STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF CONCILIATION BETWEEN:

THE FRATERNAL ORDER OF POLICE, OHIO LABOR COUNSEL, INC. FOR PATROLMEN AND DETECTIVE SERGEANTS,

"Employee Organization/Union"

and

CITY OF CAMPBELL,

"Employer"

CASE NO. 2017-MED-05-0680

OPINION AND AWARD OF CONCILIATOR

DATE OF ORDER AND DATE OF MAILING: October 10, 2018

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I. INTRODUCTION.

These matters come before the Conciliator as a result of a referral on July 31, 2018 by the State Employment Relations Board ("SERB") to conciliation protocol between the Fraternal Order of Police/Ohio Labor Council, Inc., currently representing eight patrolmen (one vacancy) and detective sergeants and the City of Campbell (Mahoning County), Ohio. The parties' current collective bargaining agreement ("CBA") was for the period March 1, 2014 to September 30, 2017. The new contract agreement and negotiations became the subject of fact-finding and reported at SERB Case Number 17-MED-05-0680.

The City of Campbell, in the 1960s, had a population of 13,406. In the 1970s, the population declined to 12,577, and by 2010, reflected a census of 8,235.

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 Jack E. McCormick dated July 5, 2018 and his Amended Report dated July 10, 2018. (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.

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 between the Union and the City for the period March 1, 2014 through September 30, 2017. The parties executed an extension agreement pursuant to Revised Code § 4117.14(G)(11) effective until October 30, 2018.

The hearing in the instant matter was held on September 24, 2018 at the City of Campbell City Hall, 351 Tenney Avenue, Campbell, Ohio.

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.

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.

In addition to the representatives identified on the face page of this decision, the following were also present and/or testified:

Ryan Bloomer – Campbell FOP, Lodge #42, Vice President

John Gulu – Campbell FOP, Lodge #42, President

Lew Jackson, Jr. – Director of Administration, City of Campbell

Dennis Poskarcik –Chief of Police, City of Campbell

Mary Schultz, CPA – Union Financial Expert

Yianni Tiliakos – Finance Director, City of Campbell

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 July 5, 2018 and amended July 10, 2018. 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.
>
> * * *
>
> 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.
>
> 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. AGREED ITEMS.

The parties have represented that the following articles and/or matters have been agreed to and are not presented for resolution by conciliation but set forth for the reader's benefit:

Article 1	Preamble/Purpose
Article 2	Severability
Article 3	Bargaining Unit Application of Civil Service Law
Article 4	Recognition and Dues Deduction

Article 5	Representation
Article 6	Non-Discrimination
Article 7	No Strike/No Lockout
Article 8	Application and Interpretation of Work Rules, Policies and Directives
Article 9	Rights of Law Enforcement Officers
Article 10	Corrective Action
Article 11	Personnel Files
Article 12	Vindication
Article 13	Grievance Procedure
Article 14	Labor/Management Meetings
Article 15	Internal Affairs Committee
Article 16	Investigative News Release
Article 17	Shift Assignments
Article 18	Department Size/Minimum Staffing
Article 19	Layoff and Recall
Article 20	Health and Safety
Article 21	Bulletin Board
Article 22	Seniority
Article 25	Off-Duty Felony Arrest
Article 26 – Section 2	Health Insurance
Article 27	Life Insurance
Article 28	Injury on Duty
Article 29	Death on Duty/Professional Liability Insurance
Article 31	Bereavement Leave

Article 32 – Section 1	Military Leave
Article 34	Holidays
Article 36	Longevity Pay
Article 37	Call-In Pay/Court Time
Article 40	Drug Screening
Article 42	Fitness Stipend
Article 43	Duration
Article __ (New Section)	Management Rights
Article __ (New Section)	YMHA Assignments
Side Letter (New)	Extra Duty Details

IV. ARTICLE 23 – HOURS OF WORK/OVERTIME (SECTION 2).

Originally, there was a disputed issue as to the compensation protocol when an employee works in excess of 40 hours per week. Suffice to note that during conciliation, the parties mutually agreed to maintain current contract language.

V. ARTICLE 23 – HOURS OF WORK/OVERTIME (SECTION 5)

Under current contract, there is an allowance for compensatory time accumulation to 100 hours. The Union had proposed an increase to 240 hours. The Fact-Finder ruled to maintain current contract language. At conciliation, the Union proposed the Fact-Finder's recommendation. The City modified its position and proposed an increase to 180 hours. The Conciliator believes that the City's current proposal is reasonable and should be adopted.

The following is suggested language:

> "Section 5. In the event an employee is required to participate in any training or work by the City and such training or work results in an overtime situation, the employee shall be compensated at time and one-half (1-1/2) or compensatory time at the employee's option.

> Compensatory time shall be limited to a maximum of one hundred eighty (180) hours per employee."

VI. ARTICLE 23 – HOURS OF WORK/OVERTIME

The Union had proposed that, when overtime is necessary, it first be offered to a bargaining unit member. The City had argued that the offering of overtime is a management issue and should be decided by the Chief of Police, including the right to use par-time employees. The Fact-Finder found in favor of the Union. The Fact-Finder did not discuss this issue in detail. The Conciliator notes, however, that Section 4 of the current contract provides in pertinent part: "Overtime, with the exception of special assignments, shall be passed out on a rotating basis. The rotation shall begin with the oldest (most senior) officer and shall proceed through the seniority list to the youngest (least senior) officer." Implicit in this language is the comment that overtime would first be offered to unit bargaining members. Thus, the Conciliator agrees with the Fact-Finder and rules in favor of the Union as follows:

> "When overtime is found to be necessary, it shall be offered to bargaining unit members first."

VII. ARTICLE 23 – HOURS OF WORK/OVERTIME.

At fact-finding, an issue arose as to Section 2 regarding "contractual overtime" and whether the computation should be based on daily or weekly basis. Current contract language states in pertinent part: "All employees who work hours in excess of eight (8) hours in any day or forty (40) hours in any week shall be compensated on an overtime basis." Per the City's conciliation submission statement, the Conciliator thus considers that the City is withdrawing any prior proposal or objection to eliminating daily overtime. Accordingly, the Conciliator holds that current contract language in Section 2 should continue.

VIII. ARTICLE 23 – HOURS OF WORK/OVERTIME (CANINE) [NEW SECTION].

The Union has proposed a new section addressing the use of a City canine and canine handler. The Union proposes that Canine Officers (of which there are currently two) receive 1/2 hour of actual pay at the regular rate each day of the week for providing care for the canine while off duty. The City proposes a side letter addressing Canine Officers and their compensation for canine duty. The City also proposed that compensation be on the basis of 14 hours of compensatory time every 4 weeks.

The Conciliator is required to select one choice or the other. He cannot edit or modify any proposal. In that context, the Conciliator is of the view that the Union's proposal is more practical. This issue should be addressed directly in the contract similar to other compensation issues. Accordingly, the Conciliator accepts and approves the following:

> "The City shall pay the cost of feeding, grooming and veterinarian services necessary for the care of the canine. The City shall pay the cost of kenneling the canine while the handler is on vacation or otherwise unable to attend to the canine's needs. The City shall compensate the canine handler with one-half (1/2) hour of pay at the regular rate each day of the week for providing care for the canine while off duty. The City agrees to provide the canine handler priority over others seeking private ownership of the canine upon its retirement from police service."

IX. ARTICLE 23 – HOURS OF WORK/OVERTIME (FIELD TRAINING OFFICER) [NEW SECTION].

On this issue, the Union stated in its position statement: "The Union proposes a new section addressing the Employer's many years of providing employees who serve as Field Training Officers (FTOs) with two (2) hours of compensatory time while serving each shift as an FTO."

The City has likewise agreed to the 2-hour compensatory time aspect and stated in its position statement: "The Employer has verbally agreed to the Union's Field Training Officer (FTO) proposal for two (2) hours of compensatory time as it is the parties' current practice."

The disputed aspect is the administrative language for the section. The Fact-Finder noted at page 6 of his Report: "The parties have agreed upon the Union's proposal above [i.e., two (2) hours of compensatory time] is hereby adopted. The City's clarification that assignments will be made by the Chief of Police is adopted on the in that [sic.] the Fact-Finder finds that to be within Management Rights."

Having reviewed the parties' arguments and the Fact-Finder's conclusions, the Conciliator accepts the Fact-Finder's report and conclusions.

X. ARTICLE 23 – HOURS OF WORK/OVERTIME (USE OF COMPENSATORY TIME) [NEW SECTION].

As noted in the City's submission statement: "The Employer also proposes a new section regarding the time frame for requesting use, and to clarify the Employer's right under the FLSA [Fair Labor Standards Act] to manage compensatory time banks. * * * Currently, the parties have no language addressing approval or denial of compensatory time requests." The City also stated: "The Union has opposed the Employer's proposal for language regarding approval administration of compensatory time requests." As to the Fact-Finder, the City stated: "The Fact-Finder did not actually address or make a recommendation on the Employer's proposed language."

The Conciliator is uncomfortable that no recommendation was made by the Fact-Finder. Also, the Conciliator is not at liberty to review the parties' positions with a view for any editing, amending or revising. Thus, the Conciliator is faced with either a complete acceptance of the City's proposal or a complete rejection as proposed by the Union. At this point in time, the Conciliator considers any final selection as premature and that this matter is one for negotiation between the parties or for mediation and specific review by a fact-finder.

XI. ARTICLE 24 – PART-TIME EMPLOYEES.

This article addresses the use of part-time employees. Current contract provides in pertinent part: "The Union acknowledges that in order to ensure the health, safety, and welfare of the citizens of Campbell and maintain the integrity of police department operations, the Employer shall have the ability to utilize part-time personnel to supplement shift strength, cover time off, cover call offs, or otherwise perform duties that it determines necessary." The Union does not take issue with this language nor does it propose any change, but rather proposed the addition of the following language: "Further, the Employer agrees that when it determines that overtime is necessary, the overtime opportunity will be offered to bargaining unit members prior to offering it to non-bargaining unit personnel."

The Fact-Finder recommended the Union's proposed additional language. The Conciliator recognizes that such language is a "protection" for its own members. The Conciliator is of the view that since the day to day administration and operation is with bargaining unit members, it is not unreasonable that overtime opportunity be offered first to bargaining unit members. The Conciliator does not believe that such a process creates an unreasonable burden on the Chief of Police or the Police Department in its ability to perform the above management functions. The above items are still management functions and decisions. See, also, the Conciliator's comments above regarding Article 23.

Accordingly, the Conciliator accepts the Union proposal and the additional language as set forth above.

XII. ARTICLE 30 – SECTION 6 – SICK LEAVE CONVERSION.

Current contract provides: "Accumulated unused sick leave time may be converted at the time of retirement, total disability, or death, for all bargaining unit members. The payment for all those who qualify under this section shall be based upon the rate of pay of the employee at the

time of the qualifying event, and payment shall amount to a maximum of nine hundred sixty (960) hours."

The Union proposes current contract. The City proposed a modification to this section providing that the above language would apply to those bargaining unit members hired before January 1, 2018. As to employees hired on or after January 1, 2018, the proposal is that "upon retirement with ten (10) years or more: 10 years to 20 years - 40% up to 480 hours; 20 years+ - 60% up to 720 hours."

The Conciliator recognizes that the modification is a financial assistance to the City. The Conciliator is not opposed to creating benefits for current employees and also creating a second tier benefit level for new employees. The Conciliator has seen this type of arrangement frequently in collective bargaining agreements.

In this instance, however, the modification language only refers to "retirement" versus the contract language currently refers to "retirement, total disability, or death." Thus, it is unclear whether the proposed language only applies to a retirement situation but current language would still apply to an employee with less than 10 years. Also, the proposed language does not address the question as to what sick leave applies to an employee with less than 10 years if total disability would occur.

The Conciliator, in concept, does not disapprove of the City's proposal but as currently proposed, an extensive rewriting would be required, a function not permitted for the Conciliator. The Conciliator must select a proposal as submitted by the parties. Accordingly, the Conciliator accepts the Union's position as to current contract language.

XIII. ARTICLE 33 – VACATIONS.

The current contract for this article is numbered "Sections 1, 3, 4, 5, 6, 7, 8, 9 and 10." There is no Section 2. Without rewording any section, and by agreement of the parties, the Conciliator renumbers the sections as follows:

Section 1 – no change.

Section 3 is renumbered as Section 2.

Section 4 is renumbered as Section 3.

Section 5 is renumbered as Section 4.

Section 6 is renumbered as Section 5.

Section 7 is renumbered as Section 6.

Section 8 is renumbered as Section 7.

Section 9 is renumbered as Section 8.

Section 10 is renumbered as Section 9.

The current contract provides a vacation formula based on years of service with a corresponding vacation time. The formula starts with one (1) to five (5) years of service allowing two weeks (10 working days) and progresses to twenty (20) years and over allowing six (6) weeks (30 working days).

The City has proposed a new Section 10 as follows: "Bargaining unit members hired on or after January 1, 2018, shall have their maximum vacation annual accrual eligibility capped at five (5) weeks under Section 1."

Both the Union and the Fact-Finder rejected this proposal, retaining current contract language.

The Conciliator recognizes that there are no current bargaining unit members to whom the new Section 10 would apply and there is no current economic/financial benefit to the City nor loss

to any current unit members under any projected new 3-year collective bargaining agreement. However, admittedly, the City has been under Fiscal Emergency in the past and its financial picture is tight. The Fact-Finder rejected the proposal on the basis that to do so would create a 2-tier system and would eliminate an "already bargained for provision." The Conciliator does not accept the notion that the creation of a 2-tier formula is either *per se* or *ipso facto* improper. Further, there actually is no bargained for provision to employees who do not presently exist. Some financial planning is not unreasonable.

The Conciliator has only two choices. Upon extensive review of the parties' positions and the Fact-Finder's Report, the Conciliator accepts the City's proposal as set forth above.

XIV. ARTICLE 35 – WAGES – SECTION 1 - RATES OF PAY.

Current contract of Section 1 sets forth a wage scale "effective January 1, 2015" which is not currently the correct scale. The Union proposes a "*de minimis*" change to the wage table to reflect current wages paid and in effect since January 1, 2016. The Conciliator believes that this proposal is proper and approves same in order to reflect what is current.

XV. ARTICLE 35 – WAGES – SECTION 3 – SHIFT DIFFERENTIALS.

This section deals with shift differential pay applicable to the Day Shift, the Afternoon Shift and the Midnight Shift. At conciliation, the parties represented that they have reached a verbal tentative agreement (TA) on changes in shift hours. The Conciliator accepts and approves the representation without the necessity of reprinting same in this decision.

XVI. ARTICLE 35 – WAGES – SECTION 1 – RATES OF PAY.

As is common, this issue strikes at the essence of a collective bargaining agreement. The Fact-Finder made a number of factual representations which served as the basis for his recommendation regarding this section.

As noted, in the 1960s and early 1970s, steel factories and work were booming in Mahoning County. More recently, those factories have been abandoned, adversely affecting not just the City but the entire county and its county seat, Youngstown. The Fact-Finder also noted that there is little hope for a return "to the good old days."

Currently 40 percent of the City's residents are on social security. Out of the current population of 8,235, 1,386 (40 percent) are on social security, 667 (10.3 percent) are unemployed, 423 (12.2 percent) are on disability, 266 (7.7 percent) are on public assistance and 933 (16.9 percent) receive some type of retirement benefit.

The City has a local income tax at 2.5 percent.

The City was in fiscal emergency from 2004 to 2013 with the prospect that may soon reoccur. At fact-finding and again during Conciliation, Mary Shultz, CPA testified regarding the City's financial prospects. Although admitting that the finances were "tight," she felt that there were areas where funds could be used for pay raises, such as the park fund.

The Fact-Finder noted that Campbell patrolmen rank at the bottom compared with nearby cities, such as:

Girard	$46,987
East Liverpool	$46,683
Struthers	$43,285
Salem	$49,962
Average	$46,779
Campbell	$39,707

The Fact-Finder also noted that for 2017, the City incurred expenses that exceeded revenue by $227,524. Also, expected tax revenues should increase by approximately 1 percent (between $76,000 - $77,500).

The Fact-Finder concluded: "The City of Campbell does not now have the ability to pay any base wage increase(s) through this contract period (2018 – 2020). Therefore, the City's proposal for a wage freeze should be adopted."

Notwithstanding the above holding, the Fact-Finder stated: "However, recognizing that this unit is underpaid in comparison to their nearby colleagues, some renumeration (sic) must be considered, provided the City has the ability to fund the same." The Fact-Finder then concluded that "the City currently has sufficient funds" to pay a one-time lump sum payment of $3,000 payable in the first pay period in July 2018.

The Conciliator is in a bit of a quandary as the Fact Finder states that the City "does not now have the ability to pay" but at the same time concludes that the "City has the ability to fund" the lump sum of $3,000. Based on a $40,000 salary, $3,000 would be 7.5 percent, although the Conciliator recognizes that there are some differences between receiving a lump sum payment versus a pay raise of 7.5 percent. On a three-year basis, 7.5 percent would represent approximately 2.5 percent each year.

At conciliation, the City changed its position from that suggested at fact-finding and offered a new Section 10 providing for a lump sum payment of $500 payable in the second full pay period in January 2019 and a lump sum payment of $500 payable in the second full pay period in July 2019.

However, at the same time, the City also proposed a new Section 11 captioned "Reopener" allowing for a contract reopener after November 1, 2019. Also, "Said reopener shall not be contingent and in the event it is triggered by either party it shall reopen the whole contract such that either party may submit proposals on any matter with cost or benefit implications."

Upon inquiry by the Conciliator, the City indicated that the new proposed Sections 10 and 11 could not be bifurcated but must be accepted or rejected together.

The Conciliator is familiar with reopener provisions but feels that proposed Section 11 goes too far. In essence, the provision converts a planned 3-year contract into a very possible 2-year plan as a substantial number of issues have "cost or benefit implications."

In light of the City's financial picture, the Conciliator would be inclined to approve and adopt the City's proposed Section 10 as the Fact-Finder's recommendation appears to be internally inconsistent. However, inasmuch as the City has taken the position that proposed Sections 10 and 11 cannot be bifurcated, plus the fact that the Conciliator cannot edit or rewrite the parties' proposals, the Conciliator therefore approves and adopts the Union's position and approves a one-time lump sum payment of $3,000 payable in the first pay period in July 2018. It should be noted that July 2018 has come and gone and, thus, for ease of the calendar should be payable in the first pay period in January 2019.

XVII. ARTICLE 35 – SECTION 10 - EDUCATION BONUS [NEW SECTION].

The Union had proposed a new Section 10 providing for an educational bonus for achievement of an Associate's Degree ($300), a Bachelor's Degree ($600) or a Master's Degree ($900). The Fact-Finder noted: "This may be laudable, but it [the City] has no reserve funds to use for this proposal. For the reasons set forth by the Fact-Finder and the Conciliator (see above), the Conciliator concurs with the Fact-Finder's conclusion that "The City current finances are not sufficient to fund this new benefit proposal."

XVIII. ARTICLE 38 – UNIFORM ALLOWANCE – SECTION 1.

Section 1 of this Article sets forth 13 items which constitutes the "complete uniform." The Union had proposed an additional item consisting of a bullet proof vest with outer carrier." The

parties are not in material disagreement but the City contends that the vest specifications should be left to the police chief. This was also the view of the Fact-Finder.

The Conciliator agrees with the Fact-Finder and the City, and therefore, Section 1 should be amended by adding "Item 14" to read as follows: "Tactical bullet resistant ballistic vest, as determined by the Chief of Police."

XIX. ARTICLE 38 – UNIFORM ALLOWANCE – SECTION 2.

This section grants bargaining unit members who have completed not less than 6 months of service, a uniform allowance of $850 payable on the first Thursday of June. The Union modified its proposal during Conciliation to an increase of $100 but having the $950 payable in January. The argument is that the uniform allowance has been unchanged since 2002. The City has not seriously quarreled with this increase.

The Conciliator agrees with the Fact-Finder that the uniform allowance should be $950 annually. However, the Conciliator does not believe that there is an overriding necessity of changing the payment time from that currently set forth in the contract. Accordingly, the Conciliator approves the City's proposed language to read as follows: "Effective June 2019, the annual uniform allowance payment shall be Nine Hundred Fifty Dollars ($950) annually."

XX. ARTICLE 38 – UNIFORM ALLOWANCE – SECTION 4 - SEPARATION OF EMPLOYMENT AND SECTION 5 - RECOVERY OF UNIFORM PAYMENT [NEW SECTIONS].

The City has proposed two new sections. Section 4 addresses recovery of costs when a probationary employee has left the city. Section 5 similarly addresses recovery for non-probationary employees. The parties are not in material dispute. The Fact-Finder approved these provisions but did not set forth language. The Conciliator accepts the City's position and the sections shall be as follows:

> "Section 4 – Probationary Employees. In recognition of the cost and expense to the City to outfit new Cadets with uniforms, a Cadet who separates from employment prior to his/her first anniversary for any reason shall return all equipment listed in Section 1 to the Employer and shall be responsible for the total cost of the equipment provided in Section 1 that the Employer determines it is not returned to the Employer, or any item returned that cannot be reused due to excessive damage not caused by normal wear and tear. The Employer may deduct monies paid for the items in Section 1 from the employee's final paycheck as allowed by law, and/or the employee shall be liable to repay the Employer monies in excess of that which may be deducted from the final paycheck by law."
>
> "Section 5 – Proration of Uniform Allowance Upon Separation for All Employees. Any employee who separates from employment shall have his/her annual uniform allowance prorated upon separation based on the number of months remaining in the current allowance year from date the payment is received to the following June (e.g., six (6) months = one-half (1/2) of annual allowance. Said amount shall be deducted from the employee's final paycheck."

XXI. <u>ARTICLE 39 – MISCELLANEOUS – SECTION 2 – PREVIOUS BENEFITS</u>.

Current contract states: "All benefits previously granted will not be diminished by any provision or failure of a provision in this Agreement." The City proposed elimination. The Fact-Finder states: "The City proposes to end a longstanding agreement to honor maintenance of previous benefits by eliminating language that has been in existence since at least 2001. The City provided no facts to justify this proposal." Likewise, the Conciliator has not been presented with an issue or underlying facts which creates a conflict. In the absence of such a situation, the Conciliator agrees with the Fact-Finder. Current contract should be maintained.

XXII. <u>NEW ARTICLE - SEVERANCE OF PRIOR AGREEMENTS AND MID-TERM BARGAINING</u>.

The City has proposed a new article containing two sections. Section 1 gives the City authority to modify or discontinue rules, regulations and benefits unless otherwise specifically set forth. Section 2 gives the parties the right to negotiate over issues, after prior notice to SERB and the other party, during the life of the contract.

The issues raised by the City revolve around mandatory and/or permissive subjects of bargaining. At this time, the Conciliator considers these issues much too complex to be answered simply in a Conciliator's decision. Additionally, the City has not suggested any area or subject matter where this is presently a major unresolved issue. At this point in time, the Conciliator agrees with the Fact-Finder and the Union that the two new suggested sections should not be adopted.

In *SERB v. Toledo City School District Bd. of Ed.*, SERB Opinion 2001-005, the Board stated at page 5:

> "Under the National Labor Relations Act, an employer commits an unfair labor practice if it unilaterally changes a term in an existing agreement only if the term is a mandatory subject of bargaining. Once the parties agree to permissive subjects of bargaining, those subjects continue to exist essentially at the will of either party, although civil remedies may apply, parties to a contract may rescind any permissive term of the contract at any time without violating section 8(a)(5) of the NLRA. * * * The midterm unilateral modification of a collective bargaining agreement is 'a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining.' Once agreement is reached, the terms of the written bargaining agreement are preserved and neither management nor labor may unilaterally modify the agreement without the consent of the other party." [Citations omitted.]

At page 7, the Board further stated:

> "Where the parties have not adopted procedures in their collective bargaining agreement to deal with midterm bargaining disputes, SERB will apply the following standard to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement after bargaining the subject to ultimate impasse as defined in Vandalia-Butler:
>
> > 'A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute.'

* * * * * * *

Executed at the City of Cleveland, Cuyahoga County, Ohio, this 10th day of October, 2018.

Respectfully submitted,

/s/ *Donald N. Jaffe* [Electronically Signed]
DONALD N. JAFFE
Conciliator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing OPINION AND AWARD OF CONCILIATOR has been forwarded, via email transmission, this 10th day of October, 2018, on the following:

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DONALD N. JAFFE
Conciliator