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**STATE OF OHIO**
**STATE EMPLOYMENT RELATIONS BOARD**

**IN THE MATTER OF CONCILIATION BETWEEN:**

**OHIO PATROLMEN'S BENEVOLENT ASSOCIATION (SERGEANTS)** — **CASE NO. 2015-MED-09-0865**

**"Employee Organization/Union"**

**and**

**CITY OF NELSONVILLE, OHIO – POLICE DEPARTMENT**

**"Employer"**

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**IN THE MATTER OF CONCILIATION BETWEEN:**

**OHIO PATROLMEN'S BENEVOLENTASSOCIATION** — **CASE NO. 2015-MED-09-0863**

**"Employee Organization/Union"**

**and**

**CITY OF NELSONVILLE, OHIO – SENIOR PATROLMEN AND PATROLMEN**

**"Employer"**

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# OPINION AND ORDER OF CONCILIATOR

**DATE OF ORDER AND DATE OF MAILING: August 26, 2016**

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**Representative on Behalf of Employee Organizations / Union:**

Mark J. Volcheck, Esq.
Ohio Patrolmen's Benevolent Association
92 Northwood Boulevard, Suite B-2
Columbus, Ohio 43235
Telephone: 614.888.7901
Email: markvolcheck@sbcglobal.net

**Representative on Behalf of Employer:**

Garry E. Hunter, Esq.
Nelsonville City Attorney
211 Lake Hope Drive
Nelsonville, Ohio 45764
Telephone: 740.592.5580
Email: ghunter@hunterlawoffices.us

**CONCILIATOR:**
**DONALD N. JAFFE, ESQ.**
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862
Telephone No.: 216.687.3262
Telecopier No.: 216.621.8369
E-mail: djaffelaw@aol.com

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## I. INTRODUCTION.

These matters come before the Conciliator as a result of a referral on June 15, 2016, by the State Employment Relations Board ("SERB") pertaining to conciliation protocol between the Ohio Patrolmen's Benevolent Association currently representing two sergeants, five senior police patrolmen and police patrolmen. It should be noted that the Union also represents a third bargaining unit consisting of part-time patrolmen (four members authorized-currently three). The part-time patrolmen were the subject of fact-finding, along with the other two bargaining units, and reported as SERB Case No. 2015-MED-09-0864. Although the part-time patrolmen participated in the fact-finding protocol, they are not eligible for participation in conciliation because of their part-time status. See, Ohio Revised Code §4117.14(D)(1) and Administrative Code 4117-9-06. The City of Nelsonville is located in Athens County, having a population of almost 6,000.

The Conciliator has taken into consideration the statutory guidelines enunciated in Revised Code §4117.14(G)(7)(a) through (f) and SERB Regulation 4117-9-06(H)(1) through (6). In addition, the Conciliator has reviewed and taken into consideration the Report and Recommendations by Fact-Finder Betty R. Widgon dated May 17, 2016. (See Revised Code §4117.14(G)(6).)

Revised Code §4117.14(G)(7) provides: "After hearing, the conciliator shall resolve the dispute between the parties by selecting, on an issue by issue basis, from between each of the parties final settlement offers . . .." The Conciliator thus emphasizes that he is not at liberty to fashion his own remedy or his perception of what constitutes an equitable public sector settlement, but, rather, is required to accept or reject each of the parties' final offers, on an issue by issue basis, taking into consideration the statutory and administrative guidelines as referenced above, the parties' position statements, the testimony and the evidence presented.

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As the Supreme Court cogently stated in *Fairborn Professional Fire Fighters Assn., IAFF Local 1235 v. Fairborn* (2000), 90 Ohio St.3d 170, 171-172: "Thus, the statute [R.C. 4117.14(G)(7)] requires that the parties submit in writing their final offers on disputed bargaining issues and that the arbitrator choose between those two offers in determining a resolution. There is no splitting the baby on specific issues--the arbitrator must choose from one final offer or the other on each issue."

The Conciliator has received from the parties pre-hearing position statements and reviewed a number of exhibits and documents which have been taken into consideration in reaching the award set forth herein. Included among those exhibits is the Collective Bargaining Agreement by and between the Ohio Patrolmen's Benevolent Association and the City of Nelsonville, Ohio - Police Department for the period January 1, 2015 through December 31, 2017.

The hearing in the instant matter was held on August 10, 2016 at the City of Nelsonville City Hall, 211 Lake Hope Drive, Nelsonville, Ohio 45764.

The Conciliator is acutely aware of and particularly sensitive to the high responsibility placed upon him and the eventual effect of his decision in light of the caveat mentioned by the Supreme Court in *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 192, Syllabus No. 2, wherein the Court stated: "Once it is determined that the arbitrator's award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award pursuant to R.C. 2711.10(D) is at an end." See, also, *Union Township Bd. of Trustees v. Fraternal Order of Police, Ohio Valley Lodge No. 112*, 146 Ohio App.3d 456, 2001-Ohio-8674; *Johnson v. Ohio Patrolmen's Benevolent Assn.*, 2003-Ohio-4597, ¶14.

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The Conciliator also recognizes that Revised Code §4117.14(H) provides in pertinent part: "All final offer settlement awards and orders of the conciliator made pursuant to Chapter 4117 of the Revised Code are subject to review by the court of common pleas having jurisdiction over the public employees as provided in Chapter 2711 of the Revised Code." Chapter 2711 is the Ohio Arbitration Act.

## II. EVIDENTIARY EFFECT OF FACT-FINDER'S REPORT.

As previously noted, the Fact-Finder's Report and Recommendations in this case was filed with SERB on May 18, 2016. Under Revised Code §4117.14(D) and Ohio Administrative Code 4117-9-06(E)(4), the conciliation process addresses the unresolved issues that are asserted by the parties.

In *City of Ashland and Ohio Patrolmen's Benevolent Association*, SERB Case Nos. 91-MED-10-1183 and 91-MED-10-1184, and the conciliator's decision in the matter of *City of Wooster and the Ohio Patrolmen's Benevolent Association,* SERB Case Nos. 98-MED-10-0938 and 98-MED-10-0939, the question as to the evidentiary effect to be given to the fact-finder's report was addressed. In the *City of Ashland* conciliation decision, the conciliator stated at page 4 of his decision:

> "It is clear to both sides that proceeding to conciliation has left the finalization of the unresolved terms to the undersigned [conciliator] in accordance with the precedential law that has been developed and followed in Ohio in recent years. That was formulated during the early period of proceedings under this law by Professor John Drotning, who, in a conciliation award, first espoused the need to show clear error on the part of a Fact-finder before overturning in a conciliation award terms contained in a duly arrived at Report and Recommendation. That is the guideline employed herein."

In the *City of Wooster* case, the conciliator stated at pages 4-5 of his award:

> "My immediate objective is to review the record for evidence that the fact-finder either made errors or omitted critical data in reaching his recommendations.

* * *

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> The required burden of proof to show inherent error has not been met and since the OPBA position accepts the total measure of the recommendation, I hereby grant it."

The clearly erroneous standard is one followed in the federal judicial system under Rule 52(a), Fed. R. Civ. P., which states: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This provision is similarly followed in bankruptcy proceedings under Bankr. R. 8013. As noted in *United States v. Gypsum Co.* (1948), 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746, 766, a finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been made. See, also, In re Arnold, 908 F.2d 52 (CA6, 1990). When there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer City*, N.C. (1985), 470 U.S. 564, 574. If the fact-finder's choice is not clearly erroneous, then a reviewing court must accept the fact-finder's determination.

Significantly, the Rule 52 standard in the federal judiciary is not found within Rule 52 of the Ohio Rules of Civil Procedure although, generally, the Ohio Rules are patterned after and mirror the federal standard.

In the conciliation award of *Cuyahoga County Sheriff's Department and Ohio Patrolmen's Benevolent Association*, SERB Case No. 97-MED-05-0605, the conciliator departed from the clear error standard and stated that the more appropriate test was that deference should be given to the fact-finder's report. As the conciliator noted at page 6 of the award:

> "The Ohio Revised Code and the Administrative Rules of the State Employment Relations Board are silent as to the relationship between a fact-finder's determination and a subsequent conciliation proceeding. Nor has SERB taken an official position on the matter: conciliators are permitted to make their own determination of the issue.

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> It is this Conciliator's view that deference should be given and that a fact-finder's recommendation should not be overturned lightly. The primary purpose of fact-finding is for the neutral to reach a fair and proper resolution of the matter(s) in dispute, which will hopefully be acceptable to both sides based on the evidence presented. Giving deference would encourage such acceptance."

It is this Conciliator's view that neither a clearly erroneous standard nor a deference standard are totally appropriate. Certainly, a fact-finder's report provides guidance, however, this Conciliator is of the view that a fact-finder's report, although a significant portion of evidence, should nevertheless be considered along with the other required considerations as outlined in Revised Code §4117.14(G)(7)(a)-(f). The Conciliator should not simply rubberstamp the fact-finder's decision ipso facto.

## III. <u>ARTICLE 18 – INSURANCE</u>.

Without a detailed analysis or commentary on this Article, suffice to note that at the conclusion of conciliation, the parties had mutually agreed to maintain current contract language. However, the parties also recognized that there was some unnecessary and nonsubstantive language in Section 1(A) which was no longer applicable and should be stricken from Article 18, Section 1(A). Subsection (A) is set forth below together with a "strikethrough" reflecting the deleted portion:

> "A. ~~Effective April 1, 2012, full-time employees shall contribute ten percent (10%) towards the payment of all monthly insurance premiums below.~~ Effective January 1, 2013, full-time employees shall contribute fifteen percent (15%) towards the payment of all monthly insurance premiums below. ~~Contribution amounts prior to April 1, 2012, shall be based upon the prior agreement.~~"

As reflected above, the Conciliator does hereby approve the parties' representations.

## IV. <u>ARTICLE 23 – WAGES</u>.

Section 1 of the above article provides in pertinent part: "Wage rates reflect an across the board increase of three and one-half percent (3.5%) effective January 1, 2015. The parties agree

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that wage rates (Article 23) and insurance (Article 18) for 2016 and 2017 shall be subject to re-opened negotiations. No other articles of this agreement shall be re-opened."

**Union's Position:**

The final offer as modified during conciliation was for a wage freeze for 2016 and a two percent (2%) wage increase for 2017. As noted in the CBA, there was a three and one-half percent (3.5%) wage increase in the first year of the CBA (2015).

The Union has argued: "It is indisputable that the bargaining units at issue continue to lag behind their counterparts in the area of wages." In support, the Union has referred to some prior fact-findings occurring in 2009, 2010 and 2011, when wage increases as high as five percent (5%) were being allowed. The Union has also urged that the cities of Logan and Belpre should be used as acceptable comparables because they are located relatively close to Nelsonville and the city sizes are similarly comparable. The Union has argued (Position Statement, pp. 8-9):

> "For 2015, Nelsonville Senior Patrolmen's wage rates are over seven percent (7%) behind their peers in Logan. While the City of Logan does not have Sergeants, the wage rates for Nelsonville Sergeants are twenty-one percent (21%) behind the next rank above patrolmen in Logan – Lieutenants. The Patrolmen and Lieutenants in Logan have just settled on a new contract that includes general wage increases of three percent (3%) in 2016, three percent (3%) in 2017 and three percent (3%) in 2018.
>
> For 2016, the Nelsonville Patrolmen and Senior Patrolmen are over nine percent (9%) behind their peers in Belpre. Nelsonville Sergeants are over fourteen percent (14%) behind Sergeants in Belpre. The Belpre Patrol Officers and Sergeants received a two percent (2%) general wage increase in 2016."

Further, the Union contends:

> "No matter how one evaluates the external comparables, it is obvious that the OPBA members are underpaid. Moreover, since the employer is not offering any increase at all in this case, the gap will only grow larger as the comparable jurisdictions continue to enjoy general wage increases."

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The Union has contended that the additional wage cost increase resulting from a two percent (2%) wage adjustment would be $6,869.00. The City has contended that the figure is somewhat higher at $7,517.81 (City Exhibit 12).

**City's Position:**

The City's final offer in conciliation was an agreement with the Union for a wage freeze in 2016 but proposed a wage re-opener for 2017.

On behalf of the City, testimony was presented by City Manager Gary Edwards, the City Auditor Garry Dickenson and by the City's Income Tax Administrator Stephanie Williams. The City Manager was candid in acknowledging that police officers in Nelsonville are underpaid in comparison with the comparables and other cities and he wished that there was more money available. However, he and other representatives of the City contended that economically, the City was in "better shape" economically than it is today for a variety of reasons and that a wage increase for 2016 and 2017 was inappropriate. In large measure, the City's Auditor noted from Union Exhibit 11, which sets forth the City's revenue and expenses for Calendar Year 2015, that compensation for police officers are paid solely out of the general fund. The City's total revenue for 2015 was $4,556,346.56, with an ending balance of $3,111,369.05. However, since police payroll is solely out of the general fund, that line item reflected that at the beginning of Calendar Year 2015, the balance in the general fund account was $847,862.01, with net revenues of $1,717,317.75, net expenses of $2,083,245.61, and an ending balance of $481,934.25. Thus, it is evident that the general fund account is being depleted at a significant percentage. The City Auditor testified that the 2015 deficit of approximately $400,000 would be repeated in 2016 and 2017, which was a major reason why the City Council adopted a balanced budget ordinance.

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The Fact-Finder had recommended no wage increases for both 2016 and 2017. The Fact-Finder set forth eleven factual aspects pertaining to the proposed wage increase which are likewise pertinent to this conciliation. At Pages 5-6 of her decision, the Fact-Finder stated:

> "Of the evidence presented by the City, the Fact Finder found the following evidence to be solid and particularly persuasive in considering Nelsonville's current resources and financial condition and its projected sources of income in comparison with neighboring comparable cities:
>
> (1) The police department is paid out of the general fund exclusively.
>
> (2) The City's General Fund currently contains just over two months operating reserves;
>
> (3) The City's population is declining as those who lost jobs in Nelsonville are relocating;
>
> (4) The City's tax base has decreased further due to the loss of revenue previously generated by Hocking College, its local two-year college. The City presented credible evidence that the University has lost between 50-60% of its student enrollment over the past 2-3 years resulting in a significant loss of tax income for the City;
>
> (5) Doctors' Hospital Nelsonville, which was a large employer and contributed significantly to the City's tax revenue, closed last year;
>
> (6) Several of the City's other businesses have closed during the past two years;
>
> (7) The increased revenues to the City generated in recent years from the construction of the 8.5-mile US. Route 33 Nelsonville Bypass are no longer available. That project was completed around October 2013;
>
> (8) Now that the bypass has been completed, the City has lost the revenue it habitually received from motorists traveling through Nelsonville on the way to and from Columbus.
>
> (9) The City has a larger number of low-income residents and residents who do not contribute to its tax revenues than do its neighboring comparables;
>
> (10) At present, aside from seeking a tax increase or imposing levy, neither side identifies any other immediate sources of future income.
>
> (11) The last tax increase was in 2013 for capital improvements (the Nelsonville Aquatics Center), and the City doubts that the declining population would be willing or able to support either a tax increase or a levy."

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**Conciliator's Decision:**

The Conciliator recognizes that the Union substantially modified its position from that asserted in fact-finding. In that context, the Conciliator does not consider the Union's proposal of zero percent (0%) for 2016 and two percent (2%) for 2017 as being unreasonable. Indeed, that percentage figure is used extensively in many other collective bargaining agreements throughout the State of Ohio. However, ultimately, each case must be determined on its own unique facts and circumstances. Although the Conciliator does not find that the Union's proposal is, on its face, extraordinarily excessive or unreasonable, in this instance, the Conciliator accepts the City's position of the wage freeze for 2016 and a wage re-opener for 2017 and, thus, he does not accept the Union's proposal nor that of the Fact-Finder. This conclusion is based on several factors.

First, the very language of the CBA signed on March 14, 2015 provides in Article 23, Section 1, that the wage rates for 2016 and 2017 "shall be subject to re-opened negotiations." Thus, the Conciliator concludes that at the time the CBA was executed in 2015, the parties impliedly recognized that the issue of wages for the second and third years of the CBA were not settled and were subject to re-opening. Here, the parties have specifically provided for re-opening. The Conciliator is usually reluctant to require re-opening when it is apparent that the parties were unable to resolve an issue during negotiations. However, in this case, the parties inserted a re-opening clause which is an acknowledgment that there will be further negotiations that the parties will have to undertake for the subsequent years. During conciliation, both the Union and the City accepted the wage freeze for 2016. The Conciliator recognizes that re-opening protocol will require the parties to sit down once again and negotiate the wage issue. The Conciliator believes that since the parties themselves inserted a re-opening clause, it is a

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better course of action for the parties to negotiate between themselves rather than having the Conciliator impose a specific remedy by choosing one position over another. The parties opted for re-opening, and this Conciliator is not willing to override that provision.

Additionally, the Conciliator notes that Article 3, Section 1 of the current CBA provides for several different bargaining units. As noted in Section1(a):

> "Unit defined. The bargaining unit shall consist of all employees assigned to the classifications listed below:
>
> POLICE DEPARTMENT:
>
> Senior Police Patrolman
> Police Patrolman
> Sergeant
> Part-time Patrolman"

As noted previously, the part-time patrolmen were part of the fact-finding protocol occurring in May 2016 before Fact-Finder Betty Widgon and the part-time patrolmen's case is noted under SERB Case No. 2015-MED-09-0864. As indicated previously, the part-time patrolmen are not subject to conciliation. However, in the event re-opening is pursued, arguably, the part-time patrolmen would be entitled to participation by virtue of their inclusion in the CBA currently in effect.

Additionally, the Conciliator notes that on March 15, 2016, AFSCME Ohio Council 8 and Local 2845B (Fire) (AFL-CIO) and the City entered into an agreement providing for a wage freeze for Calendar Year 2016. Calendar Year 2017 was unresolved. Likewise, on June 28, 2016, the Service Workers Union entered into an agreement providing: "Wages: Current contract language (wage freeze) 2016. Wage & insurance re-opener 2017."

Although other Union contracts are not dispositive of the instant matter, they are nevertheless additional factors to be taken into consideration by the Conciliator as suggested both statutorily and by the facts of this case, in part that all three unions have collective

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bargaining agreements expiring the end of 2017. To say that the other contracts would have absolutely no effect or impact as to matters arising out of the instant matter would be to ignore both factual reality and the reality of collective bargaining.

## V. CONCLUSION.

For the reasons set forth herein, the Conciliator adopts the position of the City in that the Conciliator orders a wage freeze for Calendar Year 2016 and a wage re-opener for Calendar Year 2017.

* * * * * * *

Executed at the City of Cleveland, Cuyahoga County, Ohio, this 26th day of August, 2016.

Respectfully submitted,

/S/ Donald N. Jaffe

DONALD N. JAFFE
Conciliator

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing OPINION AND ORDER OF CONCILIATOR has been forwarded, via email transmission, this 26th day of August, 2016, on the following:

Mark J. Volcheck, Esq.
Ohio Patrolmen's Benevolent Association
92 Northwood Boulevard, Suite B-2
Columbus, Ohio 43235
Email: markvolcheck@sbcglobal.net

Garry E. Hunter, Esq.
Nelsonville City Attorney
211 Lake Hope Drive
Nelsonville, Ohio 45764
Telephone: 740.592.5580
Email: ghunter@hunterlawoffices.us

Administrator, Bureau of Mediation
State Employment Relations Board
65 East State Street
Columbus, OH 43215-4213
Email: MED@serb.state.oh.us

/S/ Donald N. Jaffe
DONALD N. JAFFE
Conciliator