union proposes retention of the current Contract provision, however, the Sheriff's Department proposes that in lieu of the 150 day language, the Contract be amended to allow for 365 days. The basic argument in support of this change is that it is now necessary for correction officers to receive certification through the Ohio Peace Officer Training Academy and that the period of training is treated within the probationary time period but the employee is not actually on the job site in order for the Sheriff's Department to actually determine how satisfactory the employee's performance might be. Thus, although 150 days might, on its face, appear reasonable, in fact, the Sheriff's Department is only afforded a very limited window of opportunity to evaluate the individual's performance. The Fact-Finder appreciates the Sheriff's concerns, however, the probationary status is one that is generally perceived as a transitional status wherein the employee may be summarily terminated. To suggest that an employee should be on a probationary status for a one year period may cause that individual to raise doubts as to whether he or she is actually going to be retained. The employee is entitled to some degree of certainty as to retention.

The Fact-Finder therefore recommends that the probationary period be set forth as follows:

“Section 1. Employees entering this Unit are probationary employees for a period of 180 days. The Union may represent any non-probationary employee. There shall be no extension of the 180 day probationary period other than for leave of absence of that employee during that 180 day period.

Section 2. A newly hired probationary employee shall be afforded Union representation after his or her 60th day of employment. Any Employee discharged for cause between the 60th and 180th day shall not be subject to arbitration and Management's decision is final.”

Health Insurance:

In essence, the current contract, pertaining to health insurance, provides that as of January 1997, the Sheriff contributes up to \$200.00 per month (single coverage) and up to \$528.00 (family coverage). It is further provided that cost increase above the 1997 monthly rate that exceeds \$200.00 for single plan or \$528.00 for family plan will be paid one-half by the Sheriff and one-half by the particular employee.

The Association essentially proposes to maintain current contract language but with a modification to the effect that prior to the effective date of a proposed rate increase, the employee is to be advised and given the option of choosing a different plan. The Sheriff, on the other hand, has proposed a new format which provides that notwithstanding whatever the dollar amount of the monthly health insurance premium, the Sheriff would pay 92.5% of the premium and the employee would contribute 7.5% of the premium cost for the particular plan selected.

The Sheriff presents two essential arguments in support of its position. First, it contends that the increases in health insurance premiums from year to year make it unreasonable for the Sheriff to absorb all of the costs even if the premium stays within the \$200.00 or \$528.00 level. Second, at the present time, almost all of the other collective bargaining employees in the Sheriff's Department are now on a contributory plan of the County paying 92.5% in some instances and 95% of the premium costs in some other instances. Based on information submitted during the fact-finding, it might be possible for an employee to have health insurance coverage even under the new contract but with present contract language resulting in no additional costs. Health insurance costs are today a matter of everyone's attention and, whereas in years past when health insurance premiums were matters which produced little or no debate, today, it is a significant expenditure item, both for an employer and an employee. On balance, however, in light of the fact that a

percentage contribution formula appears to be used with other collective bargaining units within the Sheriff's Department, in this instance, it does appear appropriate that the present health insurance provision be modified to similarly reflect a contribution formula. Accordingly, the Fact-Finder recommends that Section 3 of this portion of the Contract be amended to provide that the Sheriff will contribute 95% of the premium and the employee, if he or she elects to participate in the plan, will contribute 5% of the premium cost for that plan.

Accrued Time Records:

The present contract provides that the Sheriff, on a bi-weekly basis, provides to each employee an accounting of accrued time as to all those instances in which time is permitted to be accrued. The Association has proposed a slight modification to the extent that on the first day of each payroll period (there being 26 payroll periods during the year), the Sheriff will post a list showing the accumulated AWOL (Absence Without Leave) hours that each employee would have as of the time of posting.

On October 2, 1991, the Sheriff issued General Order 91-3 setting forth the standard for disciplinary action dealing with certain employee conduct. In that regard, it was noted that an employee might be charged with AWOL if, for example, the employee was more than 30 minutes tardy, was absent without an authorized leave or absent without prior notification to the Sheriff. The Order also provides for varying penalties based on the amount of accumulated AWOL hours; for example, if an employee has accumulated 16 hours of AWOL during a "floating 12 month reckoning period," he or she receives a written reprimand; upon accumulating 32 hours of AWOL time, the employee receives three days suspension; upon accumulating 40 hours of AWOL time, the employee receives ten days suspension; and upon accumulating 48 hours of AWOL time, the employee can be terminated.

The Sheriff contends that it should not be placed with the administrative burden or task of accounting to an employee for the amount of accumulated AWOL on the basis that the individual employee is or should be aware of the amount of AWOL that he or she has accumulated. In other words, this is a matter of individual responsibility.

Although the Fact-Finder concedes that a level of individual responsibility and accounting is appropriate, nevertheless, the actual determination of whether an employee has incurred an AWOL is made by the Department and, at least initially, it does not appear to be unreasonable that the Sheriff should communicate to the employee what AWOL time has been charged and accumulated. Further, such a tabulation may serve to alert the employee to the amount of AWOL time that has been accumulated and that the employee is at risk of incurring certain disciplinary action. By way of analogy, for example, the Registrar of the Bureau of Motor Vehicles is required to notify a driver when he or she has accumulated six points even though the suspension of a driver's license does not occur until 12 points have been accumulated. Inasmuch as the records of AWOL time are maintained by the Sheriff, it does not appear to be unreasonable to have that information disseminated to an employee. However, to require that this information, applicable to approximately 600 correction officers in addition to all of the other employees in the Sheriff's Department, be provided on the first day of each payroll period as of the preceding day (as suggested by the Association) might well be a burden and imposition on the Sheriff's administrative staff.

The Fact-Finder therefore recommends that a new Section 2 be added to the "Accrued Time Records" section to read as follows:

"Section 2. On the first day of each calendar month, the Employer shall post a list showing the accumulated AWOL hours of each Employee computed as of the most recent payroll period."

Part-Time Employment:

The present Contract provides that a member of the Bargaining Unit is allowed to have “part-time employment” but that the individual must first apply to the Sheriff obtaining the Sheriff’s written permission prior to engaging in the part-time employment. Further, the Agreement provides that the granting or denial of the request shall be governed by various criteria set forth in the Contract such as, for example, the part-time employment does not involve more than 20 hours per week, the place of business where the part-time employment will occur is not a place where any officer of the business has been convicted or is under investigation for a serious criminal offense, there is no conflict of interest or that the part-time employment does not adversely affect or interfere with the individual’s duties for the Sheriff’s Department.

The Association has proposed a modification to this provision to the effect that employees would be permitted to work in any lawful outside employment without first obtaining the Sheriff’s permission so long as they do not use the uniform or identification of the Sheriff’s Department, contending that the current “approval” process is onerous, unnecessary and is an interference by the Sheriff with an individual’s right to seek outside or part-time employment. Essentially, the Association proposes that if an employee requests approval of outside employment, it should be granted unless there is a clear case that the part-time employment is unreasonable or illegal.

The Fact-Finder appreciates and is aware that correction officers are not in the same category or classification as peace officers, i.e., deputies and police officers, however, it is this Fact-Finder’s opinion that the general public might well have a different perception and not be able to distinguish between some of the “niceties” among the various law enforcement classifications. Further, it must be realized that the Sheriff’s Department, similar to other law enforcement agencies,

is particularly open to public scrutiny and employees of those agencies may well be held to a higher personal standard. Equally, a situation might exist where an employer would be particularly pleased to have a law enforcement officer or a correction officer as an employee. On balance, however, it does not appear to be so unreasonable, considering the very nature of the Sheriff Department's operations, to require at least some initial requisition for approval of part-time employment. The Contract does set forth some criteria so that a correction officer is put on notice in advance as to the types of part-time employment which would or would not be approved. If the part-time employment which is sought does not contravene any of the criteria set forth in the Agreement and yet the request is denied, such action might rise to the level of a grievance, an issue which this Fact-Finder neither addresses nor resolves. Considering all of the circumstances, the Fact-Finder recommends that the current Contract language be retained.

Access to Refreshments:

The Association has proposed a new article to the Collective Bargaining Agreement providing, in essence, that employees will be permitted to keep water and coffee in the control room on each floor for their personal consumption during their shift and that the refreshments can be consumed from a Styrofoam cup at the employee's post. The Sheriff has opposed this proposal essentially on the basis that the only available place where water or coffee could be kept would be in the control room and that this area is a workstation, not a place for employees to come and go. The Association argues, on the other hand, that the individuals who operate the control room on each floor do keep refreshments. The Fact-Finder is of the view that although a level of access to refreshments for purposes of hydration or matters involving personal hygiene should be addressed, such items are more appropriately left within the discretion of the Sheriff within the scope of his managerial or administrative responsibilities rather than be set forth under the terms of a Collective

Bargaining Agreement. Certainly, if some type of reasonable accommodation is not made, such will impact on morale, employment efficiency and like matters, which certainly would draw the attention and resolution by the Sheriff. Accordingly, the Fact-Finder does not recommend the adoption of the Association's proposal pertaining to access to refreshments.

Placement of the Disabled:

Under the terms of the present Contract, an employee who sustains an "on the job" injury is permitted to seek alternate work assignment which may include a transfer to another shift or an alternative work assignment for a period up to 30 calendar days and, at the conclusion of the 30 day period, if no alternative work assignment is available on the employee's original shift assignment, that employee is then placed on sick leave or leave of absence. The Association has proposed several changes, including (1) that an employee cannot be required to accept an alternate work assignment, (2) the alternate work assignment is available to any employee who has sustained an injury, whether the injury has occurred "on the job" or "off the job."

Further, the Association proposes a provision to the effect that an employee injured on duty who does not receive injury and illness leave is permitted but not required to use any form of accrued leave which he or she may have. Further, in that regard, if an employee receives workers' compensation benefits, the employee may "buy back" a week of accrued leave for each week of workers' compensation benefits that the employee pays over to the Sheriff. Further, the Association proposes that if, as a result of the injury the employee is required to use or wear a "medical appliance," the employee should not be prohibited from working at his regular job or an alternate work assignment if the employee is otherwise capable of performing the functions of that assignment.

The Sheriff has proposed that the title of the section be renamed "Transitional Duty" to more accurately describe what is set forth in the Contract provision. The Sheriff has, substantively, proposed an amendment to the present Contract language to the effect that the employee may be placed in an alternative work assignment consistent with his or her medical restrictions. The alternative work assignment shall be for an initial period not to exceed 60 days but that the Sheriff, in his discretion, can extend the assignment.

The Association has also argued that the recent Collective Bargaining Agreement entered into with the corporals allows for a light duty assignment whether the injury has occurred "on the job" or not. The Sheriff argues, however, that the corporals' contract only pertains to approximately 44 members and, thus, its application and administration is significantly different than that pertaining to approximately 600 correction officers.

Upon consideration of the positions of the parties, the Fact-Finder recommends retention of the current contract language, although the Fact-Finder does have some reservations regarding similar light-duty assignments being applied equitably and non-discriminatorily between corporals and correction officers. Likewise, in that same context, if the Contract pertaining to the corporals permits a light-duty assignment when there has been an off the job injury, some accommodation for that same type of situation should be applied to the correction officers.

Vacation Leave:

The present contract provides for a graduated entitlement to vacation leave based on years of service commencing after the employee has completed one year of service. Vacation time is computed on the basis of 80 hours of vacation leave on the basis of 26 bi-weekly pay periods, or, in other words, vacation leave accrues at the rate of 3.1 hours each bi-weekly period. If an employee has eight or more years, the individual is entitled to 120 hours of vacation leave accruing on the

basis of 4.6 hours each pay period. Employees with 15 or more years of service are entitled to 160 hours of vacation leave accruing on the basis of 6.2 hours each pay period. Employees with 25 years of service or more are entitled to 200 hours of vacation leave accruing at the rate of 7.7 hours each bi-weekly period.

The Sheriff has likewise essentially proposed the retention of the current Contract except for a provision that those employees who have less than 80 hours in an active pay status would be credited with a prorated amount of leave according to the same formula set forth in the Contract. Although this issue could undoubtedly be argued back and forth at length as to whether the employee is an active pay status or not for purposes of prorating or determining the amount of credit to be given for vacation time, the Fact-Finder believes that such a formula might create potential areas of confusion or misunderstanding by employees as to their vacation time entitlement.

Accordingly, the Fact-Finder recommends retention of the current Contract language.

Sick Leave:

The present Contract provision allows for an employee to earn sick leave at the rate of 3.7 hours for each 80 hours of service completed but not to exceed 120 hours in any one year. Unused sick leave can be carried forward from one year to the next and there is no maximum number of hours which are permitted to be carried forward.

The Contract also sets forth various illustrations or reasons in which sick leave can be used. Also, the Contract provides that if an employee is unable to report for work, he should notify the Sheriff at least two hours prior to the start of his schedule unless emergency situations preclude it. The employee is required to submit a signed written statement for the request and a justification of the sick leave within eight hours after returning from work and certain required

medical documentation is submitted within three calendar days. The medical documentation is required where the employee requests use of sick leave for three or more consecutive days.

The Association has proposed retention of current Contract language but with an additional provision that in the event an employee has exhausted his sick leave, he may elect to use any other form of accumulated leave for those instances in which sick leave is permitted.

The Sheriff has proposed an adjustment in the sick leave time from the current 3.7 hours to 3.07 hours for each 80 hours of service but not to exceed 96 hours in any one year. The Sheriff also proposes certain modifications on the notification process and further proposes that an employee would be paid at 70% of his regular rate for all sick leave time used in excess of 40 hours.

The Sheriff has also proposed a provision to the effect that in the event an employee uses sick leave under such circumstances which would also qualify for leave under the Federal Family and Medical Leave Act, the use of the sick leave and the FMLA leave would run concurrently. Under the provisions of the Department of Labor regulations pertaining to the administration of the Federal Family and Medical Leave Act, Title 29, Page 825, Code of Federal Regulations, Section 825.207, the FMLA permits sick leave to run concurrently with FMLA leave, inasmuch as FMLA leave is unpaid leave. Section 825.207 provides:

“Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.”

If the Sheriff is entitled to require that the employee use both sick leave and FMLA leave to run concurrently, then there is an independent question as to whether, as a matter of equity, an employee should be allowed to use other forms of accumulated leave in the event he has exhausted sick leave. There might well be extenuating circumstances wherein an individual might

have some leave time accumulated under a different categorization but has exhausted his sick leave as such. On balance, the Fact-Finder is of the view that an employee should be allowed to utilize other leave which might be available for sick leave usage.

The Fact-Finder, therefore, recommends that, subject to the modifications to be set forth hereinafter, that the current contract language be retained. However, the Fact-Finder recommends that the present Section 7 be deleted and, in lieu thereof, the following be set forth:

“Section 7. Employees who have exhausted sick leave may elect to use any other form of accumulated leave for the purposes described in Section 3.”

Additionally, the Fact-Finder recommends that the present Section 8 be deleted and, in lieu thereof, the following be set forth:

“Section 8. If an Employee uses sick leave under circumstances that qualify for leave under the Family and Medical Leave Act (“FMLA”), the use of sick leave and the use of any leave authorized or permitted under Section 7 and FMLA leave shall run concurrently.”

Salaries:

As is not uncommon during fact-finding, a major area of contention between the parties revolved around the matter of salaries. Interestingly, under the present Contract, the salaries for 1996 was set forth in 15 grades, starting with a new hire at \$19,399.00 with a maximum after 15 years of \$28,191.00. The Contract also provided for a wage re-opener for the second and third years of the Contract. Unfortunately, the parties were not able to resolve the wage re-opener issue and the matter was referred to conciliation under Case No. 97-MED-05-0605. On July 6, 1998, Conciliator Dana F. Castle issued his Report. He noted that at that time the Sheriff's Department was offering to reduce the grades from 15 to 10 with new hires starting at \$20,523.00 and, after 10 years, reaching the maximum of \$29,040.00. For 1998, the pay range was \$21,000.00 for a new hire to a maximum

of \$29,465.00 but the 10 grades were proposed to be reduced to 8 grades. The OPBA had proposed a slightly different format, to wit, beginning January 1, 1998, a new hire's salary would be \$20,214.00, with a maximum after 10 years of \$30,496.00 and that effective January 1, 1999, a new hire's salary would be \$20,921.00 with a maximum reached after 8 years of \$31,624.00. For reasons set forth in more detail by the Conciliator, the position asserted by OPBA was accepted.

In the instant fact-finding, the OPBA is now proposing that the 8 grades be reduced to 5 grades so that the employee would reach maximum compensation after 5 years. A new hire (trainee) is proposed to start at \$21,964.80 and after 5 years reaching a maximum of \$34,848.00. Further, the OPBA proposes a 4% wage increase for the second year of the Contract and another 4% increase in the third year of the Contract.

The Sheriff's Department proposes to compress the number of levels to 7 years during the first year of the Contract, 6 years during the second year of the Contract and 5 years in the third year of the Contract. Further, it is proposed that employees who have reached Level 8 under the presently existing salary schedule would receive a \$1,000.00 lump sum payment on the 6 month anniversary of the effective date of the current Agreement. Those employees would also receive an additional \$1,000.00 lump sum payment on the 18 month anniversary of the effective date of the Agreement and another \$1,000.00 lump sum payment on the 30 month anniversary of the effective date of the new Agreement.

Both parties have presented a number of statistical comparisons from other counties, all of which lend some credence and which suggest that the Cuyahoga County correction officers are somewhat at the lower end of the scale when compared with other large metropolitan counties.

The Fact-Finder notes that under the corporals' contract with the Sheriff's Department covering the period February 10, 1999 to December 31, 2001, the corporals receive a

5% wage increase effective January 1, 1999, a 4% wage increase effective January 1, 2000, and another 4% wage increase effective January 1, 2001. In the deputy sheriffs' contract for the period January 1, 1999 to December 31, 2001, in the matter captioned "OPBA and Cuyahoga County Sheriff," Case No. 99-MED-04-361, Fact-Finder Margaret Nancy Johnson recommended a 3% increase for the year 2000, a 4% increase for the year 2001 and a 3.5% increase for the year 2002.

In the Sheriff's contract with the Communications Workers of America for the contract period January 1, 2000 to December 31, 2002 (covering such employees as secretarial, payroll clerks and clerk typists), there was essentially a 5% increase granted for each of the contract years.

The Fact-Finder recognizes that both the OPBA and the Sheriff's Department are trying to reach a level of equipoise recognizing that reasonable compensation is necessary if the Sheriff's Department is to maintain a high level of employee performance and morale and, at the same time, maintaining a low level of turnover. The Fact-Finder could go on indefinitely analyzing and re-analyzing each particular salary proposal as it relates to other counties and also the compensation provided in past contracts. On balance, however, the Fact-Finder believes that a reasonable accommodation to the positions asserted by both parties is for the following salary format: Effective upon the commencement of the first year of the Contract, there shall be a 5% wage increase computed on a proportionate compression of 7 pay grades plus the initial trainee or new hire pay grade. Commencing the beginning of the second year of the Contract, the pay grades shall be proportionately compressed to 6 years plus the classification of a trainee or new hire classification, and there shall be a 4% wage increase. Commencing the beginning of the third year of the Contract, the pay grades shall be proportionately compressed to 5 years plus the classification of a trainee or new hire classification, and there shall be a 4% wage increase.

Expiration and Renewal:

Both parties have proposed a three year Agreement but have left this item open to the Fact-Finder for purposes of recommended language. Accordingly, the Fact-Finder recommends that the expiration and renewal clause of the Contract read as follows:

“This Agreement is effective as of the date of ratification of the Report and Recommendation of the Fact-Finder and shall remain in full force and effect until 12:00 o'clock Midnight on the _____ day of _____, 2003, being three (3) years from the effective date hereof and shall thereafter continue in full and effect from year to year and shall be renewed for successive years unless written notice of termination or a desire to modify or change this Agreement is given, in writing, by either party at least one hundred twenty (120) days prior to the expiration date. Upon receipt of notice, a conference shall be arranged within thirty (30) days.”

Respectfully submitted,


DONALD N. JAFFE
Fact-Finder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the a copy of the foregoing Report of Fact-Finder and Recommendations has been forwarded to George Albu, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, Columbus, Ohio 43215-4213; Kevin Powers, Esq., Representative on Behalf of Employee Organization, at Ohio Patrolmen's Benevolent Association, 10 Beech Street, Berea, Ohio 44017, and James P. Wilkins, Esq., Representative on Behalf of Employer, at Kaster, Westman & Wilkins LLC, 3480 West Market Street, Suite 300, Akron, Ohio 44333, via FedEx, this 30th day of November, 2000.


DONALD N. JAFFE
Fact-Finder