

STATE EMPLOYMENT
RELATIONS BOARD

Before the

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

2003 MAR -3 A 10: 28

In the Matter of Fact Finding Re:

Clark County Department of Job and
Family Services (The Children's Home)

- and -

SERB CASE NO. 02-MED-09-0761

American Federation of State, County,
And Municipal Employees, Ohio Council 8,
Local 101, Dayton Public Service Union,
AFL-CIO

Appearances:

For the Employer:

Cheri B. Hass, Esq.
Downes, Hurst & Fishel
Columbus, Ohio

For the Union:

P. Scott Thomasson
Lead Staff Organizer
Dayton, Ohio

REPORT AND RECOMMENDATIONS
OF THE
FACT FINDER

Frank A. Keenan
Fact Finder

Background:

The bargaining unit, initially certified in 1999 in SERB CASE NO. 99-REP-04-0888, is comprised of all full-time, permanent part-time, and intermittent (greater than 500 hours per year) employees of the Clark County Jobs & Family Services Department Children's Home in the classifications of Cook I, Cook II, Education Specialist I, and Youth Leader 2. There are some nineteen (19) employees in the bargaining unit. The record reflects that the most recently expired Contract, the January 1, 2000 through December 31, 2002 Contract (hereinafter referred to as the current or predecessor Contract) was the parties first collective bargaining agreement. The parties entered into negotiations for a successor Contract on November 14, 2002 and December 10, 2002, which negotiations led to a tentative agreement on all provisions for a successor collective bargaining agreement. However, the bargaining unit failed to ratify, and, indeed, rejected the tentative agreement, on December 17, 2002. Notwithstanding the bargaining unit's rejection of the parties' tentative agreement, the parties enter Fact Finding with but two issues at impasse, namely, Article 20 - Wages, and a new Article proposed by the Union providing in effect that any successor or assign of the Children's Home would be bound by the terms of the parties' Contract. The Fact Finding proceedings were held in Springfield, Ohio, the County Seat, on February 3, 2003.

In arriving at the Recommendations herein made, the Fact Finder has taken into account and relied upon the statutory criteria set forth in Ohio Revised Code 4117.14 (G)(7), (a) to (f), to wit: the factors of past collectively bargained agreements; 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 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; 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.

The format of the Report includes the Record, comprised of each party's position on both issues at impasse; their salient evidence on each issue; and their principal arguments on both issues; the Rationale, setting forth the major reasons for the undersigned's "Recommendations"; and the undersigned's "Recommendation" with respect to each issue.

The Record:

In my view most of the record evidence is relevant to both of the issues here at impasse. Thus the record reflects that both here, and in formal negotiations, the Union seeks, and sought, respectively, to add to the parties' Contract a "new" article providing a measure of job security for the bargaining unit, reading as follows:

"This Agreement shall be binding upon the successors and assignees of the parties hereto and no provisions, terms, or obligations herein contained shall be affected, modified, altered or changed to the detriment of the other party in any respect whatsoever by the consolidation, merger, sale, transfer, lease or the assignment of either party hereto or of any separable, independent segment of either party hereto except to the extent that the law provides to the contrary."

The Union introduced an excerpt from the January 1, 2000 through December 31, 2002 collective bargaining agreement between the Clark County Utilities Department and AFSCME Local 1780 containing at Section 24.2 a "Successors" provision reading substantially like the successor clause the Union seeks here.

The seeking of this measure of job security was prompted by a newspaper article in the Springfield Sun News concerning the Department bidding out the work being done at the County's Children's Home, and by a meeting subsequent to said newspaper article, conducted by Department Director Robert Suver, on October

7, 2002, with the bargaining unit employees and their Union Representative, Mr. Thomasson. At that meeting Director Suver indicated that the work in fact being done by the bargaining unit did not fit into the mission statement of the Department. Excerpts from, and paraphrases of, the newspaper article referenced above are enlightening concerning the nature of the work of the bargaining unit employees, and the operations at the Children's Home. Thus, as the newspaper article states:

". . . It is expensive to operate a children's home" said Kenny Pedraza, communications director of the agency. "A lot of counties have found other ways to work with these kids." [Indeed, the article points out that of Ohio's eighty-plus Counties only eight, including Clark, continue to directly run their County's Children's Home with County employees.]

* * *

The County runs two cottages . . . Maple for the boys and Hickory for the girls. The cottages can accommodate up to 24 children . . .

The agency spent \$902,400 [in 2001] to run those programs, which are staffed 24 hours a day. Teens stay an average of six months.

"We work primarily on behavior modification," said Denise Schmidt, cottage supervisor.

The teens placed at the home range in age from 13 to 18 and nearly all have some level of mental health needs. Some have been in trouble with the law, and others come from broken homes where drugs or alcohol is abused by parents.

* * *

The teens all attend public school but once they step back on the Children's Home campus, their days are filled with activities, therapy, sports, and art opportunities.

The structure is designed to give the teens the chance to heal and burn off the anger that contributes

to their problems. The teens at the home end up there because they are . . . unruly, abused, neglected or dependent. . . . "[County Commissioner Sheehan said that the Children's Home facility] wasn't built to handle teens with severe behavioral and emotional problems."

Further with respect to this latter point it is noted that the children serviced by the Department are categorized into "acuity levels," with 1 being the highest and 4 being the lowest. The acuity level is determined by considering: (1) the frequency with which professional intervention is necessary; (2) the child's needs; and (3) the level of supervision required. In calendar 2001, care at the Children's Home was provided at a cost of \$227.00 per day, per child served—a cost that is more appropriate for children determined to need the most intensive acuity level 1. The record reflects that the intensive needs children doubled in 2002 from a traditional number of six to twelve. The consequence of this increase was a growing budget deficit in 2002 that required an additional \$500,000 appropriation from the Agency's reserve fund. Simultaneously, one of the historic funding sources for the Children's Home was the payments to it from the Alcohol, Drug & Mental Health Board (ADMH), which were cut 50% in 2001, and cut entirely in 2002. Thus, since 2000, the Children's Home has suffered a cumulative loss of funding of \$396,000. Additionally, Federal Title IV-E funding is a primary funding source for placement costs, but the amount the Agency receives is no longer linked directly to placement levels, with the consequence that

dramatic increases in placement levels do not result in dramatic increases in Federal Title IV-E funding monies. This appropriation left the Children's Services Fund Budget unencumbered carryover balance at the close of 2002 at its lowest level since 1997. Moreover, the Department's unencumbered carryover balance declined to 0 at the close of 2002.

The Department emphasizes that while it is studying the possibility of bidding out some or all of the bargaining unit's tasks in order to furnish its child care responsibilities less expensively and/or perhaps more efficiently and effectively, no decision to do so has yet been made.

As for the Union's proposal for a successor clause, the Department takes the position that such clause is both contrary to law and violative of the Management's Rights clause the parties have tentatively agreed to. In this regard the Department asserts that Ohio Revised Code Section 4113.30 expressly states that, in a labor agreement between a labor organization and a private employer, a successor clause is "binding upon and enforceable against any successor employer." Notably, however, the statute upholding the enforceability of a successor clause, "does not apply to any public employer."

This Agreement is negotiated under the Public Employees' Collective Bargaining Act. Conversely, private employees and employers are governed by the National Labor Relations Act. No

law exists to suggest that a public contract successor clause may enforce the terms of an existing public agreement upon a private agency. To the contrary, O.R.C. §4113.30 suggests that such a clause would be unenforceable. Therefore, the Employer submits that the Union's proposal is contrary to law. In addition, the proposed successor clause is a direct violation of management's rights.

The Management Rights Article under the 2000-2002 Agreement provides, among other things, that management reserves the right to:

8. Consolidate, merge, or otherwise transfer any or all of its facilities, property, processes or work with or to any other agency or entity, or effect or change in any respect the legal status, management or responsibility of such property, facilities, processes or work;

9. Terminate or eliminate all or any part of its work or facilities;

10. Transfer or subcontract work; . . ."

In the event the Employer determines that closing all or a portion of the Children's Home is necessary, the Employer has a duty to, upon request, meet with the Union and discuss the effects of that action. However, the Employer has the absolute management right to "terminate or eliminate all or any part of its work or facilities" as it sees fit. To impose the burden of a successor clause on the Employer violates management's statutory rights and

is in direct violation of the Management Rights Article in the 2000-2002 Agreement."

The Union's advocate obtained a memorandum from the Council's General Counsel challenging the County's assertions that a successor clause would be both contrary to law and in violation of the employer's statutory and contractual management rights, not surprisingly taking the position that the Employer's contentions were "wrong in both regards." The Union submitted General Counsel Grayson's memo into evidence and the relevant parts thereof are attached hereto as Appendix I.

As previously indicated, in the course of negotiations the parties reached a tentative agreement on new Contract terms, including wages, and not including any successor clause, which tentative agreement was rejected at the Union's ratification vote. Under the terms of the tentative agreement the parties had tentatively agreed to across-the-board increases in Article 20 - Wages of 3.5% in year 1; 2% in year 2; and 2% in year 3.

Going into Fact Finding the Department, as is its right, reduced its across-the-board wage increase to 3.5%; 1.5% and 1.5% respectively. The Department also adheres to its opposition to any successor clause. In the course of mediation conducted by the undersigned, the Department was requested by the undersigned to formulate a contractual provision which it could live with, providing for some measure of job security with the County in the

event the County discontinued providing the services now furnished at the Children's Home with its own employees. The County did so, putting forth a provision whereby the Department, for a certain period of time, would, upon an employee's application give first consideration to bargaining unit employees who meet the minimum qualifications for openings within the Department in the event the employee's bargaining unit position is abolished.

As for wages, the Union seeks three 3.5% across-the-board increases for each year of the Contract. The parties have stipulated that they are agreed that the first year's wage increase, whatever the Fact Finder might recommend, should be retroactive to January 1, 2003, and that otherwise the parties' Contract will become effective upon execution.

Issue No. 1 - Article 24 - Wages

The Record: (See above)

The Rationale:

As noted hereinabove, one of the statutory factors the Fact Finder is mandated to take into consideration in making his recommendations is "such other factors, not confined to those noted [i.e., as set forth in O.R.C. 4117.14 (G) (7) (a) to (e)], 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." In this regard, since virtually the inception of

O.R.C. 4117 in 1984, Fact Finders and Conciliators have given very substantial weight to the circumstance of the parties having reached a tentative agreement at the bargaining table and such being rejected by either the legislative body or the Union membership, as the case may be. In this circumstance Fact Finders and Conciliators have generally "recommended" the parties' tentative agreement. This action is grounded on the proposition that the party's respective negotiating committees have been selected/elected by the Party to represent their Party's best interest, and having agreed tentatively at the table to a certain disposition of an issue, the assumption is that such was indeed regarded by both committees as in their respective Party's best interest. Thus, typically and most frequently, the neutral, here the Fact Finder, will reconstruct the tentative agreement and recommend that it be made a part of the parties' Contract. This statutory factor is usually heavily weighted by the neutral, and I have done so here. Furthermore, the Department's established fiscal difficulties, and thus the statutory factor of the public employer's ability to finance the issue, here wages, which must also be taken into consideration, bolsters the statutory "other factors" referenced above. Accordingly, the tentative agreement's 3.5%; 2% and 2% across-the-board wage increase, and not the Department's 3.5%; 1.5%; and 1.5%, nor the Union's 3.5%; 3.5%; and 3.5% across-the-board increase, will be recommended.

Recommendation:

It is recommended that the parties' Contract at Article 24 - Wages, read as follows:

ARTICLE 24 WAGES

Section 24.1 Effective January 1, 2003, all employees shall receive a three and a half percent (3.5%) increase on their current hourly rate.

Effective January 1, 2004, all employees shall receive a two percent (2%) increase on their hourly rate.

Effective January 1, 2005, all employees shall receive a two percent (2%) increase on their hourly rate.

Issue No. 2 - (New) Article - Successor

Rationale:

Here again the statutory factor of "other factors" militates against recommending any successor clause. This is so because the tentative agreement contained no successor clause. Furthermore, in my view, the additional statutory factor of external comparables serves to bolster this "other factors" statutory factor. Thus, as hereinabove noted, of the eighty plus Ohio Counties, only Clark and seven other counties in the State provide the Department's Children's Home-type services with their own employees. This tells us that the norm statewide is for non-employee performance of the required services. Accordingly it is clear that the grant of job security in the form of a successor clause is simply contrary to the industry practice, as it were, and incompatible with the practices of external comparables.

Nevertheless, with the possibility of abolishment of some or all of the bargaining unit positions, and the discharge of the duties inherent therein by non-employees of the Department, the Department has expressed a willingness to provide as a "new" Article, some measure of job security, as noted and described above. Accordingly, this "new" Article will be recommended.

Recommendation:

It is recommended that the parties' Contract contain the following provision:

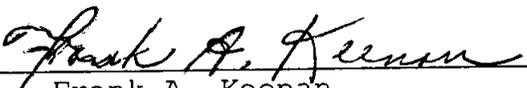
[New] "ARTICLE _____ OTHER DEPARTMENT POSITIONS

In the event bargaining unit positions are abolished as a result of the Employer ceasing to directly provide one or more services being provided by bargaining unit members, the Employer agrees to first consider bargaining unit members for any open position with the Department of Job and Family Services for which the employee meets the minimum qualifications upon the bargaining unit member's application. This consideration will continue for six months following the job abolishment."

Finally, it is RECOMMENDED that the parties' Contract set forth all of the parties' tentative agreements; the provisions of the current Contract, which the parties agreed to not change; and, with the exception of Article 24 - Wages, that the parties' new Contract will become effective upon execution.

This concludes the Fact Finder's Report and Recommendations.

Dated: February 28, 2003


Frank A. Keenan
Fact Finder

APPENDIX I

The Clark County Dept. of Jobs and Family Services asserts in its Pre-Hearing Statement that the inclusion of a successor clause in the parties successor collective bargaining agreement would be both contrary to law and in violation of the employer's statutory and contractual management rights. The employer's position is wrong in both regards.

1. Legality of Successor Clause

The Ohio Revised Code does contain a provision at O.R.C. 4113.30 that provides for the enforcement of successor clauses in collective bargaining agreements. The employer points out that public employers are exempt from this provision - as are private sector employers subject to either the National Labor Relations Act or the Railway Labor Act. Although the exemption of public employers from O.R.C. 4113.30 would preclude a public employee organization from enforcing a successor clause under the terms of this particular statutory provision, *there is no language in O.R.C. 4113.30 that prohibits a public employer from negotiation a successor clause in a collective bargaining agreement.* The fact is that successor provisions are routinely negotiated in labor agreements in both the public and private sectors.

While O.R.C. 4113.30, enacted in 1978, has never been repealed or amended, it is no longer applicable to public sector employers who have been organized and have entered into collective bargaining agreements pursuant to Ohio's Public Employee Collective Bargaining Law. The Public Employee Collective Bargaining Law, set forth at O.R.C. Chapter 4117, clearly provides at O.R.C. 4117.10, that the provisions of a collective bargaining agreement entered into pursuant to O.R.C. Chapter 4117, *supercede over all conflicting laws*, with the exception of a small list of specifically enumerated statutes referenced therein. O.R.C. 4113.30 is not listed as an exception. Thus, any successor clause negotiated between a public employer and an employee organization would supercede O.R.C. 4113.30. See, *Cincinnati v. Ohio Council 8, American Fedn. of State, City and Municipal Employees, AFL-CIO* (Ohio, 1991) 61 Ohio St. 3d 658 and *State ex rel Rollins v. Board of Educ. For Cleveland Heights-University Heights City School Dist.* (Ohio, 1988) 40 Ohio St. 3d 123. Such a successor clause would be enforceable under O.R.C. 4117.09 (B)(1) and 4117.12. It is clear therefore, that the inclusion of a successor clause in a collective bargaining agreement between a public employer and employee organization negotiated pursuant to O.R.C. Chapter 4117, is not contrary to law.

Ohio Council 8 has negotiated numerous contracts with public sector employers across the State of Ohio which contain successor clauses. A review of 300 of the over 400 public sector contracts Council 8 has negotiated revealed that *118 of those labor agreements contain a successor clause.* A specific list of these jurisdiction can be produced if needed.

2. Successor Clause as Violation of Management Rights

O.R.C. 4117.08 lists those subjects which Ohio recognizes as "inherent" management rights. The transferring of governmental services is not a recognized inherent management right under the statute although "determining the adequacy of the workforce" is. Thus, it could be argued that the right to transfer work is an "inherent" statutory management right.

O.R.C. 4117.08(C) specifically recognizes however that management rights are not impaired "unless a public employer agrees otherwise in a collective bargaining agreement." If therefore, a successor clause is adopted by the parties as a result of the fact finding process, the adoption of the successor clause would not "violate" the employer's statutory management rights but rather would act as a waiver of those rights.

Similarly, the adoption of a successor clause would not constitute a violation of the management rights provision of the parties collective bargaining agreement. The management rights clause of the current collective bargaining agreement provides that those rights enumerated under the clause are "inherent" management rights "except as specifically limited by a provision of this Agreement". Thus, the inclusion of a specific successor clause in the collective bargaining agreement would supercede the more general management rights clause.