

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

STATE EMPLOYMENT
RELATIONS BOARD

**FACT-FINDING PROCEEDINGS
CASE NO. 02-MED-09-0771**

2003 FEB 26 A 10:40

**DANIEL N. KOSANOVICH
FACT-FINDER**

IN THE MATTER OF :
 :
AMERICAN FEDERATION OF :
STATE, COUNTY, MUNICIPAL :
EMPLOYEES, OHIO COUNCIL 8, :
LOCAL 101, DAYTON PUBLIC :
SERVICE UNION, AFL-CIO :
Employee Organization :
 :
and :
 :
CITY OF MORaine, OHIO :
Public Employer :

**REPORT AND RECOMMENDATIONS OF THE FACT-FINDER
ISSUED: February 25, 2003**

Appearances:

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REPORT AND RECOMMENDATIONS

I. Background and Procedural History

The bargaining unit is described in the collective bargaining agreement as: All full-time employees of the City of Moraine in the Division of Buildings and Parks Maintenance, including Custodian, Maintenance Assistant and Unskilled Laborer.

Excluded from the bargaining unit are: Supervisory, management-level, and confidential employees as defined in the Act, including Superintendent of Buildings and Parks Maintenance and Maintenance Supervisor; seasonal and casual employees.

Bargaining was initiated and the parties met on September 17, 2002, October 1 and 23, 2002, November 13 and 20, 2002, December 3, 12 and 16, 2002. The City and the Union also participated in mediated bargaining sessions on January 8 and 16, 2003. As a result of the negotiations, the parties tentatively agreed to all provisions of the collective bargaining agreement, with only two non-economic issues in dispute.

On November 29, 2002 and in compliance with Ohio Revised Code Section 4117.14 (C)(3) the State Employment Relations Board appointed the undersigned to serve as the Fact-Finder in connection with this matter. As required by law, the Fact-Finder's report was originally due on December 13, 2002. However, the parties extended the due date for the fact-finder's report until February 28, 2003.

The fact-finding hearing took place on February 19, 2003. At the outset of the hearing, the undersigned offered to mediate the remaining issues. The parties rejected the offer.

II. Criteria

In compliance with Ohio Revised Code Section 4117.14 (G)(7) and the Ohio Administrative Code 4117-9-05(J), the Fact-Finder considered the following criteria in making the recommendations contained in this report:

1. Past collectively bargained agreements between the parties;
2. Comparison of unresolved issues relative to the employees in the bargaining units 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 affect of the adjustments on normal standard of public service.
4. The lawful authority of the public employer;
5. Stipulations of the parties; and
6. Such factors not confined to those listed above, which are normally or traditionally taken into consideration.

III. Findings and Recommendations

It must be noted for the record that the representatives of the parties conducted themselves professionally in making their respective presentations on the outstanding issues in dispute. Both presentations were direct and focused upon the reasons in support of the positions taken with respect to the proposal to eliminate compensatory time and to provide a vehicle for the creation of a drug-testing program, which includes a random testing element.

The undersigned carefully considered the issues and attendant circumstances in reaching my recommendations. While neither the Employer nor the Union will be enthusiastic about these recommendations, they represent a workable solution to the matters at hand.

Article 6.09 Compensatory Time

Employer's Position

It is the City's proposal to eliminate compensatory time and its accrual from the collective bargaining agreement. The elimination of compensatory time and its accrual is part of an overall plan by the City to seek the deletion of such provisions in all other labor contracts the City has with its employees in other bargaining units.

In support of its position the City referred the Fact-Finder to statewide comparables to municipalities with a population range between 5,000 and 20,000. According to the City "56 of the 113 listed municipalities show either no listing or -0- for comp time accumulation." Moreover, the City argues, "[o]f the 12 municipalities that show -0- for comp time accumulation, 6 of the bargaining units are AFSCME." The conclusion to be reached from the comparisons to other municipalities is that roughly half of those entities do not have provisions for the accumulation of compensatory time.

The City also notes that compensatory time usage in this bargaining unit has been significantly reduced suggesting that the members of the unit really aren't interested in compensatory time accumulation. Finally, the City points to the administrative inconvenience associated with managing accumulated compensatory time as a reason to delete the compensatory time provision.

Union's Position

The Union argues that compensatory time is a bargained for benefit, which at worst causes a minor administrative inconvenience and should not be taken from the members without significant reason to do so. The Union also suggests that

these negotiations have resulted in significant contractual changes. There is no justifiable reason to make this change.

Furthermore, AFSCME directs the Fact-Finder's attention to internal comparables. The 3 FOP bargaining unit have a contractual provision granting an accumulation of compensatory time of up to 100 hours. Likewise, the IAFF bargaining unit has a 100-hour cap on compensatory time accumulation. AFSCME's cap is only 80 hours. The conclusion that the Union urges the undersigned to draw is to provide a recommendation that retains the compensatory time provision of the contract.

Recommendation

It is the Fact-Finder's recommendation that the compensatory time provision of the contract (Section 6.09) be included in the new collective bargaining agreement. The City simply did not present a compelling enough reason to eliminate the benefit of accumulated compensatory time. A desire to eliminate the compensatory time benefit for all City employees (Union and non-Union alike) coupled with the elimination of the administrative inconvenience is not compelling enough to warrant the deletion of Section 6.09.

Moreover, the undersigned has placed great weight on the comparables offered for consideration. The internal comparables alone suggest that the compensatory time provision should be retained in the contract. Additionally, while close to 50% of the statewide comparables either don't address compensatory time, only 12 expressly deny the employees the right to accumulate compensatory time. The other comparable entities have contracts that are silent on the matter and no conclusion can be drawn on how compensatory time is handled in those jurisdictions. On balance, the comparables warrant the inclusion of Section 6.09 in the parties' contract.

Article 16, Sections 16.03 and 16.04 (New Language)

City's Position

The City is proposing to add new Sections to the collective bargaining agreement, which ultimately provide for an element of random drug testing. The language proposed is as follows:

16.03 Employees must report to work fit for duty and free of any influence of alcohol, controlled substances or any substance that may impair their ability to safely and competently perform their duties. Employees experiencing problems relating to misuse of alcohol or controlled substances are encouraged to seek assistance before these problems affect their work.

16.04 In addition to the existing drug and alcohol screening program based upon reasonable suspicion and/or post incident, the City shall have the right to institute a drug and alcohol screening policy which includes random testing provided the following first occurs: (1) the random testing policy applies to all City employees (union and non-union); and (2) the random testing policy is created by a Joint Labor-Management Committee which includes a representative of this bargaining unit. Disagreement over the provisions of the policy are subject to binding arbitration.

The City offers the following reasons in support of its proposal:

1. "The other bargaining units in the City have already agreed to a similar provision or as is the case in the other AFSCME Contract covering employees in Street Maintenance are already required to submit to random drug testing for CDL requirements."
2. "The State of Ohio's Drug Free Workplace Program (which benefits employers on workers comp premiums) requires the use of random testing."
3. "The proposed Article requires representatives of the Union to participate in a joint Labor Management Committee comprised of representatives of the Police, Fire and Service Unions and the City so as to arrive at a mutually understood and agreed upon Drug and Alcohol Testing Program. This Joint Labor Management Committee would also be in a position to implement the latest pronouncements of BWC and Ohio Courts in the utilization of random testing."

At the hearing the City submitted that the Joint Labor Management Committee would be responsible for identifying the jobs that fall within the guidelines for random testing and determining which employees would be the subjects of such testing.

Union's Position

It is the Union's contention that the City's proposal exceeds the parameters established by the government and the Courts with respect to permissible random drug testing. It simply does not make sense to subject the members of this bargaining unit to random testing. All the other bargaining units in the City are either comprised of safety sensitive positions or governed by CDL requirements. The members of this bargaining unit do not fit that profile. (A conclusion with which the City takes issue)

Further, the Union argues that adequate protection for a safe work place is provided through the application of reasonable suspicion testing and just cause testing.

Fundamentally, the Union is institutionally opposed to random drug testing. Moreover, there are any number of ways for the City to realize savings from the Bureau of Workers Compensation which do not require random drug testing of non-safety sensitive employees.

Recommendation

At the hearing the City provided the Fact-Finder with a copy of the Ohio Supreme Court's decision in the case of The State Ex Rel., Ohio AFL-CIO, et. al. v. Ohio Bureau of Workers' Compensation, 97 Ohio St 3d 504 (2002). In its decision the Supreme Court recognizes that in discrete circumstances "warrantless drug and alcohol testing" of workers is acceptable under the Fourth Amendment to the United States Constitution. To quote the Court: "The Supreme Court has held that "[a] search unsupported by probable cause can be constitutional * * * when special needs beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." (citations omitted) However, the Ohio Supreme Court's holding in this case was that Am. Sub. H.B. No. 122 was unconstitutional because it subjected all employees to drug testing, not a discrete segment of the work place.

According to the City, the decision provided the Court with the opportunity to establish guidelines, which allow for the random drug testing of employees. The Fact-Finder does not believe that those guidelines are easily recognizable, nor are they readily transferable to this situation. This bargaining unit is a maintenance unit.

Moreover, the proposed language leaves many questions unanswered. The proposed Section 16.04 provides that the City has the right to implement a drug and alcohol-testing program (including a random testing element), but only after two conditions precedent have been satisfied. First, the program must apply to all City employees and, second, the "random testing policy is created by a joint Labor-Management Committee which includes a representative of this bargaining unit."

How does the Labor-Management Committee create the random testing policy? Is a consensus required? Or, is a unanimous vote required to create such a policy? Does the City retain the right to institute the random testing policy in the event that the JLM Committee is unable to resolve differences? What is the timetable for the JLM Committee to complete its work?

According to the proposed Section 16.04 "[d]isagreement over the provisions of the policy are subject to binding arbitration." Are disagreements over the application of the policy the subject matter referable to binding arbitration? Or, are issues over the creation of the policy subject to binding arbitration? Answers to these questions affect the recommendation to be made by the Fact-Finder.

The City argues that it could save money on BWC premiums by developing such a program. The City need only randomly test 10% of the City's employee population in each of the first two years of the program. In years three through five that percentage would increase to 25% of the employee population.

In satisfying the requirements provided by the BWC, the City will realize a savings of \$28,000.00 per year.

Admittedly, other ways to realize savings on BWC premiums exist and do not require random drug testing.

Finally, the City points out that the other bargaining units in the City have similar language in their respective contracts. The evidence submitted at the fact-finding hearing indeed indicates that each of the 3 police bargaining units, the firefighter bargaining unit and the other AFSCME group have language which is either identical to that proposed by the City, or very similar to the proposal. Each of the other bargaining units participation in the program is dictated by the inclusion of all City employees in a random drug-testing program.

However, as understood by the Fact-Finder, all of the bargaining units listed above are subject to random testing because of their position (recognized as safety sensitive) or because of CDL requirements. Thus, the complexion of the testing for those groups is not altered by the participation (or lack thereof) of the present unit. In fact, neither is the participation of the non-union employees affected.

It seems that the primary focus is one of balancing the employees' right to be free from warrantless searches (random testing), with the City's need to conduct such testing. Stated differently, are there sufficient safeguards built into the proposal to minimize the intrusion into the private lives of the employees in order to meet a necessary objective of the Employer?

In order to conduct this inquiry one must look to the structure of the JLM and its charter. If the elements set forth in JLM Design below are present, then, the creation of the JLM can be recommended. **Recommended JLM Committee Design—the JLM Committee shall be comprised of one representative from each of the bargaining units involved and a representative from the City. All final determinations reached by the JLM with regard to random testing, included, but not limited to, who shall be subjected to random testing and under what circumstances must be unanimous. No policy can be implemented without the unanimous approval of the JLM. Any dispute as to the application of a random drug testing policy approved by the JLM Committee shall be submitted to binding arbitration.**

This design provides protection for the employees' right to be free from unreasonable warrantless searches; gives the Union the opportunity to maintain its institutional position; and paves the way for the City to accomplish its stated goal.

Anything short of a JLM design with these elements is lacking and cannot be recommended by the Fact-Finder.

Therefore, with the adoption of the Recommended JLM Design described above the undersigned recommends the City's proposal on drug testing. Recommending a JLM Committee as designed above places a vehicle into the collective bargaining agreement to explore random drug testing, an opportunity to create one and implement it.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. N. Kosanovich". The signature is fluid and cursive, with a prominent initial "D" and a long, sweeping underline.

Daniel N. Kosanovich
Fact Finder
2/25/03