

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

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RELATIONS BOARD

2002 SEP -3 A 10:43

In The Matter Of The Conciliation Between:

THE SUMMIT COUNTY SHERIFF'S )  
DEPARTMENT ) 01-MED-09-0776  
-AND- )  
THE FRATERNAL ORDER OF POLICE )  
OHIO LABOR COUNCIL, INC. )  
LODGE NO. 139 )

APPEARANCES:

For The Sheriff:

Howard Heffelfinger Executive Vice President  
Clemans, Nelson & Associates  
Martin Bramlett, Senior Consultant  
Christine L. Croce Director of Administration  
Steve Finical Assistant Sheriff

For The Union:

Hugh Bennett Staff Representative  
Gwen Callender Counsel  
Doug Smith President  
Jack Giordano Former President  
David Stone Former President

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BEFORE ALAN MILES RUBEN, CONCILIATOR

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## BACKGROUND

The Employer, the Summit County Sheriff, provides jail facilities, road patrol and related policing services for the residents of Summit County.

The Sheriff's Department employs 326 full-time Deputy Sheriffs who form a Bargaining Unit exclusively represented by the Fraternal Order of Police, Ohio Labor Council, Inc., Lodge No. 139, (hereinafter referred to as "Union" or "FOP").

The Department's full-time Deputy Sheriffs in the classifications of Sergeant, Lieutenant, Captain and Major are organized into a separate Unit which is represented by the Summit County's Sheriff's Supervisors' Association.<sup>1</sup>

The Sheriff and the FOP have been parties to several Collective Bargaining Agreements, the last of which became effective as of January 1, 1999 and expired on December 31, 2001.

The parties resolved through negotiations and tentatively agreed on some of the provisions to be included in the successor Agreement, but reached impasse on a number of others.

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<sup>1</sup> The Communication Technicians and the Office and Clerical Personnel are organized in separate units, both of which are represented by A.F.S.C.M.E., Local 1229.

The parties were unable to reach agreement on proposals for changes to Article 7, Section 7.2 - (FOP Representation); Article 9, Sections 9.8(C) and 9.8(F) - (Grievance Procedure); Article 10 - (Discipline); Article 11 - (Personnel Files); Article 12 - (Labor/Management Committee); Article 17 - (Hours of Work and Overtime); Article 18 - (Wages and Compensation); Article 19 - (Court Time/Call-In Pay); Article 20 - (Insurances); Article 24 - (Funeral Leave); Article 25 - (Injury Leave); Article 27 - (Uniforms and Equipment); Article 30 - (Severance Pay); Article 33 - (Vacancies); Article 34 - (Substance Abuse Screening); Article 35 (Duration); New Article - (Secondary Employment Rates) and New Article - (Physical Abilities).

The parties proceeded to Fact-Finding before Fact-Finder Robert G. Stein on their respective proposals for the text of the above enumerated Articles.

The Fact-Finder was utilized as a Mediator and succeeded in resolving conflicts over the text of Article 7 - (FOP Representation); Article 22 - (Vacations); Article 23 - (Sick Leave) and Article 26 - (Leaves of Absence). The Fact-Finding hearing went forward with respect to the remaining proposals, and resulted on May 9, 2002 in the

issuance of Recommendations by the Fact-Finder on all disputed issues.

The Fact-Finder's Recommendations for resolution of all of the disputed issues were not accepted.

In consequence, the State Employment Relations Board issued a Conciliation Order on June 4, 2002, and, at the designation of parties, appointed the undersigned Conciliator to resolve after hearing, "the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the parties' final settlement offers."

A Mediation session was held with the parties on July 26, 2002. As a result of that conference both parties agreed to accept the Recommendations of the Fact-Finder on the following provisions:

Article 7, Sections 7.1, 7.2 & 7.3 - (FOP Representation);  
Article 9, Sections 9.8(C) & 9.8(F) - (Grievance Procedure);  
Article 10, Sections 10.1, 10.2, 10.6 & 10.7 (New Proposal/Discipline);  
Article 11, Sections 11.1 & 11.4(B) - (Personnel Files);  
Article 12, Section 12.1 - (Labor/Management Committee);  
Article 17, Section 17.8 - (New Proposal/Hours of Work and Overtime);  
Article 18, Sections 18.1 & 18.3 - (Wages and Compensation);  
Article 19, Sections 19.1 & 19.2 - (Court Time/Call-In Pay);  
Article 20, Section 20.1, 20.3 & 20.5 - (Insurances);  
Article 22, Section 22.1 - (Vacations);  
Article 23, Section 23.3 - (Sick Leave);  
Article 24, Section 24.1 - (Funeral Leave);  
Article 25, Sections 25.1, 25.2 & 25.4 - (Injury Leave);  
Article 27, Section 27.1 - (New Clause Respecting Purchase of  
Civilian Clothes To Be Used In Court);  
Section 27.4 - (Extending Date For Return of Unexpended  
Uniform Allowance to December 15, 2004);  
Article 33, Sections 33.1, 33.2 & 33.5 - (Vacancies);  
Article 34, Sections 34.1, 34.5, 34.7, 34.9 & 34.12 - (New Proposal -  
Substance Abuse Screening);  
New Article - (Secondary Employment Rates);  
New Article - (Work Rules Policies and Procedures).

There remained in dispute provisions of the following seven Articles:

Article 17, Section 17.7 - (Compensatory Time);  
Article 20, Section 20.2 - (Caps on Premium Contributions and  
Co-Payments for Prescription Drugs);  
Article 27, Section 27.1 - (Uniform Allowance Schedule);  
Article 30, Section 30.1(A) - (Severance Pay);  
Article 33, Section 33.7 - (Transfers to Fill Temporary Vacancies);  
Article 35, Section 35.1 - (Effective Date of Contract));  
New Article, (Physical Abilities)

All proposals of the parties not referred to above or discussed below are deemed to have been withdrawn and abandoned.

At the direction of the parties the Conciliation hearing was held on August 20, 2002 at the Summit County Jail facility.

Timely in advance of the hearing the parties made the pre-hearing submissions required by O.R.C. Section 4117(G)(3) and O.A.C. Section 4117-9-06(E) setting forth, inter alia, their respective final offers and positions on the issues remaining in dispute.

The parties agreed that all of the provisions of the 1999 Contract, not amended by consent in their negotiations nor remaining in dispute and subject to Conciliation Award, were to be carried forward and incorporated into the three year successor Agreement, mutatis mutandis. The parties specifically agreed that the wage increases were to be retroactively effective to January 1, 2002.

The advocates for the parties offered opening statements and made evidentiary presentations with respect to each of the unresolved issues. The parties jointly introduced the 1999 Contract and the instant Fact-Finder's Report; the 2001 Agreement between the Summit County Sheriff and the Summit County Sheriff's Supervisors' Association, and a portion of the Fact-Finder's Report and Recommendations issued with respect to that Agreement, and a study on physical abilities testing in law enforcement prepared by a staff representative of the Fraternal Order of Police in 1999 that incorporated the program developed for the Florida Department of Law Enforcement, Division of Criminal Justice Standards.

The Union offered Order No. 11-2002 dealing with "flex-time" issued by the Sheriff on April 10, 2002 (subsequent to the instant Fact-Finding proceeding); excerpts from the July, 2000 "Fair Labor Standards Handbook"; certain Administrative Letter Rulings of the Wage and Hour Division of the Department of Labor; a 2000 State Employment Relations Board Research and Training Section Report on the cost of health insurance in Ohio's public sector; a comparison of sick leave conversion upon retirement benefits in six Sheriff Departments and the City of Akron Police Department; and, finally, a 1994 Fact-

Finding Report issued following impasse in Contract negotiations between the Clermont County Sheriff and the Fraternal Order of Police, Ohio Labor Council, Inc.

The Sheriff submitted a table showing the portion of insurance premiums paid by Summit County pursuant to Contracts with its fifteen other Bargaining Units; a schedule of the uniform allowances paid by fourteen other County Sheriff Departments and a table portraying the sick leave conversion entitlements upon retirement in those fourteen Sheriff Departments; a table of the sick leave conversion allowances in Contracts with the County's fifteen other Bargaining Units and a table comparing group health plans offered to all employees of Summit County.

In consideration of the Conciliator's docket, the parties graciously extended the time within which he might issue his Report and Award.

The Conciliator considers below the final proposals and positions of the parties, as well as the Report and Recommendation of the Fact-Finder, on the issues submitted to Conciliation.

In fashioning his Award, the Conciliator has carefully considered the factors enumerated in O.R.C. Section 4117.14(G)(7), viz.:

for whatever reason, the employee is to be paid for the overtime and not denied the pay for the hours worked in excess of eighty (80) hours."

The Union believes that the Order is ambiguous in several respects, and, when flex-time is denied, it is unclear whether the overtime would be paid at the straight-time or time and one-half rate.

Members of the Bargaining Unit, the Union contends, have been required to work more than eighty (80) hours in a pay period, but in lieu of paying overtime at the time and one-half rate, Supervisors "coerce" them into volunteering to flex their work hours. In return, the Deputies are offered the opportunity to work fewer straight-time hours in the first week of the pay period or fewer time and one-half hours in the second week of the pay period.

The Union insists that if the Sheriff intends to permit members of the Bargaining Unit to select compensatory time or flex-time as an optional method of overtime compensation, then the practice must be legitimized and memorialized as the Union has proposed and compensation be made in accordance with the requirements of the Fair Labor Standards Act.

C. The Sheriff's Final Offer:



The Employer rejects the Union's proposal for a new Section 17.7 because the provision would result in employees taking more time-off, and make it more difficult for the Sheriff to provide adequate staffing. It would also result in additional cost because the Sheriff would have to require other Deputies to work on an overtime basis to cover for those who choose compensatory time. The Union's proposal which would permit employees to accrue up to one hundred sixty (160) hours compensatory time has no counterpart in any of the other Collective Bargaining Contracts entered into by the Sheriff.

D. The Fact-Finder's Recommendation:

The Fact-Finder recommended that the current language of Article 17 be retained without change. He found that the "comparable data presented by the Employer makes a compelling case to remain with what has worked in the past, current language. I do not find that the current system the Employer has for compensating overtime is inadequate or out of line with comparable jurisdictions."

E. Conciliator's Analysis and Award:

A number of Conciliators and Interest Arbitrators have taken a narrow view of their role in making an Award where one of the parties has adopted the recommendations of a Fact-Finder and the other has not. They perceive it their

duty to "give great weight to the recommendations of a Fact-Finder", or to require the objecting party to either "show clear error on the part of a Fact-Finder before overturning in a Conciliation Award the term contained in a duly arrived at Report and Recommendation", or otherwise to prove "good cause for overturning his recommendation".

These various statements of the deference due a Recommendation by a Fact-Finder are all designed to protect the integrity of the statutory process, and deter use of the Fact-Finder's Report and Recommendation as only a "bottom line" springboard for obtaining better terms in a subsequent Conciliation proceeding.

Fact-Finders are trained, skilled and experienced neutrals, typically selected by, or mutually acceptable to the parties, and in whose impartiality and parties have confidence. They reach their Findings and Recommendations after careful evaluation of the respective positions of the parties and the available data, taking into account all relevant factors.

The notion is that the Fact-Finder thus stands somewhat in the position of a judge in a non-jury trial, while the Conciliator serves as a quasi-appellate tribunal. Put somewhat differently, there is a rebuttable presumption that the Fact-Finder's Recommendations are correct, but the

presumption may be rebutted by showing that relevant circumstances have materially changed since the Report was issued, that significant evidence was not available or considered by the Fact-Finder, that the data relied upon was flawed otherwise misinterpreted by the Fact-Finder or that some other similar fundamental oversight deprived the Fact-Finder's Recommendations of their presumptive validity.

Although this Conciliator subscribes to the view that a Fact-Finder's Recommendations ought not to be lightly disregarded, perhaps these formulations represent a too circumscribed reading of the Conciliator's function.

There is no escaping the fact that the Recommendation of a Fact-Finder on a particular issue, while restrained by evidentiary considerations and the statutory factors, represents, in essence, an exercise in judgment. That judgment should take into account the impact of the Recommendation on the long term relationship between the parties, the effect on relationships and negotiations with other Bargaining Units, the impact upon the effective and efficient rendition of City services, the competing demands upon finite governmental resources for other services, and the recruitment and retention of quality personnel in light of wages and working conditions elsewhere.

There ought to be an opportunity for the Conciliator to set aside a Fact-Finder's Recommendation, at least on those relatively rare occasions when the Conciliator is convinced that the judgment of the Fact-Finder has been improvidently exercised.

No reasons appear here to disturb the Fact-Finder's Recommendation with respect to Article 17.

Both parties agree that there had been a practice governing the availability of compensatory time-off rather than monetary compensation for overtime. Indeed, the Sheriff insists that the practice has been in existence since 1981, and that the April 10<sup>th</sup> Order which the Union finds offensive is nothing more than an attempt to codify the pre-existing practice. The parties disagree, however, as to what that practice provided for. The Union asserts that the past policy had been inconsistently applied, and deprived members of the time and one-half rate of pay in contravention of the Fair Labor Standards Act. It further states that members assigned to specialized units such as the SWAT Team and Bomb Unit were coerced into "volunteering their time" in order to remain as members.

The Conciliation hearing is not the appropriate form to determine the nature, extent, and consistency of application of the past practice, nor of the meaning and

validity of the Sheriff's Order No. 11-2002. Indeed, aside from the assertions of the parties' advocates, no evidence was offered on these issues.

The Conciliator believes that the grievance process provides the appropriate mechanism to resolve disputes over the appropriateness of overtime compensation rates and the substitution of time-off or flex-time for such compensation. Obviously, the Sheriff's attempt in Order No. 11-2002 to "clarify" the existing practice needs itself to be clarified. The parties can profitably enter into discussion with a view towards resolving these issues.

Accordingly, the Conciliator Awards the Sheriff's Final Offer and rejects the Union's proposal to add a new Article 17, Section 17.7, to the successor Agreement.

**Article 20, Section 20.2 - Insurances:**

**A. The 1999 Contract:**

The 1999 expired Contract provided in Section 20.2:

"All employees who receive hospitalization, surgical, medical, and prescription drug benefits will pay ten percent (10%) of the premium costs through payroll deductions. The costs for the self-insured plan will not exceed thirty-one dollars (\$31.00) per pay in 1999, and will not exceed thirty-three dollars (\$33.00) per pay in 2000, and will not exceed thirty-five dollars (\$35.00) per pay in 2001."

B. The Union's Final Offer:

The Union proposes that employee contributions towards premium charges be capped at \$36.00 in 2002, \$45.00 in 2003 and \$50.00 in 2004.

The Union also proposes that the employee co-payment for prescription drugs be limited to \$10.00 for generic drugs and \$15.00 for name brand drugs.

In support of its proposals the Union argues that the employee share of the premium for health care insurance has already been set for 2002 at the rate of \$36.00 per pay, [sic - actually \$35.00] raising the cap on employee contribution for the year 2003 to \$45.00 would represent a 25% increase, while the forecasted percentage increase for that year is considerably less. The proposed \$50.00 cap for the year 2004 would represent a further 11% increase in the maximum employee responsibility for health care costs. Taken together, employees would be subject to a to 36% increase in their potential responsibility for health care premiums in the final two years of the successor Agreement.

Even if employee health care premium contributions were to increase in 2003 only to the Union's proposed \$45.00 cap, the effective wage increase for the average Deputy in that year would be reduced from 3% to 2.5%. If the Sheriff's proposed 2003 cap of \$55.00 were reached, the

effective wage increase for that year would be reduced to only 2%.

According to a 2000 S.E.R.B. Report on the annual cost of health care in Ohio's public sector, employees in comparable counties and in the immediate Akron/Canton area contribute significantly less towards the cost of health insurance.

Turing to the issue of prescription drug co-payments, the Union notes that the Sheriff's proposal to double employee payments for prescriptions from the present \$5.00 for generic drugs and \$10.00 for name brand or non-generic drugs, would further erode the real wages of Union members.

The members of the other County Bargaining Units presently pay only \$5.00 and \$10.00 for their prescriptions.

Although the Sheriff's health care proposals were adopted by the Supervisors' Unit, the base wage rate of a Sergeant is 16% greater than that of a Deputy, and that of a Captain is 48% more than the Deputy rate, so that Supervisors are better able to absorb the increases.

#### C. The Sheriff's Final Offer:

The Sheriff proposes to increase the caps on employee contributions towards both premium charges and the cost of prescription drugs as follows:

"All employees who receive benefits will pay ten percent (10%) of the premium costs through payroll deductions. The cost for the self-insured plan will not exceed forty-five dollars (\$45.00) per pay in 2002, and will not exceed fifty-five dollars (\$55.00) per pay in 2003 and will not exceed sixty-five dollars (\$65.00) per pay in 2004.

"The employee prescription drug co-payment shall not exceed ten dollars (\$10.00) for generic medication and shall not exceed twenty dollars (\$20.00) for non-generic brand of medication during the term of this agreement."

In support of its proposal the Sheriff notes that it is offering the same caps and co-payments that are found in the recently negotiated Labor Agreement between the Summit County Sheriff and the Supervisors Bargaining Unit, and that the majority of the Bargaining Units in the County have a straight 90/10 split of the premium charges without the protection of a cap.

D. The Fact-Finder's Recommendation:

The Fact-Finder recommended adoption of the Sheriff's proposal for increases in the caps on employee contributions towards premium charges and in the co-payment for prescription drugs. The Fact-Finder concluded: "The rapid rise in health care costs requires employees to take on a greater share of the costs, particularly in the area of drug costs. However, the Employer is not in a favorable position to demand more than employees can reasonably be



prepared for in terms of increases. It is also noteworthy that in the history of bargaining the 10% employee share has never exceeded the cap." He reasoned that since premiums are rising nation-wide at a average rate of thirteen percent a year, it is unlikely that the caps would be reached during the term of the successor Contract. He also found that the principle of sharing increases in health care costs was followed by comparable Ohio public employers.

E. The Conciliator's Analysis and Award:

The Conciliator notes that the employees' 2002 contribution towards the cost of premium charges has already been established at \$35.00 and therefore the parties' proposed caps for that year have become moot.

In light of the County's present financial condition, the evidence does not persuade the Conciliator that the Fact-Finder's Recommendations are flawed, and that it would be unfair to provide for a contingent increase in employee responsibility for health care costs by increasing the caps on their contributions towards premium costs and their co-payments for prescription drugs as proposed by the Sheriff.

In this latter connection, the Conciliator points out that when employees are required to take maintenance doses

of a prescription medication, ninety-day supplies may be purchased by mail order at a substantial discount.

The dynamics of the present situation, where governmental units find themselves caught between double digit annual increases in health insurance costs, on the one hand, and continuing revenue losses from the lingering recession, on the other, have prompted the introduction of deductibles and co-payments, or increases in the amounts of such cost-sharing arrangements in recently negotiated Contracts throughout the Country.

Accordingly, the Conciliator Awards the Sheriff's proposal for Article 20, Section 20.2.

**Article 27, Section 27.1 - Uniforms and Equipment:**

A. The 1999 Contract:

The 1999 expired Contract provided annual allowances for the purchase and maintenance of uniforms and required leather equipment as follows:

Uniform Allowance Schedule:

1999 - \$650.00  
2000 - \$700.00  
2001 - \$750.00

B. The Union's Final Offer:

The Union proposes to amend the current schedule to provide for a \$50.00 increase in the uniform allowance in each year of the Agreement as follows:

Uniform Allowance Schedule:

2002 - \$800.00  
2003 - \$850.00  
2004 - \$900.00

In support of its proposal the Union reminds the Conciliator that the members of the Bargaining Unit have received annual uniform allowance increases of \$50.00 in each of the last six years.

The complete cost of a uniform may exceed \$1,000.00, and the prices of uniform components increase each year. Further, all Deputy Sheriffs who accept private, off-duty assignments as Deputy Sheriffs must wear a bullet proof vest which costs between \$400.00 and \$600.00.

C. The Sheriff's Final Offer:

The Sheriff proposes no increase in the uniform allowance for the Deputies in 2002, and \$50.00 increases to \$800.00 in 2003 and to \$850.00 in 2004.

In support of his proposal the Sheriff states that of fourteen comparable Sheriff Departments, only four provide greater uniform allowances than Summit County, and the average allowance is only \$646.00.

D. The Fact-Finder's Recommendation:

The Fact-Finder, while observing that the parties had bargained for an annual uniform allowance increase of \$50.00 and that the increases were appropriate to cover the inflation in the prices of items that wore out, nevertheless concluded that "the current shortfall of revenue in the County must be factored into increases in the successor Contract. It justifies a one-time departure of this pattern of increases for the first year of the Agreement."

E. Conciliator's Analysis and Award:

The Conciliator is cognizant of the fact that while the wage increase agreed upon for the 2002 Contract year will be retroactive, it will not be paid to employees until September, some nine months into the term, and that the payment will be without interest. During this period the County has had the opportunity to put the retained wages to productive use. To partially recompense employees for the delay in payment the Conciliator agrees that the Union's proposal for a \$50.00 increase in the first year of the Contract is justified.

Accordingly, the Conciliator Awards the Union's proposal for a \$50.00 increase in each of the three years of the Contract term so that uniform allowance available to

employees in 2002 will be \$800.00, in 2003 \$850.00 and in 2004, \$900.00.

**Article 30, Section 30.1 - Severance Pay:**

A. The 1999 Contract:

The expired 1999 Contract contained the following schedule of payments for accrued but unused sick leave at the time employees retire from service:

"An employee who retires from active service with the Employer shall be paid for the value of his accrued but unused sick leave, in accordance with the schedule in Section 30.1(A), provided that the years of service were with the Employer or involved public service with a political subdivision of the State of Ohio. Payment shall be based upon the employee's rate of pay at the time of retirement.

"A. Ten (10) but less than fifteen (15) years of service:  
(25% of up to a maximum accrual of 1,000 hours);

"Fifteen (15) but less than twenty (20) years of service:  
(35% of up to a maximum accrual of 1,333 hours);

"Twenty (20) but less than twenty-five (25) years of service:  
(55% of up to a maximum accrual of 1,666 hours);

"Twenty-five (25) but less than thirty (30) years of service:  
(55% of up to a maximum accrual of 2,000 hours);

"Thirty (30) but less than thirty-five (35) years of service:  
(65% of up to a maximum accrual of 2,333 hours), and

"Thirty-five (35) or more years of service:  
(65% of up to a maximum accrual of 2,333 hours, plus 10% of all accrued hours over 2,333)."

B. The Union's Final Offer:

The Union proposes to amend the schedule so as to consolidate the existing six groupings of service years into three, increase the maximum percentage of accrued hours subject to pay out from 65% to 75% and eliminate the limits on the number of hours for which compensation is payable. The schedule would read as follows:

"Ten (10) years but less than fifteen (15) years of service:  
(Twenty-five percent (25%) of all accrued hours);

"Fifteen (15) years but less than twenty-five(25) years of service:  
(Fifty percent (50%)of all accrued hours), and

"Twenty-five (25) years or more years of service:  
(Seventy-five percent (75%) of all accrued hours)."

In support of its proposal the Union states that as a result of changes in the eligibility requirements for benefits under the Public Employees Retirement System, Deputy Sheriffs with twenty-five years of service are now qualified to retire beginning at age forty-eight. The current schedule was written to track the former requirements of completing thirty years of service and reaching age fifty-five.

Since most Deputies will retire after twenty-five years of service instead of thirty, their earlier departures will reduce the amount of sick leave hours they can accumulate and justify the higher percentage of such hours subject to the buy-out.

The Union cites the fact that six Sheriff Departments and the Akron Police Department pay accrued sick leave upon retirement at 100% of the employee's final salary. But the Union acknowledges that, except for the Montgomery County Sheriff Department, the actual number of sick leave hours for which compensation is payable is less than that of the Summit County Sheriff.

D. The Sheriff's Final Offer:

The Sheriff proposes to retain the current sick leave conversion schedule without change. It notes that the Supervisors Unit Contract has the same severance pay provisions. Further, significant enhancements were made in the last Contract negotiations, so that the conversion benefits allowed by Summit County are perhaps the most "generous" of any comparable Sheriff Department. None of the other Bargaining Units in Summit County have a sick leave conversion schedule "that comes close to the one enjoyed by the Summit County Sheriff's Deputies".

E. The Fact-Finder's Recommendation:

The Fact-Finder recommended the retention of the existing schedule of sick leave buyouts on retirement:

"When viewing the comparable districts presented by the Employer it is apparent that the bargaining unit's current severance package favorably competes with the likes of Portage, Medina, Stark and Wayne Counties. Cuyahoga does

not even have a provision for severance pay. I do not find a compelling basis for making an improvement in the language at this time."

E. Conciliator's Analysis and Award:

The Conciliator believes that the enhanced buyout levels of accrued sick leave sought by the Union are unrealistic. No other County Sheriff Department offers a 75% buyout of all accrued sick time. The present schedule of unused sick leave buyouts is already among the highest in the state.

The Conciliator therefore finds no reason to disturb the Fact-Finder's Recommendation, and accordingly Awards the Sheriff's Final Offer.

**Article 33, Section 33.7 - Vacancies:**

A. The 1999 Contract:

The expired 1999 Agreement allowed the Sheriff to temporarily transfer employees for a period not to exceed ninety working days. However, the Agreement limited selection to "employees from within the division requiring the reassignment", and further limited eligibility by establishing a series of qualifying conditions.

B. The Union's Final Offer:



The Union proposes to amend the text of the first paragraph of Section 33.7 to read as follows:

"The Employer may temporarily transfer an employee for a period not to exceed ninety (90) working days. When the Employer determines (with sufficient notice) that it is necessary to make a temporary reassignment, the Employer shall select employees from requiring the reassignment [sic] who are at work and qualified to perform the assignment on a rotating basis, subject to the following conditions:"

[Presumably the Union actually intended the second sentence of the paragraph to read as follows:

"When the employer determines (with sufficient notice) that it is necessary to make a temporary reassignment, the Employer shall select employees who are at work and qualified to perform the assignment on a rotating basis, subject to the following conditions:]"

In support of its proposal the Union contends that despite the "within the Division" restriction, the Sheriff has been making temporary reassignments of other Deputies to the Patrol Division out of seniority order if the junior Deputy has had previous experience in the Division. But, if the senior member of the Bargaining Unit who seeks the transfer opportunity has not previously worked in the Patrol Division, he can never obtain the requisite experience to qualify for selection. And, without having the prior experience, the senior employee will also be

passed over when a permanent vacancy occurs in the Patrol Division. Since all members of the Bargaining Unit hold the rank of Deputy Sheriff and have obtained at least the minimum qualifications demanded by the Ohio Peace Officers Training Council, they should have the ability to work any job within the Sheriff's Office.

C. The Sheriff's Final Offer:

The Sheriff proposes to retain the present text of Article 33, Section 33.7 without change. The Sheriff insists that the Union's proposal to allow temporary inter-division temporary transfers would be disruptive, and that it remains operationally in the best interest of the Sheriff's Office for temporary transfers to be limited to employees within the Division in which the opportunity arises.

D. The Fact-Finder's Recommendation:

The Fact-Finder observed that Article 33 had been the subject of numerous grievances and arbitration decisions because of its confusing wording, particularly concerning the extent to which factors other than seniority control the selection process.

However, he believed it unwise to have the Fact-Finder impose language when "the parties had not engaged in bargaining that identified the most important areas that

require improvement. The intimate knowledge the parties possess regarding the requirements of the numerous positions that exist in the Bargaining Unit is critical in negotiating changes that make 'real' improvements. However, the current solution of continual grieving of this issue and getting differing opinions from Arbitrators, partly due to different fact patterns, may be necessary in the interim but it is not a permanent solution. It is recommended that the parties engage in mid-term bargaining over this issue in an attempt to at least clarify the meaning and application of the current language contained in Article 33."

E. Conciliator's Analysis and Award:

Many Deputies in Divisions other than Road patrol would like the opportunity to qualify for transfer to that Division. It is apparent that at least the perception of favoritism and disparate treatment with respect to the offering of temporary transfers exists within the Bargaining Unit.

The use of seniority as the objective and, where feasible, determinative factor, is a legitimate goal. And, it is also appropriate to allow interested Deputies assigned to other Divisions such as the jail, for example, to learn Road Patrol duties on a temporary transfer.

However, the Sheriff points out that the rate of absenteeism among Deputies assigned to the jail is the highest within the Department, and it would be a hardship to allow transfers of Deputies who do show-up, especially since a Court Order requires minimum manning requirements to be met.

The Conciliator concurs with the recommendation of the Fact-Finder that the parties ought to engage in mid-term bargaining by establishing a Joint Committee to develop appropriate objective criteria which will both accommodate the Sheriff's need for adequate jail staffing, and provide opportunities for temporary transfers on a rotating basis for all interested Deputies.

Since the Employer has agreed with the Fact-Finder's Recommendation, the Conciliator Awards the Sheriff's Final Offer.

**Article 35, Section 35.1 - Duration:**

A. The 1999 Contract:

Section 35.1 of the expired 1999 Agreement became effective as of January 1, 1999 for a three year term ending on December 31, 2001.

B. The Union's Final Offer:

The Union proposes a three year Agreement effective as of January 1, 2002 and terminating on December 31, 2004.

C. The Sheriff's Final Offer:

The Sheriff seeks to have the Agreement go into effect on the date the Conciliator issues his Award. While agreeing that the wage provision of the Contract should be retroactive to January 1, 2002, the Sheriff believes "that there could be an unanticipated problems if all contract articles are made retroactive to January 1<sup>st</sup>."

D. The Fact-Finder's Recommendation:

Focusing on the length of the Contract, not on its effective date, the Fact-Finder Recommended that the Agreement become effective as of January 1, 2002 and remain in full force and effect until 11:59 p.m. on December 31, 2004.

E. Conciliator's Analysis and Award:

It is typical for contracts negotiated or awarded after the expiration of an existing contract to take effect as of the day immediately following the expiration of the predecessor Agreement. That has been the practice with respect to the prior Contracts entered into by the parties here. Obviously, if any provisions of the Agreement, because of the lapse of time, have become impractical of implementation on a retroactive basis, the custom in both

the public and private sector has been to give only prospective effect to those provisions. There is no reason why the present successor Agreement should not be so interpreted.

Accordingly, the Conciliator Awards the Union's Final Offer.

**New Article - Physical Abilities:**

A. The 1999 Contract:

The 1999 Agreement contain no provision with respect to physical abilities standards and testing.

B. The Union's Final Offer:

The Union proposes a "letter of intent and understanding physical fitness trial program as set forth below:

**UNION FINAL OFFER  
LETTER OF INTENT AND UNDERSTANDING  
PHYSICAL FITNESS TRIAL PROGRAM**

**FITNESS PROGRAM AS PROPOSED BY THE FOP/OLC**

**Scope.** The physical fitness trial program shall be implemented in two phases. Phase one shall be comprised of members of the bargaining unit that volunteer to participate in the program. Phase two shall be comprised of members of the bargaining unit that do not volunteer to participate in the program. Members of the bargaining unit that do not volunteer to participate in the program will be required to complete the trial fitness test by October 15<sup>th</sup> of 2004.

The details of the fitness program shall be determined by a committee composed of no more than four (4) representatives of the Employer and four (4) representatives of the Union. The committee shall construct the physical fitness program using any means at their disposal. In the event that the committee fails to reach agreement on the physical fitness program at the end of a six month period, beginning with the execution of this agreement, the neutral that conducted the conciliation hearing shall be utilized by the parties for assistance.

All management employees in the Sheriff's Office are encouraged to lead by example and to take the trial test prior to October 15,2004.

No employee shall be subject to disciplinary action for failing any portion of the physical fitness test during the term of this agreement.

Physical fitness tests and requirements shall be adjusted for the age and gender of the member of the bargaining unit taking the test.

Members of the bargaining unit shall be permitted to use up to two hours of on duty time per week to prepare for the physical fitness test and to maintain a standard of physical fitness as required by the Summit County Sheriff's Office.

Financial incentives for bargaining unit members that attain a level of fitness in the program shall be a subject of discussion for the committee constructing the program.

The physical fitness program formulation committee shall make recommendations for actions to be taken if members of the bargaining unit are unable to successfully complete the physical fitness test. The recommended actions shall not include discipline.

The physical fitness test shall be reevaluated periodically. If members of the bargaining unit have suggestions for modifications or improvements to the test the formulation committee shall examine the feasibility of the modifications and implement those that will improve the test.

The physical fitness standard developed by the joint committee shall consist of a minimum of the following segments:

- (1) Initial health and physical examination (IHS)
- (2) Scheduled health and physical examination (HPE)
- (3) Annual physical fitness test (APFT)

**Initial Health Screening (IHS).** An initial screening will be required prior to an employee participating in the annual physical fitness test (APFT). This examination shall be conducted at no cost to the employee. Participation in the IHS shall be mandatory and conducted by a Physician mutually selected by the Sheriff and the Union. Both parties will show good faith and cooperate in the selection process. The IHS will include those tests and evaluations set forth in Appendix A. The examining physician must approve an employee to participate in each phase of the IHS before the employee will be permitted to participate in that phase. If an employee is not approved to

participate due to a serious medical condition which would interfere with the employee's ability to safely perform his/her currently assigned duties, the employee shall not be permitted to perform regular duties until the condition is remedied. Following the examination, a copy of the confidential and comprehensive report concerning the medical and physical condition, along with follow-up reporting, if necessary, will be mailed directly to the employee. The original report will be filed in the employee's medical file.

**Scheduled Health and Physical Examination (HPE)** A scheduled HPE shall be conducted approximately every three years (36 months) for all employees below age 35, every two years (24 months) for all employees age 35 to 49, and approximately every year (12 months) for those 50 and above. Employees assigned to positions which by law require an annual physical examination will be scheduled approximately every year (12 months) regardless of age. The HPE will be conducted and/or supervised by the Physician mutually selected by the Sheriff and the Union and will consist of the same tests and evaluations as the IHS. The criteria used by the Physician to approve participation in the HPE or not shall be the same as the IHS. The results of the examination should be treated the same as the results of the IHS.

**Medical Deferrals.** When an employee is scheduled for an HPE or APFT and believes there are medical reasons (other than short-term illness) to defer such examination and testing, the employee shall notify the Sheriff and submit documentation from his/her personal physician(s) to the Physician designated by the Sheriff to conduct the HPE for review and approval. If the medical condition continues, this documentation must be re-submitted for approval each ninety (90) days thereafter until the medical condition is remedied. Employees may receive a deferral only in those phases of the program which they are medically incapable of performing, as verified by the Sheriff's Physician. Decisions concerning deferrals will take into consideration input (if any) from the employee's personal physician(s). Once a deferral is granted, an examination in the area(s) or phases approved for deferral will not be scheduled until the medical condition is remedied and approval to participate is given by the Sheriff's Physician.



## APPENDIX A

### HEALTH AND PHYSICAL EXAMINATION

An Initial Health and Physical examination (IHS) will be conducted on all employees prior to participation in the Annual Physical Fitness Test (APFT).

A scheduled HPE shall be conducted thereafter approximately every three years (36 months) for all employees below age 35, every two years (24 months) for all employees age 35 to 49, approximately every year (12 months) for those age 50 and above, and approximately every year (12 months) for employees assigned to positions which by law require an annual physical examination.

The IPE will be conducted and/or supervised by a Physician designated by the Sheriff and the Union, at no cost to the employee, and will include the following components:

1. Physical Examination
  - a. Health history
  - b. Back history
  - c. Occupational exposure history
  - d. Temperature, pulse, blood pressure, height, weight
  - e. Urinalysis (dipstick)
  - f. Complete physical exam
2. Vision screen using Titmus Vision Tester
  - a. Near and far acuities
  - b. Color test
  - c. Depth perception
  - d. Peripheral vision
3. Audiogram (frequencies .5K through 8K)
4. Pulmonary Function Test (including interpretation)
5. Chest X-ray (2 view including interpretation)
6. Lab work
  - a. Complete Blood Count (CBC) with differential
  - b. Diagnostic Multi Chem
  - c. Thyroid profile
  - d. Hemocult (to check for blood in the colon) — optional
  - e. PSA - males age 40 and older
7. Body Composition.  
Percent of body fat/lean body mass will be estimated using bio-impedance method.  
Testing results in a personalized report
8. Tuberculosis Skin Test — optional  
Site must be looked at in 48 to 72 hours for interpretation
9. Treadmill Stress Test (includes interpretation)  
Cardiorespiratory Endurance will be determined by a Stress treadmill test using the

Standard Bruce Protocol and EKG. Includes baseline EKG.

At the completion of the HPE, the employee will be provided with feedback should any medical or physical condition be discovered which warrants further evaluation and/or treatment. It will be the employee's responsibility to pursue any further evaluation and treatment through his/her personal physician. Medical records will be made available to the employee or his/her personal physician upon request. Records of the HPE will be maintained in a Confidential Medical Records Filing System. The Physician or designee will provide notification of Pass/Fail status to the Summit County Sheriff.

In support of its proposal the Union argues that while a voluntary physical abilities program is appropriate for the Bargaining Unit, it should have certain built-in safeguards and compensation incentives among which are: giving the members of the Bargaining Unit a physical examination before they participate in the program; allowing for on-duty times when the members can "work out" to prepare for the test and become physically fit, and, offering a monetary incentive for members to pass the physical abilities test.

The Americans With Disabilities Act requires that a job task analysis be completed, and only a validated physical abilities testing program may be used. Neither of these requirements has been met by the Sheriff. Further, the Employer's proposal has a default provision which would allow the Florida Department of Law Enforcement Program to be implemented as a interim measure. Thus, if the representatives of the Employer on the Joint Committee envisioned by the Employer's proposal vetos or delays adoption of another physical abilities testing format, the Employer can enforce adoption of the Florida program. The Florida Department Program was presented as an Employer proposal in the 1994 Claremont County negotiations, but the Fact-Finder found it inadequate and imposed a number of

restrictions including requiring the Sheriff to provide on-duty work-out time, the grand-fathering of employees, physical examination of employees with releases signed by their own physicians and prohibiting use of the test, and employee performance on it, for disciplinary, promotional or special assignment purposes.

C. The Sheriff's Final Offer:

The Sheriff adopted the Recommendations of the Fact-Finder which was set forth in a "Letter of Intent and Understanding - Physical Fitness trial Program". The Recommendations are set forth in the next section of this Report.

The Sheriff notes that the Fact-Finder's Recommendation is very similar to the one he made in the Fact-Finding process which preceded the Supervisors Agreement. The Sheriff contends that the Union's proposal which requires that members of the Bargaining Unit be granted up to two (2) hours of duty time to maintain their fitness, is unreasonable, and would adversely affect the operations of the Office. Two hours per week represents 5% of a Deputy's normal workweek. In the course of a year for this Bargaining Unit of 326 employees, the proposal would result in a loss of 33,904 man hours, equivalent to the loss of more than sixteen full-time Deputies.

D. The Fact-Finder's Recommendation:

The Fact-Finder recommended that "no language be placed into the Agreement at this time, until the parties have sufficient opportunity to jointly design appropriate physical fitness standards. ... As they did with substance abuse testing, it is recommended that the parties make a firm commitment. However, a program of this magnitude represents a major cultural change. It is not the type of change that should be implemented without study, planning and experimentation to determine the best approach for the Department. Therefore, it is recommended that the parties enter into a letter of intent and understanding to develop a trial physical fitness program that includes testing.

The following is recommended:

**" LETTER OF INTENT AND UNDERSTANDING**  
**" PHYSICAL FITNESS TRIAL PROGRAM**

***" Section 1. The parties shall establish a committee for the purpose of developing and implementing a trial physical abilities testing program. The committee shall consist of no more than four (4) representatives from each party. The parties shall have the latitude to visit other employers and gather data on other successful programs. If practical and agreeable with both parties and both bargaining units, the committee may be combined with the committee established for the supervisors' bargaining unit for purposes of efficiency.***

***" Section 2. If the committee cannot agree on a physical abilities testing program within six (6) months of execution of this agreement, the Employer shall have the right to implement a trial job-related physical abilities testing program similar to the one adopted by the Florida Department of Law Enforcement and presented to the Union during the current contract negotiations. It is recognized that the Florida program may not be appropriate for the needs of the Summit County Sheriff's Office. However, this trial program shall be implemented in order for the parties to collect empirical data that will give them a fitness benchmark for all members of the Sheriff's Office and a basis to mutually design a workable program suited to the unique needs of the Sheriff's Office. The trial program shall be used for the duration of this agreement.***

***" Section 3. The parties agree that the program will initially be voluntary. However, all bargaining unit employees, except those specifically exempted by mutual agreement of the parties, shall be required to participate in a trial fitness test by October 15<sup>th</sup> of the final year of the labor agreement. The Employer agrees that it shall make reasonable precautions to ensure the safety and health of employees who participate in the program. No employee shall be subject to disciplinary action for not passing the trial test during the duration of this agreement (2002-2004). All management employees in the Sheriff's Office are encouraged to lead by example and to take the trial test prior to October 15, 2004. Effective January 1, 2005, the program will become a mandatory program subject to the terms and conditions of the program negotiated by the parties during the next round of negotiations. The subject of financial incentives and how to address employees who fail to pass the test shall be included in these negotiations.***

***" Section 4. The parties further agree that during the duration of this agreement, the committee may, if it deems such to be appropriate, recommend changes to the Physical Abilities Testing Program. If such recommendations are agreeable to both the Union and the Employer, they will be reduced to writing and incorporated into this letter of intent and understanding. <sup>1)</sup>***

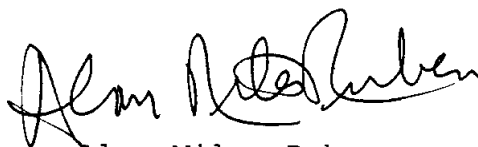
E. Conciliator's Analysis and Award:

The Conciliator agrees with the Fact-Finder that the parties ought to work out a physical fitness program which is attuned to the particular needs and limitations of the Department, rather than have imposed upon them a ready-made model which has been cobbled together from other programs.

The Conciliator has no reason to doubt that the Sheriff will act in good faith to develop a satisfactory program, and not derail the process in order to implement the Florida Law Department Program by default. In any event, the Sheriff's representatives assure the Conciliator, that the Florida Program would not be enforced so as to have any disciplinary, promotional or other consequences for employees who fail to meet its standards.

Therefore, the Conciliator Awards the Sheriff's final offer.

Report and Award signed, dated and issued at Cleveland, Ohio this 30<sup>th</sup> day of August, 2002.



Alan Miles Ruben  
Conciliator

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