Received Electronically @ SERB Nov 2, 2011 8:34am

STATE OF OHIO

BEFORE THE OHIO STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF CONCILIATION BETWEEN THE:

MIAMI TOWNSHIP BOARD OF TRUSTEES
MONTGOMERY COUNTY, OHIO

EMPLOYER

AND THE

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

UNION

OPINION AND AWARDS OF THE CONCILIATOR

For the Employer: W. Joseph Scholler, Esq.
Frost, Brown, Todd LLC
West Chester, OH

For the Union: Mark E. Drum
Designated Representative
Columbus, OH

Frank A. Keenan
Conciliator

A. Preliminary Matters:

This Conciliation proceeding involves certain terms of a successor Contract to the March 1, 2007 to February 28, 2010 collective bargaining agreement between Miami Township and the F.O.P., O.L.C. covering a bargaining unit of "all full-time police officers below the rank of Sergeants," concerning which the parties remain at impasse.

The parties' March 1, 2007 to February 28, 2010 Contract will be referred to in this Opinion and Award as "the current Contract."

The conciliator has duly considered the evidence of record and the parties' pre-hearing statements in reaching the Awards herein made. Additionally, in arriving at the Awards hereinafter set forth, and directed to become and made part of the parties' successor collective bargaining agreement, the undersigned Conciliator has resolved the disputes remaining between the parties by selecting on an issue-by-issue basis, from between each party's final settlement offers. In this selection process, the undersigned has taken into consideration the factors outlined in O.R.C. Section 4117.14(G)(7), to wit: past collectively bargaining agreements, if any, between the parties; comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved; the interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service; the lawful authority of the public employer; the stipulations of the parties; and such other factors, not confined to those listed above,

which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment. In addition, and pursuant to O.R.C. 4117.14 (G) (6), the undersigned conciliator has also given consideration to the written Report and Recommendations of Fact Finder Silver rendered in the instant case.

B. Article XVI, Layoffs, Section 2. No Bumping/Retainment of Seniority

Discussion and Rationale :

First addressed is the parties' impasse concerning Article XVI, Section 2. ARTICLE XVI – Layoffs in the current Contract is comprised of three Sections, namely Section 1. Layoff Procedure; Section 2. No Bumping/Retainment of Seniority; and Section 3. OPOTA Certification. Changes to all three Sections were proposed by one or another of the parties in Fact Finding.

Following Fact Finding issues concerning Section 1. and Section 3. were resolved. The current Contract at Article XVI, Section 2., provides as follows:
"Section 2. No Bumping/Retainment of Seniority. Employees laid off do not have the right to bump into another bargaining unit. Employees will retain their seniority for a period of eighteen (18) months and may be reinstated for up to eighteen (18) months after being laid off. Employees will be recalled in reverse order of their lay off."
In its pre-conciliation hearing statement for the instant conciliation proceeding concerning full time police officers, thirty in number, the Union correctly points out that the current Contract's provision at Article XVI – Layoffs, Section 2. No Bumping/Retainment of Seniority, prohibits laid off bargaining unit employees from

bumping in to another bargaining unit. In the Union's pre-conciliation hearing statement the Union also notes that "[police officer] supervisors recently formed a bargaining u nit with a competing Union, namely, the Ohio Patrolman's Benevolent Association (OPBA). Additionally, in its pre-conciliation hearing statement the F.O.P. proposes to "clarify" the current Contract's bumping rights provision and "verify" that, during a layoff, members from another bargaining unit (self-evidently, the Sergeant's bargaining unit represented by the OPBA) could not bump into the police officer bargaining unit, the bargaining unit involved in this proceeding and represented by the F.O.P. To the extent that the F.O.P.'s use of the terms "clarify" and "verify" is meant to suggest that in a lay off the language of the current Contract implicitly prohibits employees of a bargaining unit other than the police officer bargaining unit could bump a bargaining unit police officer, and that such prohibition merely needs "clarification" and "verification" I am unable to agree with the F.O.P. To the contrary, in my judgment any such prohibition needs to be spelled out. And indeed the F.O.P. does so, proposing that the phrase "and no employees of another bargaining unit shall have the right to bump into this bargaining unit," be added to the first sentence of the current Contract's provision at Section 2 of Article XVI.

The Fact Finder also stated in his Report that the Union additionally proposed to change the second sentence of Section 2 of Article XVI of the current Contract by having employees "retain their seniority for two years rather than the current eighteen months.

The Fact Finder stated in his Report that the aforesaid changes to Article XVI, Section 2, proposed by the Union, were "proposals from the Union that the fact finder favors." Accordingly, the Fact Finder recommended that the parties adopt the Union-proposed changes to Section 2 of Article XVI in their successor Contract.

The Fact Finder's rationale for his recommending the Union-proposed change to sentence two of Section 2 of Article XVI, was set forth in his Report at page 36 and reads as follows: "Considering the premium of recalling officers with experience, local knowledge, and skills necessary to a position within the bargaining unit, the fact finder recommends the changes proposed by the Union for Article XVI, Section 2 in the retention of seniority following layoff."

The Fact Finder's rationale for his recommending the Union-proposed change to sentence one of Section 1 of Article XVI of the current Contract reads as follows: "[The FOP proposed] Section 2 of Article XVI…would add language that would prohibit employees from other bargaining units bumping into the bargaining unit of uniformed full-time police officers. Current language within this section prohibits bargaining unit members from bumping into other bargaining units. The fact finder finds no reason to deny this protection, extended to other bargaining units, to the members of the bargaining unit at issue in this proceeding."

Accordingly, in his Report the Fact Finder made the following recommendation concerning Article XVI, Section 2 for the parties' successor Contract:

"Section 2. No Bumping/Retainment of Seniority.

Employees laid off do not have the right to bump into another bargaining unit and no employees of another bargaining unit shall have the right to bump into this bargaining unit. Employees will retain their seniority for a period of two (2) years and may be reinstated for up to two (2) years after being laid off. Employees will be recalled in reverse order of their lay off."

In this Conciliation proceeding the FOP takes the position that its Conciliation proposal for Article XVI – Lay Offs, Section 2, No Bumping/Retainment of Seniority "is identical to the Fact Finder's recommendation."

Here in Conciliation the Employer is agreed to expand the Article XVI, Section 2, sentence two period of time that laid off bargaining unit employees retain their seniority, from the current Contract's eighteen (18) months, to twenty-four (24) months, as proposed by the Union and recommended by the Fact Finder. The Employer resists, however, the Union's proposal, adopted and recommended by the Fact Finder to add to sentence one of Section 2 the protective concept and language that "no employee of another bargaining unit shall have the right to bump into this bargaining unit." As previously noted, in support of his recommendation the Fact Finder stated that he found "no reason to deny this protection, extended to other bargaining units, to members of the bargaining unit at issue in this proceeding." (Emphasis supplied.) The question arises: what "other bargaining units" was the Fact Finder referring to in his observation underscored above? Among the Township's other bargaining units, only the OPBA's January 1, 2010 through December 31, 2012 Collective Bargaining Agreement covering a bargaining unit of police Sergeants was received into evidence. That Agreement's lay off provisions are found at Article 17 – lay offs. Insofar as is pertinent here, Article 17, Section 1 Lay off Procedure provides that: "…when it is determined by the Employer that regular full-time employees must be laid off from the bargaining unit, the employees will be laid off according to classification seniority with the lowest seniority person laid off first."

Accordingly, while the Sergeant's OPBA Contract with the Township establishes an order-of-layoff based on classification seniority, it is silent with respect to contractualized bumping rights out of the OPBA bargaining unit and into another bargaining unit, such as the FOP bargaining unit of police officers below the rank of Sergeant, and it is silent with respect to the rights, or lack thereof, of non-OPBA bargaining unit employees, such as the FOP's police officers, to bump into the OPBA bargaining unit of Sergeants. The point to be made here, therefore, is that when the Fact Finder, at page 36 of his Report, rationalized his decision to recommend the Union-proposed language protecting the FOP's bargaining unit of police officers from being bumped by laid off employees from other bargaining units (self-evidently, laid off Sergeants from the OPBA bargaining unit), on the grounds that such bargaining unit employee protection was "extended to other bargaining units," the Fact Finder could not have been referring to its OPBA's bargaining unit. It appears that perhaps the Fact Finder was referring to the protection granted to a bargaining unit of Richland County Ohio Sheriff's Deputies in their 2008-2010 collective bargaining agreement, entered into evidence here (and apparently in Fact Finding) as F.O.P. Exhibit No. 1. In that collective bargaining agreement between the Richland County Ohio Sheriff and the F.O.P., O.L.C., the Sheriff and the F.O.P. agreed, at Article 40 – Lay off and Recall, Section 40.01, to the following pertinent terms:

"Section 40.01. In a case of the need for a lay off of bargaining unit employees, based on lack of work or lack of funds, the Employer will notify the Union twenty-one (21) days in advance of the effective date of the pending lay off. The Employer shall determine the classification from which lay offs will occur. There will be no displacement [read here

"bumping"] between classifications or bargaining units. (Emphasis supplied.) The Employer and the Union shall meet to discuss possible alternatives…[T]his procedure shall be the exclusive procedure…."

The Employer argues that: it appears that the purpose behind the Union's Section 2. protective language proposal is to prevent members of the police supervisors' bargaining unit, represented by the OPBA, from bumping into the police officer bargaining unit during a reduction in force. And in this regard, notes the Employer, police supervisors/sergeants "typically have more seniority than patrol officers, and accordingly would typically be able to bump less senior police officers. The Employer contends that the Union's proposed change is "illegal because the Union is attempting to bargain away the rights of employees it does not represent."

Citing ORC 4117.11 (B)(1), the Employer states that said Code provision provides that "a Union may not restrain employees in the exercise of their collective bargaining rights." If the Union's proposed language is adopted, the Township will be forced to agree to a provision that prohibits laid-off supervisors from bumping into the FOP patrol officer unit." I note at this juncture that, as set forth hereinabove, the OPBA represented Sergeants' collective bargaining agreement, at Article 17 – Lay offs, Section 1. Lay off Procedure, presently in effect, does not provide that Sergeants on lay off can "bump" into the police officer bargaining unit. Thus, it could be argued that, leastways until December 31, 2012, the termination date of the current Township/OPBA Sergeants' collective bargaining agreement, the Sergeants and the OPBA have implicitly waived any statutory right they may have had to collectively bargain the right to bump into the police officer bargaining unit in the event of a lay off of Sergeants. At the same time, however,

in the instant case, the Township and the FOP have tentatively agreed to a three (3) year Contract, to remain in effect until 11:59 p.m., February 28, 2013. Accordingly, in the time frame between December 31, 2012, when the Sergeants' Contract expires (unless said Contract is extended) its implicit waiver of any right to bump into the police officers' bargaining unit, in the event of a lay off of Sergeants, would likewise also expire. Assuming, without deciding, that the Township's underlying premise to the effect that were the undersigned to award the Union's proposal here to add to Article XVI, Section 2, sentence one (1) of the current Contract the phrase "and no employees of another bargaining unit shall have the right to bump into the bargaining unit," the Union would be in violation of O.R.C. 4117. 11 (B) (1). However, in light of the Sergeants' implicit waiver of its alleged statutory right to bargain for and obtain a right to bump into the police officers' bargaining unit in the event of a lay off of Sergeants, it appears that any such violation could not and would not occur until from and after the expiration of the Sergeants' current Contract. The expiration of the Sergeants' current Contract would serve to void the Sergeants' waiver, and restore the Sergeants' right to seek bumping rights into the police officer bargaining unit. Put another way, again, assuming without deciding that the township's theory of a violation of DRC 4117.11 (B) (1) is correct, given the implicit waiver by the Sergeants in their current Contract to bump into the police officers' bargaining unit in the event of a lay off of Sergeants, a violation of said statutory provision would not be made out until the expiration of the current Contract and/or any extensions thereof.

Then, too, the Employer is apparently contending that even the mere attempt, standing alone, on the part of the F.O.P., to, as the Employer sees it, in effect block the

statutory right of other Township employees from bargaining a right to bump into the police officers' bargaining unit is a violation of ORC 4117.11 (B) (1).

Additionally, in its pre-Conciliation hearing statement the Employer contends that at the same time, the FOP "is attempting to force the Township to bypass the bargaining rights of the police supervisors [i.e. the Sergeants], which is prohibited under ORC 4117.11 (B) (2)."

Anticipating that the Union will make certain arguments in support of its proposal to add language to Article XVI, Section 2, sentence one, to wit, "and no employees of another bargaining unit shall have the right to bump into this bargaining unit," the Township offers certain counter arguments concerning said anticipated Union arguments. Thus, the Township contends that "[t]he Union will argue that its proposal is fair because the current language prevents the patrol officers from bumping into another bargaining unit. However, this argument ignores the fact that this language has no practical effect because there is no unit for laid off patrol officers to bump into. Moreover, the patrol officers, through their Union representative, agreed to include this language in the Contract. The issue is not 'if it's good enough for us, it's good enough for them.' Rather, the issue is whether the affected employees had the opportunity to bargain this language. The patrol officers are attempting to deny the police supervisors their right to collectively bargain this issue. Accordingly, argues the township, "this [FOP] proposed language should be rejected."

Finally in this matter, the township states in its pre-Conciliation hearing statement that it intends to file unfair labor practice charges against the Union for its alleged

attempt to infringe on the rights of certain Township employees, namely, the Police Department's Sergeants.

Although I have the impression, and would have thought, that both ORC 4117.11 (B) (1) and 4117.11 (B) (2) contemplate proscriptions against against the Union vis a vis employees it represents (and it does not represent the Township's Sergeants), and although neither party has cited any SERB or Court case, supporting the case of the Employer, and undermining in the case of the Union, the Township's implicit claimed application of ORC 4117.11 (B) (1) and (B) (2) to the underlying fact pattern here, since there may be no such SERB/Court cases affirming or undermining the Township's theory, I am not prepared to speculate one way or the other. And in my view in such a situation I do not believe it would be proper for the undersigned to embark upon an independent search of the law, if any, in the matter, only to possibly perfect one party's position over the other. In these circumstances I am not willing to find that the Township's argument is clearly without merit, as the Fact Finder implicitly and/or effectively did. To do so, should my impressions on the matter be in error, this Opinion & Award would be placed in jeopardy. I am unwilling to take that risk. Accordingly, I AWARD the Township's final settlement offer concerning Article XVI – Layoffs, Section 2. No Bumping/Retainment of Seniority.

ARTICLE XCXVII – Health and Life Insurance Discussion and Rationale:

Discussion & Rationale:

The current Contract's ARTICLE XXVII Health and Life Insurance, provides as follows:

"Section 1. Health Insurance. The Employer shall continue to provide hospitalization and medical insurance to all full-time employees covered herein in such amounts and benefits as are in effect on the date of this Agreement.

The Employer shall pay 80% and the employee shall pay 20% of the applicable monthly premium for the hospitalization insurance.

The Employer agrees to a joint review in conjunction with representatives of all other Township employee bargaining units, of existing health insurance coverage prior to the date of program renewal. The Employer agrees to consider Union and employee representative recommendations, suggestions and criticisms in its selection of health insurance coverage and carriers."

In Fact Finding the Fact Finder in pertinent part, had the following to say in his Report with respect to Article XXVII – Health and Life Insurance.

"The Employer provides health and life insurance coverage to all employees of Miami Township, organized and non-organized. Also participating in this coverage pool are the Miami Township Trustees and their families. …[T]he medical histories of some of those in the Miami Township coverage pool have prompted substantial increases in the cost of coverage." The Fact Finder notes, too, that the Union pointed out that while the police officers' bargaining unit employees contribute 20% toward the cost of the health insurance premium and the Employer contributes 80% toward the cost of the health insurance premium, while non-organized employees, and, until recently, and just preceding the Fact Finding hearing, Township Trustees, contributed only 10% toward the cost of the health insurance premium, and the Employer contributes 90% toward the cost of the health insurance premium. The Fact Finder notes in his Report that the Employer

justifies requiring non-organized employees to pay only 10% of the monthly health insurance premium on the grounds that non-organized Township employees receive lower wage increases, or, sometimes, no wage increase at all. The Fact Finder's comment on this 90%/10% split of the cost of the health insurance premium for non-organized employees, in contrast to the 80%/20% split of the cost of the health insurance premium for police officer bargaining unit employees, is that "[t]he Employer is fully authorized to determine the pay of its exempt [i.e. non-organized] employees," and further that "what is less evident is the connection between the salaries set by the Employer for exempt [i.e. non-organized] employees and the amount of monthly premium contributions required of the [police officer] bargaining unit members." In other words the Fact Finder rejected the Township's justification for having non-organized employees pay 10% toward the health insurance premium, while the police officer bargaining unit employees were paying 20% toward the health insurance premium. The Fact Finder recommended that the parties' successor Contract provide, as the Union proposed, that the Employer pay 90% of the cost of the health insurance premium, and that the police officer bargaining unit employees pay 10% of the health insurance premium. The Fact Finder's rationale in his Report for this recommendation was that "group health care coverage intends to spread risks among participants in a coverage pool, and treating participants in a uniform manner provides a fairer and more efficient delivery of benefits. Differences in [health insurance premium] contributions among participants in the same coverage pool, among those receiving the same coverage, is not recommended by the Fact Finder." He also justified his recommendation concerning the 90/10 contributions toward the premiums for the health insurance benefit on the grounds that such 'would bring these [police officer]

bargaining unit members into parity with the other participants in the coverage pool" and "would diminish distinctions that favor one group of coverage pool participants over another." And additionally, the Fact Finder stated that, "by standardizing how all participants in the coverage pool are treated, both as to Employee and Employer contributions, the protections sought by the Union will be achieved through uniformity of investment within the coverage pool."

The Fact Finding Report, at page 43, recites that "the Fact Finder does not recommend the other language proposed by the Union for Article XXVII, [that is] the new paragraph intended for Section 1 and the new paragraph intended for Section 3 [i.e. the health insurance opt-out provision proposed by the Union and taken up hereinafter. (Emphasis supplied.) However, the Fact Finder does not describe and set forth in haec verba, said "other language" proposed by the Union for Article XXVII in his Report. Nevertheless, in my judgment, the record here in Conciliation readily discloses the "other language" proposed by the Union in Fact Finding. Thus the Union's pre-Conciliation hearing statement at page three (3) commences what the Union describes as its "Position by Issue." Thereafter it lists and numbers eight (8) such issues concerning which it has a position. These positions are as follows: "1. Article XVI – Layoffs. Section 2. – No Bumping/Retainment of Seniority"; "2. Article XXVIII (sic) Section 1. (B) – Monthly Premium costs"; 3. Article XXVIII (sic) Section 2. (C) – HSA Funding of Contributions"; "4. Article XXVIII (sic) Section 3. – Insurance Opt-out (new)"; "5. Article XXVIII. Section 1. – Wages Schedule."; "6. Article XXVIII. Section 2. – Officer-in-Charge Pay (OIC)"; "7. Article XXVIII – Section 4. Longevity Pay."; and "8. "All Tentatively Agreed To Articles." This "Position by Issue" list of the Union specifically

identifies HSA Funding/Contributions as a proposal it would add to Section 1, and since it was not provided for in the current Contract, it was clearly "new." This list also specifically identified as "new" a Section 3. (the current Contract had no Article XXVIII Section 3). Indeed the list read as follows: "Section 3. – Insurance Opt-out (new)," thereby identifying Section 3. as a "new" Union proposal. Accordingly, reading this list together with the Fact Finder's finding at page 43 of his Report to the effect that he did not recommend "the other language proposed by the Union for Article XXVII, [i.e.] the new paragraph intended for section 1 and the new paragraph intended for section 3," two matters become apparent: (1) that the Fact Finder had before him for recommendation, or not, the Union's HSA Funding/Contributions provision for Section 1, presented here in Conciliation, as well as the Union's new Section 3 – Insurance Opt-Out provision, and (2) that the Fact Finder rejected both provisions and therefore did not recommend them. The Union has reasserted these two "new" provisions in Conciliation. In Fact Finding the Fact Finder grounded his failure to recommend the Union's "new" proposal for an HSA Funding/Contributions provisions to Section 1 of the current Contract, and his failure to recommend a "new" proposal for a [Health] Insurance Opt-out as a Section 3 to Article XXVIII because in his view both of these provisions were "a drastic change to the coverage plan in the absence of an agreement between the parties." And said agreement between the parties obviously did not exist.

ARTICLE XXVII – Health and Life Insurance, Section 1. Health Insurance, First Paragraph (Insurance Plan Design)

Discussion & Rationale:

This issue is peculiar and particularly complex. I note at the outset that the current Contract's provision at Article XXVII – Health and Life Insurance, Section 1. Health Insurance, is comprised of three (3) paragraphs. The first paragraph of Section 1. of the current Contract provides and reads as follows:

"The Employer shall continue to provide hospitalization and medical insurance to all full-time employees covered in such amounts and benefits as are in effect on the date of this Agreement." (Emphasis supplied.)

I also note at this juncture that the record reflects that on March 29, 2010, the parties entered into a tentative agreement on Article XXXIV – Duration for their successor Contract, which reads as follows:

"ARTICLE XXXIV

Duration

This Agreement shall be effective from March 1, 2010 through 11:59 p.m. February 28, 2013. If a new agreement has not been entered into prior to that time, this Agreement shall continue in effect thereafter until replaced or until notice of not less than sixty (60) calendar days is given by either party to the other in writing.

Agreement shall be retroactive to March 1, 2010."

In its pre-Conciliation hearing statement, the employee, at page 17 thereof, sets forth, and proposes its final settlement offer concerning the first paragraph, of Section 1. Health Insurance of Article XXVII, as follows:

"B. ARTICLE XXVII: HEALTH AND LIFE INSURANCE

1. Section 1: Insurance Plan Design. The Township proposes that the Conciliator adopt the following changes to the current insurance plan design language:

"Section 1: Health Insurance. The Employer shall provide the same hospitalization and medical insurance to all full-time employees covered herein in such amounts and benefits that other non-organized Township employees receive."

Thus by virtue of the plain meaning of the language of the Employer's final settlement offer for the first paragraph of Section 1 of Article XXVIII, set forth above, the Employer unambiguously reveals that, in the Employer's view, said first paragraph deals with and concerns (as does said first sentence in Article XXVII, Section 1 of the current Contract) a health "insurance plan design." And this is so notwithstanding the fact that in both the Employer's final settlement offer and in the current Contract, said first paragraph does not indicate such in haec verba. I agree with this viewpoint of the Employer.

In my judgment the current Contract's health insurance plan design unambiguously provides for the continuation of the same hospitalization and medical insurance benefits in effect for bargaining unit employees "on the date of this Agreement," which date, pursuant to Article XXXIV – Duration, of the current Contract, was March 1, 2007. Put another way, the current Contract froze the amounts and benefits of hospitalization and medical insurance that were in effect as of March 1, 2007. The Employer, here in Conciliation, seeks a change from the current Contract's language in paragraph 1, of Section 1, of Article XXVII, and the concepts it gives rise to.

The Union, believing that the first paragraph of Section 1 of Article XXVII – Health and Life Insurance was not an "open issue," did not set for a final settlement offer in its pre-Conciliation hearing statement.

The Fact Finder did not have an issue concerning the first sentence of Section 1, nonetheless recommended, inter alia, as follows: "Section 1. Health Insurance. The Employer shall continue to provide hospitalization and medical insurance to all full-time employees covered herein in such amounts and benefits as are in effect on the date of this Agreement." That is, the Fact Finder recommended current Contract language. There is, however, no indication in his Report that either party sought anything different from the current Contract, concerning the first sentence of Section 1, Article XXVII, and it appears that the Fact Finder recommended this language simply as a preamble to the provision in the next paragraph, the percentage of the monthly health insurance premium that the parties would pay, which issue was before him. Put another way, there is no indication in the Fact Finding Report that either party had any problem/issue with the concept of maintaining the same "hospitalization and medical insurance…in such amounts and benefits as are in effect on the date of their Agreement." Since, as noted above, it was not an "open issue" to the Union, the Union did not submit a formal final settlement offer on it in Conciliation. In its pre-Conciliation hearing statement the Employer did submit a formal final settlement offer, an offer which differed from the current Contract's provision, as also seen above.

The Employer's justification for its proposed language change is set forth in its pre-Conciliation hearing statement, reproduced in Appendix "A" to this Opinion & Award. The Union, upon receipt of said Conciliation hearing statement filed an unfair labor practice charge with SERB on April 12, 2011, the text of which is attached as Appendix "1". The Union also submitted at the Conciliation hearing a statement entitled

"FOP Rationale Statement Article 27 Health Insurance," which is attached hereto as Appendix 2.

In my judgment, reading together Appendix "A", the Employer's contentions, and Appendix 1 and 2, the Union's contentions, it can only be concluded that the Employer cannot be heard to assert that the Union has taken no position on the issue and indeed it makes no such contention. Hence the Conciliator can only order the Employer's final settlement offer. Put another way, the Employer is estopped from claiming that the Union failed to, or was tardy in, submitting a final settlement offer on the issue. Any doubt in the matter is in my view laid to rest by the Employer's failure to expressly claim that, indeed, the Union has failed to timely submit a final settlement offer on the issue of involving sentence one of Section 1 of Article XXVIII.

I note that the Township does not expressly contend that its position on the first paragraph of Section 1 of Article XXVII must be awarded because the Union took no position on said paragraph in its pre-Conciliation Hearing Statement, and I view such as a waiver of said contention. And in any event, had the Union endeavored to make such a claim, its claim would not be heard, that is, it would have been estopped from making such a claim because, when after fact finding the parties reached no agreement on said paragraph, it was patently clear and evident that the Union was relying on the parties' agreement that said issue was not an "open issue." That being so, the inescapable inference is that, going into Conciliation, the Union's position matched the language of the first paragraph of Section 1, of Article XXVII of the current Contract.

On the merits the statutory factor of past collectively bargained agreements between the parties supports the Union's reliance on the language on the matter in the

parties' current Contract. Another important fact supporting the Union's de facto final settlement offer is the "other factors" statutory criteria found in ORC 4117.14 (G) (7) (f). Thus in the years following the Statute's enactment, one of the "other factors" referred to in ORC 4117l.14 (G) (7) (f) which evolved to become a factor to be taken into consideration in fact finding and conciliation was the notion that incremental change in a term or condition of employment was preferred over dramatic change, a concept which I parenthetically note resonates with Fact Finder Silver's aversion to "drastic" change. This statutory guideline and factor is essentially grounded on the notion that dramatic change is a major condition of employment, such as the health care benefit, threatens the stability of the Employer/employee relationship, a condition at odds with the genesis and purpose of the Statute. Put another way, this principle of incrementalism, as it were, was essentially but a refinement and logical extension of the Statute's past collectively bargained agreements factor, whose goal and purpose is patently the stability of the principles working relationship, particularly important with police officer bargaining units. This concept of incrementalism has been an important guideline for the undersigned when acting as a Fact Finder or as a Conciliator. Thus in City of Trotwood and OPBA, SERB Case #04-MED-06-0658 (Keenan, 2005), I noted that "…Self-evidently the underlying purpose or justification for the need to take past-collectively bargained agreements into account is the desirability of maintaining stability in the collective bargaining relationship by not straying dramatically from past agreements." Here, the Township proposal is clearly a drastic change from past agreements. See also: City of Riverside and FOP Lodge No 161, SERB Case #05-Med-09-0933 (Keenan, 2006). Concerning reliance specifically on ORC 4117.14 (G) (7) (f) see City of Gahanna

and OPBA, SERB Case No. 2009-MED-10-1148 (Keenan, 2011) and City of Dublin and FOP Capital City Lodge No. 9, SERB Case Nos. 10-Med-1374 and 10-MED-1375 (Keenan, September 26, 2011)

In my judgment these statutory factors for this safety force bargaining unit serve to trump the internal and external comparables (more so the internal comparables) when lend support to the Township's final settlement offer.

Accordingly, the Union's de facto final settlement offer is Awarded.

ARTICLE XXVIII – Section 1 – HSA Funding/Contributions

Discussion & Rationale;

The Union has proposed here, and previously in Fact Finding, the following addition to the current Contract's Section 1.

"Effective July 1, 2011, ALL contributions to the HSA shall be funded by the Employer at a rate of 85% of the total cost of the HSA with the employee contributing the remaining 15%. The HSA payments will be made by the Township quarterly. However, if the member's medical expenses are such that additional payments into the HSA fund are needed, the township will be provided an explanation of the benefits and the additional funds will be placed into the member's HSA account."

In his Report the Fact Finder did not set forth verbatim this new addition to Section 1 proposed by the Union. Rather, the Fact Finder simply made the following observation in his Report: "The Union requests language in the parties' successor Agreement that will require the Employer to contribute ninety percent of the total cost of the health savings account, with these payments to be made quarterly." At page 43 of his Report, as previously indicated, the Fact Finder stated that he did "not recommend the other language proposed by the Union for Article XXVII, [i.e.] the new paragraph intended for Section 1….The Fact Finder is not prepared to recommend such a drastic change…in the absence of an agreement between the parties."

Here in Conciliation the Union acknowledges with respect to its proposal that "the Fact Finder did not recommend this issue." The Union went on to state, however, that "the FOP believes it is an intricate element of health care coverage and needs to be addressed."

In further support of its HSA Funding proposal here in Conciliation, the Union also states the following in its pre-Conciliation hearing statement:

"At the beginning of the existing Agreement the Employer provided a traditional healthcare plan. During the second year, the Employer added an optional high deductible (Health Saving Account) HSA plan. The Employer has since eliminated the choice of the traditional insurance. However, under the existing agreement, there is no provision to define the township's responsibility to fund the HSA account. In essence, the FOP feels that a formula for funding the HSA account must be addressed. The FOP proposes that the Employer pay eighty-five percent (85%) of the HSA and the employee be responsible for the remaining fifteen (15%) percent."

In opposition to any fixed HSA Funding/Contribution obligation being imposed on the Employer, in its pre-Conciliation hearing statement the Employee put forth the following contentions and arguments:

At fact finding, the Union proposed to add language requiring the Township to make a specific contribution to [police officer] employees' health savings accounts (HSA). Under this proposal, the township would be required to fund 90% [or 85% - the reduced amount the Union seeks be awarded here in Conciliation] of the out-of-pocket costs of the employees. Moreover, if…an [police officer] employee's medical expenses exceed the fund in his or her HSA, the Township will be required to provide additional funds to the employee's HSA. The Fact Finder reported this as necessary (sic) [i.e. unnecessary] The township respectfully requests the Conciliator to adopt the Fact Finder's recommendation to reject this language.

"The Union's proposal guarantees a significant increase in the costs of providing health insurance to police employees into the future as health insurance costs rise. The Township simply cannot afford any increased costs during the life of this contract. Furthermore, imposing a contractual percentage for HSA contributions is unworkable in the long-term because it exposes the Township to an unknown financial obligation. Considering the long-term trend of health insurance costs, the township would be responsible for 90% of an ever-increasing amount. The Township should not be forced to contribute 90% or any other percentage to an HSA because the future costs of health insurance is unpredictable.

"Furthermore, the Township cannot promise to fund 90% of an employee's out-of—pocket expenses because there is a statutory maximum placed on HSAs. Currently,

the maximum contribution to an employee's HSA is $6,150. There is a possibility that, in the future, under the proposed 90% regime, the township would be obligated by the contract to make contributions in excess of the statutory maximum. Therefore, the Township would be placed in the position of choosing whether to violate the law or violate the contract.

"Finally, the Township's current HSA contribution is variable for employees because employees are required to complete certain tasks to earn this money. For example, an employee can earn money in his or her HSA contribution by participating in health screening programs and having annual check-ups. This is a very creative and responsible program that is designed to help employees learn how to live healthier lives and identify certain health problems at a time when they can be more effectively treated. The result is a healthier workforce that will help lower the cost of insurance into the future. A guaranteed HSA contribution will eliminate these incentives and likely result in higher insurance costs for the Township and its employees into the future.

"Because the Township cannot afford this level of HSA funding and because such a funding obligation would impose long-term hardships on the township, this proposal should be rejected."

Directly to the point, given the dramatic change in the status quo an award of the Union's proposal would create; the lack of any internal comparables to support such; and the fact finder's conclusion, which must be given consideration by the Conciliator, I am constrained to conclude that the Fact Finder simply got it right when he concluded that the Union's proposal here was simply too "drastic" to warrant it be recommended. It also

follows that it is simply too drastic a change to warrant its award in this forum. This judgment is bolstered by internal comparables.

Accordingly, the Union's new proposal for an addition to Section 1 of Article XXVII dealing with HSA Funding/Contributions, within Section 1., is not awarded.

The Township's final settlement offer, which reads: "Section 1. Health Insurance…The Employer shall pay 80% and the employees shall pay 20% of the applicable monthly premium for hospitalization insurance

ARTICLE XXVIII, Section 3 – Insurance Opt-out:

Discussion & Rationale:

This is a "new" issue proposed by the FOP. The proposal reads as follows: "Section 3. Insurance Opt-out. Effective July 1, 2011, an employee who "opts-out" of the Township provided health insurance plan shall receive one hundred and fifty dollars ($150.00) per month. Such employee must provide proof of insurance coverage from an insurance plan not funded by Miami Township."

This same issue was proposed by the Union in Fact Finding. In support of its proposal here in Conciliation the Union asserts that its provision for an opt-out of the health insurance plan is a provision commonly present in collective bargaining agreements. Additionally, contends the Union "for those [police officer bargaining unit employees who] have other health [insurance] coverage options, the offer of a monetary incentive to encourage the members to waive the Employer's healthcare plan can be a cost savings to the Employer and [hence to] tax payers of Miami Township. The Union states correctly that "the fact finder did not award this issue." The Union additionally

states that the fact finder "did not specifically discuss or address any reasons or rationale regarding this issue."

I disagree with this latter statement of the Union; see the undersigned's discussion earlier in this Opinion and Award concerning what was before the Fact Finder and the Fact Finder's recommendations with respect thereto. Thus, as found hereinabove, the matter of the Union's new proposal for a Section 3 – Insurance Opt-out provision in the successor Contract was before the Fact Finder; he considered it; and he declined to recommend it, finding it to be too "drastic" a change from the parties' past police officer bargaining unit collective bargaining agreements.

The Township asks the undersigned, as Conciliator, "to adopt the Fact Finder's recommendation to exclude this new Union proposal from the parties' final Contract. The Employer notes that internal comparables do not support such a provision inasmuch as no township employee, unionized or not has such an option. Likewise, notes the Employer, the vast majority of external comparable jurisdictions do not offer a health insurance either.

Moreover, the Employer notes that most employees who do not participate in the Township's health insurance plan are insured through another source—typically a spouse. These employees, here only a fraction of the thirty (30) full time police officers in the bargaining unit, choose not to participate in the township's health insurance plan because, at least in their estimation and judgment, it is advantageous to do so for reasons independent of any payment from the Township to incentivize them to not participate in the township's health insurance plan. Accordingly, argues the Employer, the Union's proposal to have the successor Contract provide for the first time at a new Section 3, that

employees who opt-out of the Township provided health insurance plan shall receive $150.00 per month, is simply an unjustifiable and unnecessary windfall to such employees who are fortunate enough to have more than one health insurance option.

Finally, argues the Township, it does not believe that the Union's new opt-out proposal will result in savings that would equate to the payments it will make to employees opting out. To the contrary, argues the Township, health insurance opt-out plans such as the Union proposes often result in the employees in the pool losing its healthier employees because it is the healthier employees who can most likely find health care options elsewhere. As a result, argues the Employer, the remaining employees in the pool (and the Employer) will likely incur higher insurance costs in the future.

By way of summary the Employer states that "there is no reason to include this [opt-out] provision [proposed by the Union] in the collective bargaining agreement; it is an unnecessary windfall to only a few employees, and it is not supported by comparables.

In my judgment the Employer's contentions are far and above more valid and persuasive than the Union's contentions on this Section 3 health insurance opt-out proposal of the Union. Accordingly, the Union's new proposal for a Section 3 – Insurance Opt-Out is not Awarded.

Article XXVIII – Wages, Section 1. Wage Schedule:

Discussion & Rationale:

The current Contract at Article XXVIII – Wages, Section 1 provides as follows: "Section 1. Wage Schedule. During the term of this agreement, wages shall be paid as set forth in the applicable Appendix A. Wage Rates.

APPENDIX A
Wage Rates

March 1, 2007 through February 28, 2008
Increase of 5%

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$20.60	$21.36	$22.26	$23.11	$23.79
Corporal					$24.99

March 1, 2008 through February 28, 2009
Increase of 4.5%

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$21.53	$22.32	$23.26	$24.15	$24.86
Corporal					$26.11

March 1, 2009 through February 28, 2010
Increase of 3.5%

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$22.28	$23.10	$24.07	$25.00	$25.73
Corporal					$27.02

In Fact Finding the Employer sought wage increases of zero, zero, and zero for the three years of the parties' successor Contract. The Union sought wage increases of 7.5%, 7.5%, and 7.0% for the three years of the parties' successor agreement.

The Fact Finder recommended as follows:

"Section…1…Article XXVIII – Wages

Retain current language.

Appendix A – Wages

March 1, 2010 through February 28, 2010 (sic) [i.e. 2011] – Zero percent

March 1, 2011 through February 28, 2012 – 2.0 percent increase

March 1, 2012 through February 28, 2013 – 2.0 percent increase

* * *

RECOMMENDED LANGUAGE – APPENDIX A – WAGE RATES

March 1, 2010 through February 28, 2011

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$22.28	$23.10	$24.07	$25.00	$25.73
Corporal					$27.02

March 1, 2011 through February 28, 2012

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$22.73	$23.56	$24.55	$25.50	$26.24
Corporal					$27.56

March 1, 2012 through February 28, 2013

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$23.18	$24.03	$25.04	$26.01	$26.77
Corporal					$28.11

Here in Conciliation the F.O.P.'s final settlement offer is an annual wage increase of two-percent (2%) effective March 1st of each year of the three-year successor Agreement. Accordingly, the F.O.P.'s final settlement offer concerning Article XXVIII – Wages, Section 1. Wage Schedule is as follows:

"Section 1. Wage Schedule. During the term of this agreement, wages shall be paid as set forth in the applicable Appendix A. Wage Rates. The wage rates reflect a two-percent (2%) increase effective March 1, 2010, a two-percent (2%) increase effective March 1, 2011 and a two-percent (2%) increase effective March 1, 2012.

APPENDIX A
Wage Rates

March 1, 2010 through February 28, 2011
Increase of 2.0%

	Hire-In	A (1Year)	B (2 Years	C (3 Years)	D (4 Years)
Police Officer	$22.73	$23.56	$24.55	$25.50	$26.24
Corporal					$27.56

March 1, 2011 through February 28, 2012
Increase of 2.0%

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$23.18	$24.03	$25.04	$26.01	$26.77
Corporal					$28.11

March 1, 2012 through February 28, 2013
Increase of 2.0%

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$23.64	$24.51	$25.54	$26.53	$27.30
Corporal					$28.67

In support of its offer the Union points to the Township's external comparables, namely other similarly situated township or municipal police officers, and in effect contends that, absent the award of its final offer, the township's police officers will be paid substantially less than their counterparts in other similarly-situated township or municipal police agencies." The F.O.P. also relies on the statutory factor of "past collectively bargained agreements between the parties "in support of its final wage increase settlement offer, noting that said offer is "less than previous pay increases received by this bargaining unit." Contending in effect that the gloomy picture the township draws of its "current economic status" does "not accurately reflect the true economic picture" of the Township and the F.O.P. urges the undersigned to Award the 2% wage increase it seeks in the first year of the Contract.

Here in Conciliation the Employer's final settlement offer is a lump-sum payment of $600.00 in the first year of the successor Contract, followed by a 2% wage increase in each year of the final two years of the successor Contract. Accordingly, the Employer's final settlement offer concerning wage is as follows:

"ARTICLE XXVIII Wages

Section 1. Wage Schedule During the term of this agreement, wages shall be paid as set forth in the applicable Appendix A. A One-time lump-sum payment of $600.00 shall be made to each employee effective within 30 days of the signing of this agreement. This lump-sum payment shall not be included in the base wage of the employees.

APPENDIX A
WAGE RATES

March 1, 2010 through February 28, 2011
Increase of 0%

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$22.28	$23.10	$24.07	$25.00	$25.73
Corporal					$27.02

March 1, 2011 through February 28, 2012
Increase of 2.0%

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officers	$22.73	$23.56	$24.55	$25.50	$26.24
Corporal					$27.58

March 1, 2012 through February 28, 2013
Increase of 2.0%

	Hire-In	A (1 Year)	B (2 Years)	C (3 Years)	D (4 Years)
Police Officer	$23.18	$24.03	$25.04	$26.01	$26.77
Corporal					$28.11

In support of its final offer the Employer asserts that its $600.00 lump-sum payment "is greater than a 1% wage increase for employees in the top step of the police officer wage schedule." The Employer also relies on "internal comparables" pointing to its one-year freeze with its unionized fire department employees, followed by two 2% increases for each of the next two years while simultaneously providing a "200 annual signing bonus for each year of the three-year contract. And, like the Employer's final settlement offer here, these consecutive signing bonuses of $200.00 per year to the fire fighter bargaining unit is not included in its base wage of the firefighters. It is the Employer's contention that "in essence, the fire union has agreed to accept a $600.00

cash payment in lieu of a wage increase in the first year. The Township also points to the police Sergeants' bargaining unit which agreed to a wage freeze in the first year of the contract followed by two 2% increases. The Employer notes that the supervisory Sergeants' bargaining unit agreed to a first year wage freeze and further agreed to give up longevity pay in exchange for a one-time lump sum payment of $1,200.00, which was approximately one year's longevity payment, and which Sergeants didn't receive, and a one-time adjustment to their base wages. With respect to non-union township employees, in 2010 they received a wage freeze without any lump sum payment; in 2011 only a 2% wage increase; and they no longer receive longevity pay. The Township argues that "internal comparables" are a significant factor considered by fact finders and conciliators when determining whether to award a particular wage increase. The Township also seeks to support its final wage rate settlement offer here in Conciliation by citing the Fact Finding decision rendered in International Brotherhood of Teamsters and Cuyahoga County Sanitary Engineer, decided 10/19/10, wherein Neutral Panelist Harry Graham discussed the situation where an Employer's work force is divided up into multiple bargaining units. According to Fact Finder Graham one feature of such a situation is that the parties attempt to secure standardization of the terms in the separate collective bargaining agreements. Fact Finder Graham put it this way in his decision:

"It would be incongruous if members of this [Sanitary Engineering] bargaining unit received a wage increase while their colleagues elsewhere in County service did not. A feature of situations characterized by multiple bargaining units is an attempt by the parties to secure standardization of the terms of the agreements. It should not be expected

that absent extraordinary circumstances one group would secure more favorable treatment than others working for the same Employer."

Expressing its understanding of the above quote from Fact Finder Graham's decision, the Employer states in its pre-hearing statement that "in other words, if the Employer's other employees are not receiving wage increases, a wage increase is inappropriate. Disparities in wage increases among the Employer's bargaining units and non-union employees lead to disharmony among the employees and threaten Employee morale." Furthermore, states the Employer "there are no 'extraordinary circumstances' in this case justifying a <u>percentage</u> wage increase for the [police] officers."

The Conciliator AWARDS the City's final settlement offer with regard to WAGES. In the instant case one can say without any equivocation whatsoever that the parties have been given every opportunity to develop their respective positions concerning the financial situation of the township, and both parties have taken ample opportunity to do so. The financial picture here has been thoroughly vetted by both parties. Extensive evidence was offered in both Fact Finding and here on the Township expenditure needs, both actual and anticipated; financial reserves and the need to conserve them; revenue sources; and necessary capital improvement expenditures. The input of both parties has been exhaustive.

In the final analysis it is my judgment that the township's position is more persuasive and in so concluding I do <u>not</u> rely on Professor and Neutral Panelist Graham's "pattern bargaining" rationale on the wage issue. Mr. Graham's case did not involve a police officer (safety force) case as is the case here. As elaborated upon subsequently in the discussion on the first paragraph of Section 1 of Article XXVII – <u>Health and Life</u>

Insurance, police forces are viewed as justifiably receiving greater compensation and/or health insurance features, if feasible.

In the instant case I rely principally on the concepts put forth by the Township and embodied in their highlighting, what they accurately describe and characterize as "economic uncertainty" and the need therefore for "fiscal prudence." The need to address the reality behind these two expressive concepts, coupled with the "internal comparables" evidence and coupled with the Employer's implicit willingness to acknowledge the vital role the bargaining unit employees play with respect to meeting and attaining one of the primary functions and duties of the Township, namely, the attainment and maintenance of law and order; by paying them somewhat greater compensation than other Township employees, persuades me to AWARD the Township's final offer settlement concerning Article XXVIII and APPENDIX A.

G. Article XXIII – Wages, Section 2. Officer – In-Charge Pay

Discussion & Rationale:

The current Contract provides as follows:

"Section 2. Officer-In-Charge Pay. When a police officer is assigned to fill in for a supervisor as a shift supervisor, he shall be compensated an additional $1.50 per hour for all hours worked as Officer-In-Charge. Additionally, if such hours are worked on a holiday or on an overtime basis, the additional $1.50 per hour shall be added to the officer's base rate and he shall be compensated at 1.5 times the total of his combined base rate and OIC compensation. Under no circumstances will compensation for Officer-in-Charge pay be converted to any type of leave time. Any officer choosing to work as an

OIC must participate in any training management determines appropriate for serving as an Officer-in-Charge."

Under Tab 32 – "Outstanding Issues" of the looseleaf binder of documents submitted by the Union to support its positions, at the Tab therein entitled "Article XXVIII" the Union sets forth its proposal for the successor Contract's provision at Article XXVIII Wages, Section 2. Officer-In-Charge Pay. In its proposal the Union deletes some language set forth in the current Contract's provision at Article XXVIII, Section 2., and adds some language therein, as follows:

"Section 2. Officer-In-Charge Pay.

When a police officer or detective is assigned to fill in for a supervisor as a shift supervisor, he shall be compensated at the sergeant's top pay rate for all hours worked as Officer-In-Charge. Additionally, if such hours are worked on a holiday or on an overtime basis, he shall be compensated at 1.5 times the total of his OIC rate of compensation. Under no circumstances will compensation for Officer-In-Charge Pay be converted to any type of leave time. Any officer choosing to work as an OIC must participate in any training management determines appropriate for serving as an Officer-In-"Charge. The Employer shall attempt to train at least two (2) such individuals for each shift or section. The use of the OIC shall be rotated as much as practical to provide each OIC with experience in a supervisory capacity."

The Employer is opposed to the Union-proposed language deletions and additions to the current Contract's language, and, to the contrary, urges that the language of the current Contract's OIC Pay provisions be retained.

The Fact Finder states that in Fact Finding the Employer pointed out that "all of the duties required of a shift supervisor are not required of an Officer-In-Charge." To the contrary, noted the Fact Finder, the Employer described an OIC as a "lead" worker, responsible for task-oriented activities on the shift and not responsible for administrative duties. The Fact Finder discussed and concluded that an increase in compensation to employees for performing OIC duties was not supported by the evidence."

In its pre-Conciliation hearing statement the Union takes the position that the fact finder never addressed the issue of Article XXVIII, Section 2. However, the Union is only partially correct. Thus, as seen above it is clear that the Fact Finder did have before him the specific issue of the rate of pay for a police officer performing the supervisory duties of a Sergeant and he addressed same, as noted above, but there is no indication in the Fact Finder's Report that a discussion took place before him concerning either the Union's proposal to require the Employer to attempt to train at least two (2) bargaining unit employees for each shift or section, or concerning the rotation, as much as practical of the OIC task, in order to provide each OIC with experience in a supervisory position.

Here in Conciliation the Employer opposes the Union's proposal concerning the training of two (2) officers-in-charge for each shift and the Union's proposal to rotate Officer-In-Charge as much as practical. It is the employer's position that these Union-proposed changes "significantly limit the Township's ability to effectively manage its workforce." Elaborating, the Employer asserts that it should not be required to train at least two Officers-In-Charge per shift inasmuch as such a requirement would force the Township to spend the limited resources providing "unnecessary training."

The Township additionally asserts that the Township must have the flexibility to determine what training is "necessary." In this regard I note that the F.O.P. has not made a claim or a case establishing that such training is operationally "necessary."

Finally, states the Employer, the township must have the discretion to determine who serves as an Officer-In-Charge. These assignments, asserts the Employer, are determined at the Chief's discretion, and, typically, the Chief makes these assignments based on a combination of seniority and demonstrated capability. Indeed, argues the Employer, unqualified employees should not be placed in a supervisory role solely because of a rotation schedule. The Township argues that the Township must have the right to determine who supervises the Police Department when sergeants are absent.

Based on all the foregoing, the Employer proposes that the undersigned, as Conciliator, adopt the Recommendation of the Fact Finder to maintain the current language of Section 2 of Article XXVIII – Wages.

Directly to the point, as all the foregoing well demonstrates, the Union has simply not made a case for the additional compensation, training, and rotating assignment it seeks. No evidence was introduced to show, for example, that more pay was necessary to recruit better or more OIC candidates; no favorites and/or discriminatory assignments to the OIC position were shown to justify the rotation sought; nor was the current pool of potential OIC's shown to be inadequate to fill the Townships need for OIC's. In these circumstances I am constrained to concur with the Fact Finder.

AWARD

The parties' Contract at Article XXVIII, Wages, Section 2. Officer-In-Charge Pay, is to read the same as the current Contract.

H. Article XXVIII – Wages, Section 4. Longevity Pay

Discussion & Rationale:

The parties' current Contract at Article XXVIII, Section 4. Longevity Pay, reads as follows:

"Section 4. Longevity Pay. Longevity Pay is paid to the employee on the first paycheck that immediately follows the employee's anniversary date. Additionally, Longevity Pay is paid separate from other wages earned and is paid to the employee with a physical, non-direct deposited check. Example: A paycheck is scheduled to be distributed Friday, April 2. Employee A's anniversary is on Wednesday, March 30. Employee B's anniversary was on Monday, March 11. Both Employee A and Employee B will receive a physical check for their Longevity Pay on Friday, April 2. The Employer is responsible for compliance with Section 4 of Article XXVIII.

This text is followed by the following chart:

Years of Service Completed	Rate of Longevity Pay/Year	Maximum Payment
One to Two Years	$40.00	$80.00
Three to Six Years	$50.00	$300.00
Seven to Ten Years	$60.00	$600.00
Eleven to Fourteen Years	$70.00	$980.00
Fifteen Years and Up	$80.00	$1,200.00

In Fact Finding the Employer sought the elimination of Longevity Pay in its entirety. The Union sought an extension of the longevity pay chart/schedule to pay additional longevity pay to employees with twenty (20) to twenty-five (25) years of service, and twenty-six and more years of service. As seen above, the current Contract's highest rate is attained at "fifteen years and up."

In his Report the Fact Finder addressed the parties' different across-the-board wage increase proposals, just prior to his discussion of the parties' proposals with respect to Longevity Pay. The Fact Finder noted that the Employer proposed "a wage increase of zero, zero, and zero for the [three] years of the parties' successor Agreement," and that the Union proposed "wage increases of 7.5%, 7.5%, and 7.0% [for the three years of the parties' successor Agreement]." Following a thorough review of voluminous fiscal testimony of expert witnesses presented to him by both parties, the Fact Finder recommended increases of "zero [0] percent for the first year, 2.0 percent for the second year, and 2.0 percent for the third year," percentages the Fact Finder "bottom line" justified as appropriate "in the face of uncertainties about the economics of the region, state, nation and world." The Fact Finder additionally disclosed that he also viewed his wage recommendation as "fiscally sound and affordable by the public employer…"

Moving next to the parties' starkly different Longevity Pay proposals in Fact Finding, the Fact Finder concluded that he did "not find the present to be an appropriate time to expand the longevity pay schedule within the parties' collective bargaining agreement." I take this comment to be an implicit reference back to his observation concerning the ongoing fiscal uncertainties. He further found that he was "not persuaded to recommend a deletion of the longevity program as proposed by the Employer, noting that "the longevity pay program contained in Section 4 of Article XXVIII represents a promise made under prior contracts (read here-the statutory factor of past collectively bargained contracts) and the Fact Finder finds insufficient reason to nullify this promise." Accordingly, it was the Fact Finder's Recommendation "that the language of Section 4,

Longevity Pay, within Article XXVIII, be retained unchanged in the parties' successor Agreement.

Here in Conciliation the F.O.P. adopts as its final settlement offer the Fact Finder's Recommendation, namely, the retention of the current Contract's language at Article XXVIII, Section 4. Longevity Pay.

Here in Conciliation the Employer's final settlement offer retains the text/language of the current Contract, but adds to that text/language the following language:

"Effective upon the signing of the new Agreement, longevity pay will be eliminated for all new employees in the bargaining unit hired after the date of execution. Current employees will continue to receive longevity pay benefits as contained in Article XXVIII.

The Employer characterizes its position as a "compromise that 'grandfathers' longevity benefits for current employees, but eliminates this benefit for future employees." In effect, the Township seeks to justify its final offer on this issue on the grounds that "internal equity" supports it. Thus, the township points to the following facts: Longevity pay for the Township's non-union employees was eliminated beginning January 1, 2010; the Township and its fire union have agreed to discontinue longevity pay for new hires, grandfathering longevity pay for current fire employees; and the Township and the police supervisor (Sergeants) Union , the OPBA, have agreed to eliminate longevity pay. The Township acknowledges that with respect to the OPBA bargaining unit of Sergeants "the Township agreed to roll longevity into the OPBA base wage not only to eliminate future longevity payments, but also as a 'catch up' because the

police supervisors (Sergeants) were significantly lower in the Township's external comparables analysis."

The Township also acknowledges that it "is aware of the fact that the current bargaining unit members value this benefit."

Still further with respect to purported circumstances which the Township views as supportive of its proposed elimination of longevity pay for new hires, the Township states that newly hired police officers are well compensated as external comparables show, such that longevity pay for new hires is not justified; police officers' wage increases have outpaced inflation nearly every year since 1998; the current economic climate does not support "any additional compensation"; there is a widespread movement among public Employers away from pay based on seniority to pay based on merit, as exemplified by Senate Bill 5. The Township equates longevity pay with "a bonus that rewards length, not quality, of service." The Township candidly acknowledges that the Township's goal is "to move away from compensation based on seniority, and removing longevity [pay] is necessary to achieve this goal"; and the "primary objective is to remove longevity from its contracts," and "removing longevity pay is part of a uniform cost-savings measure applied throughout [the township's] workforce. Additionally, the Township characterizes its final settlement offer on Longevity Pay as "the best of both worlds—current bargaining unit members are protected against losing this benefit, while the Township is able to implement its broader compensation strategy.

Finally, the Township takes the position that "the Union's proposal to add steps to the current longevity scale must be rejected. The increase in longevity pay [steps] is not warranted in light of the already generous benefits that the patrol officers receive."

Understandably the Township notes that “the Fact Finder did not find that it was appropriate to expand the longevity schedule.”

In my judgment “internal comparables” must be given the greatest weight here. It follows that the Employer’s final settlement offer creating a two-tier system of longevity pay is AWARDED.

Finally, I note that the FOP proposes, and states that it believes the Employer concurs, that “the Conciliator incorporate all articles tentatively agreed to by the parties into his findings and report.” The record fails to disclose that the Employer concurs in the FOP’s proposal. It may be that the Employer simply overlooked doing so, or it may be that to do so could be construed as at odds with its proposed final settlement offer concerning the first paragraph of Section 1 of Article XXVII Health And Life Insurance. In any event, in an abundance of caution I am not inclined to AWARD the Union’s proposal concerning the parties’ tentative agreements. Of course I urge the parties to nonetheless do so.

This concludes the Conciliator’s Opinion and Award.

DATE: October 30, 2011

_____

Frank A. Keenan
Conciliator