STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF CONCILIATION PROCEEDINGS BETWEEN:

THE FRATERNAL ORDER OF POLICE,
OHIO VALLEY LODGE NO. 112
Employee Organization

and

THE BOARD OF TRUSTEES,
UNION TOWNSHIP,
CLERMONT COUNTY, OHIO
Employer

FINAL OFFER SETTLEMENT AWARD

Case Nos. 99-MED-01-0053
99-MED-01-0054
99-MED-01-0055

Date of Issuance: September 27, 1999

Hearing Date: September 24, 1999
Location: Union Township Offices, Gleneste, Ohio
Conciliator: James L. Ferree

APPEARANCES

For the Employee Organization:

Kay E. Cremeans, Attorney, Fraternal Order of Police, Ohio Labor Council, Inc.
Frank T. Lambros, Staff Representative, F. O. P., Ohio Labor Council, Inc.
James Frodge, Sergeant, Union Township Police Department
David McIntosh, Patrolman, Union Township Police Department
John Lucas, Detective, Union Township Police Department
Gregory Jasper, Detective, Union Township Police Department
Michelle Burkey, Dispatcher, Union Township Police Department

For the Employer:

Charles A. King, Director of Labor Relations, Clemans, Nelson & Associates, Inc.
Lawrence E. Barbiere, Attorney
Tom Knox, Chief of Police
Ken Geis, Township Administrator
Darlene M. Anthony, Court Reporter, LSS Incorporated

PROCEDURAL BACKGROUND

Union Township (herein called "the Employer" or "the Township") is located in Clermont County, Ohio, where it employs about 112 full-time employees, currently including 48 who are covered by the collective bargaining agreements at issue in this proceeding. Fraternal Order of Police, Ohio Valley Lodge No. 112 (herein called "the Employee Organization," "FOP," or "the Union") was certified by the State Employment Relations Board ("SERB") in March 1987 to represent three collective bargaining units, one consisting of all full-time Patrolmen, another made up of all full-time Sergeants, and another unit comprised of all Dispatcher/Clerks. There are currently thirty patrol officers, seven sergeants, and eleven dispatchers. The three collective bargaining units have been covered by a "multiple unit agreement" which applies equally to all units, except where specifically limited, and which expired on March 31, 1999.

The Parties met to negotiate a successor agreement in the Spring of 1999, reaching agreement on nearly all of the articles and sections to be included in the new collective bargaining agreement, which is to become effective upon execution and to remain in effect until March 31, 2002. Those agreements, which were entered into the record at the hearing under tab 5 of the Employer's evidence binder and tab 6 of the Union's evidence binder, are hereby incorporated into this Award. Two issues remained in dispute, however: Article 7, Discipline, and Article 24, Wages.

A hearing was held on June 18, 1999 before Fact Finder Frank A. Keenan, who issued his report and recommendations on July 9, 1999. Thereafter, the Employer timely rejected those recommendations. Pursuant to the parties' selection, on July 29, 1999, the

State Employment Relations Board appointed the undersigned as Conciliator, pursuant to Ohio Revised Code Section 4117.14(D)(1). The SERB provided the Conciliator with a copy of the Fact Finder's Report and Recommendations. Prior to the hearing, the parties submitted their written reports, summarizing the unresolved issues, the parties' final offers as to each unresolved issue, and the rationales for their positions. The conciliation hearing, at which both parties were given full opportunity to call witnesses to testify, to offer documentary evidence, and to argue their positions, was held on September 24, 1999 at the Township's offices.

The Conciliator explored with the parties the feasibility of mediating the issues, but neither issue was resolved by mediation. Unresolved issues remaining for consideration by the Conciliator were:

1. Article 7, Discipline, Section 7.5, second paragraph, and

2. Article 24, Wages.

CRITERIA

Consideration was given to the criteria listed in Ohio Revised Code Section 4117.14 (G)(7) of the State Employment Relations Board:

> 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, taking into consideration the following:
>
> (a) Past collectively bargained agreements, if any, between the parties;
>
> (b) 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;

(c) 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;

(d) The lawful authority of the public employer;

(e) The stipulations of the parties;

(f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of 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.

After carefully considering all reliable and relevant evidence presented with respect to the issues at impasse, the arguments of the Parties, and the foregoing criteria, the Conciliator submits the following resolution of the disputes.

ISSUES AND AWARDS

Issue 1: Article 7, Discipline, Section 7.5, second paragraph

The recently-expired collective bargaining agreement provides, in Article 7, titled "Discipline," that the Employer may take disciplinary action against any employee, for "just and sufficient cause," if the employee violates "established standards of conduct," commits an act "which any reasonable person should know to be wrong," etc. Five forms of disciplinary action are: counseling, written reprimand, suspension, demotion, and discharge. Discipline is to be "applied in a progressive and uniform manner," with "penalties . . . appropriate to the offense." Certain procedural guidelines are set forth for investigation, hearing, and decision-making regarding alleged misconduct, including definitions of the roles of FOP representatives, supervisors, the Chief of Police, the Township Administrator, and the Board of Township Trustees. Supervisors may impose

counseling and reprimands, which may be grieved but not arbitrated. The Chief conducts pre-disciplinary conferences when suspension, demotion, or discharge may result.

Finally, Section 7.5 reads as follows:

> Section 7.5 The Township Administrator will conduct a disciplinary hearing to review the Chief's findings and recommendation for discipline. The Administrator will prepare for submission to the Board the formal recommendation for discipline. At the discretion of the employee, a hearing before the Board may be waived. Prior to any proposed suspension, demotion, or discharge, the employee shall be entitled to a hearing before the Board within thirty (30) calendar days of the formal recommendation of the Township Administrator. At the option of the accused employee, the hearing shall be held either in open session or executive session. The accused may be represented by counsel or anyone of his choosing. Following the presentation of all evidence and testimony, the Board shall determine what discipline, if any, is appropriate.
>
> **In the event the Board imposes a suspension, demotion, or discharge the employee may appeal such action to the Clermont County Court of Common Pleas within ten (10) days of issuance of the discipline in accordance with O.R.C. Section 505.49.**

The final paragraph is at issue in this proceeding. According to the Fact Finder's Report, the parties' positions at the time of the Fact Finding Hearing were as follows:

> The F.O.P. would retain Sections 7.1 through and including Section 7.4, and would make some changes to Section 7.5. Thus the F.O.P. would delete the last paragraph of Section 7.5, beginning, "In the event the Board imposes a suspension etc. etc.," and substitute in lieu thereof, as follows:
>
> > **"Disciplinary action involving suspension, demotion or discharge may be submitted directly to Step 3 of the grievance process."** [Emphasis added.]
>
> In other words the F.O.P. seeks binding arbitration (Step 3 of the Grievance Procedure), in place of the current Contract's provision providing employees with the right to appeal suspension, demotion or discharge actions of the board of Trustees to the Clermont County Court of Common Pleas in accordance with Ohio Revised Code Section 585.49, and the employee option of having the Recommendation to the Board of Trustees being made by a neutral Arbitrator, as proposed by the Employer. Additionally, the F.O.P would add Section 7.6 and Section 7.7,

The Union proposals for new Sections 7.6 and 7.7 concerned the use of polygraph examinations and the manner in which the Employer was to notify the employee of the results of the disciplinary procedure. The Employer opposed binding arbitration of suspensions, demotions, and discharges. The Township also opposed adding new sections regarding lie detector tests and notification of disciplinary decisions.

After discussing the parties' evidence and arguments, the Fact Finder recommended in favor of the Employee Organization's proposal to permit binding arbitration of suspensions, demotions, and discharges. He recommended against the parties' other proposals.

Position of the Employee Organization:

In its pre-hearing submission, the Union summarized its position thus:

> The current Agreement does not provide for binding arbitration for disciplinary action involving demotion, suspension or termination. The FOP is proposing binding arbitration through FMCS. The Fact Finder recommended our proposal. . . . The FOP membership has accepted the Fact Finders recommendation and our last offer for conciliation is [that] disciplinary action of suspension, demotion or discharge is [to be] submitted to Step 3 of the grievance process.

The Union's final offer proposes to retain the language of Article 7, except for the final paragraph of Section 7.5, for which it would substitute this language:

> **Disciplinary action involving suspension, demotion, or discharge may be submitted directly to Step 3 of the grievance process.**

Position of the Employer:

The Township's pre-hearing submission contained this statement of its position on this issue:

> Discipline: The Township proposes to maintain existing language. The due process rights of police personnel are expressly delineated in the Ohio

Revised Code. The parties cannot negotiate the jurisdiction of the court of common pleas. The Union seeks to force the Employer to accept arbitration of disciplinary disputes. The Employer has filed an unfair labor practice charge on the basis that the Union has submitted a permissive topic of bargaining to the impasse procedure. The Employer will object to any proposal by the Union to arbitrate disciplinary disputes that are subject to O.R.C, Section 505.49.

For its proposed contract language, the Employer submitted the following:

Article 7

Discipline

Section 7.1. No change.

Section 7.2. No change.

Section 7.3. No change.

Section 7.4. No change.

Discussion:

At the conciliation hearing, the parties submitted arguments and copious evidence in support of their positions. My general impression is that these arguments and this evidence are much the same as were presented to Fact Finder Keenan, whose recommended contract language is now proposed, verbatim, by the Union.

The Union asserted that employee discipline is a mandatory subject of bargaining already covered in the contract. If the Ohio legislature had intended to exclude townships from eligibility for arbitration of discharges, it has had 15 years to do so, FOP observed. The Union points out that the Employer waited to file its unfair labor practice charge, alleging the Union's proposal as a violation, until after the Fact Finder's Report ruled against the Township.

The FOP again emphasized the fact that nearly all of the comparable jurisdictions have binding arbitration for serious discipline, including discharge. Although the 40 townships adopting this measure are actually 90.9% of the 44 unionized townships, not 99% as the Fact Finders Report related, the FOP advised that another township has subsequently entered into a contract with this arbitration clause, bringing the percentage up to 93% and demonstrating an undeniably clear standard. Also, the Township has such a provision in its collective bargaining agreement with the union representing its Service Department employees. The Union argued that the present administration has experienced disciplinary actions with increasing frequency, thus justifying a change in this Article of the collective bargaining agreement. Previous contracts allowed arbitration for the Dispatchers unit, and arbitration is needed for all units in cases involving "the capital punishment of employment relations."

The Employee Organization cited court cases for the proposition that labor arbitrators are recognized to have greater expertise than most courts have in the area of labor relations, and especially in areas of discipline. The FOP argued that courts are overworked, and they tend to focus on the procedural due process aspect of underlying proceedings, rather than the facts of the case. The Union said it is not seeking to deny officers the right to appeal to the Court of Common Pleas, but they need access to the neutral expertise of an arbitrator as well. Fact Finder Keenan observed in his Report that nothing about the Union's proposal was unlawful, and that most other jurisdictions have assumed the risk that an officer may take "two bites of the apple."

The Township argued that the Conciliator is without jurisdiction to grant the Union's proposal, under Ohio Revised Code Section 505.49, which provides the exclusive remedy for a Township's termination or suspension of a police officer. All Township authority derives from the State legislature, which provided in ORC 505.49 that townships may establish police districts. If a township does so and hires officers who qualified for police work by completing approved training programs, then the officers who suffer "removal or suspension" by the board of township trustees "may appeal the decision of the board to the court of common pleas . . . to determine the sufficiency of the cause of removal or suspension," the statute says. The Employer argued that it has no duty or ability to infringe upon this right to appeal to the Court of Common Pleas, and that court decisions support the view that a contract which is contrary to the statute is unenforceable. The Township also contends that the FOP committed an unfair labor practice by insisting to impasse on including this non-mandatory subject of bargaining in the contract, and the Conciliator would exceed his jurisdiction if he were to order mandatory arbitration..

The Employer contends that it cannot bargain away the jurisdiction of the Court of Common Pleas, and that even those employees of township police agencies with arbitration of discipline and discharge in their labor agreements nevertheless have the protection of the Court of Common Pleas. Most township employees covered by arbitration of discipline and discharge, such as the Employer's AFSCME-represented unit, are "at will" employees, not covered by ORC 505.49(B)(3). The most relevant "internal comparable" bargaining unit, the fire fighters, include identical language in

their contract: "In the event the Board imposes a suspension, demotion, or discharge, the employee may appeal such action to the Clermont County Court of Common Pleas . . . ." The Employer argued that the parties have lived 15 years under labor agreements which do not provide for arbitration of suspensions, demotions, and discharges, and the Union failed to show any need to change the contract language because there has been no upsurge in serious disciplinary actions.

Opinion

The Union's proposal would accomplish two things: 1) remove from the contract a reference to police officers' statutory right to appeal to the Court of Common Pleas after being suspended or discharged; and 2) explicitly insert into the contract the right of employees to arbitrate suspensions, demotions, and discharges which violate the contract.

In the opinion of the Conciliator, selection of one of the parties' final offers should take into account the provisions of Article 5, Grievance Procedure (one of 16 items regarding which neither party proposed any changes in the new contract). Relevant portions read as follows:

ARTICLE 5

GRIEVANCE PROCEDURE

Section 5.1. The term "grievance" shall mean an allegation by a bargaining unit employee that there has been a breach, misinterpretation, or improper application of this Agreement.

Section 5.2. All grievances must be in writing and must contain the following information to be considered:

* * *

Section 5.3. All grievances must be presented at the proper step and time in progression in order to be considered at the subsequent step. The aggrieved may withdraw a grievance at any point by submitting, in writing, a statement to that effect, or by permitting the time requirements

at any step to lapse without further appeal. . . . The following are the implementation steps and procedures for processing grievances:

Step 1: Within fifteen (15) calendar days of the date on which the facts or circumstances giving rise to the grievance occurred, the grievant and his steward (or representative) shall present the written grievance to the Chief of Police. The Chief shall meet with the grievant and steward. . . .

Step 2: If the grievance remains unresolved following Step 1, the employee and his steward or representative shall present the grievance to the Township Administrator . . . . The Administrator shall conduct a hearing . . . and shall issue a written response . . . .

Step 3: Arbitration. A grievance unresolved at Step 2 may be submitted to arbitration upon request of the FOP in accordance with this Section of this Article.

The FOP, based upon the facts presented, has the right to decide whether to arbitrate a grievance. . . .[T]he FOP shall notify the Employer of its intent to seek arbitration over the unresolved matter. The FOP may withdraw its request to arbitrate at any time prior to the actual hearing. Any cancellation fee due the arbitrator shall be paid by the party (or parties) cancelling the arbitration. Any grievance not submitted within the twenty (20) calendar day period described above shall be deemed settled on the basis of the last answer given by the Employer's representative(s).

A. The representatives of the parties shall attempt to agree on an arbitrator. . . .

   The arbitrator shall limit his decisions strictly to the interpretation, application, or enforcement of specific articles in this Agreement. He may not modify or amend the Agreement.

B. The question of arbitrability of a grievance must be raised by either party before the arbitration hearing of the grievance, on the grounds that the matter is non-arbitrable or beyond the arbitrator's jurisdiction. If the arbitrator determines the grievance is within the purview of arbitrability, the alleged grievance will be heard on its merits before the same arbitrator.

C. The decision of the arbitrator in all matters shall be final and binding. The arbitrator shall be requested to issue his decision within thirty (30) days after the conclusion of testimony and argument.

D. The costs of the services of the arbitrator, the cost of any proofs produced at the direction of the arbitrator, the fee of the arbitrator, if any, or the hearing room, shall be borne equally by the Employer and the FOP. . . . Any bargaining unit member whose attendance is required for such hearing shall not lose pay or benefits to the

extent such hearing hours are during normally scheduled working hours on the date of the hearing.

Section 5.4. When an employee covered by this Agreement chooses to represent himself in the presentation of a grievance, no adjustment of the grievance will be inconsistent with the terms of this Agreement. Prior to the hearing of any such grievance, the appropriate FOP steward will be notified of his/her right to be present at the hearing.

Section 5.5. The FOP shall use a grievance form, which shall provide the information outlined in Section 2. The information the responsibility for the duplication, distribution, and their own accounting of the grievance forms.

Section 5.6. Time limits set forth in this Article may be waived by mutual, written agreement.

A comparison of Article 5, Grievance Procedure; Article 7, Discipline' and ORC 505.49 shows:

1. the minor forms of discipline -- counseling and written reprimands -- can be grieved, but not arbitrated;
2. police officers holding a certificate of training who experience "removal or suspension" have a statutory right to appeal to the Court of Common Pleas;
3. the statute omits any reference to similar appeal rights for employees who were not hired as police officers after earning a certificate from an approved training program;
4. the statute omits any reference to appeals to the court from "demotions;" and
5. the existing last paragraph of Section 7.5 purports to broaden the right to appeal to the Court of Common Pleas, to include employees other than qualified officers and to include employees who suffer "demotion in pay and position."

In my experience, it is not uncommon for an employer and a union to include in their collective bargaining agreement a reaffirmation of their intention to follow certain employment-related laws, such as occupational safety, equal employment opportunity,

etc., thus creating for employees a contract right which duplicates their statutory right. The last paragraph of Section 7.5, which includes a restatement of qualified officers' rights under ORC 505.49, appears to be a similar duplication. ORC 505.49 already provided Township police officers with this avenue for appeal, to the Court of Common Pleas, of their suspension or discharge, even before the parties put this language into their collective bargaining agreement; and the statutory right exists independently of its acknowledgment in the collective bargaining agreement.

With all due regard to the Township's reluctance to negotiate the jurisdiction of the Court of Common Pleas, I am not convinced that it makes any difference whether this language is in the contract, or not, insofar as it duplicates statutory rights. Omitting the language will eliminate the court appeal right of employees who do not hold a certificate of training as a police officer, and will remove demotions from the list of actions which may be appealed to the court, but neither of these rights are created in ORC 505.49, as I read it. Thus, no statutory area of jurisdiction of the Court of Common Pleas will be eliminated by omitting the old contract language.

Nothing on the face of the recently expired contract prevented the filing of a grievance alleging that a suspension, demotion, or discharge fails to meet the "just and sufficient cause" standard set forth in Article 7, Discipline or otherwise violated the contract. In the opinion of the Conciliator, the ability to take such a grievance to arbitration is not barred by the final paragraph in Article 7 of the recently expired contract: In sum, I am not convinced that it makes any difference whether this language remains in the parties' collective bargaining agreement, or not.

However, a 1995 arbitration decision and/or the parties' past practice of treating suspension, demotion and discharge as outside the scope of the grievance procedure, could stand in the way of arbitrating a grievance on such matters, unless the new contract explicitly and unambiguously states that these serious disciplinary actions are covered by the grievance and arbitration procedure. The Union's proposal, to state specifically in the contract that this grievance and arbitration procedure applies to suspension, demotion, and discharge, would have exactly that effect.. Mandatory, binding arbitration of serious discipline is an accepted feature of most collective bargaining agreements, and it provides protections which are simply not available under court review.

In conclusion, like Fact Finder Keenan, I am convinced that adoption of the Union's final offer is the better choice. Township Police Officers will still have the statutory protection they have had under ORC 505.49, and all Police Department employees, not only police officers, will have access to final and binding arbitration to determine whether their disciplinary suspensions, demotions, and discharges meet the contractual "just cause" standard, and comply with other provisions of the contract.

Award:

The proposal of the Employee Organization is selected for inclusion in the Parties' collective bargaining agreement.

Issue 2: Article 24, Wages

Section 24.1 of the recently-expired collective bargaining agreement begins with a chart of the annual and hourly wages of Dispatcher/Clerks who earn the "probation rate," followed by annual and hourly wages of Dispatcher/Clerks with 12 months' service, 24 months, and 36 months. The same information is set forth for Patrol Officers. Sergeants' annual and hourly rates are set forth without any longevity increases. The foregoing wage scale, which became effective April 1, 1996, is followed by the remark, "The above rates reflect a 4% increase." The same format is followed for rates effective April 1, 1997, with the comment, "The above rates reflect a 3% increase;" and the rates effective April 1, 1998 are followed by an explanation that "The above rates reflect a 2% increase." Article 24 continues with Sections 24.2 and 24.3, which are not in dispute. The Township's budget is based on a calendar year, commencing January 1, and the references to April 1 are not based on the date beginning a fiscal year.

Fact Finder Keenan summarized the parties' proposals at the time of the Fact Finding Hearing, as follows:

> The F.O.P. proposes an across-the-board increase of 5%, 4%, and 3% effective April 1, 1999, April 1, 1999, and April 1, 1999, for Section 24.1. No change is sought for Sections 24.2 and 24.3. The F.O.P. would add a new "Section 24.4 - Longevity," calling for 1% above top pay at 5 years of service; 2% above top pay at 10 years of service; 3% above top pay at 15 years of service; and 4% above top pay at 20 years of service.
>
> The Township proposes an across-the-board increase commencing effective with the effective date of the Contract of 5% the first year of the Contract; 3% the second year of the Contract; and 2.5% the third year of the Contract. The Township proposes no changes to Sections 24.2 and 24.3 and resists the F.O.P.'s proposal for longevity pay in a new Section 24.4.

After weighing the evidence and arguments presented to him, Fact Finder Keenan concluded that "the Township's wage proposal represents a reasonable resolution of the parties' dispute in light of the applicable statutory factors," and that the Employee Organization's longevity proposal "represents a dramatic departure from past collectively-bargained agreements." His recommendation reads as follows:

> It is recommended that the wage scales currently reflected in Section 24.1, effective April 1, 1998, be improved by an across-the-board increase of 5%, effective April 1, 1999; that an additional across-the-board increase of 3% be effectuated April 1, 2000; and that an additional across-the-board increase of 2.5% be effectuated April 1, 2001.
>
> It is recommended that no changes be made to Sections 24.2 and 24.3.
>
> The F.O.P.'s proposed Section 24.4 proposing longevity pay is not recommended.

Position of the Employee Organization:

The FOP made two submissions prior to the conciliation hearing, one sent by Priority Mail which was received by the Conciliator on September 18, six days before the hearing, and another which was sent by facsimile ("fax") and received on the day before the day of the hearing. The second final offer, on Article 24, was nearly identical to the first one, except that the distribution and dollar amounts of proposed bonus payments were changed. At the hearing, the Township urged the Conciliator to reject the second final offer on the grounds that it is time-barred by the collective bargaining law.

The SERB's July 29, 1999 letter to the representatives of the parties included these instructions, to which I have added emphasis with bold type:

> **In advance of the hearing**, each party must send its position statement to the conciliator and to the other party in compliance with Ohio Administrative Code Rule 4117-9-06(E). (See enclosed Conciliation Hearing and Report Guidelines.)

Section 4117(G) of the Ohio Revised Code provides, in part:

> (G) The following guidelines apply to final offer settlement proceedings under division (D)(1) of this section: * * *
>
> (3) The conciliator shall conduct the hearing pursuant to rules developed by the board. The conciliator shall establish the hearing time and place, but it shall be, where feasible, within the jurisdiction of the state. **Not later than five calendar days before the hearing**, each of the parties shall submit to the conciliator, to the opposing party, and to the board, a written report summarizing the unresolved issues, the party's final offer as to the issues, and the rationale for that position. (Emphasis added.)

The SERB rules, referred to above, state, in relevant part at 4117-9-06:

> Upon notice of the conciliator's appointment, each party shall submit to the conciliator and serve on the other party a written statement. A failure to submit such a written statement to the conciliator and the other party **prior to the day of the hearing** shall require the conciliator to take evidence only in support of matters raised in the written statement that was submitted **prior to the hearing.** (Emphasis added.)
>
> * * *
>
> If, after submission of the parties' reports, mediation efforts result in a change in a final offer, a party may, with the permission of the conciliator, submit a revised final offer to the conciliator.

The SERB *Conciliation Guidebook* states:

> **<u>Position Statements</u>**
>
> **Prior to the hearing**, the parties must send the following information to the conciliator and to the other party:
>
> 1) The name of the party and the name, address and telephone number of the principal representative of the party;
>
> 2) A description of the bargaining unit including the approximate number of employees;
>
> 3) A copy of the current collective bargaining agreement, if any, and
>
> 4) A report defining all unresolved issues, stating the party's final offer as to each unresolved issue, and summarizing the position of the party with regard to the unresolved issue. ***[O.A.C. Rule 4117-9-06(E)]***. (Positions are to be written in contract language form and indicate effective date of the provisions.)
>
> A party must file its position statement with the conciliator and the other party **prior to the day of the hearing**. Failure of a party to submit timely this information shall cause the conciliator to take evidence only in

> support of matters raised in the written statements submitted prior to the hearing ***[O.A.C. Rule 4117-9-06(E)]***. The conciliator is responsible for enforcing this rule requirement.
>
> On occasion, the parties will stipulate to a waiver of the rule requirement regarding the filing of position statements. The parties exercise such an option at their own risk. No precedent exists to support or oppose the ability of the parties to stipulate to a waiver. (Emphasis added.)

The Union presented evidence in the hearing that it requested certain information (gross earnings) upon which to base its final offer, and that the Employer was careful to obscure some data on the payroll forms which it provided. The Union asserts that the failure of the Employer to provide the requested information promptly prevented it from making the calculations necessary to formulate its final offer regarding a "sign in bonus," and that it submitted its second final offer after making further detailed calculations based on the incomplete information available to it.

In the opinion of the undersigned, there is a degree of ambiguity created by the reference in ORC 4117(G)(3) to "five calendar days" and the consistent use, in SERB's guidelines and rules, of the phrases, "prior to the hearing," and "prior to the day of the hearing," without any more specific limitation. It appears to the Conciliator that the Employer's pre-hearing submission omits some information required by the Rule (approximate number of employees, positions written in contract form), yet no objection was raised to its admissibility. It appears to the undersigned that a major reason for the time limit on parties' submissions is to put one another, and the Conciliator, on notice regarding what issues each party intends to introduce, not to pin them down on what position they will take about those issues. Further, it appears that the purpose of the conciliation procedure is to facilitate collective bargaining, and the Union's second final

offer is a compromise position which ostensibly brings the parties' positions closer to agreement. I will interpret the ambiguous guidelines in favor of allowing the Union's second final offer, received the day before the hearing day. I view this ruling as consistent with the conciliator's authority to receive a revised final offer after mediation.

The Union's second final offer reads as follows:

> The FOP-OLC, Inc. on behalf of our membership is modifying our proposal on the sign in bonus as follows:
>
> All Bargaining Unit Members shall receive the following sign in bonus according to their classification
>
> | | |
> |---|---|
> | Dispatchers Unit | $ 1022.40 |
> | Patrol Officers | $ 1324.80 |
> | Sergeants | $ 1512.00 |
>
> * * *
>
> **Union Township Police Department 1999**
> **Conciliation Submission**
>
> **ARTICLE 24**
> **WAGES**
>
> **Section 24.1**
>
> A. Effective April 1, 1999 Bargaining Unit Members shall receive a 0 % raise.
>
> B Effective January 1, 2000 Bargaining Unit Members shall receive an 8% increase to current wages.
>
> C. Effective April 1, 2001 Bargaining Unit Members shall receive a 2.5 % increase to their hourly wages.
>
> **Section 24.2** The Employer shall have the right to begin a new hire employee in Unit A or Unit C at any rate in the wage scale. Members must progress through the remaining steps upon the succeeding anniversary dates.
>
> **Section 24.3** The probationary rate for Unit B shall be the mid- point between top patrolman and the non-probationary sergeant rate.

Section 24.4 All bargaining Unit Members shall receive a one time only sign in bonus as follows:

Unit A $ 1022.40
Unit B $ 1324.80
Unit C $ 1512.60

Sign in Bonus shall be made in a separate check, and such payment shall be in one lump sum minus any statutory payroll deductions.

Bargaining Unit Members shall receive the sign in bonus during the month of January 2000.

Unit A, referred to above, is the bargaining unit of Patrol Officers; Unit B is the Sergeants' unit, and Dispatcher/Clerks are Unit C. I note that, with only an insubstantial variance, Sections 24.3 and 24.4, above, are identical to the language in the recently expired contract.

Position of the Employer:

The Township's pre-conciliation submission stated, "Wages: The Employer's proposal is exactly what the fact finder awarded. A total increase of ten and one-half (10½) percent." For its proposed contract language, the Employer submitted the following:

Article 24

Wages

Section 24.1. Effective the first pay period following January 1, 2000, rates of pay for bargaining unit members shall be increased by five percent (5%). Effective the first pay period following April 1, 2000, rates of pay for bargaining unit members shall be increased by three percent (3%). Effective the first pay period following April 1, 2001, rates of pay for bargaining unit members shall be increased by two and one-half percent (2 ½ %).

Section 24.2. No change.

Section 24.3. No change.

In the interest of clarity, I note that the Employer's proposal is not exactly what the Fact Finder awarded, to the extent that his proposed wage increase would have become effective retroactively on April 1, 1999, whereas the Employer's final offer would be effective at the beginning of the next budget year, January 1, 2000.

Discussion:

As was the case with the first issue, it appears that the parties made similar arguments and presented nearly the same evidence as they put before the Fact Finder, whose recommendation favored the Township's wage rates and the Union's retroactivity.

The Employer pointed out that a new Consumer Price Index report has issued for "Cincinnati-Hamilton, OH-KY-IN" which begins:

> Consumer prices in the Cincinnati-Hamilton metropolitan area increased 1.2 percent during the 1st half 1999. This was in line with a 1.0 percent increase recorded in the 1st half 1998. The Cincinnati-Hamilton Consumer Price Index for All Urban Consumers (CPI-U) for the 1st half 1999 was 157.7 (1982-84 = 100), representing a 2.1 percent annual increase from the 1st half 1998. This was similar to the 2.0 percent increase in the previous 12 month period.

The Employer points out that this new data supports the previous information, upon which the Fact Finder relied. Data from a recent SERB publication showed a trend toward recent wage increases of 10.5% over the term of three-year contracts. The Township pointed out that its proposal "front loads" the increases, which is to the employees' benefit, and makes the 5% increase effective with the first pay period of the next budget year, to be followed three months later with another 3% increase. The Employer's comparisons with comparable jurisdictions support the Employer's proposal,

with a few anomalies which were explained. The Employer's proposal would result in wages in the following ranges for the three employee groups over a three-year period:

	Year 1 - 5%	Year 2 - 3%	Year 3 - 2.5%
Dispatcher	22,844.64 - 31,231.20	23,529.29 - 32,108.14	24,117.52 - 32,972.34
Patrol Officer	32,550.09 - 40,186.63	33,320.59 - 41,392.23	34,153.61 - 42,427.03
Sergeant	45,746.90	47,119.31	48,297.27

An Employer exhibit detailed the costs of benefits and showed the total cost of compensation received by Police Department employees. Another exhibit showed that wage increases have outpaced inflation in recent years. In conclusion, the Employer asserted that its proposal is reasonable and consistent with the facts. The Employer remarked that the term "sign in bonus" is unfamiliar to it, and the purpose of a "signing bonus," to induce employees to accept an offer, is not applicable in this situation.

The Union concedes that the Employer is able to prevent a wage increase retroactive to the expiration of the latest collective bargaining agreement (April 1, 1999) because the law prohibits it, without the Employer's consent. In previous contract negotiations, the Township never opposed retroactivity. The FOP proposes to cut the employees' losses, caused by the delay, by making the first 8% increase entirely due immediately at the beginning of the year (January 1, 2000) and by giving employees a "sign in bonus" to make up for part of the wages lost by delaying the increase.

The Employee Organization presented data regarding pay scales and rates of wage increases at police departments in comparable townships, which supported its argument for higher wages. Other sources were cited to show that the Township is

growing rapidly, and the employees' workload has increased. According to the Union's calculations, the Township's delay of the wage increase deprives bargaining unit employees of a substantial amount of money; the Union's proposal for a "sign in bonus" is intended to soften the blow, although it is too little to compensate for the actual loss caused by the delay.

As noted above, Fact Finder Keenan made an extensive analysis of the data presented him, which was obviously included in the evidence presented at conciliation. He concluded that wages should be increased 5% on April 1, 1999, 3% on April 1, 2000, and 2½% on April 1, 2001. I am persuaded that the Fact Finder's judgment was correct. Given the unavailability of a final offer which conforms with the optimum solution, I will compare the two final offers available for implementation. As the parties observed at the conciliation hearing, their final offers are not so far apart, yet they did not resolve their differences through mediation.

Although the Township's offer is generous, it does not account for the delay in employees' wage adjustments during the period between the end of the previous Agreement and the beginning of the next budget year (April 1, 1999 to January 1, 2000). Moreover, the Township's rejection of retroactivity, which it is privileged to do under the law, does not appear to be based on economic necessity or principle. Rather, denial of retroactivity is ostensibly the Employer's retaliation for the Union's steadfastly seeking arbitration of discharge and discipline cases.

ORC 4117.14(G)(7), quoted above, requires the Conciliator to give consideration to several specific factors and "such other factors . . . which are normally or traditionally

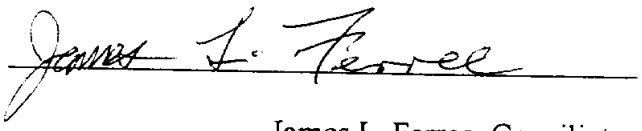
taken into consideration in the determination of issues submitted to . . . impasse resolution procedures in the public service or in private employment." One such factor is the impact an award will have on the parties' future relationship. In the opinion of the undersigned, the long-term relationship between the Township and the Union which represents its Police Department employees will be better served by adoption of the final offer which more greatly reduces the financial losses suffered by the employees because of the Employer's refusal to grant retroactivity. Therefore, I will select the Union's second final offer, detailed above, rather than the Township's final offer.

Award:

The proposal of the Employee Organization is selected for inclusion in the Parties' collective bargaining agreement.

CONCLUSION

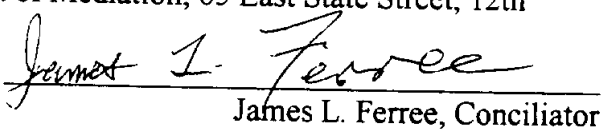
The Conciliator hereby submits his final offer settlement award and orders that the awards herein and the parties' pre-conciliation agreements be incorporated into their collective bargaining agreement .



James L. Ferree, Conciliator

TRANSMITTAL

I hereby certify that on this 27th day of September, 1999, a copy of the foregoing Final Offer Settlement Award was served upon Charles A. King, Dir. of Labor Relations Clemans, Nelson & Associates, Inc., 8520 East Kemper Road, Suite 4, Cincinnati Ohio 45249; Frank T. Lambros, Staff Representative, Fraternal Order of Police Lodge No. 112, 533 Old State Route 74, Mt. Carmel OH 45103; and G. Thomas Worley, Administrator, State Employment Relations Board, Bureau of Mediation, 65 East State Street, 12th Floor, Columbus Ohio 43215-4213.



James L. Ferree, Conciliator