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IN THE MATTER

OF

FACTFINDING

BETWEEN

THE CITY OF PIQUA, OHIO

AND

AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL
EMPLOYEES, OHIO COUNCIL 8, LOCAL 984,
AFL-CIO

Hearings: October 24, 2000
SERB Case No.: 00-MED-01-0079
Date of Report: November 6, 2000
Issue: Factfinding

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REPORT AND RECOMMENDATIONS

Michael Paolucci
Factfinder

Administration

By letter dated March 31, 2000, from the Ohio State Employment Relations Board, the undersigned was informed of his designation to serve as factfinder for the Parties. On October 24, 2000, a hearing went forward in which the Parties presented arguments and documentary evidence in support of positions taken. The record was closed at the end of the hearing on October 24, 2000, and is now ready for a factfinding report.

Factual Background

The City is located just north of Troy, Ohio; the Union represents approximately eighty two (82) employees, who work in a wide range of positions throughout the City. Prior to the beginning of the hearing, mediation was attempted by the factfinder, but was unsuccessful.

Some unusual facts, as it pertains to the Parties' negotiations, apply to this case. Throughout these negotiations the leadership for both Parties were able to collectively bargain in a positive atmosphere. Notwithstanding that fact, the Parties were unable to reach agreement in a manner that was acceptable to their constituents. The Parties met on thirteen (13) separate occasions for negotiations — February 7, 18, 23, and 28; March 8, 15 and 28; April 11, 14, and 24; June 1 and 8; and August 8, 2000. In addition, two (2) mediation sessions were held on September 1, and 13, 2000. Out of these combined sessions, the Parties were able to reach a tentative agreement three (3) separate times. The bargaining unit rejected each of the tentative agreements. The date of each tentative agreement, and the Union's vote on each, is as follows:

<u>Date of Tentative Agreement</u>	<u>Vote on Rejection</u>	
	<u>Against</u>	<u>For</u>
April 24, 2000	37	9
June 12, 2000	49	0
September 13, 2000	59	2

Following the third rejection, the Union notified the City that it was withdrawing four (4) issues from the last tentative agreement. In response the City withdrew its position on four (4) other issues. Combined, there are seven (7) issues unresolved. At the hearing, these seven (7) issues were addressed and they are listed in sequential order as follows (parenthesis indicate which party withdrew the issue from the last tentative agreement):

1. Article V, Section 1- Wages and retroactivity (Both Parties);
2. Article V, Section 3 - Uniforms (City);
3. Article VI, Section 1 - Holidays (Martin Luther King Day) (City);
4. Article VIII, Section 1 - Conversion on separation (Union);
5. Article XI, Section 5 - Job Bidding (Union);
6. Article XI, Section 6 - Supervisory Work (Union);
7. Article XIV, Section 6 - Grievance Procedure (City).

Section 4117-9-05 of SERB's administrative rules addresses the issues that a factfinder must consider when making recommendations. That section, in pertinent part, reads as follows:

(K) The fact-finding panel, in making recommendations, shall take into consideration the following factors pursuant to division (C)(4)(e) of section 4117.14 of the Revised Code:

- (1) Past collectively bargained agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit 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 interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (4) The lawful authority of the public employer;

(5) Any stipulations of the parties;

(6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment. (emphasis added)

Each issue will be addressed giving consideration to all of the required factors.

In addition, it is important to address some difficulties that frequently arise in factfinding. When it is apparent that one party or another is acting in bad faith in negotiating, it is reasonable to make a negative inference with regard to each issue that such a party proposes. Bad faith negotiating leads often to bad faith proposals. Taking the inverse of that general proposition, when both Parties negotiate in good faith it is fair to look first at their tentative agreement, if any exist, for guidance in determining what is fair. When both Parties show that they have been guided by professional leadership who have taken all relevant factors into consideration when entering tentative agreements, then it is difficult for a neutral factfinder to decide that he has a better understanding of the Parties relationship than themselves. Such a finding would violate the scope of authority granted a factfinder and could reasonably be expected to lead to a worse Agreement following the intervention of a factfinder than that which existed prior to such "assistance."

Thus, unless some extraordinary situation is proven to exist, a factfinder should rely on the Parties' tentative agreements for guidance. While this general principle is usually relied on, some circumstances will justify a recommendation different than that which the Parties agreed. However, it must be noted that only in extraordinary circumstances will the interference of a neutral factfinder be justified. Absent some such circumstance, it is wise for a factfinder to act with great hesitance in varying significantly from a mutually agreed to tentative agreement. It is simply not the purpose

of factfinding to conclude that one party was misrepresented during negotiations. Since that conclusion is a prerequisite to recommending something other than what the Parties' representatives mutually agreed, then it is necessarily rare.

In this case, not only did the Parties reach a tentative agreement, they did so on three (3) separate occasions. Twice on their own, and once with the assistance of a mediator. In this case, it is fair to conclude that the bargaining unit is seeking something that can not be provided by the undersigned. While precisely what the bargaining unit is in search of is not discoverable, such is not pertinent since it is beyond the ability and authority of the undersigned to determine. As a result, such will not be attempted. Rather, the most important factor that will be considered in each issue is whether each proposal is within the statutory guidelines and whether the tentative agreement is a fair alternative. If either a tentative agreement or one of the Parties' proposal is within the internal and external comparables, then such will be recommended.

1. ARTICLE V, SECTION 1 - WAGES AND RETROACTIVITY (BOTH PARTIES)

Each of the tentative agreements contained a three percent (3%) wage increase in each year of a three (3) year contract. Moreover, each allowed the wages to be paid retroactively.

CITY POSITION

The City proposes a 3% wage increase in each year of a three (3) year contract. It contends that while its receipts are rising, they are not rising by much. It asserts that the ability to pay is only one (1) of the relevant factors to consider and it argues that the City's remaining financial circumstances do not support a higher wage increase than that which it proposes.

In addition, the City proposes that the wages not be made retroactive because of the bargaining unit's rejection of three (3) tentative agreements. While it concedes that retroactivity is typically paid, it argues that the bargaining unit should not be rewarded for its unreasonable rejection of the tentative agreements by receiving retroactive wage increases.

UNION POSITION

The Union proposes a 5% wage increase in each year of a three (3) year contract. It argues that the City's had a significant improvement in revenue in the last few years; that it has received more than a five percent (5%) increase in revenue in the last few years; and that it has the ability to pay the wage increase. Thus, it argues that its wage increase proposal is justified.

The Union contends that it did not act in bad faith during negotiations and therefore retroactivity should not be at issue. Since there is no reason not to award retroactivity then it proposes that any wage increase be paid retroactive to May 1, 2000.

RECOMMENDATION

The most significant factor to consider is that every other employee within the City will receive a three percent (3%) wage increase. That fact together with the three (3) previous tentative agreements make the finding of a three percent (3%) wage increase inescapable. Therefore, it is recommended that a three percent (3%) wage increase for each year of a three (3) year contract be made.

As it regards the issue of retroactivity, while it is rare for retroactivity not to be recommended, it must be found in this case that the bargaining unit has acted unreasonably. While

the bargaining unit's actions do not rise to the level of bad faith, it has been unreasonable. As a result, some recommendation must be made that recognizes this unreasonableness. For this reason, it must be found that the period of retroactivity should be reduced by the same amount of time between the last vote rejecting the mediated settlement (September 13, 2000) and the date of the factfinding hearing (October 24, 2000). It will be up to the Parties to calculate this period. However, it should include both the date that the Union rejected the last tentative agreement and the date of the Factfinding hearing. With the exception of the aforementioned period, it is recommended that retroactivity be paid back to May 1, 2000.

2. **ARTICLE V, SECTION 3 - UNIFORMS (CITY)**

The current language has no allowance for work boots.

The Union proposes a \$100.00 per year work boot allowance.

The tentative agreements all had a \$100.00 work boot allowance.

CITY POSITION

The City rejects the Union's proposal since its economic package included in the tentative agreements was a total package. Since the Union failed to ratify the tentative agreement, and since all economic proposals were contingent on the total package being agreed to, then the City must remove each portion of the economic package including this item.

UNION POSITION

The Union argues that other similarly situated City's each have a similar benefit and it asks that the same be granted these bargaining unit employees.

RECOMMENDATION

Based on all the other economic recommendations, and since the Parties previously included this benefit in their tentative agreements, then it is recommended that this benefit be included here.

3. ARTICLE VI, SECTION 1 - HOLIDAYS (MARTIN LUTHER KING DAY) (CITY)

The current Agreement does not have a benefit for Martin Luther King Day.

The Union proposes adding the holiday.

The tentative agreements included the holiday.

CITY POSITION

Similar to the rationale for a boot allowance, the City withdrew this as part of the economic package that the Union failed to ratify.

UNION POSITION

The Union argued that since all other bargaining unit employees receive this holiday, then it should also receive it.

RECOMMENDATION

Under the same analysis contained in the work boot allowance, above, it is recommended that the Martin Luther King Holiday be included in the new Agreement.

4. ARTICLE VIII, SECTION 1 - CONVERSION ON SEPARATION (UNION)

The bargaining unit employees currently receive fifteen (15) days of sick leave each year.

If unused the sick leave days accumulate. Upon separation of employment the City pays employees for all accumulated sick leave at the rate of pay the retiring employee is currently earning. If the separation of employment is because of retirement, then the maximum number of days of pay is one hundred and eighty (180). Upon any other type of termination of employment, the maximum payment is one hundred twenty (120) days.

The tentative agreements each had a provision that limited this benefit to current employees only. On the first tentative agreement a two (2) tiered system was created where all new hires received a different maximum payout. These numbers were ninety (90) days for retirement and sixty (60) days for other termination. The second tentative agreement had a similar provision. On the third tentative agreement, the City agreed to remove the two (2) tier system and replace it with an across the board one hundred fifty (150) day maximum.

CITY POSITION

The City proposes going back to the two (2) tier system as included in the first two (2) tentative agreements. The City contends that the current system is too expensive; that it requires the City to maintain a separate fund that currently holds \$1,746,000.00; and that for newly hired non-represented employees the benefit has already been changed to match that which it proposes here. Moreover, it argues that it intends to change the benefit for all employees and asserts that it must begin with this Union before it changes the benefit for other, stronger, bargaining units.

UNION POSITION

The Union proposes leaving the *status quo* for the benefit. It argues that no compelling case

has been made that would justify a modification of the language. Moreover, it points to the internal comparables where all other bargaining unit employees in the City receive the benefit as currently written. Although the City is correct in asserting that a cost savings will occur, it contends that such will not be realized for over ten (10) years thus limiting the impact of the modification now. It argues that, as opposed to the City's assertion, the more powerful bargaining units should be forced to change before this unit must. It contends that since this is a past bargained for benefit, and since something was lost in exchange for this benefit, then the City's proposal to change the benefit without giving up anything is not justified.

RECOMMENDATION

Although the City is correct in arguing that the benefit has become too costly, the Union is correct in asserting that the internal comparables make changes difficult to justify. A review of the record reveals that the City's position is reasonable, is justified and is supported by the tentative agreements previously reached. The difficulty is justifying a change while other units do not yet have to make the sacrifice. The City's persuasive claim that it must start with this bargaining unit when negotiating a change to this benefit does not override the appearance to the bargaining unit that it is being treated unfairly. It is against this backdrop that the following recommendation is made:

It is recommended that the City's proposal be included in the Agreement as written. However, it is also recommended that additional language be added that makes the enforcement of the new benefit delayed until the remaining bargaining units agree to the same language.

It is the intent of the undersigned to allow the City to make the change because the benefit is too costly. However, since the City has made it clear that it intends to make similar changes to all

employees, then it should only be able to make the change to these employees once it is successful in so modifying the remaining employees. The Union's concern with becoming the lone employees so affected is valid and must be balanced against the City's need to reduce costs. Since the cost savings will not be realized for some time, then the cost of the delay in enforcing the new benefit is small in comparison to the fair treatment of this bargaining unit. Thus, it is recommended that the change be made but that it not be enforced against new hires until new hires under all other bargaining units are similarly affected.

5. ARTICLE XI, SECTION 5 - JOB BIDDING (UNION)

The City proposes changing the language so that employees are allowed three (3) days from the date a vacancy is posted to apply for the position; allows the City to advertise and interview applicants from outside the bargaining unit if there are no qualified employees; changes the language to allow the City to consider the most qualified "applicant," rather than just the most qualified "employee"; and allows the City to only consider a bargaining unit member as the most qualified when they have the "minimum" qualifications and have gone more than twelve (12) months without discipline.

CITY POSITION

The City argues that the language will not deplete the bargaining unit since any new hires will be part of the bargaining unit. Moreover, it argues that since the proposal gives preference to bargaining unit employees who meet minimum qualifications, then it does no harm to the Union. Since its proposal was acceptable to the Union through three (3) tentative agreements, then it asks that it be recommended here.

UNION POSITION

The Union argues that the proposed language will result in the erosion of the bargaining unit and will take bargaining unit work away from the Union employees. Since upward mobility is a vital concern to the employees, and since the gains the Union has made for the unit in this regard have been obtained through bargaining, then it contends that the City's proposal contains no *quid pro quo*. Since the City actually gains little from its proposal, then the Union argues it should not be included.

RECOMMENDATION

A review of the record reveals that City's proposal must be recommended. It is reasonable, it does little harm to the bargaining unit; it allows qualified bargaining unit employees to receive preference in filling vacancies; it creates a more flexible situation for the City in the filling of vacancies; and it acts without weakening the Union in any way. For these reasons, it is fair and reasonable. Moreover, the previous tentative agreements recognized these findings. For these reasons, the City's proposal must be recommended for inclusion in the Agreement.

6. ARTICLE XI, SECTION 6 - SUPERVISORY WORK (UNION)

The current Agreement prevents supervisors from performing bargaining unit work except in cases of "training or in an emergency."

The City proposes changing the language (to match that agreed to in the first tentative agreement) whereby supervisors may perform bargaining unit work so long as it does not cause layoffs or reductions of bargaining unit employees, and as long as it is not done for the sole purpose

of circumventing overtime call-ins.

CITY POSITION

The City argues that it has a legitimate interest in permitting supervisors to do productive work when needed to supplement or assist bargaining unit members in the completion of a job. It contends that these situations only arise when employees are short-handed, are in an emergency, or are being given training. It maintains that since the affected supervisors work very closely with the bargaining unit members and since unexpected circumstances sometimes arise, then the supervisors could more efficiently complete work if the current mandates were loosened.

UNION POSITION

The Union contends that the power of past Agreements should prevail. It argues that the City's proposal invades the province of work performed by the bargaining unit without any benefit being given in return. Since it bargained for the benefit sometime in the past, and since nothing is being offered for the addition of the language here, then it argues that no reason is given for adding the language.

RECOMMENDATION

A review of the record reveals that the City's proposal is fair and reasonable. While the Union's concerns about the weakening of the bargaining unit and loss of overtime opportunities is legitimate, the language that is proposed protects those interests. The reason that supervisors are often prevented from doing bargaining unit work is that allowing such to occur will often result in

a bargaining unit member being displaced or adversely affected in an overtime opportunity. This language prevents either one of these things from occurring. Consequently, the otherwise valid concern of the Union is seriously diminished. To force management to stop supervisors from assisting co-workers in time of need only results in inefficiency without actually protecting a bargaining unit members job. When inefficiency outweighs actual harm, the Union's argument loses its impact.

For these reasons, the City's proposal must be recommended.

7. ARTICLE XIV, SECTION 6 - GRIEVANCE PROCEDURE (CITY)

The current language mandates that a Grievance be granted if the City fails to timely answer it at either Step 2 or 3.

The City proposes changing the default language such that the Union automatically has the right to appeal a Grievance to the next step if it is not timely answered.

CITY POSITION

While the City concedes that no Grievance has ever been granted because of the failure to timely answer a Grievance, it contends that the penalty is too severe for a timeliness issue. Moreover, it argues that since no other comparable City has such a benefit, then it is not justified.

UNION POSITION

The Union argues that since no problem was identified, then nothing needs to be fixed. It maintains that the benefit is very valuable since it requires that management act quickly in response to important Union issues. Since the benefit was bargained for in exchange for something, and since

nothing is being offered in exchange for the lost benefit here, it argues that no justification exists to change the provision.

RECOMMENDATION

A review of the language shows that it can not be recommended here. Too many more important issues must be resolved if the Parties are to ever reach an Agreement. Since a problem was not identified, and since the Parties agreed to the *status quo* during the tentative agreements, then the *status quo* is recommended here.

November 6, 2000
Cincinnati, Ohio



Michael Paolucci