

BEFORE THE
STATE EMPLOYMENT RELATIONS BOARD

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RELATIONS BOARD

2002 MAY 16 A 10: 12

FACT FINDING PROCEEDINGS
CASE NO. 01-MED-09-0767

IN THE MATTER OF:

HAMILTON COUNTY
BOARD OF COMMISSIONERS

AND

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 20

APPEARANCES:

FOR THE COUNTY: Mark J. Lucas

FOR THE UNION: John Gray

REPORT AND RECOMMENDATIONS OF THE FACT FINDER

James E. Murphy
Fact Finder

BACKGROUND:

Hamilton County is located in the far southwestern corner of Ohio and encompasses the city of Cincinnati and surrounding metropolitan area. The County and Union have maintained a collective bargaining relationship since 1987, reflected in successive contracts the most recent of which was effective from December 1998 through December 31, 2001. It remains in effect, by virtue of mutually agreed extensions, until May 15, 2002. The bargaining unit is described in the most recent contract as "all Boiler Operators, Facility Maintenance Worker I's, Facility Maintenance Worker II's, HVAC Technicians and Stationary Engineers," and is presently comprised of 23 employees.

Over the past several months the parties engaged in extensive collective bargaining negotiations and were successful in reaching agreement on many items. However, as of the commencement of the hearing in this matter, they remained at impasse on six issues, to wit: Article 2-Dues Deduction; Article 14-Wages; Article 28-Duration; New Article-Contract Construction; New Article-Supervisory Work; and New Article-Tuition Reimbursement. Accordingly, this case came on for hearing in Cincinnati, Ohio on April 18, 2002.

Evidence and able argument in support of the parties' respective positions on the disputed issues were presented at the hearing. What follows is a summary of that evidence, the parties' positions, the Fact Finder's Recommendations and the rationale for same. In making my recommendations, I have considered and relied upon the following statutory criteria, whenever such factors were advanced by the parties: the factor of past collectively bargained contracts; comparisons 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; the interest of the public; the ability of the public employer to finance and administer the issues proposed; the effect of the adjustments on the normal standards of public service; the lawful authority of the public employer; the stipulations of the parties; and such other factors, not confined to those noted 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.

ARTICLE 2-DUES DEDUCTION:

Evidence and Positions:

The current contract contains provisions for the payroll deduction of union dues "once each month" upon voluntary authorization by individual employees. In addition, it provides that any unit employee making such an authorization and thereafter revoking it must continue to "pay to the Union, through payroll deduction, an agreement administration fee for the duration of this Agreement."

The County seeks to change "once each month" to "on a bi-weekly basis," but would leave the remainder of the article as is. The Union seeks a "fair share" provision under

which each bargaining unit member would be required to pay, in lieu of dues, an amount equal to the Union's administrative costs, as determined pursuant to various court decisions on the issue.

In support of its position, the Union notes that it has 9 collective bargaining agreements with public employers in Southwestern Ohio and that only the instant contract does not contain a fair share provision, that although every unit employee is now a voluntary member, there have been times when one or two unit employees have been "free riders," and that it has taken the necessary steps to separate its political and collective bargaining activities, the "fair share" fee only supporting the latter.

The County, in response, contends that the Union does not need fair share language since it all ready enjoys full membership, that such language should be obtained through the give and take of collective bargaining rather than be imposed by a fact finder, and that the Union has never presented it with evidence of compliance with the various court decisions on the subject. Finally, the County notes that its proposal for changing the dues remission language is merely an attempt to conform contractual language to existing practice.

Rationale:

As has been noted before, the conflicting interests here..... freedom of choice versus reasonable payment for services rendered.....are closely balanced. In these circumstances, I am constrained to agree with other interest arbitrators that this issue is best left to future negotiations. In the instant case, it is also worth noting that the Union currently enjoys 100% unit membership, and that the contract now contains what is essentially a maintenance of membership provision. In my view, both these facts serve as additional reasons for maintaining the status quo. The Union did agree during the hearing to change the dues remission language in the manner sought by the County.

Recommendation:

It is recommended that the language of Article 4-Dues Deduction remain as is except that the words "once each month" in Section 4.2 be changed to "on a biweekly basis."

ARTICLE 14-WAGES:

Evidence and Positions:

On this issue the parties' differences are primarily philosophical, not monetary. Thus the Union seeks across the board increases for each year of a three year contract, \$.61/hour in the first year, \$.62/hour in the second, and \$.63/hour in the third. The County offers yearly increases of 3% on the base rate of each classification (essentially equivalent to what the Union is asking), but seeks to institute a "pay for performance" plan in the second and third years of the prospective contract. Under the system presented here, a portion of the proposed 3% increase would be guaranteed (2% in the second year, 1.5% in the third), the remainder would be dependent on the results of twice yearly employee

performance evaluations. Thus, all employees receiving a score of 85% or better would receive a full raise; those receiving less would only get the guaranteed amount. No one would receive more than 3%.

In support of its position, the County cites the following factors: the interest of both the taxpaying public and the County Commissioners in a system which ties pay to performance accountability, the unfairness of a system which rewards poor performers equally with good performers and the desirability of being able to use wage increases as a positive incentive to encourage improved performance, and the undesirability of paying guaranteed increases to one group of employees (this unit) while others groups of county employees must meet performance standards to receive the same percentage amounts. The County also notes that, based on the latest round of appraisals, only 2 unit employees would have received less than full raises, and also that its proposal preserves a role for the Union in the wage process, both in negotiations setting up the system and the amounts available for distribution under it, and in representing employees during performance reviews. With respect to the last point, however, the County would only permit non-arbitral grievances, citing cost.

The Union contends that a pay for performance plan, such as that proposed here, essentially substitutes individual bargaining for collective bargaining. And it is collective bargaining, the Union asserts, which the unit employees chose when they selected it to act as their bargaining representative. The Union also contends that tying wage increases to supervisory evaluations will make unit employees less likely to file grievances on other issues for fear of offending an evaluating supervisor, thus adversely affecting its ability to police the contract. Finally, the Union asserts that the County's own evaluation statistics show that the vast majority of unit employees are performing satisfactorily, making any change in the present system unnecessary, and cites the potentially divisive effects of having similarly classified employees receiving different wage rates.

Rationale:

Each party presented persuasive arguments on this issue. Thus, the concept of using wage incentives to reward superior, and discourage inferior, performance is undoubtedly attractive. Also significant is that fact that all but one other group of county employees, including some that are unionized, are under a form of pay for performance.

On the other hand, the argument that unit employees chose collective wage bargaining when they selected the Union as their representative is a powerful one. A corollary to that argument, in my eyes, is the proposition that any departure from the existing uniform system of wage increases should be freely made during collective bargaining by the employees' elected representative, not imposed by an outside fact finder. Moreover, the pay for performance plan as proposed does not include a pool of guaranteed money, with greater increases going to high performers to offset the reduced increases going to low performers, thereby affording at least a temptation for budget strapped managers to save money by giving low evaluations. The County did indicate during the hearing that it is

open to a pool concept, but again the details of such a program, in my opinion, are best worked out through collective bargaining, not constructed whole by a fact finder.

Accordingly, I shall recommend that the existing system of uniform wage increases be retained in the new contract. I shall also recommend that the existing single tier wage schedule be retained since, absent pay for performance, I have been given no basis on which to change it.

With respect to the amount of increases, the Union's proposal calls for set figures each year, presumably the same amount for each classification. The County makes its offer in percentages, which would result in slightly different amounts for each classification. The yearly wage increases set forth in the expiring contract, if my math is correct, are based on percentages. Since I have been given no reason to change the existing method, I shall recommend its retention in the new contract.

In sum, my recommendation will be for a 3% increase in the wage rate for each classification for each year of the new three year contract.

Recommendation:

It is recommended that Article 14, Sections 14.1, 14.2 and 14.3 of the new agreement read as follows:

SECTION 14.1: Effective on the pay period which includes January 1, 2002, the pay level of all bargaining unit employees shall be as follows:

CLASSIFICATION	HOURLY	BI-WEEKLY
Boiler Operator	17.07	1365.60
Facilities Maintenance Worker 1	19.18	1534.40
Facilities Maintenance Worker 2	20.27	1621.60
HVAC Technician	24.45	1956.00

SECTION 14.2: Effective on the pay period which includes January 1, 2003, the pay level of all bargaining unit employees shall be as follows:

CLASSIFICATION	HOURLY	BI-WEEKLY
Boiler Operator	17.58	1406.40
Facilities Maintenance Worker 1	19.76	1580.80
Facilities Maintenance Worker 2	20.88	1644.00

HVAC Technician	25.18	2014.40
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SECTION 14.3: Effective on the pay period which includes January 1, 2004, the pay levels of all bargaining unit employees shall be as follows:

CLASSIFICATION	HOURLY	BI-WEEKLY
Boiler Operator	18.11	1448.80
Facilities Maintenance Worker 1	20.35	1628.00
Facilities Maintenance Worker 2	21.51	1720.80
HVAC Technician	25.94	2075.20

ARTICLE 28-DURATION:

During the hearing the parties agreed on the changes proposed by the County in this Article. Moreover, since it is desirable that this article remain the last in the contract, and since I am recommending three new articles below, I believe that this article should be renumbered. Accordingly, it is recommended that Article 28 be renumbered Article 31, that the sections therein be renumbered Section 31.1, 31.2 and 31.3, and that Section 31.1 be further amended to read as follows:

SECTION 31.1: Unless otherwise specified within specific Articles or Sections of this Agreement, all terms and conditions of this Agreement shall become effective upon execution by the parties, and shall remain in full force and effect until 11:59 p.m., December 31, 2004.

Finally, it is recommended that Section 31.3 be further amended by deleting therefrom the entire final sentence.

NEW ARTICLE-CONTRACT CONSTRUCTION:

Evidence and Positions:

Both parties agree that they have always assumed the provisions of their collective bargaining agreements, for example with respect to holidays, supercede statutory provisions on the same subject. According to the County, a recent court decision has called that assumption into question, absent contractual language specifically addressing the issue.

The County therefore seeks to specifically set forth in the new contract the long time mutual assumption of the parties. As noted above, the Union states that it holds the same

assumption as the County. In these circumstances, I shall recommend that the new contract contain the language sought by the County.

Recommendation:

. It is recommended that a new Article 28 be inserted in the agreement to read as follows:

ARTICLE 28
CONTRACT CONSTRUCTION

Section 28.1: The provisions (including procedures) of this Agreement supercede those provisions (including procedures) in the Revised Code covering the same subject matter, and in particular, but not limited to, those governing probationary employees and probationary periods, layoffs and job abolishments, holidays, sick leave, sick leave conversion, and vacations, except that employees will continue to be able to carry sick leave from jurisdiction to jurisdiction and to receive the prior service credit to which they are entitled under the Revised Code for vacation, even though sick leave carryover and prior service credit are not addressed in this Agreement.

NEW ARTICLE-TUITION REIMBURSEMENT:

Evidence and Positions:

During the term of the expiring contract the County established a tuition reimbursement program, open (with certain performance criteria) to all of its full-time, non-probationary, non-bargaining unit employees. The Union here seeks to add a provision conferring the right to participate in that tuition reimbursement program to the employees it represents. The County views the right to participate in this program as part of the overall economic package, which of course remains unresolved. It adds, however, that it has "no particular objection" to bargaining unit participation. In these circumstances, I shall recommend that the new contract contain a provision conferring on bargaining unit employees the right to participate in the tuition reimbursement program on the same basis as other county employees.

Recommendation:

It is recommended that a new Article 29 be inserted in the agreement to read as follows:

ARTICLE 29
TUITION REIMBURSEMENT

Section 29.1: All employees covered by this Agreement shall be eligible to participate in the Employer's Tuition Reimbursement Program under the same terms and conditions, and with the same benefits, applicable to other employees of the Employer.

NEW ARTICLE-SUPERVISORY WORK

Evidence and Positions:

The Union here seeks a new contract article specifically prohibiting supervisors from performing bargaining unit work. According to the Union, this issue is of relatively recent duration, arising mainly after the hiring of Bill Scholl to the new position of HVAC Supervisor. Apparently, it was initially intended to retain Scholl as a unit HVAC Technician, but when the Union filed a grievance contending that contractual hiring procedures had not been followed, and in consideration of the fact that Scholl had been offered the job and had given notice to his previous employer, he was appointed instead to the non-bargaining unit position of HVAC Supervisor.

Probably to no one's surprise, trouble ensued. Scholl's job description, prepared by the County, provides that 15% of his "Essential Functions" are to install and repair HVAC equipment, duties similar to if not identical with those listed in the job descriptions of unit HVAC technicians. When Scholl in fact performed those duties, the Union filed a grievance, a grievance denied by the County on the basis that there was no contractual language prohibiting such assignments. The instant request for a new contractual provision, to specifically prohibit any such practice, ensued. In support of its request, the Union points to three contracts with public employers in Southwestern Ohio, all containing language restricting, in varying degrees, supervisors from performing bargaining unit work.

The County strongly opposes the proposed provision, which it views as an infringement on its basic management right to assign work. Moreover, it notes that there is no similar provision in any of its other labor contracts.

Although it seems clear that the parties lived amicably under whatever practice existed ante-Scholl, there is no agreement on what that practice was. Thus, the County maintains that its unit supervisors, while primarily expected to perform supervisory duties, have always "pitched in" when necessary to get the work done. The Union, on the other hand, contends that except for emergencies or instructional purposes, supervisors have never, or almost never, performed unit work.

Rationale:

My conclusions are based on the documents and evidence presented at the hearing, but especially on the lack of any problems with this issue over a fairly long bargaining history. For that to have been the case, each party must have exercised some restraint....the County in seeing that its supervisors did not regularly perform unit work, and the Union in overlooking those relatively rare occasions when, for a variety of reasons not solely related to emergencies or education, they did so

In fashioning a recommendation on this issue, it is therefore my intent to restore as closely as possible what I believe was the commonsense, amicable practice ante-Scholl. I

do so while recognizing the County's strong interest in protecting its undoubted right to assign work. But surely that right is not unlimited. Surely no one would contend that Scholl could regularly spend 100% of his time, rather than 15%, performing bargaining unit work. Or that several additional "Scholls" could be hired, all assigned to perform substantial amounts of bargaining unit work, resulting in the layoff of one or more unit employees. Without belaboring the obvious, and in no way suggesting that the County would ever do so, it seems clear that such a concept, carried to its extreme, could destroy a bargaining unit.

Recommendation:

It is recommended that a new Article 30 be inserted in the agreement to read as follows:

ARTICLE 30
SUPERVISORS WORKING

Section 30.1 Supervisors shall not be regularly assigned to perform work historically performed by members of the bargaining unit. Supervisors may intermittently perform bargaining unit work in emergencies, for instructional purposes, to prevent property damage or a significant delay in customer service, or when a bargaining unit employee is not reasonably available to perform the work.

This concludes the Fact Finders Report and Recommendations. I wish to thank all parties for their helpful and cooperative approach throughout this proceeding.

May 15, 2002

James E. Murphy