

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the matter of Fact Finding between	)	SERB Case Nos.
	)	2017-MED-09-0935
	)	2017-MED-09-0936
FRATERNAL ORDER OF POLICE,)	
CAPITAL CITY LODGE NO. 9,	)	Hearings: August 14, 21, 22
	)	27, 2018; September 11, 2018
Employee Organization,	)	and October 15, 2018
)	
and	)	Date of Report:
	)	November 27, 2018
CITY OF COLUMBUS,)	
	)	Before Mitchell B. Goldberg,
Public Employer.	)	SERB Appointed Fact Finder

FACT FINDING REPORT

Appearances: Ronald Linville and Jennifer Edwards, Attorneys for the City; and Russell Carnahan and Nicole Wannemacher, Attorneys for the FOP.

I. Introduction and Background.

The Ohio State Employment Relations Board ("SERB") appointed the undersigned as the Fact Finder of this public employment labor dispute on April 13, 2018. The hearings in this matter took place in Columbus, Ohio at the Columbus Police Academy on August 14, 21, 22, and 27, 2018; September 11, 2018; and October 15, 2018. The parties presented witnesses and extensive exhibits as evidence in support of their respective positions. Bargaining committee representatives were present in significant numbers on both sides. Due to the numerous individuals present, I will reference witnesses and counsel only. The parties submitted post-hearing briefs on November 5, 2018.

The FOP represents two bargaining units of City employees: (1) sworn police officers below the rank of Sergeant; and (2) sworn police officers holding the rank of Sergeant or above, which includes Lieutenants and Commanders but excludes the Chief and Deputy Chiefs. Both units have traditionally bargained together and been included in a single collective bargaining agreement ("CBA").

The City's other bargaining units include the International Association of Fire Firefighters, Local No. 67 (IAFF); Fraternal Order of Police, Ohio Labor Council, Inc. (FOP/OLC); Ohio Council 8, American Federation of State, County and Municipal Employees AFLCIO and its Local 1632 (AFSCME 1632); Ohio Council 8, American Federation of State, County and Municipal Employees AFL-CIO and its Local 2191 (AFSCME 2191); and Communication Workers of America AFL-CIO and its Local 4502 (CWA). The City's management compensation plan (MCP) establishes the wages, health insurance, and other fringe benefits for management employees.

The current CBA expired on December 8, 2017. The parties agreed to operate under the terms and conditions of their expired CBA until a successor CBA is agreed upon and executed. Negotiations for a successor agreement between the parties began in September 2017. The bargaining teams met on 22 occasions in an effort to negotiate a successor agreement.

The following recommendations on the unresolved issues in this Report incorporate all unchanged articles and provisions from the parties' expired CBA. They are made in accordance with the existing statutory factors and standards incorporated in SERB Rules and Guidelines. They are: (A) past collectively bargained agreements between the parties; (B) consideration of 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; and (F) such other factors, not confined to those listed in this section, which are normally, or traditionally taken into consideration in the determination of the issues submitted to final offer settlement

through voluntary collective bargaining, mediation, fact finding, or other impasse resolution procedures in the public service or in private employment.

II. Economic Evidence.

In 2008, Columbus was, as was most of the nation, adversely affected by a stark downturn in the economy. Then-Mayor Michael Coleman convened an Economic Advisory Committee ("EAC") to make recommendations on how to improve the City's finances. City Exhibits 53-59. The City began implementing the recommendations in a multi-year, phased approach that has continued to this date. Part of that approach included the City's commitment to a 10 Year Reform Plan with cost containment initiatives. City Ex. 58. Those initiatives are: (a) phasing out pension pick-up for City employees; (b) increasing employees' share of monthly health insurance premium contributions; and (c) reducing the costs of the various health insurance plans by making modest plan design changes. Since 2008, the City has focused on eliminating pension pick-up provisions from all of its CBAs. The City has also increased City employees' monthly insurance premium contributions across-the-board to cover increasing costs of health insurance. City Exs. 44-45. The City brought goals consistent with this approach to Fact Finding.

The FOP notes that the City has not claimed inability to pay its proposed across-the-board 5% wage increases. From its perspective, the City has fully recovered from the 2008 recession. Its population has grown significantly, the unemployment rate has dropped, and the General Fund revenue has increased significantly. FOP Exs. 19, 27, 27c-27f. Yet, the City's salaries for police officers have not kept up with the salaries of suburban officers. Further, the City's proposal for continued reduction in the pension pick-up necessitates a corresponding increase in wages due to the parties' bargaining history, as the FOP exchanged wage increases for pension pick-up in the past. The FOP

disagrees with the City's desire to shift increasing health care costs to FOP members. The parties' bargaining history reflects that the FOP made significant compromises during bargaining to keep its rich health insurance plan. Consequently, any changes to the insurance plan require careful consideration of the impact on members.

III. Unresolved Issues.

The parties presented extensive evidence to support their respective proposals and rebut one another's proposals. I have reviewed and considered the parties' exhibits, testimony, and arguments presented in pre-hearing statements and post-hearing briefs. In light of this evidence, I recommend that the parties maintain current contract language for the following provisions:

- Article 1.1 – Definitions
- Article 2.7 – Past Benefits and Practices
- Article 6.6 – Additional Release
- Article 8.1 – Internal Investigation Procedures
- Article 8.2 – Right to Representation
- Article 8.3 – Right to Disclosure
- Article 8.5 – Investigation Questioning
- Article 8.13 – Access to Records
- Article 8.17 – Relieved from Assignment or Duty
- Article 10.3 – Progressive Action
- Article 10.7 – Leave Forfeiture
- Article 11.1 – General Guidelines
- Article 11.3(C)(3) – Assignment Changes
- Article 12.5 – Grievance Procedure
- Article 22.7 – Report-in/Call-in Pay
- Article 22.11 – Canine Handlers
- Article 23.2 – Eligibility for Shift Differential
- Article 27.5 – Vacation Time
- Article 28 – Sick Leave
- Article 34 – Tuition Reimbursement
- Article 36.2 – Purchase of Service Handgun
- Article 36.4 – Body Worn Camera Compensation
- Article 36.5 – CALEA Accreditation Bonus
- Article 38 – Duration of Contract

Further, I recommend that the parties do not incorporate the November 3, 2016 Memorandum of Understanding concerning video/audio recordings into the contract as

a new Article 8.18, but I recommend that the parties, at their discretion, consider adding that Memorandum of Understanding to the contract appendix. With respect to the parties' other proposals, I recommend as follows:

Article 20.1 – Salaries and Compensation

City's Position

A fiscally responsible wage increase is consistent with the City's continued commitment to the EAC's recommendations, the 10-Year Reform Plan, and the City's obligation to be a responsible steward of taxpayer dollars. There has been only a 13% growth in year-to-date income tax collections through July 31, 2018, but 5% growth is necessary to maintain service levels from year-to-year. Tr. Vol. III, 719-720, 724-26, 734; City Ex. 54, p. 15. Thus, the 5% wage increase proposed by the FOP could potentially result in budget cuts to other departments. City Ex. 59, p. 1; Tr. Vol IV, 773-76.

The City proposes a 2% wage increase at ratification (and thus not retroactive), a 2% increase for the period including December 9, 2018 to December 8, 2019, and a 2% increase for December 9, 2019 to December 8, 2020. Additionally, the City opposes the F-Step proposal the Fact Finder requested from the FOP. A 5% differential between the E and F-Steps is excessive. It would produce problems at the Lieutenant and Commander ranks because the data demonstrates that those ranks, as distinguished from the lower ranks, are not lagging behind the comparable jurisdictions.

The City's proposal is more consistent with its recently negotiated CBAs with AFSCME 1632, AFSCME 2191, FOP/OLC, and the Fire Department unit. City Ex. 67. Its wage proposal is also supported by external comparables. Tr. Vol. IV, 813. SERB's Fact Finding/Conciliation Report from 2014-2017 showed an average 2.19% wage increase for fact finding awards for 2017. City Ex. 63. Additionally, FOP members, especially in

the higher ranks, are paid more than their counterparts in the four major Ohio cities and large national cities. Tr. Vol. IV, 826, 855; City Exs. 71-76.

The FOP proposal contains wage increases greater than those received by the City's other bargaining units historically and presently. Tr. Vol. III, 842; IV, 81; City Ex. 67. The FOP does not propose the types of cost-containment measures that the other bargaining units have agreed to during this and prior negotiations.

FOP's Position

The FOP proposes 5% annual wage increases with the first increase being retroactive to December 9, 2017. The City has fully recovered from the 2008 recession. Its population has grown significantly, the unemployment rate has dropped, and the General Fund revenue increased to \$852,520,000 in 2017. FOP Exs. 19, 27, 27c-27f. Further, the City has a AAA bond rating, unlike most large U.S. cities. In addition, the FOP contends the City's 0.5% income tax increase in 2009 was supposed to be used for safety services. Tr. Vol. II, 294-95.

When wages are considered in conjunction with pension pick-up, Columbus police officers, who were ranked second in annual salary among the law enforcement agencies in Franklin County, are now ranked fifteenth in 2018 as compared to their counterparts. FOP Ex. 19; Tr. Vol. III, 592-93. The annual base salary for a top-step Columbus officer, plus a 1.5% pension pickup, is now approximately \$6,500 below that of top-step officers in the highest ranked police agency in FOP Lodge 9. However, officers in Columbus encounter more crime and a larger population. FOP Ex. 30c; Tr. Vol. III, 597-98. If the City's proposal is implemented, Columbus police officers will fall even further behind their peers in the local market.

The City did not claim an inability to pay or that the FOP's proposals would be detrimental to its financial condition. Instead, the City claimed that the FOP's proposals

are inconsistent with certain policy goals. FOP Exs. 27g, 27i, 28a-28g. But, public safety is the City's most important service. It is the overwhelming policy goal.

The FOP proposes that 5% increases are warranted because bargaining unit wage increases have not kept pace with those of the other law enforcement agencies in Franklin County; and the City of Columbus' current economic condition and outlook continues to be excellent. Members of the CPD are highly trained, qualified, and dedicated professionals. The wage increase proposed for bargaining unit members by the FOP is reasonable, warranted, and well within the City's ability to pay.

RECOMMENDATION: I recommend wage increases of 3% each year, with the first being retroactive to December 9, 2017. I also recommend the addition of a new officer step (F-Step) that is 3% higher than the current top step (E-Step). Effective with the pay period that includes December 9, 2019, all officers ending their ninth year (or already having ended their ninth year) of continuous employment with the City will move to the new F-Step at the new hourly rate. The rank differential between officers and sergeants, between sergeants and current lieutenants, and between current lieutenants and current commanders, will remain at its current percentage (i.e. approximately 18%). But for those promoted to lieutenant or commander on or after January 1, 2020, the rank differential will be reduced to 15% between the ranks of sergeant-lieutenant and lieutenant-commander.

Article 20.2 – Member's Contribution to Pension Fund

City's Position

The City proposes a reduction in the FOP pension pick-up of 0.5% at ratification (reducing the pick-up from 1.5% to 1%) and another 1% reduction as of the pay period including June 1, 2019. This would result in the total elimination of the pension pick-up

for FOP members. This proposal conforms to the EAC's recommendations and all of the City's CBAs since 2010.

The City has followed through on its reduction of the pension pick-up for all other City employees, as well as FOP members hired on or after January 1, 2013. Tr. Vol. IV, 765, 819; City Ex. 68. Further, most suburban jurisdictions do not have a pension pick-up. Tr. Vol. III, 555-56. It would be imprudent from a financial management view to adopt the FOP's suggestion that every percentage point that is removed from the pension pick-up should be replaced by a percentage point increase in wages. Tr. Vol. III, 555-56. This is an unrealistic position given the reality of the City's budget and the potential reemergence of the structural imbalance. Tr. Vol. IV, 766.

FOP's Position

The FOP proposes the further elimination of the pension pick-up reductions. It proposes maintaining the City's 1.5% pension pick-up for employees hired before January 1, 2013. At a minimum, any reduction in pension pick-up should be counteracted by an increase in wages because pension pick-up is part of the wage package. Tr. Vol. III, 555-56. Historically, the FOP agreed to increases in pension pick-up in lieu of wage increases, so it would be unfair to now remove the pick-up without increasing wages. As recently as 2005, the City offered additional pension pick-up to the FOP (rather than meet the FOP's demand for a higher wage increase) in order to reach agreement on a collective bargaining agreement. Tr. Vol. II, 286, 316-17.

RECOMMENDATION: I recommend that the City's pension pick-up be reduced by 0.25% in 2018 and 0.5% in 2019. The City will pick up 1.25% of the employee's contribution in 2018 and .75% in 2019. A reduction in the pension pick-up is consistent with the established history between the City and all its employees. In addition, it is consistent with the EAC's recommendations. However, because pension pick-up has

been considered part of the wage package, a slower phase-out helps accomplish both parties' goals. I recommend the following language for Article 20.2:

20.2 Member's Contribution to Pension Fund.

- (A) That portion of the member contribution to the Fund of ~~one~~ **one** three and one-half percent (~~1.5%~~) of the member's earned compensation shall be picked up (assumed and paid) on behalf of the member and, in lieu of payment by the member, by the City of Columbus. Any remaining portion of the member contribution which might exist shall continue to be paid by the member, using the determined method of pension contribution.

Effective as soon as practicable following the acceptance of this collective bargaining agreement by City Council, but no earlier than December 9, 2018, that portion of the member contribution to the Fund of ~~one and one-quarter~~ **one and one-quarter** three—percent (~~1.25%~~) of the member's earned compensation shall be picked up (assumed and paid) on behalf of the member and, in lieu of payment by the member, by the City of Columbus. Any remaining portion of the member contribution which might exist shall continue to be paid by the member, using the determined method of pension contribution.

Effective the pay period including December 9, 2019, that portion of the member contribution to the Fund of ~~three quarters of one two and one-quarter~~ **three quarters of one** two and one-quarter percent (~~0.75%~~) of the member's earned compensation shall be picked up (assumed and paid) on behalf of the member and, in lieu of payment by the member, by the City of Columbus. Any remaining portion of the member contribution which might exist shall continue to be paid by the member, using the determined method of pension contribution.

~~Effective the pay period including December 9, 2016, that portion of the member contribution to the Fund of one and one-half percent (1.5%) of the member's earned compensation shall be picked up (assumed and paid) on behalf of the member and, in lieu of payment by the member, by the City of Columbus. Any remaining portion of the member contribution which might exist shall continue to be paid by the member, using the determined method of pension contribution.~~

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- (C) Both parties hereby declare that the sum paid hereunder by the City on behalf of the member (i.e., ~~3.5%, 3%, 2.25%, 1.5%~~, **1.25%, .75%** of the member's earned compensation) is not to be considered additional salary or wages and shall not be treated as increased compensation. For purposes of computing the member's earnings, or basis of the member's contribution to the Fund, the amount paid by the City on behalf of the member as a portion of the member's statutory obligation, is intended to

be and shall be considered as having been paid by the member in fulfillment of the member's statutory obligation.

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Article 23 – Shift Differential

City's Position

The City proposed that members' \$.90 shift differential only be paid for the actual hours worked between 6:00 p.m. and 6:00 a.m. FOP salaries are higher than those of police officers in other large Ohio cities and national jurisdictions, so an increase in the shift differential is not necessary. Further, hours worked within the proposed timeframe should only qualify for shift differential because the other hours are consistent with a normal workday, and shift differential is meant to cover the inconvenience of working before or after the normal workday.

FOP's Position

The FOP proposes to increase the shift differential to \$1.25 and extend the period for shift differential to begin at 12:00 p.m. instead of 2:00 p.m. Tr. Vol. III, 594, 655. This increase is necessary because the FOP did not receive increases in shift differential in some prior contracts and the differential throughout other FOP Lodge 9 bargaining units has continued to increase. FOP Ex. 19, pp. 40-41; 22. The proposal to expand eligibility for shift differential by two hours ensures that officers are properly compensated for working shifts that disrupt family life and negatively impact their health.

RECOMMENDATION: I recommend an increase of the shift differential to \$1.25 per hour effective upon ratification. I do not recommend any change to the hours in which the shift differential applies. This brings the FOP's shift differential in line with comparables. Thus, I recommend the following language for Article 23.1:

23.1 Shift Differential Pay Rates.

Shift differential pay shall be paid at the rate of \$.90 per hour. **Beginning with the first full pay period following ratification of this Agreement, shift differential pay shall be paid at the rate of \$1.25 per hour.**

Article 35 – Insurance

City's Position

The City proposed plan design changes that are in line with both internal and external comparables. The City proposes to increase medical plan deductibles, medical provider co-payments, prescription co-payments, and employee premium contributions. The other bargaining units, and MCP employees have nearly identical plan designs. City Exs. 17-23.

The City's proposed single and family deductibles and out-of-pocket maximums are less than the majority of deductibles and out-of-pocket maximums statewide. Tr. Vol. I, 137; City Ex. 27, pp. 2-3. The City's proposals on co-insurance, the use of a Maximum Non-Network Reimbursement Program ("MNRP") to encourage in-network use, and to create a formulary with prior authorization and step components are also in line with internal and external comparables. Tr. Vol. I, 113, 144, 152-56, 160, 217; City Exs. 19-22, 27, 33-36.

Similarly, the City's proposal to include amounts for office and urgent care visit copays are consistent with external comparables, as is having a waivable copay for an emergency room visit. Tr. Vol. I, 119-120, City Exs. 16, 29-32. The City's proposed incremental increases to prescription copays are reasonable and supported by internal and external comparables. Tr. Vol. I, 169; City Exs. 16, 42. Finally, the City's proposed increases to members' premium contribution rates—moving one percent per year—are

supported by internal and external comparables, as is moving away from the unique retrospective calculation of the "negotiated insurance base." Tr. Vol. I, 124-25, 173, 230-32; City Exs. 44-45, 48, p. 2. The City's proposals would still maintain a its high quality plan. Ultimately, the City's proposal is a fair way of balancing rising insurance costs with FOP members' reliance on a high benefit level health insurance plan.

FOP's Position

The FOP proposes maintaining the current health insurance plan for several reasons. First, police officers' type of work affects physical and emotional health differently than other forms of work. Tr. Vol. II, 513-23. As a result, the changes the City has made with the other bargaining units' health insurance plans are not relevant. Second, as Sgt. Scott Leroy testified, the FOP gave up wage increases in 2005 in exchange for its rich health insurance benefits. Tr. Vol. II, 313; FOP Ex. 7. To take away those benefits now would be to decrease the FOP's total wage package.

Under the City's proposal, bargaining unit employees will pay more for health care. The increased costs take multiple forms: higher deductibles, higher out of pocket maximums, a new out-of-network charge, increased primary care and specialist office visit co-pays, and higher prescription drug charges. These additional costs will be unreasonably burdensome upon its membership. Tr. Vol. II, 449.

The use of a pharmacy benefit manager or program administrator for the formulary would pose problems, such as potential spread pricing. FOP Exs. 6a-6g; Tr. Vol. II, 337. Further, step therapy and prior authorization components might mean that FOP members are not covered for drugs they need. Tr. Vol. II, 344-46. In particular, FOP members might be required to drop long-standing prescriptions for certain medications and/or file some form of appeal.

Regarding members' premium contribution, the "retrospective" calculation was agreed to in lieu of a fixed dollar "cap" on monthly premiums. Tr. Vol. I, 287. It does not hurt the City to use a retrospective "negotiated insurance base"; it just means that the members' premium contributions are increased one year in arrears. Tr. Vol. II, 464. Expecting members to take on the risk associated with ever-increasing healthcare costs on a prospective basis is not fair to them.

Instead of transforming the insurance plan, the City should consider other methods of containing costs, such as member education, dependent audits, "ACI Pricing," stop-loss coverage, creative contracting, value based payment terms, or joining a purchasing collaborative. Tr. Vol. I, 182-83; II, 347-48, 356-58, 429, 432, 443. The City should not radically change the FOP's health insurance plan before trying other options.

RECOMMENDATION: The parties acknowledge that rising costs plague any discussion of benefits and plans for health insurance. Additionally, the parties are dealing with an unstable health care environment on the national level and in the marketplace itself. As a result, I recommend implementation of the City's proposal as soon as practicable, with the following exceptions:

Maintain 90/10% co-insurance for in-network, rather than the City's proposed 80/20%.

- No office visit, emergency room, or urgent care co-payments.
- Increase the members' share of the premium contribution to 13% for the pay period that includes April 1, 2019 and 14% for the pay period that includes April 1, 2020.
- Effective January 1, 2020, new hires' share of the premium contribution will be 20%.
- The City will continue to use the retrospective calculation for the "negotiated insurance base" but will add 3% to account for health care inflation before calculating the dollar value of the members' share of the premium contribution.
- The CBA will explicitly state that individual deductibles are embedded in family deductibles.
- If an individual insurance plan participant (i.e., a member and/or his/her family members) is currently prescribed a particular medication, he/she will be able to continue using those prescriptions despite the new step therapy component (i.e., existing prescribed medications will be grandfathered).

Article 8.10 – Admissibility of Evidence

FOP's Position

The FOP proposed a sentence prohibiting CPD from requiring members to provide their personal cell phones or electronic devices without a warrant due to constitutional and privacy concerns related to public employers' seizure of personal devices.

City's Position

The City opposed this change because it conflicts with its goal of ridding CPD of unlawful discrimination and harassment and is contrary to Ohio Public Records Law.

RECOMMENDATION: I recommend adding compromise language to Article 8.10 that will address the FOP's concerns while creating an exception for public records requests or other legal requirements as concerns the City. I recommend the following language:

8.10 Admissibility of Evidence.

Any evidence obtained in the course of an investigation through the use of administrative pressures, threats, lies, coercion, or promises shall not be admissible in any subsequent criminal action or disciplinary hearing. However, explaining to a member that potential corrective and/or discipline action could result if the member continues to refuse to answer questions or participate in an investigation shall not be construed as administrative pressures, threats, lies, coercion, or promises.

In the absence of a search warrant or unless otherwise required by law, no member shall be required in the course of an investigation to produce or permit inspection of personally owned cellular phones or other personally owned electronic devices capable of storing personal data (e.g., personal computers).

Article 8.12 – Complaints

City's Position

The City proposes increasing the current 60-day period for a citizen to submit a complaint for investigation to 120 days. Further, the City proposes an additional exception to this rule for allegations of conduct that could constitute unlawful discrimination or retaliation.

FOP's Position

The FOP opposed the City's modifications to Article 8.12. Current contract language already provides that any citizen complaints alleging criminal misconduct and/or misconduct that could lead to termination of employment are not subject to the 60-day filing period. Regarding the proposed exception for "unlawful discrimination or retaliation," the language is overly broad, subject to multiple interpretations, and offers a "solution" to a problem that does not exist.

RECOMMENDATION: I recommend increasing the current 60-day period for a citizen to submit a complaint for investigation to 90 days. The record showed that the increased burden on the CPD will be minimal but will result in the completion of more investigations. In addition, I propose an exception to the deadline for citizen complaints regarding complaints only by non-sworn employees of the Division of Police regarding discrimination in the workplace. I recommend the following language:

8.12 Complaints.

- (A) In order for a citizen complaint (including an anonymous complaint) to be investigated, the complaint must be received by the City in writing or reduced to writing within **ninety (90)** ~~sixty (60)~~ days after the date of the alleged event giving rise to the complaint. Further, when an anonymous complaint is made against a member and no corroborative evidence is obtained from the information that either accompanies the complaint or that is reasonably obtainable from information provided in the complaint, the complaint shall be classified as not investigated and the accused member shall not be required to respond.
- (B) The following are exceptions to the **ninety (90)** ~~sixty (60)~~ day time limit imposed in paragraph (A) above. The following complaints may be investigated provided that notice is given to the Lodge Grievance Chairperson that such an investigation is to be initiated under one of the following exceptions:

* * * * *

- (4) Complaints by non-sworn employees of the Division of Police that allege workplace misconduct by members that would violate policy prohibiting discrimination in the workplace.**

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Article 8.14 – Investigation Outcome

City's Position

The City proposed deletion of the language in Article 8.14 that prohibits discipline for an investigation into a citizen complaint that takes more than 180 days. No comparable jurisdictions prohibit member discipline if an investigative timeline for a citizen complaint is not met. City Ex. 111.

FOP's Position

The FOP opposed the City's proposal for Article 8.14 and proposes current contract language.

RECOMMENDATION: Rather than a strict prohibition on member discipline if an investigation takes over 180 days, I recommend a compromise of adding language that an arbitrator should consider the timing of the investigation in considering appropriate discipline. Thus, I recommend the following language:

8.14 Investigation Outcome.

The investigation of citizen complaints shall be concluded within ninety (90) days after the date the complaint was received by the City. This deadline may be extended by the Lodge upon written request from the City. Such request will set forth rationale for the City's inability to meet the ninety (90) day deadline and include an estimated time of completion. An agreement to extend an investigation beyond the ninety (90) days will not be unreasonably withheld by the Lodge. An investigation will be considered concluded on the date it is initially forwarded to the chain of command for review. **If An arbitrator shall consider the result of an** the applicable time limit is not **being** met, or **if** the investigation otherwise exceeds one-hundred eighty (180) days, **as part of his/her analysis related to any** ~~no member will be disciplined~~ arising out of the investigation of such citizen complaint. The ninety (90) day limit shall be held in abeyance pending determination by the chain of command to investigate criminal activity and during any on-going criminal investigation. Further, the ninety (90) day limit shall not apply to any chain of command review. At the conclusion of any investigation, the member shall be informed in writing of the outcome.

Article 10.4 – Responsibility for Imposition of Discipline

City's Position

The City proposes deleting Article 10.4. No comparable jurisdictions impose a burden on upper management to prove why he or she did not follow the recommendation of an immediate supervisor or the chain of command. City Ex. 119. Article 10.4 allows lower level supervisors to create past practices by issuing documented constructive counselings ("DCC") or even no discipline for conduct that higher management believes to be more egregious.

FOP's Position

The FOP proposes current contract language for Article 10.4. Current language reflects a long-standing and entirely workable system. The immediate supervisor (i.e., Sergeant for Officer, Lieutenant for Sergeant, Commander for Lieutenant) directly supervises the member on a daily basis, and is most familiar with the circumstances that might warrant progressive discipline. It makes no sense to eliminate their authority to impose such discipline. FOP Exs. 42, 42a, 42b, 42c, 42d.

RECOMMENDATION: Having considered the parties' proposals, I recommend the following language:

10.4 Responsibility for Imposition of Discipline.

~~It is the policy of the City that corrective/disciplinary action shall be issued by the lowest level of supervision. A decision to issue positive corrective action, documented constructive counseling or a written reprimand pursuant to progressive disciplinary action will be made by the member's immediate supervisor where the member was assigned at the time of the incident. The decision to issue corrective/disciplinary action (or inaction) and the level of corrective/disciplinary action is subject to review by the chain of command. Such A member's immediate supervisor shall be held responsible and accountable for issuing appropriate corrective/disciplinary action. An immediate supervisor's decision or inaction shall not be modified unless the City can demonstrate reasonable justification for a different level of discipline. An immediate supervisor's recommendation to impose discipline at a higher level will require review by at least one higher rank in the member's chain of command, in which case with the final decision will be being made by the Chief of Police.~~

Article 10.10 – Retention of Records

City's Position

The City proposes that the start date for retaining disciplinary records should be based upon the date the corrective action is issued—rather than the date of the incident that led to the discipline. Under the current language, DCCs are often only retained for a few short months because the retention period begins running prior to issuance. City Ex. 120. With the City's proposals for Article 8.12, DCCs will be retained for an even shorter amount of time. Thus, any recommendation to change Article 8.12 should be accompanied by the City's proposed change in Articles 10.10 and 10.11.

FOP's Position

The FOP proposes shortening the timeframes for maintaining corrective/disciplinary action in a member's file. The FOP also proposed that entries and records of investigations classified as "not sustained" should not be maintained in a member's master personnel file, in addition to being removed from all Division files after 3 years.

RECOMMENDATION: I recommend the City's proposal regarding Article 10.10(A). The City's evidence largely revolved around the problem with using the date of the incident for DCCs because that time period is already short. I recommend current contract language for the rest of Article 10.10. I recommend the following language:

10.10 Retention of Records.

All Division records of corrective/disciplinary actions shall be maintained in the following manner:

(A) Documented Constructive Counseling. Record of a documented constructive counseling shall be maintained in the member's Division master personnel file for at least one (1) year following the date of **issuance of** the incident ~~which gave rise to the~~ documented constructive counseling so long as there is no subsequent corrective/disciplinary action **from the date of issuance through the end of** during the one (1) year period. After one (1) year or any extension of such one (1) year period

caused by subsequent corrective/disciplinary action, the documented constructive counseling shall be removed from the file.

* * * * *

Article 10.11 – Administrative Use

City's Position

As with Article 10.10, the City proposes that the start date for administrative use of disciplinary records should be based upon the date the corrective action is issued—rather than the date of the incident that led to the discipline. The FOP's proposal to shorten the administrative use period runs contrary to the principles of accountability and transparency. Chief Jacobs testified that officers "who commit violations are the ones most likely to commit another violation." Tr. Vol. VI, 992. Further, this proposal is consistent with internal and external comparables. City Ex. 121.

FOP's Position

The FOP proposes shortening the timeframes for administrative use of corrective/disciplinary action. The City already maintains and relies upon disciplinary records longer than other comparable jurisdictions. FOP Exs. 43a, 43c, 43d.

RECOMMENDATION: I recommend the City's proposal regarding Article 10.11(A).

However, I recommend current contract language for the rest of Article 10.11. Thus, I recommend the following language:

10.11 Administrative Use.

Section 10.10 establishes the periods of records retention. This Section establishes the period of time for administrative use of the records listed. While a supervisor may retain private, written notes to document reprimands, such notes shall not appear in any member's personnel files, and if found, shall be removed. The records of the Fleet Safety Committee are exempt from this Section.

(A) Documented constructive counseling – Not more than nine (9) months following the date of **issuance of** ~~the incident that gave rise to the~~ documented constructive counseling.

Article 11.3 – Selection Criteria

FOP's Position

The FOP proposed that Article 11.3(B)(3) should require approval of the Labor Relations Committee for all applicant tests. Testing for assignments has become more common in recent years, and currently there are no measures taken to ensure that such tests are relevant and fair. Tr. Vol. VI, 1173-74.

City's Position

The proposed "solution" to the test security problem would actually decrease test security because more individuals would have knowledge of the content of the tests. Tr. Vol. VI, 1175. Moreover, providing that the FOP must approve tests would hinder the efficiency of the testing process.

RECOMMENDATION: I recommend adding a requirement that the Deputy Chief in the assignment's chain of command review a proposed test to ensure it reasonably and fairly measures job-related skills. I recommend current contract language for the remainder of the Article. I recommend the following language:

11.3 Selection Criteria.

When a vacancy exists, supervisors may first realign the members within a unit and then post the resulting vacancy. For such realignment, supervisors are required to consider all members whose effective date of transfer to the involved unit is prior to the date the intra-unit realignment takes effect.

* * * * *

(B) Outside a unit:

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- (3) If a test is to be administered, **the test shall first be submitted to the Deputy Chief in the assignment's chain of command for review and approval that the test reasonably and fairly measures job-related skills, knowledge and/or abilities. Upon receipt of the Deputy Chief's approval, the test will be administered for** all applicant-members that are still eligible at this point. Eliminate any applicants-members who do not pass the test(s).

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Article 11.7 – Job Descriptions

City's Position

For changes to exceptional qualifications, job requirements, and variable or rotating hours under Article 11.7, the City proposes that the Chief continue to obtain the review and input of the Assignment and Transfer Committee but that the review period be limited to 30 days. Further, the City proposes eliminating the requirement that the Labor Relations Committee must approve of any changes. No comparable jurisdiction has any limitation on management's right to create job descriptions and some even specifically reserve the right to create job descriptions to management. City Ex. 122. Additionally, and importantly, the City has no recourse if the Labor Relations Committee refuses to approve a proposal; rather the Division is left without that operationally important position.

FOP's Position

The FOP opposes the City's proposals regarding Article 11.7. The Chief should not have unilateral authority to determine whether every assignment within CPD requires "exceptional qualifications" or particular "job requirements" (including variable or rotating hours). Under the proposed scenario, the Chief would have unfettered discretion—over time—to make every assignment a variable hour assignment.

RECOMMENDATION: I recommend a compromise between the parties' positions to address the City's stated concern that it has no recourse if the Labor Relations Committee does not approve of a proposed job description. Thus, I recommend the following language:

11.7 Job Descriptions.

The exceptional qualifications, job requirements, and variable or rotating hours in the Job Description Manual shall only be changed following review and input of the Assignment and Transfer Committee and approval by the Labor Relations Committee. Newly created job descriptions without exceptional qualifications, variable or rotating hours, or job requirements (excluding rank) are not subject to the provisions of this Section 11.7. The parties commit that such review and input shall not exceed ninety (90) days. **If the Labor Relations Committee does not approve the changes proposed by the Chief of Police under this Section, either party may submit the issue to arbitration under Article 12; provided that the Expedited Labor Arbitration Procedures of the American Arbitration Association, shall apply to the arbitration hearing.**

Article 17 – Employee Alcohol and Drug Testing

City's Position

The City proposes to include “medical marijuana” in the definition of illegal drugs in Article 17.3(A), consistent with its internal comparables. City Exs. 89-95. The City feels strongly that its police officers should not possess marijuana while it remains listed as a Schedule 1 Drug under the Controlled Substances Act.

The City also proposes new results, including confirmatory testing, for those members who report to work with an alcohol concentration of .02-.039. This is in line with internal and many external comparables and is consistent with the Department of Transportation’s new regulations. Tr. Vol. VI, 1058-59; City Exs. 96-97.

In addition, the City proposes increasing the annual number of random tests from 20 to 25%. For return-to-duty testing, the City proposes increasing follow-up testing to eight times per 12-month period for 36 months following the completion of counseling, treatment, or aftercare. This is in line with the City’s contract with IAFF, Local 67. City Ex. 95.

FOP's Position

The FOP proposed current contract language for Article 17. If medical marijuana is being prescribed by a licensed medical professional, it should not be defined as illegal

when Ohio law permits it to be dispensed and Ohio licensed physicians believe it is appropriately prescribed in a particular case.

Regarding the requirement to leave work if a member reports with an alcohol concentration of .02-.039, the City's proposal would impose immediate discipline – without any due process – upon a member who tests at such a level. That level is below the level of any recognized impairment. FOP Exs. 37, 37a, 37b.

Further, the City has not demonstrated any need for the increase in random testing. Similarly, with respect to return to duty testing, the City has not demonstrated that the current number of tests has been inadequate.

RECOMMENDATION: I recommend a compromise position with respect to drug and alcohol testing. While use of medical marijuana is still prohibited under federal law, the FOP expressed concerns of unfairness should federal law change in the way that many states' laws concerning medical marijuana have changed. As a result, I recommend including medical marijuana in the definition of illegal drugs, with an exception that kicks in thirty days after any revisions to the Controlled Substances Act that approve the lawful possession and use of marihuana.

In addition, to address the City's concern with blood alcohol concentration rising after an initial test result between .02 and .04 and the FOP's concern regarding the punitive result of requiring use of paid leave for the related time away from work, I recommend a compromise for members with an initial test in that range but a lower confirmatory test result. Those individuals will not be sent home or required to use earned leave, and all records of the testing should be removed from their personnel files. Thus, I recommend current contract language with the following modifications:

17.3 Definitions.

(A) **“Illegal Drugs”** means controlled substances listed in 21 C.F.R. Part 1308, including medical marijuana, that are not being used under the supervision of a licensed physician health care professional or otherwise in accordance with federal

law, except that thirty (30) days after any revisions to the federal Controlled Substances Act that render the use and/or possession of marijuana lawful, this reference to medical marijuana will no longer apply.

* * * * *

17.4 Prohibitions.

Members shall be prohibited from:

(A) Reporting to work or working under the influence of alcohol;

(B) Reporting to work or working with an alcohol concentration of .02 to .039, except when in the authorized line of duty or when his/her confirmatory test screen result is lower than his/her initial test screen result. Subject to 17.7(I) below, a member reporting to work with an alcohol concentration of .02 to .039 shall be sent home and must use earned leave (vacation, sick leave or comp time) to account for the missed tour of duty. Members without sufficient leave will be granted leave without pay for the remainder of the tour of duty and not be subject to discipline for such leave;

~~(B)~~(C) Consuming or possessing alcohol at any time while on duty, or anywhere on any City premises or in any City vehicles, except when authorized in the line of duty;

~~(C)~~(D) Possessing, using, selling, purchasing, manufacturing, dispensing or delivering any illegal drug at any time and at any place, except when authorized in the line of duty;

~~(D)~~(E) Abusing any prescription drug;

~~(E)~~(F) Failing to report immediately to their supervisor any duty-related restrictions imposed as a result of prescription or over-the-counter medications they are taking.

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17.7 Test to be Conducted.

In conducting the testing authorized by this Contract, the City shall comply with the following:

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- (I) With regard to alcohol testing, tests shall be performed by an individual(s) selected by the City and Lodge and certified under Federal standards. If initial screen results are ~~negative, i.e., below the positive level~~ **.02 grams per 210L**, testing shall be discontinued, all samples destroyed and records of the testing expunged **removed** from the member's personnel file. An initial ~~positive~~ alcohol level of ~~.04~~ **.02 grams per 210L** of breath **or above** shall be ~~considered positive for purposes of~~ **authorizing** the conduct of the confirming alcohol test. Only members with screen test results that are ~~positive~~ **.02 grams per 210L or above** on the initial screen shall be subject to confirmation testing for alcohol.

With respect to confirmation testing, a positive alcohol level shall be .04 grams per 210L of breath. If confirmatory breath testing results, are ~~negative, i.e., below the positive level~~, **.02 grams per 210L**, all records of

the testing shall be ~~expunged~~ **removed** from the member's personnel file. Members with initial test screen results that fall between .02 and .039 grams per 210L of breath, and who have a lower confirmatory test screen result than their initial test screen result, shall not be sent home or required to use earned leave pursuant to Article 17.4(B); and all records of the testing shall be removed from the member's personnel file.

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Date of Award: November 27, 2018

Mitchell B. Goldberg
Mitchell B. Goldberg, Fact Finder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of November, 2018, a copy of the foregoing Fact Finding Report was sent via email to:

SERB: serb.mediation@serb.oh.us

Ronald G. Linville
Baker Hostetler
200 Civic Ctr. Dr., Ste. 1200
Columbus, Ohio 43215
rlinville@bakerlaw.com

Russell E. Carnahan
Hunter, Carnahan, Shoub, Byard & Harshman
3360 Tremont Road, 2nd Fl.
Columbus, Ohio 43221
rcarnahan@hcands.com

Mitchell B. Goldberg

