2023-031 Exhibit A

STATE EMPLOYMENT RELATIONS BOARD

FACT FINDER'S REPORT AND RECOMMENDATION

IN THE MATTER OF:

SUMMIT COUNTY SHERIFF'S OFFICE

AND

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

SERB Case No. 2022-MED-09-0989
Before Fact Finder Thomas J. Nowel, NAA
January 25, 2023

PRESENTED TO:

Michael D. Esposito
Vice President, Clemans, Nelson & Associates, Inc.
2351 South Arlington Road, Suite A
Akron, Ohio 44319

Otto Holm, Jr.
Senior Staff Representative
Fraternal Order of Police, Ohio Labor Council, Inc.
222 East Town Street
Columbus, Ohio 43215

Michael D. Allen, General Counsel
State Employment Relations Board
65 East State Street, 12th Floor
Columbus, Ohio 43215

INTRODUCTION

This Fact Finder was appointed to serve by the State Employment Relations Board on November 28, 2022. The bargaining unit is represented by the Fraternal Order of Police, Ohio Labor Council, Inc. There are approximately, and probably less than, 250 employees in the bargaining unit of Deputies. Due to a number of retirements and resignations, there are numerous vacancies in the position of Deputy Sheriff. This is not uncommon, during this time, in law enforcement agencies in Ohio. Employees classified as Deputy Sheriff perform correction functions within the Summit County Jail. Deputies also perform road patrol, court security functions and law enforcement within Summit County and in contract specific areas. The Fraternal Order of Police, Ohio Labor Council, Inc. became the certified bargaining agent for Deputies of the Summit County Sheriff's Office on April 26, 2005.

Summit County is located in northeast Ohio, south of Cuyahoga County and north of Stark County. Summit County is one of two "charter counties" in Ohio which is governed by a County Council. A County Executive is elected as chief administrator, and the County Council is comprised of 11 members, three elected at large and eight members elected from districts. The County Executive and members of County Council are elected to four year terms. The Sheriff is a separate elected office.

The parties engaged in six bargaining sessions between the dates of November 7 and December 19, 2022. A number of signed tentative agreements were reached, and other provisions of the previous collective bargaining agreement remained unchanged. The previous Agreement expired on December 31, 2022. Pre-hearing statements regarding issues at impasse were received by the Fact Finder on a timely basis.

The parties met with the appointed Fact Finder on January 10, 2023 at the Summit County offices on Main Street in Akron. The Fact Finder suggested mediation of issues at impasse, and the parties agreed to make an attempt to resolve a number of issues. With the assistance of the Fact Finder, the parties attempted to find common ground on a number of the issues and some progress was made. Nevertheless, after four hours of mediation, the parties were unable to resolve most of the issues at impasse. The evidentiary hearing was conducted during the afternoon and into the evening. The parties agreed that the Report and Recommendation of the Fact Finder would be issued to the parties on January 25, 2023 which would allow both the Union membership and County Council adequate time to consider the Report.

OUTSTANDING ISSUES:

1. Article 7, FOP Representation
2. Article 9, Grievance Procedure
3. Article 10, Discipline
4. Article 17, Hours of Work and Overtime (comp time issue)
5. Article 18, Wages and Compensation (Including Side Letter on Lump Sum Payments)
6. Article 20, Insurances
7. Appendix, Disciplinary Infractions

Those participating at the hearing for the Union:

Otto Holm, Jr., FOP Senior Staff Representative
Kay Cremeans, FOP, OLC, Inc. Chief Counsel
Mary Schultz, Financial Advisor
Michael Shaffer, Deputy
Jerome Hill, Deputy
Mark Adams, Deputy
Ryan Fraley, Detective
Steve Norris, FOP, OLC, Inc. Staff
Coleman R. Caster, Deputy
Heath Trester, FOP, OLC, Inc. Staff
Keith Wagner, Deputy
Robert Ivey, Deputy
David Troutman, Deputy

Those participating at the hearing for the Employer:

Michael D. Esposito, Vice President, Clemans, Nelson & Associates
Phil Montgomery, Director of Finance and Budget

Colleen Sims, Attorney, Law Department
Michael J. Zhelesnik, Account Manager Clemans, Nelson & Associates
Scott Cottle, Chief Deputy
Brian K. Harnak, Deputy Director, Law Department

In analyzing the positions of the parties regarding each issue at impasse and then developing a recommendation, the Fact Finder is guided by the principles which are outlined in the Ohio Revised Code, Section 4117.14 (G) (7) (a – f) as follows.

1. Past collectively bargained agreements, if any, between the parties.

2. 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.

3. The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, the effect of the adjustments on the normal standard of public service.

4. The lawful authority of the public employer.

5. The stipulations of the parties.

6. Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in 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 private employment.

ANALYSIS AND RECOMMENDATIONS

During the hearing, the parties presented their positions on each open article of the collective bargaining agreement in numerical order. This Report and Recommendation will start with Article 18, Wages and Compensation. This open issue involved many exhibits

including financial analysis on the part of both parties and a great deal of discussion. This analysis will then consider the remainder of open issues in numerical order.

1. Article 18, Wages and Compensation

It is noted that the expired collective bargaining agreement did not initially include a general wage increase in its third year. Due to issues of retention and recruitment, the parties initiated a wage reopener with the results to be effective the first pay period in January 2022. The entry rate was bumped 8.5%. The pay for current employees was accelerated by movement into higher steps on the wage schedule. The negotiations for the process were concluded without the need for the involvement of a neutral, fact finding or conciliation.

Both parties to the fact finding hearing provided data regarding the financial condition of Summit County government. The Summit County tax rate is one of the lowest in the state at .50%. It cannot be increased except by the vote of its citizens. An attempt to increase the rate by .25% was defeated at the polls in 2014. The County has the lowest expenditures per capita of all major counties in the state, $235.00. This being said, the ending general fund unencumbered balance at the end of 2021 was $8,013,031, and the estimate for the end of 2022 is $9,297,576. This is compared to the balance at the end of 2015 which was $5,490,495. The 2022 budget was the first to exceed pre-recession levels, and General Fund personnel costs remain below 2008 levels. The Budget Stabilization Fund balance has been at $25,325,501, unchanged for a number of years and projected into the future to 2026. The use of this fund requires approval from the Budget Commission and County Council. Budgeted bargaining unit positions, FOP, OLC, were 17% less in 2022 compared to 2006. The Union has stated that 47 of

its members are contemplating retirement in 2023. The County, like other political subdivisions, received one time monies from the federal government due to the COVID 19 pandemic. Many of these funds are allocated for long needed infrastructure improvements, and the County Charter indicates that one-time monies may not be used for ongoing expenditures such as wages. With this brief background, as presented by the Employer and illustrated in its exhibits provided at the fact finding hearing, the proposals of each party and rationale for such are outlined as follows.

Union Proposal:

- Effective January 1, 2023, base wage increased by $5.40 per hour as an equity adjustment.
- Effective January 1, 2023, 5% across the board wage increase applied after the above noted equity adjustment.
- Effective January 1, 2024, 5% across the board wage increase.
- Effective January 1, 2024, 5% across the board wage increase.

Longevity:

- 5-10 years: Increase from 1% to 2% of salary.
- 11-15 years: Increase from 1.5% to 2.5% of salary.
- 16-20 years: Increase from 2% to 3% of salary.
- 21+: Increase from 2.5% to 3.5% of salary.

Employer Proposal:

- Effective January 1, 2023, 2% across the board wage increase.
- Effective July 1, 2023, 2% across the board wage increase.
- Effective January 1, 2024, 1.5% across the board wage increase.
- Effective July 1, 2024, 1.5% across the board wage increase.
- Effective January 1, 2025, 3% across the board wage increase.

In addition to the above across the board wage increase, the Employer proposes a side letter to the CBA which provides for three lump sum payments of $3500.00 for each year of the agreement, 2023, 2024, 2025. One-fourth of each lump sum will be paid quarterly.

UNION POSITION: The Union states that, in previous proceedings, five county Sheriff Offices have been identified as comparable to the Summit County Sheriff's Office. The Union refers to these jurisdictions as the "magic five," Franklin, Montgomery, Cuyahoga, Hamilton and Lucas. Summit is the sixth in the comparison list. The Union exhibit shows a comparison of hourly and yearly wages. The Summit County Sheriff ranks fifth on the list. The average annual compensation is $77,438.40; the highest is $112,715.20. The rate for Summit is only $66,206.40, the second lowest rate on the list. The Union states that its proposal for an equity rate increase is justified. Recruitment in law enforcement is more difficult than ever. It is critical to make wages competitive to attract new hires. And the Union's proposal will still not bring parity with the other Sheriff Offices compared to the "magic five." Data provided by the State Employment Relations Board on October 25, 2022 confirms the external comparables referenced by the Union. The Union states further that bargaining unit wages are 12% behind the average wage of law enforcement employees of other political subdivisions in Summit County. The $5.40 per hour equity increase in the first year of the new CBA will make bargaining unit wages barely average. The implementation of the Employer's wage proposal will not aid in retaining and recruiting Deputies.

The Union emphasizes that Summit County Sheriff Deputies perform the duties of corrections officers in the jail, but they are all deputies and are able to perform all duties of a Summit County Deputy Sheriff and have done so when necessary. All Deputies are assigned to the same pay schedule whether performing service in the jail, whether providing security in the Court or whether assigned to patrol duty in the community.

The Union states that its analysis of the County financial condition confirms that the Union's wage proposals are affordable. Sales tax revenues were $36 million in 2011 and have increased steadily over the years to $53 million by 2021. The unencumbered General Fund balance has steadily increased from $5,087,000 at the end of 2017 to $8,013,000 at the end of 2021. The Union analysis indicates that the true carry over balance at the end of 2022 was estimated at $34,532,000. This figure is the combination of the Budget Stabilization Fund and General Fund carryover. The Government Finance Officers Association recommends a minimum carryover of 16% of expenses and indicates that a percentage below this figure does not necessarily indicate a financial condition which is deficient. Summit County finances indicate a 27% carryover. The General Fund unencumbered balance was a healthy $23,022,000 at the end of October 2022. This was well above projections.

Casino revenues rebounded to their highest levels in 2021, and property tax collections have increased in recent years. The County received significant federal funds from the American Rescue Plan in 2021 and 2022. The Union states that ARPA funds may be utilized for first responders. Most of the federal funding has not been spent by the County.

The Union relies on the financial analysis conducted by Sargent & Associates which is Exhibit No. 2 in its binder. The Union states that its wage proposal is affordable including the suggested increase in longevity. The proposed equity adjustment is critical for recruitment and retention purposes. The overall proposal is fair and raises wages for Deputies only to an average level based on external comparables and in particular the "magic five" Ohio counties. The Union emphasizes the importance of the Fact Finder recommending its wage and longevity proposals.

EMPLOYER POSITION: The Employer states that its proposal is reasonable. It increases wages at a time when it is necessary to recruit and retain employees. Its proposal for lump sum payments will aid in the goal of retaining current and new employees in the bargaining unit. The Employer states that its proposal is generous and, in fact, the parties were fairly close in resolving wages during negotiations for the new CBA until fact finding when the Union significantly increased its proposal and added a new proposal, the $5.40 per hour proposal which is completely unaffordable. The Employer believes that the Union has not bargained the issue of wages in good faith going into the fact finding process. The Fact Finder is urged to give serious attention to the various proposals and counter proposals prior to fact finding.

The Employer states that its proposal is fair and very generous and, in spite of this, the County is financially limited in terms of allocating monies for wages. The Summit County tax rate is the lowest in Ohio at 0.50%, and it may only be increased by a vote of citizens. An attempt to increase the tax rate by 0.25% failed overwhelmingly in 2014. Summit County has the lowest expenditures per capita of all major Ohio Counties. For 2022, fourteen years following the Great Recession, the County budget exceeded pre-recession levels for the first time, and General Fund personnel costs remain below 2008 levels. The total unencumbered general funds percent of expenditures was 24.9% at the end of 2021, is projected at 23.9% for 2022 and remains in the middle 20% range projected through 2026. The average base wage for FOP bargaining unit employees has increased by 42.2% from 2006 to 2022. FOP bargaining unit wages exceed both the median family income in Summit County and the CPI growth.

In a comparison of like Ohio Counties, Summit County Deputies are the third highest paid when all forms of compensation are combined (Exhibit 14). The Employer states that its

wage proposal exceeds average negotiated increases in 2022 based on recent State Employment Relations Board data for the Akron Region, County jurisdictions in the State, and law enforcement bargaining units. In a comparison of like situated Counties, Summit County Deputy hourly rates of pay are only $1.36 per hour less than the average base wage. When compared to Correction Officers, Summit County wages are $3.34 above the average. When total compensation is compared to a list of 17 comparable Counties, Summit County Deputies are exactly in the middle. The Employer cites the negotiated wage reopener in 2022 which increased wages by 7.5% and increased entry level pay significantly. The Employer cites comments by other neutrals which support negotiated lump sum payments.

The Employer states that Summit County has a history of doing the right thing in bargaining wages and benefits. The equity wage increase proposed by the Union is simply not sustainable, and it would devastate the County budget. Negotiated wage increases impact other County bargaining units. The Employer believes that its wage proposal is fair and should be recommended by the Fact Finder.

RECOMMENDATION: Both parties recognize the importance of recruiting and retaining Deputies. There are a significant number of vacancies currently. The 2021 annual report of the Sheriff's Office indicated that there were 248 Deputies. The Union states that there are 224 Deputies on the payroll currently and states further that 47 Deputies are planning on retirement or resignation in 2023. This is also a concern for the Sheriff's Office and the community. Law enforcement is faced with these issues and concerns across the State of Ohio and beyond. Union advocates are suggesting to neutrals that these concerns must be

addressed in fact finding and conciliation reports and decisions. The parties to the instant matter recognized this and successfully negotiated a wage reopener in 2022, retroactive to January 1, which increased the entry rate by 8.5% and moved employees already employed to higher steps on the wage schedule. This was a pro-active move on the part of the Employer and Union, and the parties are to be commended for this joint endeavor. Nevertheless, a high number of vacancies continue as mentioned previously, and the Union states that staffing levels are lower today than after the layoff of 30 employees in 2011.

It is clear that issues of recruitment and retention of Deputies are critical. The parties made significant progress in making the wages of Deputies more attractive for recruitment and retention purposes when the reopener was negotiated last year. More needs to be done in this area and funding is available. The Report and Recommendation of the Fact Finder will include a $1.00 per hour equity adjustment effective July 1, 2023.

In respect to general across the board wage increases for the new CBA, the proposals of the parties had been fairly close prior to the fact finding process. In addition to the concerns of recruitment and retention, the Union states that bargaining unit wages are 12% behind law enforcement agencies within Summit County. This impedes attempts at recruitment and retention. It is a positive factor that sales tax revenues have increased over the past few years, and the General Fund unencumbered balance has steadily increased. The Sargent & Associates financial analysis indicated that a 1% wage increase for the bargaining unit will cost the County $211,866. This includes the hourly increase, OPERS, Medicare and Workers Compensation. The report suggests that the Union wage proposals are affordable. The Employer states that its wage proposal is fair and generous, and it exceeds increases across the various areas of the

State of Ohio based on data generated by the State Employment Relations Board. The Fact Finder notes the Employer's concern that contract settlements for one bargaining unit impact what occurs at the bargaining table for other units of the County. The Employer's position, that lump sum payments aid in retention, is convincing. Based on the position of the parties, the data and arguments submitted during the hearing, and the analysis contained herein, the recommendation of the Fact Finder for Article 18, Wages and Compensation, is as follows.

Available financial resources are to be allocated for across the board wage increases and the payment of lump sum payments during the term of the new collective bargaining agreement as opposed to additional funding for the longevity benefit. The recommendation includes current contract language for Section 18.3, Longevity.

Section 18.1 includes the following recommendation.

- Effective January 1, 2023, 4% across the board wage increase.
- Effective July 1, 2023, $1.00 per hour equity adjustment to each step of the schedule on the basis of the present law enforcement labor market and acute hiring and retention issues with the SCSO. This should not be construed as a general across the board wage increase as it is an equity adjustment due to the above criteria.
- Effective January 1, 2024, 3.5% across the board wage increase.
- Effective January 1, 2025, 3% across the board wage increase.

The remainder of Article 18 is current contract language.

SIDE LETTER
LUMP SUM PAYMENTS

In addition to the equity wage increase and general increases provided for under Article 18, Wages and Compensation, those bargaining unit members, who are on the payroll as of the date the payment is issued, shall receive a retention bonus payment as follows: $3500.00 in 2023; $3500.00 in 2024; $3500.00 in 2025. Employees shall receive one-fourth of the annual bonus quarterly, January 1, April 1, July 1, October 1 of each year of the Agreement ($875.00)

2. Article 7, FOP Representation

The previous collective bargaining agreement provides for the FOP Chairperson to be on full-time administrative released time in order to attend to Union business. Additionally, the Union shall appoint a "Benefits Resource Officer" who will be provided with eight hours of released time per week and 16 hours per month to attend pension board meetings in Columbus.

The Employer proposes to eliminate the full time administrative release time allowed the FOP Chairperson and to provide released time as necessary to attend meetings with the Employer, grievance meetings, labor management meetings, pre-disciplinary meetings and other recognized meetings and events. The Employer proposes to modify the provision regarding the Benefits Resource Officer to allow it to assign the duties of the position to an individual of its choosing. In the event the Employer does not make said assignment, the Union will continue to select the Resource Officer.

The Union rejects the Employer's proposals and wishes to maintain current contract language.

EMPLOYER POSITION: The Employer states that a full-time released Union Chairperson is an inefficient use of tax payer dollars especially when the Department is short staffed. The Employer proposal will allow for released time as needed which will not be denied. The proposal will improve staffing levels and will improve accountability regarding taxpayer dollars. The Employer refers to its exhibit which illustrates that, of a comparison to 16 County Sheriff

Offices, only Lucas County provides for a full-time released Union Chairperson in addition to Summit County. All other Offices allow for release time when necessary such as grievance meetings and negotiations. The exhibit suggests that no other County includes a Resource Officer with designated released time hours.

UNION POSITION: The Union states that past collective bargaining agreements have allowed for paid released time for the FOP Chairperson since 1996. In 2005, the Employer and Union agreed to make the Union chair a full-time released position pursuant to the collective bargaining agreement. Likewise, the language regarding the Benefits Resource Officer has been included in the CBA since 2005. The Employer's proposal is short sighted as both Union Officers benefit both parties regarding efficient administration of the collective bargaining agreement. The Union states that the Employer has not offered a meaningful argument to support its proposal. The Union states its position to maintain current contract language.

RECOMMENDATION: Both parties make credible arguments in support of their positions. In the past, full time released Union Presidents were more common in the public sector, even prior to the enactment of the Ohio collective bargaining law, ORC Section 4117. There are few today as illustrated by Employer Exhibit No. 2. There was, nevertheless, little data submitted by the Employer to support its proposal in terms of daily activity. Both FOP positions have existed in their current format since 2005. Ohio Revised Code, Section 4117.14 (G) (7) indicates that neutrals, in fashioning Fact Finding recommendations, consider "past collectively bargaining agreements." This is an issue which is better resolved by the parties through the package

proposal process. The FOP Chairperson may be utilized in the efforts to recruit new employees to fill the many vacancies in the Department such as speaking engagements, job fairs, etc.

The recommendation is current contract language for Article 7, FOP Representation.

3. Article 9, Grievance Procedure

The Employer proposes to modify the arbitration process contained in Article 9 of the CBA as follows:

- Modify Section 9.9 to exclude from arbitration any non-disciplinary grievance with less than $500.00 cash value and such demand for arbitration must be directly related to an alleged contractual violation.
- No disciplinary grievance will be eligible for arbitration unless there is a loss of pay.
- Delete Section 9.10 which states that arbitration hearings are to be conducted pursuant to the "Rules of Voluntary Arbitration" of the American Arbitration Association.

The Union rejects the proposals of the Employer and proposes current contract language.

EMPLOYER POSITION: The Employer states that the arbitration process is consensual, but the Union has abused it, and it must therefore be changed. The Employer cites Ohio Revised Code Section 124.34 which limits appeals of discipline for suspensions of three days or less based on a civil service appeal. In addition, the Employer's proposal to limit appeals to arbitration is consistent with its proposal to do so in its proposal to modify the disciplinary process as contained in Article 10. The Employer cites an arbitration case between the parties in which the Grievant and Union abused the process. The Employer suggests that the Union has not

acted reasonably to avoid needless expense and dispute and has not honored the Agreement as bargained.

The Employer cites a number of County jurisdictions which limit appeals to arbitration involving discipline which do not involve a loss in pay (Exhibit 4). The Employer cites a recent arbitration case, Grievant Hill. The Grievant's and Union's request for punitive damages was denied by the arbitrator. The Union abused the arbitration procedure which resulted in unnecessary time spent and the expense of the arbitration process.

The Employer has proposed the deletion of Section 9.10 of the CBA which states that arbitration hearings are to be conducted pursuant to the rules of the American Arbitration Association. The AAA amended its rules in the past to allow an arbitrator to determine the arbitrability of a grievance. The Employer suggests that the parties had agreed that such disputes would be resolved by the court and not by an arbitrator. Nevertheless, the Union has now insisted that disputes regarding arbitrability be resolved by arbitrators. This is in violation of previous agreements, and the Employer states emphatically that such matters are reserved for the court to decide.

The Employer urges the Fact Finder to recommend its proposals in order to maintain a reasonable approach to the arbitration process.

UNION POSITION: The Union states that the changes to the arbitration process, proposed by the Employer, would impact the Union's ability to represent its members. Legitimate grievances may not be heard by a third neutral party. The Union states that Ohio Revised Code Section 4117 provides the right of bargaining unit employees to file grievances. The $500

threshold would preclude the hearing of legitimate grievances at arbitration such as the Hill arbitration which involved no monetary remedy. There are legitimate grievances regarding transfers which would not be heard as all Deputies are paid on the same wage schedule. The Union states that it has not, in the past, arbitrated verbal and written reprimands. The Union rejects the proposal to delete the language regarding the AAA rules. Regardless of said language, the Employer has appealed issues of arbitrability to the court in any event. Either party, the Employer in particular, may appeal a decision of an arbitrator to court and ask that the award be vacated. The Union states that the Employer's proposals are based on its losing record at arbitration and asks the Fact Finder to maintain current contract language.

RECOMMENDATION: The Fact Finder understands the concerns and frustrations of the Employer. Nevertheless, its proposals, limiting the right of the Union to arbitrate certain disputes, is a concern. Section 9.1 of the Article requires that grievances must allege a violation of a specific term of the CBA. Section 9.9 mandates that arbitrators have no authority to stray from the specific terms of the Agreement. The parties have bargained safeguards to ensure that grievances, and therefore matters at arbitration, are strictly related to the terms of the collective bargaining agreement. Further, the parties have carefully assembled a list of knowledgeable and seasoned arbitrators to hear disputes at arbitration as opposed to receiving lists, which may include unknown neutrals, from the Federal Mediation and Conciliation Service or the American Arbitration Association. Adding the qualification of membership in the National Academy of Arbitrators may also add quality to the panel.

Ohio Revised Code Section 4117.09(B)(1) requires that collective bargaining agreements contain provisions for a grievance procedure "which may culminate with final and binding arbitration of unresolved grievances and disputed interpretations of agreements . . . " This provision does not mandate final and binding arbitration, but most advocates view it as highly recommended with the only limitation being that the process is linked specifically to a contractual dispute, and many parties allow arbitrators to decide disputes regarding arbitrability as it essentially involves the interpretation of a provision of the CBA whether procedural or substantive. Issues of arbitrability are often linked to the merits of the dispute.

At times, grievances do not involve a monetary remedy but are, nevertheless, critical to the integrity of the CBA. The Union's example of transfers where all Deputies, regardless of duties, are paid on the same wage schedule. A meritorious grievance regarding Article 33 may not have a monetary value but is, nevertheless, a serious matter which would be barred from arbitration based on the Employer's proposal.

The Employer has made a serious proposal regarding working suspensions which, in the view of the Fact Finder, should be given serious consideration. The Employer's proposal would bar an appeal at arbitration for such disciplinary actions. The progressive discipline principle could be impacted if such discipline matters are not appealable at arbitration. It would be difficult for an arbitrator/fact finder to support such a concept.

The Employer has proposed the deletion of Section 9.10 which states that arbitration hearings are to be conducted based upon the rules of the American Arbitration Association. The Employer argues that such rules allow arbitrators to decide challenges to issues of arbitrability as opposed to the court. The AAA rules read as follows:

1. Agreement of Parties
The parties shall be deemed to have made these rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the American Arbitration Association . . . .

2. AAA and Delegation of Duties
When parties agree to arbitrate under these rules or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration . . . .

The parties have assembled a closed panel from which an arbitrator is chosen to hear an arbitration case. The collective bargaining agreement does not provide for the American Arbitration Association to administer arbitration cases. Nor does the AAA provide the parties with panels of arbitrators to hear arbitration cases.

The Employer has expressed a concern that the rules of AAA require an arbitrator to decide issues of arbitrability. The AAA rule regarding arbitrability is as follows.

> A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

The provision states that the arbitrator may rule on such objections. An arbitrator is not required to rule on an issue of arbitrability. The Employer is not barred from taking the dispute to the court.

> Challenges to arbitrability are presented either to the arbitrator or to the courts. Where the collective bargaining agreement provides that the determination of arbitrability is vested in the arbitrator or where the parties agree to submit the question to arbitration, the arbitrator has jurisdiction over the determination. Absent collective bargaining provisions or agreement, the matter is for the courts to decide.
> *How Arbitration Works, Elkouri & Elkouri, Sixth Edition, pg. 278*

This arbitrator/fact finder believes that the matter of arbitrability is best resolved by an arbitrator. The parties save time and expense. Most members of the National Academy of Arbitrators would support that proposition. The current panel of arbitrators possesses the experience necessary to properly resolve disputes of arbitrability. Nevertheless, for all reasons outlined herein, the Employer's proposal to delete Section 9.10 is recommended.

With the exception of the deletion of Section 9.10, the recommendation for the remainder of Article 9, Grievance Procedure, is current contract language.

The Fact Finder submits the following suggestions to the parties as evidence indicates that the grievance and arbitration provisions have been a point of conflict. The collective bargaining agreements between the State of Ohio and a number of its Unions provide for mandatory grievance mediation prior to scheduling an arbitration hearing. Like the Summit County Sheriff CBA, the parties have assembled a closed panel of arbitrators. On a rotating basis, an arbitrator on the list will hear perhaps five or more grievances at the mediation level on a given day and work with the parties on resolution. The same arbitrator will not hear the same case at arbitration if the matter is not resolved at mediation. The mediator/arbitrator, who engages in mediation, will give a brief advisory opinion if the grievance is not resolved. The parties at the State resolve 50% or more of the cases slated for arbitration at the mediation step. Of the 300 to 400 grievances, which are not resolved immediately at mediation annually (there are at least 35,000 Unionized employees), the parties consider the advisory opinion, which is given verbally at mediation, and only 50 cases on average actually are arbitrated.[1] The

[1] Information provided by Kate Nicholson, Dispute Resolution & Training Administrator, Office of Collective Bargaining, Human Resources Division.

State and its Unions have also agreed to working suspensions. The Union may appeal these suspensions to bench decision arbitration which are final and binding. The number of witnesses are limited, and the arbitrator may hear multiple cases on a given day. If a suspension is upheld by the arbitrator, the Grievant's pay is then deducted for the number of suspension days. Working suspensions are limited, on paper, to five days. This Fact Finder's experience, as a member of the closed panel, is that the processes works effectively. The parties to the Summit County Sheriff and FOP CBA may wish to explore these possibilities in the future during labor management meetings. For a reference to actual contract language, the CBA between the State of Ohio and the Ohio Civil Service Employees Association, AFSCME Local 11, is located on the Ohio Office of Collective Bargaining website.

The recommendation of the Fact Finder for Article 9 is as follows:

- Deletion of Section 9.10 of Article 9, Grievance Procedure, is recommended.
- Current contract language for Article 9 with the exception of Section 9.10 is recommended.

4. Article 10, Discipline

The Employer proposes to add working suspensions (suspension of record) to the list of forms of discipline in Section 10.1 of the Article. Such suspension has the same effect as a suspension without pay for purposes of progressive discipline. An employee, who is subject to a working suspension, will continue to work and be compensated.

The Employer proposes to limit an employee's representative to only a Union representative for purposes of pre-disciplinary hearings in Section 10.

Finally, the Employer proposes language which states that discipline which does not result in a loss in pay (reprimands, working suspensions) may be grieved by the Union but not arbitrated.

The Union proposes no change to Article 10, maintaining current contract language.

EMPLOYER POSITION: The Employer states that the concept of working suspensions is common among public sector collective bargaining agreements. While the Union may have objected to the language at Fact Finding, it expressed general agreement during negotiations. The primary proposal, to limit the ability to arbitrate discipline, which does not involve a loss in pay, should be considered a benefit to both parties as resources are better expended addressing more severe forms of discipline. Discipline involving no loss in pay may still be grieved. The Employer believes these adjustments should be recommended.

UNION POSITION: The Union states that a bar to arbitrating discipline, which does not result in a loss in pay, allows for the elimination of the progressive discipline principle and impacts the just cause standard as found in Section 10.1 of the Article. The Union states further that the discipline matrix, which is utilized by the Employer, is unfairly applied. The Union objects to the limitation of representatives during the pre-disciplinary hearing process. The Union requests a recommendation of current contract language.

RECOMMENDATION: The Employer's proposal to include working suspensions in Article 10 is well founded. It retains employees on the job when they otherwise would be sitting at home.

This is also important when the Employer is short staffed as is the case at the Summit County Sheriff's Office. It is also a benefit to the employee who otherwise loses pay. The Employer's proposals to add Paragraph F in Section 10.1 and to include the paragraph outlining the working suspension process are recommended.

What is not recommended is the proposed prohibition to arbitrating disciplinary action which does not result in a loss of pay. Including working suspensions is a positive inclusion, but it is important that such discipline, which otherwise would be arbitrable, must be appealable to both the grievance and arbitration procedures. The Union's argument, that the Employer's proposal would impede the progressive discipline process and therefore the just cause principle, is accurate. An example would be an employee who receives a working suspension and his/her personnel file reflects a 10 day disciplinary suspension. The Union is barred from arbitrating the matter, and eight months later the same employee is the subject of further discipline which results in termination of employment. Had the working suspension been arbitrable, a neutral may have determined that the discipline was not for just cause or the penalty may have been mitigated. The later discipline may not have resulted in termination of employment based on the outcome of the earlier arbitration. This arbitrator/fact finder has had a number of such cases. Suggestions regarding bench decision arbitration for appeals of disciplinary suspensions, including working suspensions, are outlined in the Fact Finder's discussion of Article 9, Grievance Procedure. The parties may wish to discuss the concept during a labor management meeting.

The Employer's proposal to limit an employee's representative during a pre-disciplinary hearing is not recommended. An employee may wish to be represented by an individual not

directly affiliated with the Union. This proposal may be advantageous to the Union, but it may be in conflict with Ohio Revised Code Section 4117.

The recommendations for Article 10 are as follows.

- Section 10.1. Insert Paragraph F. suspension of record (i.e., working suspensions).
- Include the following paragraph in Section 10.1. "An employee who is given a suspension of record (i.e., working suspension) shall be required to report to work to serve the suspension and shall be compensated at the applicable wage for hours worked. The working suspension shall be recorded in the employee's personnel file in the same manner as other disciplinary actions having the same effect as a suspension without pay for the purpose of recording disciplinary action."
- The remainder of Article 10 is current contract language.

5. Article 17, Hours of Work and Overtime

The Employer has proposed the deletion of Section 17.7 from Article 17. This section of the Article allows for the accumulation and use of compensatory time. Current language provides for the accumulation of up to 80 hours of compensatory time, and such accumulation is to be paid off annually in December.

The Union rejects the proposal and proposes current contract language.

EMPLOYER POSITION: The Employer states that this proposal is based on current staffing concerns. With the shortage of Deputies, the use of compensatory time only compounds the difficulties of maintaining an adequate staffing pattern. Staffing concerns will continue for the

foreseeable future. The use of compensatory time is by mutual agreement, and the benefit is not readily available now and in the near future.

UNION POSITION: The Union states that current language already contains certain restrictions making the Employer's proposal unnecessary. The Union recognizes the staffing shortages and expresses its concerns regarding the possible retirement of 47 Deputies in the coming year. The Union argues for current contract language.

RECOMMENDATION: Both parties express their concern regarding staff shortages. The Union believes that the limitations contained in the current language are adequate to maintain sufficient staffing levels. During the fact finding hearing, the parties discussed a possible one year suspension of Section 17.7. The Fact Finder, therefore, recommends a Side Letter which suspends the accumulation and use of compensatory time for one year.

SIDE LETTER
COMPENSATORY TIME

The parties agree that Section 17.7 of the collective bargaining agreement is suspended from the execution of the 2023 Agreement through December 31, 2023. The provisions of Section 17.7 will be in full effect effective January 1, 2024. Employees, who may have accumulated unused compensatory time prior to the effective date of this Side Letter in 2023, may be paid for such time in December 2023.

6. Article 20, Insurances

The Employer proposes to delete Section 20.2 of the Article. This provision provides for the life insurance benefit for those former bargaining unit employees who have retired, based on the PERS retirement system. Such former employees are required to pay for the benefit.

Additionally, the Employer will make vision and dental insurance available to retired members as long as the County continues to offer such plans. Additionally, when the Union requested to insert the dates of the new three year CBA, 2023, 2024, 2025, the Employer proposed to increase the $110.00 cap to $130.00 in Section 20.3.

EMPLOYER POSITION: The Employer states that no former bargaining unit employees are enrolled in insurance coverage pursuant to Section 20.2. To do so is administratively burdensome in any event. There is no tangible benefit to the bargaining unit. In respect to the cap, the 10% employee contribution is maintained. But if the Union wishes to extend the cap for the duration of the new collective bargaining agreement, it is only fair to increase it to $130.00. The current provision, in Section 20.3, guarantees the cap only for 2019 through 2022.

UNION POSITION: The Union states that retired members of the bargaining unit may wish to enroll in the insurance benefits provided in Section 20.2 and argues that the benefit provision not be deleted. In respect to the proposal to increase the $110.00 cap to $130.00, it is important that Section 20.3 reflect the three year effective dates of the Agreement. To leave the dates of 2019 to 2022 in the new Agreement could expose bargaining unit members to higher caps at the discretion of the County. The Union requests current contract language in Section 20.2 and the dates of 2023 through 2025 in Section 20.3 with no increase to the $110 cap.

RECOMMENDATION: There are no retired members of the bargaining unit who are taking advantage of the retiree benefits provided under Section 20.2 of the Article. There was no data submitted to suggest that former bargaining units participated in the plan in the past. It appears that Section 20.2 is obsolete. The Employer's proposal to delete Section 20.2 is hereby recommended.

As the Union states, it is important to include the dates 2023 through 2025 in Section 20.3. The cap and the dates are negotiable issues. The Employer's proposal to increase the cap to $130.00 is also reasonable. The cap may not increase at all as the employee share of the self- insured plan is limited to 10%, but, if it does, the new cap would only reflect, at most, a $20.00 per pay increase. It appears that the 10% limit exists County-wide. Neither party provided information regarding the monetary cap. The Employer and Union proposals are recommended. The new dates will be inserted and the cap is extended to $130.00 Section 20.3 is recommended to read as follows:

Section 20.3. Employee Contribution. All employees who receive benefits will pay an amount not to exceed 10% of the premium costs through payroll deductions. The premium costs for coverage of the employee and his/her eligible dependents under the self-insured plan will not exceed one hundred and thirty dollars ($130.00) per pay in 2023 through 2025.

7. New Appendix, Disciplinary Infractions

The Employer proposes an Appendix to the collective bargaining agreement which includes a list of infractions which would result in disciplinary action up to and including termination of employment, but the infractions do not mandate that a first offense results in

termination automatically. If an infraction, which is listed in the Appendix, is arbitrated and is proven to have occurred, an arbitrator may not mitigate or reduce the imposed penalty. For infractions not contained in the list, a traditional just cause analysis would apply consistent with the Arbitrator Carroll Daugherty analysis.

The Union rejects the addition of the Appendix to the new collective bargaining agreement.

EMPLOYER POSITION: The Employer states that the Supreme Court has stated that a limitation to the just cause provision in a CBA must be negotiated by the parties. The list of infractions includes serious behaviors, and potential convictions. There are some behaviors that are so far outside the norm for a community that the level of discipline should be at the discretion of the Employer. The public perception of law enforcement is critical. The Ohio Supreme Court confirmed that an arbitrator had no authority to mitigate a penalty in a case in which a patient was abused by a Grievant. It is necessary for the parties to include a provision in the agreement which limits an arbitrator's ability to mitigate a penalty when it is clear the employee committed the offense. The collective bargaining agreement between the Wayne County Sheriff and the FOP, OLC, Inc. contains the provision which is being proposed in the instant negotiations. The CBA between the Portage County Sheriff and Ohio Patrolmen's Benevolent Association also includes a similar provision. The Employer cites news articles and court decisions regarding arbitrator decisions which reinstate and mitigate penalties and are therefore an affront to the community. Such decisions are improper and have a negative

impact on the community. The Employer states that it is important that the Fact Finder recommend the inclusion of the Appendix in the new collective bargaining agreement.

UNION POSITION: The Union states that the proposal is an attempt to reduce its ability to fairly represent its members. It is a limit to the just cause principle which has been bargained by the parties and has been part and parcel of all past collective bargaining agreements between the parties. The Union suggests that the Employer always has the ability to ask the courts to vacate an award which it feels includes a remedy at arbitration which is not consistent with what the parties bargained or the just cause principle. The Union states that the current disciplinary provision is sufficient and rejects the inclusion of the Appendix in the new collective bargaining agreement.

RECOMMENDATION: The concerns of the Employer are recognized. Law enforcement has been under significant scrutiny for a number of years. There have been a number of arbitration decisions over the past few years which have been criticized in the media, the community and among Employer advocates. It is also true that the media often has little or no knowledge regarding the grievance and arbitration process. There was a recent case in which an arbitrator was criticized in the media for reinstating a law enforcement officer following a serious violation of policy. What the media and others did not know was that the Grievant in the case had received a disciplinary suspension for the policy violation by the Employer. The Employer was criticized by the media and a number of public officials. Based on the public criticism, the Employer, at a later time, terminated the employment of the law enforcement officer,

referenced above, for the same offense. The collective bargaining agreement prohibited double jeopardy, and the arbitrator was bound to reinstate. The issue of double jeopardy was not reported by the media.

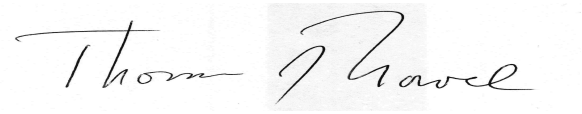
The list of offenses proposed by the Employer, as part of the Appendix, is expansive and somewhat subjective in some areas. It is also important to note that the parties do not utilize the FMCS or AAA for the appointment of arbitrators. At times, the parties are not familiar with the names submitted on the panels by these agencies. This is not the case here. The parties have assembled a closed panel of arbitrators. The parties know their background and arbitration history. The arbitrators are familiar with the parties and the issues between them. The list of seven arbitrators includes seasoned and experienced neutrals. A number are members of the National Academy of Arbitrators which membership requires a high level of qualifications and experience. The parties also have the ability to modify the list of panelists. The parties may expect fair and reasonable arbitration decisions from the members of the closed panel who they have selected to hear potential arbitration appeals. The panelists would ensure that appropriate awards and remedies regarding discipline would be rendered without the need for the list contained in the proposed Appendix.

The Employer has stated that the Supreme Court has determined that any limitation to the just cause principle in a collective bargaining agreement must be negotiated by the parties. It is the opinion of this Fact Finder that the same is true regarding the fact finding process. An issue of this nature should be negotiated by the parties and not recommended by a Fact Finder or imposed by a Conciliator. The Employer's proposal to include the New Appendix, Disciplinary Infractions in the new collective bargaining agreement is not recommended.

CONCLUSION

The recommendations contained in this Report and Recommendation include all tentative agreements reached by the parties during negotiations and during and followng the mediation session held prior to the evidentiary hearing. All unopened articles and provisions of the collective bargaining agreement are hereby incorporated in this Report and Recommendation. The Fact Finder has reviewed the pre-hearing position statements of the parties, all submitted exhibits, and all facts and information provided during the evidentiary hearing. The parties had the full ability to present their cases to the Fact Finder on all issues which were at impasse.

Respectfully submitted and issued at Lakewood, Ohio on this 25th day of January 2023.



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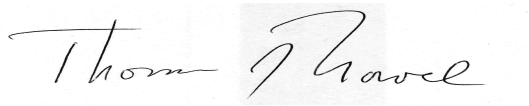
Thomas J. Nowel, NAA
Fact Finder

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of January 2023, a copy of the foregoing Report and Recommendation of the Fact Finder was served by electronic mail upon Michael D. Esposito, Vice President, Clemans, Nelson & Associates, for the Summit County Sheriff's Office; Otto Holm, Jr., Senior Staff Representative, for the Fraternal Order of Police, Ohio Labor Council, Inc.; and Michael D. Allen, General Counsel for the State Employment Relations Board.



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Thomas J. Nowel, NAA
Fact Finder