# FACT FINDING REPORT

County of Chenango and Chenango County Sheriff
Joint Employer

And

Chenango County Law Enforcement Association
New York State Union of Police Associations, Inc.
New York State

Public Employment Relations Board
Case M2016-096

Appearances:

COUNTY: Leroy C. Kotary

ASSOCIATION: Marilyn D. Berson

FACT FINDER: Clifford B. Donn

This dispute is between County of Chenango and the Chenango County Sheriff (the County) and the Chenango County Law Enforcement Association (the Association). The Association represents some twenty-three officers employed by the County and Sheriff as joint employers. Most are deputy sheriffs, four are deputy sheriff sergeants and one is a deputy sheriff lieutenant.

The parties met three times during 2016 in an unsuccessful attempt to negotiate a successor to the 2012-13 collective bargaining agreement. In accordance with the Taylor Law, the economic proposals of the parties are before an arbitration panel which, to the best of the knowledge of the undersigned, has not yet issued an award. That award will cover 2014-15. The Association requested that the Public Employment Relations Board appoint a fact finder and the undersigned was then assigned to the case to make recommendations on issues not subject to arbitration under the Taylor Law. The parties seek fact finding recommendations covering the same period as the forthcoming award of the arbitration panel, 2014-15.

After several mostly unavoidable delays, the fact finder met with the parties on September 6, 2017. The County was represented by Leroy Kotary and the Association was represented by Marilyn Berson. Exhibits were presented and the Association presented three witnesses, Mr. Anthony Solfaro, the President of the New York State Union of Police Associations, Mr. John Fern, a member of the bargaining unit and one of the Association's negotiators and Mr. Dustin Smietana, a member of the bargaining unit.

However, at that time the parties disagreed about whether the fact finder should consider two of the proposals made by the County. Both sides agreed that the proposals were economic in nature. The County asserted there is no prohibition on a fact finder considering such proposals if the interest arbitration panel has declined to consider them. The Association disagreed, asserting that such proposals when bargained to impasse could only be considered by an interest arbitration panel. The undersigned determined that the parties should brief that particular issue before proceeding with other proposals. The Association filed a brief about the matter (by Ms. Berson) and the County filed a brief (by Mr. John Corcoran). Finally, on November 14, 2017, Ms. Berson submitted (as had been agreed at the hearing), a rebuttal on behalf of the Association.

The undersigned issued a preliminary ruling on that issue on December 24, 2017. In that ruling he declined to consider the County's two economic proposals in the context of fact finding.

The parties were now ready to proceed with briefs on the substantive issues in dispute. The Association's brief (written by Ms. Berson) was sent on February 1, 2018. It should be mentioned that the Association brief referenced the statutory criteria covering interest arbitration awards and argued that these same criteria should be

relevant in fact finding.[Association brief pp.2-3]

In lieu of a formal brief, the County sent a letter dated January 31, 2018 (written by Mr. Kotary) that referenced a number of documents presented earlier or in the arbitration and simply recommended that the fact finder recommend no changes in language or benefit levels (i.e. that he reject all of the Associations proposals). Accordingly on February 1, 2018, the record was closed.

It has been quite a number of years since these parties successfully negotiated a collective bargaining agreement on their own. That agreement, which covered the period from 2005 to 2009, has been followed by a series of interest arbitration awards each covering a two-year period. The last such award was issued in March 2016 and covered the period calendar 2012 through calendar 2013. Hence the parties are now before the arbitration panel to seek an award for 2014 and 2015 and, as noted above, they seek fact finding recommendations to be considered for the same period.

The Association produced an economic expert to testify at the arbitration hearing and his testimony was made available to the fact finder (the parties agreed to submit the arbitration transcript to the fact finder). The report from that witness (Kevin Decker) is appended as Appendix A to the County's fact finding brief. While that report on the County's finances and Mr. Decker's testimony at the arbitration hearing are quite detailed, the bottom line is, as the Association's brief asserts, that, "...it is clear beyond dispute that the Employer has the ability to improve the terms and conditions of employment as proposed by the LEA." [Association brief p.4, Appendix A]

The Association also has justified improved benefits (as well as pay) arguing that despite the County's excellent financial position, the members of the bargaining unit are comparatively low paid. It cites testimony from the sheriff to the arbitration hearing that this has resulted in costly turnover as members of the bargaining unit leave for better paying local and nearby police agencies. [Association brief p.7]

The Association also notes that the County has declined to make any improvements in the items being considered in this fact finding in many years. In particular, it states that no improvements in these benefits have been made since the 2005-2009 and it strongly argues that this is highly inappropriate. [Association brief p.9]

The County has also provided an overview of its finances based on analysis done by the Chenango County Treasurer's Office. Overall, the County asserts that while it is financially in good condition, it faces great financial uncertainty and its residents, "...face some of the highest real property tax burdens in the United States." [County blue book exhibit 8]

A large number of issues remain open. It seems unclear whether the parties will be able to re-enter substantive negotiations before the issuance of the arbitration award.

The Association had argued earlier that the fact finding recommendations should be issued before the arbitration award while the County has disagreed and continues to disagree. On the other hand, there have been long delays in the process for these parties and it seems appropriate to issue the fact finding recommendations as soon as possible and the parties can deal with them as they see fit.

ISSUE – Association Business Leave (Article 3)

POSITIONS OF THE PARTIES

The Association currently has a total of three paid days per year to conduct Association business and it proposes to increase that from three to five. It has noted its need to negotiate contracts and process grievances and it has cited numerous contracts in contiguous and nearby cities, towns and counties that have much more extensive time paid for Association business. [Association brief pp.11-12]

The County notes that granting this proposal would cost it some $528 in addition to the cost of replacing the officer for the time away from their post and it is opposed to the change. It believes the proposal is unnecessary and inappropriate for a bargaining unit of such a small size. [County blue book exhibit 3]

DISCUSSION

It seems clear that the number of paid days permitted for Association business is quite limited in this unit, even for a small group and the Association has provided persuasive evidence that most other units provide more, often significantly more. This hampers the ability of the Association to represent its members. The cost of this is small and, since whether officers on Association business are paid for that time or not, they have to be replaced, the costs have been somewhat overstated by the County. Those doing Association business need to be replaced whether they are paid for the time or not so paying them for the time does not really add to the cost.

RECOMMENDATION

The parties should agree to increase the number of annual paid days for Association business from three to five.

ISSUE – Dues Deductions (Article 7)

POSITIONS OF THE PARTIES

The Association proposes incorporating in the collective bargaining agreement the statutory agency shop provisions in force for public employees in New York. It notes that this would give it a contractual remedy to enforce the provisions instead of having to rely on legal remedies. The Association is willing to reference the language in the Taylor Law so that this provision would not apply if the law were to change. The Association also notes other collective bargaining agreements that include such language including the one this County has with its nurses. [Association brief p.13]

The County notes that state law already provides for a mandatory Agency Shop and it sees no reason to repeat the provisions of the law in the collective bargaining agreement. In addition, the County notes that the law could change. [County blue book exhibit 3]

DISCUSSION

The Association has not made a compelling case for change with regard to this issue. The current arrangement complies with state law. In addition, given that this issue is currently before the U.S. Supreme Court and that the law on this issue may change in a matter of weeks, it seems not to be the time to make such a change.

RECOMMENDATION

No change is recommended.

ISSUE – Management Rights (Article 8)

POSITIONS OF THE PARTIES

The Association has proposed modifying the language of the Management Rights clause, essentially to create exclusions for existing practices and for the creation of new terms and conditions of employment. It asserts such a change will make the provision compliant with the Taylor Law and that it will give the Association a contractual remedy if it perceives a violation. It rejects the County argument that this could result in the bargaining of non-mandatory issues and it has cited an example of such language in the village of Cazenovia. [Association Brief pp.13-14, testimony of Anthony Solfaro]

The County argues that this proposal would limit the rights of the Employer to

alter management practices and this might include non-mandatory subjects of bargaining such as scheduling and assignment of officers. It asserts that, "how, when and where public safety is delivered…fearsis clearly the mission of the Sheriff and the Board of Supervisors." It is open to considering changes with regard to specific issues if the Association proposes those but it objects to this general language. [County blue book exhibit 3]

DISCUSSION

The Association has not made a compelling case for this change. It has cited little evidence in the way of comparables and has not indicated that the current arrangement has resulted in any potential problems to this point.

RECOMMENDATION

No change is recommended

ISSUE – Appointments (Article 9)

POSITIONS OF THE PARTIES

The Association proposes altering the current language on appointments which says that appointments are made at the pleasure of the Sheriff and in compliance with civil service law to remove the language about the pleasure of the sheriff. The Association asserts that this merely changes outdated and inappropriate language and will not reduce the valid exercise of discretion by the Sheriff who has not, in its view, violated the law. It cites one collective bargaining agreement with similar language. [Association brief pp.14-15]

Here the County asserts that the proposal would have the impact of opening to question the Sheriff's right to select candidates that he/she feels are best suited for an open position. It asserts this is "a basic right and responsibility of the duly elected County Sheriff." It asserts (and the Association has not disagreed) that the Sheriff has always followed the law and it opposes the change the Association seeks. It also objects to the proposal to alter the probationary period for employees. The County believes this would undermine the intent of the relevant statutory provision for probationary periods. [County blue book exhibit 3]

DISCUSSION

The Association has not made a compelling case for change on this matter. It cites a single collective bargaining agreement as a comparison and it does not cite any

instances in which the current language has resulted in misuse of authority.

RECOMMENDATION

No change is recommended.

ISSUE – Work Schedules (Article 11)

POSITIONS OF THE PARTIES

The Association asserts that it is not attempting to change the existing work schedules but merely to memorialize them in the collective bargaining agreement. It also seeks to create a seniority-based bidding system for staffing shifts or assignments. It rejects the County contention that this will change how the 15 minutes of show up time is paid because it notes that this claim is before the arbitration panel. The Association has also proposed giving detectives four additional paid "adjustment days" to compensate in part for the fact that they have a work schedule with more annual work days than road patrol deputies. It proposes language that would limit the number of times per year that a deputy sheriff can have his schedule changed. There are also proposals to allow for the flexing detective work hours and also to allow the detective sergeant and senior detective to choose both days off and their schedule which the Association believes will allow them to better deal with their work flow. The Association asserts that much of this is just about making the language consistent with the current practice. It also cites a variety of collective bargaining agreements that have similar language on some of these issues. [Association brief pp.15-19, testimony of John Fern]

The County rejects the attempt by the Association to restrict the number of shifts or the starting and ending times of such shifts which it views as appropriately within the discretion of the Sheriff and which could change if the situation changes. Further, it asserts that such issues are non-mandatory subjects of bargaining. It further rejects paying at an overtime rate for the fifteen minutes per day of show up time and it strongly rejects bidding for tours of duty by seniority which could interfere with the Sheriff's responsibility to provide public safety. [County blue book exhibit 3]

DISCUSSION

It is the standard practice in fact finding proceedings under the Taylor Law to refrain from making recommendations about subjects that one of the parties claims is non-mandatory. Such determinations are to be made by the Public Employment Relations Board and not by the fact finder.

RECOMMENDATION

No change is recommended.

ISSUE – Uniforms and Equipment (Article 15)

POSITIONS OF THE PARTIES

The Association notes that the list of uniforms and equipment provided has not been updated since 2005. It proposes to update the list to reflect current practices so that if there is a violation it can be remedied through the contractual grievance procedure. [Association brief pp.19-20, testimony of Anthony Solfaro]

The County did not comment on this proposal in either its exhibits or in its presentation at the fact finding hearing.

DISCUSSION

To the extent that the Association proposal does indeed reflect current practice in the Chenango County Sheriff's Department, this change in language can be adopted at essentially no cost and it will make the collective bargaining agreement more consistent with what actually happens. There seems no good reason not to do so.

RECOMMENDATION

The parties should update the language on uniforms and equipment as proposed by the Association.

ISSUE – Sick Leave (Article 18)

POSITIONS OF THE PARTIES

The Association proposes to make the accumulation of sick days unlimited, as opposed to the current limit of 240 days. The Association views the limit as unfair to employees who might experience a catastrophic illness. It also proposes adding language to the requirement for two-hour's notice of sick leave to waive that requirement in emergency situations. The Association claims this was just to deal with the situations in which giving the notice is simply not possible. Finally it proposes that the ability of the Sheriff to request proof of illness after three days should specifically say "consecutive" days. It asserts that the addition of the word "consecutive" will simply

make this section mean what everyone thinks it is supposed to mean. It cites some contracts with similar language. [Association brief pp.20-21, testimony of Anthony Solfaro]

The County notes that the current contract allows employees to accumulate up to 240 days of unused sick leave. At the current rate of 12 sick days per year, it would take 20 years of taking no sick days to accumulate that number. Since sick days are paid out at retirement, this could have an economic impact on the County. In addition, it rejects adding language about notice of sick leave to provide for emergency situations because it believes this opens the question of who determines what constitutes an emergency and opens these situations to debate. It also notes that evidence indicates that the Sheriff has been flexible in these situations. [County blue book exhibit 3]

DISCUSSION

There are really several different issues here. Those are accumulation of sick leave, notice when an employee uses sick leave and the right of the Sheriff to request evidence of illness. These are really three separate issues and are largely unrelated except in that all relate to sick leave.

The Association has not made a compelling case for any of these changes and it has certainly not indicated that any of these has created a serious problem with the current language. No evidence of abuse of the Sheriff's power to request evidence of illness was cited. Nor was there evidence that the limit of sick day accumulation to 240 (essentially an entire work year) has caused a problem and allowing the accumulation of more could have an economic impact on the County. The strongest case is with regard to the proposed additional language with regard to the "two-hour' notice" requirement for use of sick leave. However, even here the evidence is that the Sheriff has been reasonable and flexible under such circumstances.

RECOMMENDATION

No change is recommended.

ISSUE – Vacation Banking Policy (Article 20)

POSITIONS OF THE PARTIES

Currently deputies can ask to "bank" an additional five vacation days under extenuating circumstances but the collective bargaining agreement requires that they make this request by November 1. While the Association notes that the Sheriff has been somewhat flexible in allowing this request to be made later, it would make sense

to move the notice date back to December 1, which would allow the deputy to have a better idea if they are able to use the days or not . [Association brief pp.21-22, testimony of John Fern]

The County did not address this proposal in its exhibits or at the fact finding hearing.

DISCUSSION

The proposal made by the Association seems to have no economic cost and still leaves the Sheriff with the final determination on this issue. It simply gives employees a little longer to decide whether to make this request and it is clear from the record that the Sheriff has already allowed such requests to come in late when that was justified so in some ways this proposal just brings the collective bargaining agreement into compliance with existing practice.

RECOMMENDATION

The parties should alter the date for requests to bank vacation days as proposed by the Association.

ISSUE – Workers' Compensation (Article 26)

POSITIONS OF THE PARTIES

The Association has proposed considerable language partly to recognize benefits under general municipal law and to create a procedure for the administration of those benefits. Association witness Smietana testified to uncertainty and delays in applying for and receiving such benefits after an injury because the procedures were unclear or didn't exist.
The Association also asserts that in the absence of a procedure the only way to contest the denial of such benefits is to file an individual law suit which is neither practical nor efficient. Finally the Association cites collective bargaining agreements with similar provisions. [Association brief pp.22-25, testimony of Anthony Solfaro and Dustin Smietana]

The County prefers to continue to rely on the law which provides benefits for work-related injury or illness. The County notes that even in the case of Deputy Smietana the matter was resolved within two months and his benefits were paid retroactively. The County also asserts that the language proposed by the Association would include additional benefits not required by law. At the hearing, the County also argued that some parts of this issue (economic parts) might be included in the

arbitration award and then the rest could be considered in fact finding but since the arbitration award had not yet been issued, there was no way to know what that might look like. [County blue book exhibit 3]

DISCUSSION

While there is something to be said for clarifying procedures, the Association has not made a compelling case here. The County believes that in the language proposed by the Association there is the potential for benefits beyond those required by law. If the testimony of the Association witness on this matter is credited (and it seemed completely credible) even in this worst case scenario, the employee received all the benefits to which he was entitled after a not unreasonable delay.

RECOMMENDATION

No change is recommended.

ISSUE – Grievance Procedure (Article 36)

POSITIONS OF THE PARTIES

The Association proposes eliminating the step of the grievance procedure involving the Personnel Committee both because this step has no time limits and to bring the procedure into what it considers to be the normal pattern of three steps. In the alternative, the Association would propose that there be a time limit on the Personnel Committee step. It would also like to replace the American Arbitration panel procedure with a rotating panel of arbitrators which would allow the parties to avoid the AAA filing fee. Again it cites collective bargaining agreements with such grievance procedures. [Association brief pp.25-27, testimony of Anthony Solfaro]

The County opposes the proposal by the Association to eliminate the Personnel Committee as a step in the Grievance procedure. The County also prefers to retain the current American Arbitration Association procedure. It asserts that the Personnel Committee has not been a rubber stamp and that the Association has not proposed a time limit for responses from the Personnel Committee. [County blue book exhibit 3]

DISCUSSION

If the County is correct that the Personnel Committee has not been a rubber stamp, then the Association has not made a compelling case to eliminate that step in the grievance procedure. However, it is unusual to have steps in the grievance procedure with no time limits for a response and this does create the potential for

abuse. The County claims that the Association had not proposed placing a time limit on responses from the Personnel Committee but the Association has now made that suggestion and it is a reasonable one.

RECOMMENDATION

If the County wishes to keep the Personnel Committee as a step in the grievance procedure, it should agree to a limit (perhaps 30 days) on the time that Committee has to respond to a grievance and either party should be able to move the grievance to the next step if the Personnel Committee does not respond in that amount of time.

ISSUE – Discipline and Discharge (Article 37)

POSITIONS OF THE PARTIES

The Association has proposed adding language that restricts disciplinary interviews, suspension without pay "and the like" to comply with the statutory provisions of section 75 of Civil Service Law. The Association is concerned that the current agreement does not deal with these issues and could be interpreted to allow indefinite suspension without pay. In the alternative, the Association suggests that the fact finder recommend some limit on the length of unpaid suspension, which could be longer than the 30 days permitted under section 75. It cites an interest arbitration award that contained a provision limiting the length of suspensions without pay to 90 days as well as several collective bargaining agreements that contain limits of 30 days. [Association brief p.27, Appendix B]

The County opposes this proposal, noting that the parties had replaced Section 75 of state civil service law with a just cause standard and a grievance and arbitration procedure. It sees no merit in using elements of both section 75 and the grievance procedure to deal with disciplinary matters. It also asserts that in this proposal the Association is seeking to win back what it gave up to get arbitration. [County blue book exhibit 3]

DISCUSSION

The Association's proposal here has problems but with regard to limits on unpaid suspension, it does constitute a situation with potential for significant abuse. The parties should not go back to referencing Section 75 but they should place a limit on the possibility of unpaid suspensions. The Association cites the award in Tuxedo and that award contains a limit with which the County should not have a serious problem.

## RECOMMENDATION

The parties should adopt a limit of 90 days on unpaid suspensions.

## CONCLUSIONS

The parties continue to disagree about whether this report should be issued before the arbitration award is available. However, it should be noted that the recommendations made here have little to no economic impact. Even if all are adopted, the financial impact on the County is negligible. Accordingly, the parties could choose to discuss and resolve these issues without concern about the content of the coming arbitration award.

Date February 25, 2018 Signed Clifford B. Donn

Clifford B. Donn
Fact Finder