

BEFORE THE STATE EMPLOYMENT RELATIONS BOARD
STATE EMPLOYMENT
RELATIONS BOARD

2003 FEB 18 A 10:18

In the Matter of Fact Finding Between:

City of Upper Arlington, Ohio

and

SERB Case No. 02-MED-10-1069

Teamsters Local Union No. 28

Appearances:

City:

Mark J. Lucas
President
Clemans, Nelson & Associates, Inc.
5100 Parkcenter Avenue, Suite
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Union :

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111 West First Street - Suite 1100
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REPORT AND RECOMMENDATIONS OF THE FACT FINDER

Frank A. Keenan
Fact Finder

BACKGROUND:

This case came on for hearing on January 27, 2003. Preceding the Fact Finding hearing, the parties had availed themselves of SERB's mediation processes, and both parties indicated that the issues, which remain unresolved, were probably best moved toward resolution by means of the issuance of a Fact Finding Report. Accordingly, prior to opening the record herein, mediation was not undertaken by the undersigned.

The bargaining unit is comprised of approximately forty-two (42) employees in the classifications of Solid Waste Worker, Solid Waste Crew Leader, Utility Services Worker, and Sign Technician.

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 bargaining 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 employees 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;

28, Wage Benefits, Section 28.4 Uniforms; and Issue No. 9 - Article 33, Service Credit Compensation.

The Fact Finder is grateful to the advocates for the high quality of their presentation of their respective cases; such has facilitated the Fact Finder's task.

Issue No. 1 - Article 3 - Dues Deduction, Section 3.2, Authorization, Subsection (A) Fair Share Fee

THE RECORD:

The Union would retain the Current Contract's language with respect to Article 3, except that it would add a Subsection (A) to Section 3.2 - Authorization, providing for a fair share fee, as per the language of Appendix I, appended hereto. The City is opposed to this "fair share fee" addition to Section 3.2 of Article 3, and proposes the retention of current Contract language only. In support of its "fair share fee" proposal, the Union points to the City's collective bargaining agreements with other bargaining units, namely, the Police, Police Dispatcher, and Firefighter bargaining units, whose collective bargaining agreements have long contained fair share fee provisions. In this regard I note that in Fact Finder Marcus Hart Sandver's Report & Recommendations for the parties in SERB Case No. 99-MED-02-0097, received into evidence, and concerning the parties' impasse preceding the parties' initial collective bargaining agreement, the current Contract, Fact Finder Sandver, in setting

forth in his Report the City's position, noted that "[t]he City representative recognized the fact that fair share fee was in the public safety force's [collective bargaining] agreements with the City, but . . . pointed out that these agreements were negotiated long ago." The Union argues here that those collective bargaining agreements' fair share fee provisions constitute "internal comparables," which the Statute mandates the Fact Finder take into consideration. In support of its position here, the Union additionally points to Fact Finder Sandver's observation in his Fact Finding Report, referenced above, in support of his, Sandver's, recommendation that the current Contract contain the fair share for provision the Union proposed, to the effect that:

"It is difficult for an employer who has a fair share agreement with [three] other labor organizations to prevail on the agreement of [sic] philosophical principle. Obviously, this principle has been compromised by the City in not one, in but three other instances. The duty of fair representation imposed upon the Union by O.R.C. 4117, and a myriad of other litigation, persuades me that the fair share fee is a justifiable component in the labor agreement."

The Union also points to a half-dozen municipalities, namely, Delaware, Dublin, Gahanna, Grove City, Hilliard and Lancaster, all of which have collective bargaining agreements containing fair share fee provisions. The Union notes that most of these municipalities are very geographically near to Upper Arlington. The Union argues that these municipalities'

collective bargaining agreements constitute "external comparables," which the Statute mandates the Fact Finder take into consideration. The Union also points to the undersigned's Fact Finding Report & Recommendations in Licking County Engineer and Teamsters Local Union No. 637, S.E.R.B. Case No. 99-MED-03-0285, in which I recommended a fair share fee provision. It appears that the Union relies principally on the undersigned's findings and observations set forth in a Rationale section of the Report, reading as follows:

" . . . [T]he U.S. Supreme Court has, with certain safeguards, sanctioned imposing "fair share" fees on bargaining unit employees who are non-members of the Union. . . . It does so essentially on the grounds that such fees are simply a matter of fairness. As if to give emphasis to the 'fairness' of the proposition that such non-members of the Union participate in the cost of the Union's bargaining efforts . . . the U.S. Supreme Court unflatteringly refers to such non-member bargaining unit employees as 'free riders'. Suffice it to say that the Union's fairness argument is as eminently persuasive to the undersigned as it has been to the United States Supreme Court.

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. . . [T]he acceptance of 'fair share' at the outset and for many years in the Sheriff's Department undermines any contention of philosophical objections vis-à-vis other Licking County bargaining units. . . ."

In support of its resistance to any fair share fee provision, and, to the contrary, to simply retain the current Contract's provisions at Article 3, which contain no fair share fee provision, the City points out that Fact Finder Sandver's

Report was rejected, and that following said rejection a brief strike ensued before the parties, with the help of a Mediator, reached an agreement, namely, the current Contract. During that strike some bargaining unit employees, who are still employed, did not participate in the strike, but rather worked through the strike. These employees reported to Management that during the strike they received threats and sustained property damage, which threats and property damage these employees attribute to the Union. The City's advocate conceded that there is no proof to substantiate that said threats and property damage were attributable to the Union, but, that, nonetheless, these employees, and City Council, the legislative body for the bargaining unit, believe that the Union was responsible for said threats and property damage. In these circumstances, asserts the City, it is wrong to require those employees to pay fees to a Union that they feel and believe has abused them. Agreeing to fair share provisions would make the City Council and City Administration a party to forcing those employees to pay a fee to a Union that they feel has abused them.

Additionally, asserts the City, both the present City Council and the City Administration are philosophically opposed to fair share fee provisions.

The City also alludes to one of the components of the settlement which settled the strike the bargaining unit engaged

in in 2002, following which the parties entered into their first collective bargaining agreement. Thus the City points out that part of the strike settlement terms included a commitment on the part of the City to not oppose a Union proposal for a fair share fee provision in the event the Union signed up 90% of the bargaining unit as members. And in this regard the record reflects that only approximately 70% of the bargaining unit is members.

The City argues that, conversely, some 30% of the bargaining unit employees are not Union members, which is their choice. If the Employer agreed to fair share fees which, by the Union's calculation amount to about 91% of the dues required from members, the City would effectively be making that choice for those employees, which the City does not want to do.

Finally, argues the City, fair share fee is simply something which should not be awarded by a neutral party such as the Fact Finder, and that indeed the undersigned has so held.

The Union retorts that it never agreed as part of the strike settlement, or otherwise, that it would only seek fair share if it attained 90% membership, or, put another way, it never agreed that it would not seek fair share unless it attained 90% Union membership within the bargaining unit. In this regard the City concedes that the parties never had such an agreement.

The Union also emphasizes that there is no evidence of any Union or striker involvement in the threats and damage some of the strikebreakers allege, and it bolsters this circumstance by pointing out that no police reports of threats or property damage related to the strike were filed, and following the strike, strikers and strikebreakers alike have worked side-by-side since the end of the strike without rancor or any work problems stemming from the strike.

RATIONALE:

It's true, as the City alleges, that early on the undersigned, and other neutrals from the central and southern part of the State deferred to philosophical objections vis-à-vis fair share fee provisions in a first Contract. But this is not a first contract. (See: Licking County Sheriff, supra.) And in any event, as Fact Finder Sandver found for the parties three years ago, the City is in no position to resist fair share fee provisions vis-à-vis this bargaining unit in the face of having agreed to same with respect to other bargaining units. Furthermore in the absence of any proof that the Union played any role in the purported threats and property damage to, and of, strikebreakers, the City's alternate arguments are not persuasive. Indeed at this point in time, as recently observed by the undersigned in his Report and Recommendations In the Matter of City of West Carrollton and F.O.P., O.L.C. Inc.,

S.E.R.B. Case No. 01-MED-09-0779, which issued May 22, 2002, the southern neutral's position (of according weight to philosophical objections] is considerably weakened."

In light of the foregoing Fair Share will be recommended.

RECOMMENDATION:

It is recommended that the parties' Contract contain the Union proposed Fair Share Fee provision, as per Appendix I, at Article 3, Dues Deduction, Section 3.2, Authorization, Subsection (A) Fair Share Fee.

Issue No. 2 - Article 8 - Grievances, Section 8.2, and Step 3

THE RECORD:

The parties have reached tentative agreements for some changes to Article 8, which the City characterizes as "non-substantial," primarily clarifying how the Article should be administered and extending some of the time lines for filing appeals and responding to grievances at the City Manager level. Other than these non-substantial agreed to changes, the City would adhere to current Contract language. The Union, however, would delete those provisions establishing and/or referencing the "Arbitration Panel."

Under the current Contract, only removal cases are brought to a single arbitrator, selected from a list of seven arbitrators furnished to the parties by an Ohio office of the

American Arbitration Association. A grievance involving any matter other than a removal action is to be submitted to an Arbitration panel. The Panel is comprised of one City-designated Arbitrator and one Union-designated Arbitrator. Both selectees must be "residents of Upper Arlington, and possess knowledge of labor relations. . ." The party designed arbitrators in turn select the third Arbitrator "who is a qualified Arbitrator and who shall be Chairman of the Panel." The Contract goes on to describe a process which the party-designated arbitrators are to follow in the event the party-designated arbitrators do not mutually agree on the third Arbitrator and Panel Chairman, including a list of arbitrators submitted to them by the American Arbitration Association, from which they are to mutually select the Chairman Arbitrator, and failing that, engage in a striking process "and selecting the final remaining name as arbitrator." The current Contract further provides that "[N]o Panel member shall be an employee, official or member of a Board or commission of the City, a member or representative of the Union, or a member of the immediate family or household of any such persons." The current contract provides that "a majority or unanimous vote of the Panel decides the grievance."

The City takes the position that resident panelists will have a particular understanding and sensitivity to how contract

violations or a grievance resolution will affect the bargaining unit employees and services to the community. Sometimes that will weigh in the Union's favor, and sometimes in the Employer's favor, asserts the City. The City further notes the labor contracts for the other bargaining units in the City all provide for the same type of panels. While contracts may differ on substantive issues, depending on what the parties have negotiated over the years, consistency in the mechanical administration of the labor agreements is helpful, asserts the City. The City also asserts that with a single arbitrator the City is at a disadvantage because the Union selects more AAA and/or FMCS arbitrators than does the City.

The Union notes that the parties have had only one experience with the Arbitration Panel procedure, and in its view, that arbitration went very badly, "due to extremely unusual conduct by the panel, whereby the party-designated Panel member arbitrators circumvented the neutral arbitrator and rendered a 'decision' before the parties submitted post-hearing briefs." The record reflects that in that case the City-designated arbitrator was a lawyer with labor/management relations experience. Accordingly, asserts the Union, that matter is headed toward protracted litigation. This bad experience with this highly uncommon process and procedure underlies this Union proposal to eliminate the Panel and resort

to a single arbitrator for all grievances advanced to arbitration. The Union asserts that under the present Panel system, laymen are charged with sorting out issues that are more appropriately tackled by "a qualified Arbitrator." The validity of this assertion is borne out here, contends the Union, where in the one instance in which the Panel process was utilized, the party-designed arbitrators bypassed the neutral arbitrator and thereby failed to even grasp the procedures involved.

The Union also contends that its proposal would streamline the arbitration process.

The City retorts that the current Contract language does not contemplate the use of "laymen," but rather the use of party-designated residents who "possess knowledge of labor relations."

RATIONALE:

The Elkouris in their learned arbitration treatise How Arbitration Works, 5th Edition, 1997, commencing at page 176, discuss and analyze the nature, advantages, and disadvantages of tripartite arbitration boards or panels as set forth in Section 8.2 of the current Contract. At page 178 they cogently observe that:

"A neutral member of a tripartite board who is not given [as here] authority to render a binding award without a majority vote might be faced with the necessity of compromising his or her own views or even accepting the extreme position of one side or the

other in order to have a majority award. Sometimes neither party will vote with the neutral in favor of an award based upon the true merits of the case."
[Citations omitted.]

The point to be made therefore is that a tripartite panel is simply a different form of dispute resolution by arbitration than is the single arbitrator format. Here the parties have consciously chosen the former in their first contract and internal comparables reflect the same tripartite format. Hence past collectively bargained contracts and internal comparables, statutorily mandated considerations, serve to support the status quo.

RECOMMENDATION:

It is recommended that the parties retain current Contract language at Article 8, Grievances, Section 8.2, Arbitration.

Issue No. 3 - Article 10, Hours of work, Section 10.5 Assignment of Overtime

THE RECORD AND RATIONALE:

The Union seeks to significantly overhaul the current Contract's Assignment of Overtime provisions. The City would retain current language. Obviously, a great deal of time and energy was expended in negotiations and at the hearing herein to this issue. Yet the parties were unable to resolve their differences. The City asserts that the Union is "unable to discern what the actual method of assigning overtime has

been." The Union however asserts that its proposal ". . . insures coverage of overtime and addresses the Employer's asserted concern that it be permitted to have sufficient supervisory coverage for overtime," thereby disputing the City's claim that the Union "is unable to discern what the actual method of assigning overtime has been." The undersigned does not see his role as resolving the credibility of the parties' conflicting contentions in this scenario, and, in any event, the record evidence is insufficient to the task even if it were the undersigned's role.

The Union additionally notes "the parties do not agree as to the meaning of the current Contract language and are currently engaged in a dispute regarding the meaning of [the current Contract]. (The parties have taken the issue to arbitration. Unfortunately, it is the one grievance presented to a Panel, and, due to procedural improprieties [see Issue No. 2, above] the matter has not yet been resolved." In my judgment, at this juncture, the undersigned's proper role is to stand aside from the workings of the parties' grievance and arbitration procedures and have the pending litigation resolve the matter. This can only be effectuated by recommending the status quo.

RECOMMENDATION:

It is recommended that the parties' Contract retain the language of the current Contract's provision at Article 10, Section 10.5.

Issue No. 4 - Article 12 - Injury Leave

THE RECORD:

As the Union correctly asserts, the City proposes a complete revision of the provisions in Article 12 and these proposed revisions would significantly limit the current Contract's benefits provided for injury leave.

The Union opposes such an extensive revision and seeks current Contract language with the caveat that the Union does not object to the City's proposals concerning reporting requirements and status reports. In particular, the Union opposes the City's proposal that an employee may be terminated if he/she is off work for one (1) year or more due to an on-the-job injury. In this regard, of the municipalities upon which the Union relies as external comparables, set forth hereinabove, only Lancaster has a provision for the termination of injury leave. Internally, historically the City's other bargaining units had no termination provisions. While the most recently negotiated Police Dispatcher contract provides for termination of injury leave, the Union points out that many preconditions

must first be met. In this regard the Dispatcher's Contract provides in pertinent part as follows:

Article 21

Occupational Injury & Disability

. . . .

N. Wage Continuation

. . . . If the City determines that within six (6) months from the date of injury (a) the employee will not be able to return to work and perform the essential functions of his/her position, (b) the employee is not making consistent progress toward recovery, (c) the employee is not cooperating with the City in the employee's recovery and return to work, or (3) a disability retirement is not pending, then the employee may be terminated. Every attempt will be made (e.g., through physical therapy and work hardening programs) to return the member to his former position."

The City asserts that sooner or later an employee may exhaust all forms of paid leave and become eligible for unpaid injury leave. The parties have an arbitration award, asserts the City, which provides that an employee can stay on injury leave as long as he or she was receiving Workers Compensation benefits, which ruling could mean that the employee is eligible to stay on injury leave indefinitely. The City proposes to limit the duration of injury leave to one (1) year, and to require employees on injury leave to report back their progress on returning for work.

If an employee is on indefinite injury leave, the City will encounter difficulty in hiring a replacement, since the hiree

would be subject to layoff upon the return of the employee from injury leave.

RATIONALE:

The internal comparables are mixed.

The external comparables favor the Union's position. The factor of "past collectively bargained agreements" also favor the Union's position. Accordingly, it will be recommended that the parties retain the current Contract language, with the caveat that since the Union does not object to the City's proposed reporting requirements and status reports, such requirements and reports as set forth in the Recommendation Section shall be added to the current Contract's language.

RECOMMENDATION:

It is recommended that the parties' Contract retain the current Contract's provisions at Article 12 - Injury Leave, with the following additions, and the following modification to Section 12.8.

To Section 12.2, Conditions, add:

"B. At the time of the incident, employees shall report to their immediate supervisor all accidents that have resulted in an injury. The supervisor shall send a notice, via E-mail or telephone to the Resource Assistant, of the pending injury report. As soon as possible, the supervisor shall forward to the City Manager's office a completed accident report and questionnaire form.

C. For an employee to receive injury leave, he/she must agree to:

1. complete the appropriate accident/injury report forms at the time of accident or injury;
2. contact the Human Resources Assistant monthly regarding status;

- and -

Section 12.8 [Delete current Contract language and substitute]

At the time of the initial physician's visit for work-related injury, the employee shall report to the physician that the injury occurred during the performance of employment.

Issue No. 5 - Article 13, Vacation, Section 13.2 Vacation Accrual Only

THE RECORD:

Under the current Contract, employees receive four (4) weeks of vacation after their thirteenth (13th) year of service. Employees then accrue one (1) additional day of vacation for each three (3) years of service beyond thirteen (13) years. The Union proposes that employees accrue two (2) additional days of vacation for each three (3) years of service beyond thirteen (13) years. The Union argues that its comparable municipalities are mostly ahead of the bargaining unit here, as are the City's Police and Fire units. The City would retain the current Contract's Vacation Accrual language, asserting it is generous enough.

RATIONALE:

In light of other economic improvements recommended herein, it will be recommended that the status quo on this issue prevail.

RECOMMENDATION:

It is recommended that the parties' Contract retain the current Contract's language at Article 13, Section 13.2 Vacation Accrual.

Issue No. 6 - Article 25, Insurance, Section 25.2, Member Premium Costs Only

THE RECORD:

As the Union succinctly puts it, the City proposes increasing the maximum for potential member premium contributions. Currently, the maximum increase is limited to seven percent (7%) for dependent coverage or thirty-five dollars (\$35), whichever is lesser. The City's proposal would increase the maximum dollar amount to forty dollars (\$40). The Union is opposed, asserting principally that \$35.00 is enough for any foreseeable increment in insurance premium costs. Two other City contracts have provisions as per the bargaining units current Contract. The new Police Dispatcher contract mimics the City's proposal.

RATIONALE:

Significantly the psychological barrier to participation by the bargaining unit employees has been breached in the current Contract. Given the recent leaps in insurance premiums, I lack the confidence of the Union in the stability of the current Contract's limits for the life of the Contract.

Accordingly, the City's position will be recommended.

RECOMMENDATION:

It is recommended that Article 25 - Insurance, Section 25.2 Member Premium Costs, read as follows:

Current Contract language, except change "thirty-five dollars (\$35)" to "forty dollars (\$40)."

Issue No. 7 - Wages and Benefits, Section 28.4 - Uniforms

THE RECORD:

The Union, pointing out that the uniform allowance has been at \$275.00 for five (5) years, seeks to increase it to \$300.00. It also spells out policies for return or reimbursement of new hires whose employment ends within six months of their hire. It further extends the Contract's Uniform provision to part-time employees (presumably regular part-time employees as noted in Article 2 - Union Recognition Section 2.1).

The City would modify the current Contract's language by spelling out in the Contract "the uniform policy," but would retain the current allowance of \$275.00.

RATIONALE:

It appears that the uniform allowance here is indeed for the maintenance of uniforms and not just a euphemism for extra compensation. Since it has been unchanged for five years, it's clear that even the modest inflation of recent years warrants the increase the Union seeks. Extension of the benefit to part-time employees is unwarranted since presumably their uniforms are subject to less wear and tear, and in any event, typically part timers participate in any fringe benefit only on a pro-rata basis.

RECOMMENDATION

The City's proposal for Section 28.4 Appendix II attached hereto, with the caveat that the amount of the annual uniform allowance be \$300.00, is recommended.

Issue No. 8 - Article 28 - Wages & Benefits [Except Section 28.4 - Uniforms]

THE RECORD AND RATIONALE:

As is always the case, the parties spent the most time in negotiations, their mediations, and at the hearing herein on this issue. Both parties are agreed that the wage structure of the current Contract is in need of a major overhaul. Both parties did an excellent job explaining the similarities and differences (actually the parties are not that far apart) with respect to their restructuring schemes. Suffice it to say the

matter is exceptionally complex. In my view, however, the Union's scheme and its proposal embodying same, with the exception of the annual across-the-board percentage increases it seeks, is more appropriate. In my view a better case is made for the 3.6%, 3%, 3% across-the-board increase just agreed to by the Police Dispatchers and such is recommended.

RECOMMENDATION:

It is recommended that Article 28 - Wages & Benefits (Except Section 28.4 - Uniforms, separately addressed herein) read as per the Union's proposal and restructuring, with the caveat that in lieu of the Union's proposal concerning the across-the-board percentage increases, that the across-the-board increases over the three years of the Contract be 3.6%, 3%, and 3%. It is further recommended that the restructuring and across-the-board increase be retroactive, as the parties have agreed, to January 1, 2003.

Issue No. 9 - Article 33 - Service Credit Compensation

THE RECORD AND RATIONALE:

Suffice it to say that the record amply supports the conclusion that fiscal restraint is called for. The bargaining unit's current service credit or longevity pay matches (indeed the maximum is better) that of the most recently negotiated 2003-2005 Police Dispatcher. In light of other economic

improvements recommended herein, I find that as the City contends, a continuation of the status quo is appropriate.

RECOMMENDATION:

It is recommended that the parties' Contract retain the language of the parties' current Contract at Article 33.

Finally, it is RECOMMENDED that the parties' Contract set forth all of the parties' tentative agreements and the provisions of the current Contract, which the parties determined not to change.

This concludes the Fact Finder's Report and Recommendations.

Dated: February 12, 2003



Frank A. Keenan
Fact Finder

APPENDIX I

(A) Fair Share Fee.

Any employee who is not a member of Local 284 shall pay Local 284, through payroll deduction, a contract service fee or fair share for the duration of this Agreement. This provision shall not require any employee to become or remain a member of Local 284, nor shall the fee exceed the dues paid by members of Local 284 in the same bargaining unit. Local 284 is responsible for notifying the Employer of the proportionate amount, if any, of its total dues and fees that was spent on activities that cannot be charged to the service fees of non-members during the preceding year. The amount of service fees required to be paid by each non-member employee in the unit (during the succeeding year) shall be the amount of the regular dues paid by employees in the unit who are members of Local 284 less each non-member's proportionate share of the amount of Local 284's dues and service fees spent on activities not chargeable to such service fees during the prior year. If an employee challenges the propriety of Local 284's use of such fee, deductions shall continue, but Local 284 shall place the funds in an interest bearing escrow account until a resolution of the challenge is reached pursuant to the provisions of ORC 4117.09(C) and other appropriate provisions of federal and state law and rules of the State Employment Relations Board. The Union agrees to provide, annually to the Employer, a copy of the fair share fee rebate procedure.

APPENDIX II

Section 28.4. The parties agree to abide by the uniform policy in effect at the time of execution of this Agreement, subject to amendment through the Labor Management Committee. In amending the policy in the Labor Management Committee, the parties shall provide: that the Employer will provide employees with an initial issue of uniform including shoes and any other items suitable to the season in the Employer's judgement; and that employees may be reimbursed for shoes and pants and any other items that the parties agree to include within this clause up to the value of any same type of item on the Employer's contract list and subject to the Employer's approval. Employees who are hired will be required to sign an agreement agreeing to reimburse the Employer for outerwear items that are not returned once the employee is no longer employed by the City. The annual uniform allowance is \$275, and is for maintenance of the uniform after the first year of employment per the policy.