NOTICE

FROM THE STATE EMPLOYMENT RELATIONS BOARD

PUBLICATION DATE: February 9, 2018

CASE NO(S). 2016-MED-10-1130

In the Matter of

Ohio Patrolmen's Benevolent Association

AND

Delaware County Sheriff

The attached report of the fact-finding panel has been acted on as follows:

Ohio Patrolmen's Benevolent Association (Deputy Sheriffs and Detectives) - REJECTED

Pursuant to Chapter 4117.14 of the Ohio Revised Code, this notice and attachment serves as publication of the findings of fact and recommendations of the fact-finding panel. On the publication date, the original notice of rejection of the fact-finding report was sent to a daily newspaper which serves the vicinity where the governmental entity is located. A copy of the notice has been posted in the Clerk's Office of the State Employment Relations Board.

Individuals may contact the above named parties to determine if copies of the report are available or contact the State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215.

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

IN THE MATER OF FACT FINDING BETWEEN:

Ohio Patrolmen's Benevolent Association	Case No. 2016-MED-10-1130
Employee Organization	Date of Hearing: December 29, 2017 Date of Report: January 29, 2018
and	
Delaware County Sheriff	Sherrie J. Passmore, Fact Finder
Employer	

FACT FINDER'S REPORT AND RECOMMENDATIONS

APPEARANCES:

For Ohio Patrolmen's Benevolent Association:

Joseph Hegedus, Esq.
James Mox, Director OPBA
Chris Stayer, Director OPBA
Rusty Yates, Director OPBA

For Delaware County Sheriff:

Dan Guttman, Esq.
Michael Parente, Esq.
Pamela Sonagere, Director of Labor and Employee Relations
Jeffrey Balzer, Chief Deputy
David Wiseman, Chief Deputy

INTRODUCTION

Case Background

This case is a fact-finding proceeding between the Ohio Patrolmen's Benevolent Association (OPBA or Union) and the Delaware County Sheriff's Office (DCSO or Employer). The State Employment Relations Board (SERB) appointed Sherrie J. Passmore as the Fact Finder.

A fact-finding hearing was held on November 14, 2017 at the Delaware County Sheriff's Office located at 149 N. Sandusky Street, 2d Floor, Delaware, Ohio 43015. Both parties submitted the required pre-hearing statements in a timely manner. At the hearing, the Employer was represented by Dan Guttman, Esq., of Baker & Hostetler LLP. Representing the Union was Joseph Hegedus, Esq. of the OPBA. At the conclusion of the hearing, the parties agreed that the Fact Finder would issue her report on January 29, 2018.

At hearing, the parties presented evidence and arguments in support of their positions on the open issues. Numerous exhibits and position statements were submitted. The parties agreed to submit the open issues identified below to the Fact Finder to be addressed in her report and recommendations:

Article 6.1.C Corrective Action – Use of Paid Leave
Article 23.1.M Paid Leaves – Sick Leave (Conversion)
Article 23.1.O Paid Leaves – Sick Leave (Bridge to Separation)
Article 27.2 Health Insurance
Article 28.1 Wages
Article 28.4 Wages – Placement Within the Step System
Article 32 Physical Fitness Program (new article)

Description of the Bargaining Unit

The bargaining unit consists of Deputy Sheriffs and Detectives in the Delaware County Sheriff's Office. There are approximately eighty-one (81) members currently in the bargaining unit.

History of Bargaining

Negotiations for a successor agreement between the DCSO and the Union began on December 9, 2016. Dan Guttman served as the Chief Negotiator for the DCSO and Joseph Hegedus served as the Chief Negotiator for OPBA. The bargaining teams met approximately nine (9) different times.

On April 20, 2017, the parties reached a Tentative Agreement as to the majority of open non-economic items via a "non-economic package proposal;" on June 21, 2017, the parties reached a Tentative Agreement as to the remainder of the open non-economic items as well as the entirety of economic items via an "economic package proposal". The overall Tentative Agreement was reached with the unanimous recommendation of the Union's bargaining committee. The Union, however, subsequently rejected the Tentative Agreement by a vote of 28 opposed, 27 in favor. At the request of the parties, a fact-finding mediation was held on November 14, 2017 but was unsuccessful in resolving the open issues.

POSITIONS, DISCUSSION AND RECOMMENDATIONS

In making the recommendations herein, consideration was given to all relevant information provided by the parties and the factors set forth in Ohio Revised Code 4117.14(G)(7)(a) to (f):

- Past collectively bargained agreements between the parties;
- Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employers doing comparable work, giving consideration to factors peculiar to the area and the classification involved;
- Interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect on the normal standards of public service;
- Lawful authority of the public employer;
- Stipulations of the parties; and,
- Such other factors, not limited to those above, which are normally or traditionally taken into consideration.

In overview of its position on the issues, the Employer argues that the Fact Finder should not disturb the agreement that the parties' bargaining representatives believed to be the best resolution of the issues, i.e. the Tentative Agreement that was taken out for a vote. The Union strenuously objects to this position, arguing that giving preference to the Tentative Agreement would render meaningless the membership's right to vote on and reject it. OPBA further argues that if the Fact Finder adopts such a position it would have no incentive to reach a tentative agreement in the future.

Alternatively, if the Fact Finder does not recommend the Tentative Agreement in its entirety and recommends changes to it in the Union's favor, the Employer's position is the deal should be subject to downward revisions in the economic package. DCSO contends it agreed to an economically generous Tentative Agreement in exchange for non-economic gains that it valued. It reasons that if those non-economic gains are taken away, then the value of economic package should be decreased in recognition that the parties believed they had made a fair trade at the bargaining table.

Tentative agreements reached at the bargaining table, where such bargaining produced tentative agreement on all outstanding contract issues, are one of the statutory "such other factors" which are traditionally given consideration in fact finding. Fact finders nearly universally hold that such agreements should be given significant consideration absent clear evidence of fraud or mistake. This recognizes that presumptively competent representatives of the union and the employer judged the tentative agreement to be a fair settlement, honestly arrived at through the give and take of negotiations, taking into consideration the same factors that fact finders are required to use. It also recognizes that the intent of interest arbitration laws is to encourage voluntary settlement and only use impasse fact-finding provisions as a last resort. Those purposes would be jeopardized if neutrals allowed employers or unions to be rewarded by ignoring the sanctity of those agreements. According tentative agreements significant consideration thereby serves the public interest, one of the specifically listed statutory factors.

The preference for an agreed to settlement is only a general presumption and not an automatic rule. To find otherwise would not recognize the inherent right of subsequent rejection by elected officials or union membership. The statutory factors must be considered but the burden of proof shifts. Normally, when one side or the other wishes to deviate from the status quo of the collective bargaining agreement, the proponent must fully justify its position, provide strong reasons, and a proven need. Where there is a tentative agreement on all issues, most fact finders require the rejecting party to make a very strong showing that the tentative agreement should not be deemed as the most reasonable under the criteria set forth in the pertinent statute. In effect, the tentative agreement becomes the status quo and the burden shifts to the party that seeks to deviate from it.

In analyzing the respective parties' positions, this Fact Finder was guided by the above principles in weighing the statutory criteria, which is particularly appropriate based on the facts of this case. The Tentative Agreement was only rejected by a razor-thin margin of one vote. This is not a case of the bargaining team misreading the members' priorities and seeking readjustments of the tentative trades accordingly. The facts presented in this matter, relevant to the disputed items, are not markedly different than that which the parties were aware of and presumably considered carefully prior to entering into the Tentative Agreement.

Considering the statutory criteria under the above standards, I conclude the Tentative Agreement should be upheld and recommend the Agreement in its entirety as explained more fully below. For each unresolved issue, a summary of the positions of the parties followed by a discussion and recommendation is provided.

Article 6.1.C Corrective Action – Use of Paid Leave

Position of the Employer

Under current contract language, a deputy who is suspended is allowed to determine whether to serve the suspension as a loss of pay or as a forfeiture of paid leave. The DCSO proposes that a deputy suspended for more than three days only be allowed to substitute paid leave at the discretion of the Sheriff. Because a suspension greater than three days is a high level of discipline, the Employer believes it should be the Sheriff's discretion whether an employee faces a true unpaid suspension or is allowed to forfeit leave.

The Employer argues current language is not only outside the statewide norm, but also outside the norm internally at the DCSO. None of the other four organized groups have such a provision - all other employees serve their suspension in the manner determined by the Sheriff.

The Employer notes that this proposed change was part of a "package proposal" trade on June 21, 2017 agreed to by the parties. DCSO contends it gave the Union an above-market wage increase, a generous sick leave buyback proposal, and other economic increases in exchange for this and other language in the Tentative Agreement.

Position of the Union

The Union proposes no change from current contract language. It points out that the current language has been in the contract since January 1, 1999 and that a

prior fact finder characterized the paid time off option as "a benefit of value to the employees."

Because there is long standing contract language, the Union contends the Employer has the burden of proving the proposed change from the status quo is necessary to the reasonable operation of the department. The Union argues the Sheriff cannot possibly meet this burden since there has been very little discipline under this Sheriff.

Discussion and Recommendation

This language was part of the Tentative Agreement and the evidence does not support setting it aside. Because of the Tentative Agreement there is a different standard of proof than the one suggested by the Union. This provision and others were traded for economic benefits. As discussed below, these financial gains would not otherwise have been achieved. The parties' representatives judged this to be a fair trade and no evidence was produced showing a change in circumstance since the trade was made.

Under current language, an employee facing a suspension can elect whether to lose pay or not. The proposed language gives the Sheriff the discretion to make that determination where more serious discipline is involved, i.e. suspensions of more than three days. Vesting such discretion in the Employer rather than employees is more likely to serve the public welfare and interest. It also moves this unit closer to the norm. Both internal and external comparables support the proposed language. In all other DCSO bargaining units, substitution of paid leave is at the discretion of the Sheriff for any suspension. No similar jurisdictions were

identified that allow deputies to substitute paid leave for unpaid suspensions without the employer's approval.

Based on the above, I recommend the Article 6.1.C language of the Tentative Agreement

Article 23.1.M Paid Leaves – Sick Leave (Conversion)

Union Position

The Union proposes a new provision that would allow Deputies with at least 800 hours of sick leave on November 1 to convert any hours in excess thereof up to 80 hours to vacation leave on a 2 for 1 basis. Those converted hours could then be used as time off or cashed out at any time within one year.

In support of this proposal, the Union points to ten jurisdictions that past fact finders have found to be comparable to DCSO for purposes of determining appropriate wages. It notes that four of the ten jurisdictions have contracts with sick leave conversion provisions, some of which are more generous than the one proposed here.

Employer Position

The Employer proposes to use the language as tentatively agreed, provided the complete "package proposal" trade reached by the parties is upheld. If not, DCSO's position is that this provision should be eliminated with a reversion to current language.

The Employer argues that this is a significant change and a significant benefit. Not only does it convert sick leave into valuable vacation time off, but also

creates a large economic opportunity. The Employer provides the following examples: With 2016 top step pay (5-years of service) of $33.01, 40 hours of cashed-in time is $1320. This can be approximately an additional 2% raise a year. Currently 38 of 84 members are already at the level where this would be available, 46 of 84 members earn leave at 10-plus years of service and 65 members are at the top step - this means many others are close to or easily able to qualify. Right around half of the unit would be able to immediately use this benefit, and all others could qualify with a judicious use of sick leave.

The Employer notes that no other DCSO employees have this benefit. This provision was only entered into as a tentative agreement by the DCSO because it was part of a package to secure other gains in a trade.

Discussion and Recommendation

This language was part of the Tentative Agreement. It provides a significant new economic benefit. This is a benefit I would not have awarded the Union absent the Tentative Agreement. No economic need was demonstrated for this new language and only a handful of examples were given of other jurisdictions with similar provisions. No showing was made that such conversion provisions are the norm and those that do exist were most likely the result of a quid pro quo exchange.

Because this provision was part of the Tentative Agreement and no compelling reason was presented for setting that Agreement aside, I recommend the Article 23.1.M language of the Tentative Agreement.

Article 23.1. O Paid Leaves – Sick Leave (Bridge to Separation)

Employer Position

The DCSO proposes language stating that an employee who has been medically determined to be permanently unable to work is not permitted to use sick leave as a bridge to separation. The proposed language is aimed at preventing sick leave abuse. Employees contractually may only cash out a portion of their accrued but unused sick time. This may incent an employee to "burn'' their sick time before separation even though they cannot ever medically return to work. DCSO has encountered this problem in another one of its bargaining unit and points to other jurisdictions that have added similar clarifying language (i.e., the City of Westerville and the City of Worthington). It also points out that 24 members have already built up enough sick leave to "bridge" six months or more of sick leave to separation.

Union Position

OPBA opposes the inclusion of Article 23.1.O in the collective bargaining agreement. The Union argues the language is not supported by internal or external comparables. It also contends the language is vague and will therefore lead to grievances and battles between medical experts.

Discussion and Recommendation

Article 23.1.O was part of the Tentative Agreement and the evidence does not support setting it aside. The facts presented by the Union relevant to this proposal are facts the parties would have been aware of and presumably considered carefully prior to entering into the Tentative Agreement.

The proposed language is reasonable and if anything provides additional clarity about the use of sick leave. It makes clear that employees who cannot ever medically return to work cannot remain on sick leave as a means of being paid for all of that leave versus being paid for one-fourth of it upon separation. Making this clear will discourage abuse and encourage such employees to remove themselves from the DCSO payroll so other employees can be hired. This serves the public welfare and interest and will benefit Management and bargaining members alike.

Based on the above, I recommend the Article 23.1.O language of the Tentative Agreement.

Article 27.2 Health Insurance

Position of the Union

OPBA proposes that health insurance premiums be capped at the 2017 rate. In the alternative, the Union proposes that its position on wages (3.5%, 3.5% and 3.5%) be awarded to defray the additional expense of unilaterally imposed additional health insurance costs.

The Union presented evidence that the monthly family plan health insurance premium for traditional coverage increased from $36.20 per month in 2010 to $216.00 per month in 2018. As a result, the monthly premium for the traditional plan increased by $2,157.60 per year from 2010-2018. OPBA points out that these increases significantly diminish any wage increase negotiated for the employees.

The Union contends its proposal is reasonable due to the fact that the County has raised the premium twice during the pendency of these negotiations. The family plan premium has risen from $165.00 per month to $216.00 per month since the

employees last received a wage increase. Any annual increase received by the employees for calendar year 2017 will be diminished by the $612.00 per year increase in the family plan premium, which amounts to a nearly 1.0% decrease in annual wages at the top rate of pay. 1

OPBA argue that wages and health insurance costs are inextricably intertwined. Thus, if a cap is not placed on insurance premiums, additional wages should be awarded to offset those costs. In support of its position, the Union cites fact-finding decisions wherein above market wages were awarded to compensate for participation in health insurance premium payments.

Position of the Employer

The DCSO proposes to use the language as tentatively agreed, which is current language from the prior Agreement, without any changes.

The Employer argues there is no support for the change proposed by the Union. First, the parties agreed to maintain the current language at the bargaining table during negotiations. The issue of health insurance language changes in Article 27 was never really discussed past the Union's initial proposal. The Union "dropped" its proposal to change Article 27 during the give-and-take of bargaining. In fact, the Tentative Agreement between the parties was silent on this issue as it was agreed the current language would remain. It points out that the parties have never before agreed to a “cap” on members’ health insurance premiums.

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1 It should be noted that the employee health insurance premiums for a family plan increased by $31 per month for 2017 and by $20 per month for 2018. The amount of those rate increases relative to wages must therefore be evaluated based on both any 2017 and 2018 wage increases.

DCSO contends that maintaining current language is fair. It guarantees that the plan and benefits and costs will be the same for all employees of the County generally. Deputies are treated just like every other employee. No better, no worse. The Employer also points that the amount paid by the Union is still below SERB and national averages for health insurance.

Discussion and Recommendation

Healthcare remains one of the most challenging issues in collective bargaining. Neither party has much control over rising health insurance costs. Substantial increases in those costs have presented serious budget challenges for public sector employers since personnel costs represent the largest expenditure in public sector budgets. Employees often feel like they have received a raise only to lose much of it to increased insurance premiums.

While sympathetic to the impact increases in insurance premiums have on employees, I am required to make my recommendations based on statutory criteria. Neither the bargaining history of the parties nor internal nor external comparables support capping 2017 employee health insurance premiums.

In regard to comparables, the evidence shows the following:

- All other bargaining units use the same health plan as unrepresented county employees and all other bargaining units pay the same contribution rate as other unrepresented employees toward their insurance premiums.
- For 2018, DCSO employees will be contributing approximately 11 % of the cost of their health insurance.

- In 2014, the DCSO went to fact-finding with the Corrections Officer unit. In that case, Fact Finder Richard Colvin found that a 15% employee contribution was reasonable for those DCSO employees in 2017. 2

- The 2017 SERB report on health insurance costs shows that Union deputies are paying a much lower percentage of health insurance premiums than the approximately 15% average of all Ohio public employees. For 2017, members contributed 3.4% lower for family plans than the statewide average. When compared to the average 2017 contribution rate for employees in the Columbus region for a family plan, the Union members' contribution for 2018 is still 5.2% lower and $62 less per month.

- A national survey in 2017 shows that the average worker contributes 18% of the premium for single coverage and 31% of the premium for family coverage.

Moreover, the bargaining history of the parties does not support the proposed change. Putting a cap on health insurance premiums was not part of the Tentative Agreement reached by the parties. The parties agreed to maintain current language, which is fair and reasonable under the statutory criteria.

Based on the above, I recommend the Article 27.2 current language.

Article 28.1 Wages

Position of the Employer

DCSO proposes to use the language as tentatively agreed: a 3% increase in 2017, a 3% increase in 2018, and a 3% increase in 2019. However, the DCSO strongly argues that the wage package in Section 28.1 be modified to the current SERB fact-finding/conciliation report average wage increase of 2.36% in the 1st year, 2.33% in the 2nd year, and 2.62% in the 3rd year if the Fact Finder were to adopt changes to the Tentative Agreement in the Union's favor.

2 The parties subsequently reached a settlement in which Corrections Officers would continue to pay the same contribution rate as all other DCSO employees.

The Employer argues that the tentatively agreed wage package was an above-market economic benefit only provided to the Union as part of a package-proposal trade. It testified that on the last day of bargaining, with the various items still being "open" on the Employer's trade list, the question was asked what would take to close out those issues and secure the trades Management sought and the answer that became clear was 3% raises each year.

In support of its position that the tentatively-agreed wage package was above market, DCSO points out that wage increases of 3% each year are well-beyond SERB averages and will make this unit the second highest paid Deputy Sheriffs in the entire State of Ohio (out of 88 other counties). The Sheriff was willing to pay this above-market package only to secure ALL of the elements of the final "package proposal" trade package, but feels it would be only fair to adjust wages to SERB averages if trades Management got in exchange are not awarded.

Position of the Union

The Union proposes a 3.5% increase in 2017, a 3.5% increase in 2018, and a 3.5% increase in 2019. The Union sees these increases as easily affordable for the Employer. Delaware County is in a healthy financial position and there is no reason to expect a downturn in county revenues.

OPBA argues that although a 3% increase per year is not unfair or unreasonable, it is not an above market increase. It points out that non-

union Delaware County employees were given 3% increases in 2016 and 2017. It also argues that what has been offered is less than what has been historically granted while health insurance costs have risen significantly. The requested increases are needed to offset those health insurance costs.

Discussion and Recommendation

The Employer's proposal to increase wages each year by 3% was part of the Tentative Agreement. The wages tentatively agreed to are fair and reasonable under the statutory criteria. The evidence does not support awarding the Union's request for a 3.5% increase.

A 3% wage increase is an above average wage increase that the Union would not have otherwise achieved but for the give and take of negotiations. It is above the average 2.6% wage increase in 2017 received by Deputy Sheriffs in counties that OPBA suggests are comparable for purposes of evaluating wages. It is even further above the statewide average wage increases being awarded in recent fact-findings/conciliations. SERB reports that the in the third quarter of 2017, the average first-year wage increase awarded was 2.36%, the average second-year increase awarded was 2.33% and the average third-year increase awarded was 2.62%. Percentage wage increases for counties of about the same population as Delaware County are similar. The tentatively agreed to 3% increase will make this unit the second highest paid Deputy Sheriffs in the State of Ohio in 2017.

The wage increases given to non-union Delaware County employees does not show that the tentatively agreed to wages for this unit

were only average. Although non-union employees received 3% wage increases in 2016 and 2017, those employees were on a wage freeze from 2008 to 2011. They received no wage increase in 2008, 2009, 2010, or 2011. The increases were to make up for lost ground as the County recovers from economic recession, i.e. they were given above average increases. Deputies were never on a wage freeze and received annual pay increases between 2.75% and 3.5% from 2008 to 2011.

Based on the above, I recommend the Article 28.1 language of the Tentative Agreement.

Article 28.4 Wages – Placement Within the Step System

Position of the Employer

DCSO proposes allowing the Sheriff to place a new hire below the top step, but above the entry-level step, in order to enhance entry-level pay. The purpose of this proposal is to assist the Sherriff in recruiting the best candidates. The Employer contends that as central-Ohio grows more attractive for people beginning a career, there is much competition for top law enforcement recruits. Also, with an emphasis on community law enforcement and well-rounded peace officers, the Sheriff seeks to recruit and reward applicants with relevant experience.

The Employer points out that the proposal does not negatively impact a current member by diminishing seniority. It specifically only adjusts the entry-level pay. It also notes there is support for such a provision in central-Ohio

jurisdictions. Finally, it further notes that this proposal upholds the tentative agreement already reached on Section 28.4 that was part of a "trade" at the bargaining table where economic items were given to the Union in exchange for non-economic language changes, and is what the parties already agreed to at the table.

Position of the Union

The Union rejects the Employer's 28.4 proposal in total. It argues that paying a new deputy more than a deputy who is already working for DCSO is inherently unfair and will impact morale. It also points out that such provisions are not common.

Discussion and Recommendation

Article 28.4 was tentatively agreed to language. No compelling evidence was presented for setting this provision of the Tentative Agreement aside.

External comparables support the proposal. Other central-Ohio jurisdictions have similar provisions such as the Columbus Airport Authority, the City of Dublin and the City of Hilliard. Sheriffs in the following counties also have also been given the discretion to place a new employee at an advanced step: Butler, Clermont, Lake and Medina.

The provision is not unreasonable or inherently unfair. The ability to offer advanced step placement serves as a recruiting tool. Recruiting the best candidates serves the public interest. Seniority rights are protected. The provision expressly states that nothing in the section "will confer any additional seniority on any new hire beyond his or her hire date…"

Based on the above, I recommend the Article 28.4 language of the Tentative Agreement.

Article 32 Physical Fitness Program

Employer Position

DCSO proposes implementing a physical fitness program to encourage members to adopt and maintain healthier lifestyles and achieve and maintain higher levels of physical fitness.

The program is completely voluntary for every single current member of this bargaining unit. The program is only mandatory for new hires. It points out that new hires would have been expected to meet these same standards, and in some cases more stringent standards, during the statewide Academy.

DCSO notes that the proposed program draws from other programs that have been put in place in other jurisdictions and follows Cooper Standards for Physical Fitness for Law Enforcement, a nationally acknowledged standard of fitness. The fitness levels adjust for age and gender. The program comes with significant money rewards.

The Employer also points out that the program does not involve any termination or removal from employment but rather after two years of non-compliance does have only a 3-day suspension element - but the suspension can be served with a leave forfeiture or monetary forfeiture. This forfeiture can be immediately earned back by the employee if he or she is in program compliance in the future due to the generous financial incentives.

DCSO stresses that this is one of the most important provisions to the Sheriff. According to the Employer, the provision was carefully and painstaking negotiated between the parties. The language went through many iterations and reiterations and "back and forth" discussions. The proposal upholds the tentative agreement already reached on Article 32 that was part of a "trade" at the bargaining table where economic items were given in exchange for non-economic language changes.

Union Position

OPBA is opposed to the inclusion of any language in the collective bargaining agreement that requires mandatory physical fitness testing for any employee.

The Union is concerned about potential legal liability. It notes that SERB held in In re City of North Ridgeville, 2000-SERB-008 that physical fitness testing is a mandatory subject of collective bargaining and in so holding, found that a nexus had not been shown between physical fitness standards in that case and ability to do the job at issue. Similarly, the Union contends DCSO did not provide the OPBA with any evidence that there is a nexus between its proposed physical fitness standards and the ability to do the job of a deputy. In fact, it contends the Sheriff did not provided OPBA with any written standards; the discussions at the bargaining table of the actual physical fitness standards were all theoretical.

The Union expresses further concern that the standards, whether adjusted for factors such as age and/or gender, or not, likely violates Title VII of the Civil Rights Act and cites a number of cases in support.

OPBA argues there is no support for the imposition of mandatory physical fitness standards in the comparison group of all other organized Deputy Sheriffs' bargaining units in the State of Ohio. Based on data provided by SERB, only 8 out of the 88 counties have Deputy Sheriff contracts with some sort of physical fitness testing. Only 5 of those contracts require Deputy Sheriffs to participate in mandatory physical fitness testing. Of those 5, only Union County is geographically proximate to Delaware County and Union County does not discipline employees who fail to meet the physical fitness standards.

Discussion and Recommendation

Article 32 was part of the Tentative Agreement and the evidence does not support setting it aside. The facts presented by the Union relevant to this proposal are facts the parties would have been aware of and presumably considered carefully prior to entering into the Tentative Agreement.

Although such programs are not commonplace, the trend is toward more law enforcement agencies including physical fitness provisions in their contracts. Examples of contracts in sister/similar jurisdictions to DCSO that include such provisions are Clermont County Deputies, Columbus Airport Authority, Franklin County Deputies, Lawrence County Deputies, Lorain County Deputies, Ohio State Highway Patrol, Pike County Deputies, and Union County Deputies.

I am not persuaded that the legal concerns raised at fact finding justify rejecting this provision of the Tentative Agreement. The parties bargaining teams agreed to it with the assistance of legal counsel. The statutory provision cited as a basis for concern is only directed at hiring and promotions. The legal cases cited as a basis for concern are not new cases that were decided after bargaining concluded. The cases are about hiring practices. No cases were cited wherein physical fitness programs like the one agreed to here were found to be illegal.

The program tentatively agreed to is measured and fair. It's based on nationally recognized standards of fitness, Cooper Standards for Physical Fitness for Law Enforcement, which are adjusted for age and gender. All members can participate in the program and are eligible for significant financial rewards on an annual basis if they successfully complete it. The program is completely voluntary for current members and only mandatory for new hires who would have been required to meet the same or higher standards during the statewide Academy and would be aware of the expectations going in. The provision specifically provides that any current members hired will not suffer any adverse employment action for refusing to participate or participating but not achieving passing fitness levels. The maximum adverse employment action for a new hire after January 1, 2018 is a three-day suspension and that's only after two years of not passing and can be served with a leave forfeiture.

Based on the above, I recommend the new Article 32 language of the Tentative Agreement.

CONCLUSION

After giving due consideration to the positions and arguments of the parties and to the criteria enumerated in Ohio Revised Code 4117.14, the Fact Finder recommends the Tentative Agreement in its entirety. A complete copy of the Tentative Agreement is separately attached hereto. Also separately attached is a copy of the Cooper Age and Gender Base Standards for Law Enforcement to be set forth and updated with current standards as an Attachment A to Section 32.5 of Article 32.

Respectfully submitted,

/s/ Sherrie J. Passmore
Sherrie J. Passmore
Fact Finder

January 29, 2018

CERTIFICATE OF SERVICE

This Fact Finding Report was sent by email on January 29, 2018 to:

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State Employment Relations Board
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/s/ Sherrie J. Passmore
Sherrie J. Passmore