

FACT-FINDER REPORT

STATE EMPLOYMENT
RELATIONS BOARD

Before the
State Employment Relations Board
State of Ohio
December 12, 2003

2003 DEC 15 A 10:07

In the Matter of:

S.E.I.U. DISTRICT 1199, The HEALTH
CARE and SOCIAL SERVICE UNION
Employee Organization

and

BUTLER COUNTY HEAD START
PROGRAM
Employer

Case No. 02-MED-11-1192

I. HEARING:

DATE: November 25, 2003, 5:30 p.m.
LOCATION: Fairfield, Ohio

ATTENDANCE:

For the Employee Organization:

Julie Jones, Administrative Organizer
Beth Skidmore, Family Service Worker
Fran McCoppin, Teacher
Kathy Patrick, Family Service Worker

For the Employer:

J. Michael Fischer, Attorney, Ennis, Roberts & Fischer
Daniel E. Hare, Superintendent
Lori A. Thesken, Assistant Superintendent
Kathy Matteson, Director
Kim Ulm, Treasurer

Fact Finder:

James L. Ferree

INTRODUCTION:

Butler County Head Start (herein called “the Employer” or “the Program”) operates a school system which employs 108 regularly scheduled full-time and part-time teachers, assistant teachers, family service workers, cooks, and other employees who are represented in collective bargaining by the Service Employees International Union District 1199 [formerly District 925], The Health Care and social Service Union, AFL-CIO (“the Employee Organization” or “the Union”). The Employer and the Union were parties to a collective bargaining agreement which was effective through January 31, 2003. The parties bargained and reached agreement on most of the terms of a new Agreement, but they failed to reach agreement on five issues. Consequently, the parties selected the undersigned, who was appointed by the State Employment Relations Board (“SERB”) to serve as Fact Finder in this matter, pursuant to Ohio Revised Code (“ORC”) Section 4117.14(C)(3). A fact finding hearing was conducted in the Employer’s facility in Fairfield, Ohio at 5:30 p.m. Tuesday, November 25, 2003. At the hearing, the parties agreed to extend the time for fact finding to Friday, December 12, 2003. Having considered the evidence presented at the hearing, the Fact Finder hereby issues the following report and recommendations.

II. MEDIATION:

At the hearing, the parties confirmed that they have reached agreement on a number of issues, and declined the Fact Finder’s offer to mediate. It is hereby recommended that the contract language previously agreed upon by the parties be incorporated into their new collective bargaining agreement.

The remaining unresolved issues are:

1. Article 4.B. Fair Share Fee
2. Article 4.G. Union Leave
3. Article 7.B. Vacancies
4. Article 7.C. Assignments/Reassignments
5. Article 20. Bereavement Leave

III. CRITERIA:

Consideration was given to the criteria listed in Rule 4117-9-05 of the State

Employment Relations Board:

(J) The fact-finding panel, in making findings of fact, shall take into consideration all reliable information relevant to the issues before the fact-finding panel.

(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.

IV. ISSUES AND RECOMMENDATIONS

Issue 1: Article 4.B. Fair Share Fee

Article 4 of the most recent collective bargaining agreement, titled "Union Rights," consists of 8 sections covering these topics: Payroll Deduction, Union Representation, Bulletin Board Space, Outside Political or Legislative Activities, Non-Discrimination, Information, Union Leave, and Paid Release Time.

Union Position:

The Union proposes to add a new section:

B. Fair Share

The Program agrees, that in the event during the term of this Agreement, the Union provides proof that eighty (80%) percent or more of the employees in the bargaining unit are dues paying members of the Union, the fair share fee provision set forth below will be implemented within thirty (30) days of said proof being provided. Furthermore, the fair share fee provision set forth above shall be applicable to all employees after the date of this agreement is executed by the parties.

1. All bargaining unit employees who are not members of the Union shall pay to the Union through payroll deduction a fair

share fee. The Union guarantees that its fair share fee satisfies the requirements of federal and state law.

2. The Union agrees to indemnify the Program for any cost or liability, including the attorney fees and punitive damages, incurred by the Program as a result of the implementation and enforcement of the above fair share fee provision.

Management Position:

The Employer opposes the proposed new provision.

Evidence and Arguments:

The Employee Organization asserts that all Head Start bargaining units in Ohio which are represented by the Union, except for this Employer, have a fair share/agency fee provision in their agreements. The Union has succeeded in including the provision in the first contract of all of those agencies except for one, the Hamilton County Head Start, where those parties agreed to include the above language in their current contract. Examples were submitted of other Head Start agencies in the area which have some form of fair share in their collective bargaining agreements. The Union proposed in April:

The Union and the Program agree that, as a condition of employment, all members of the bargaining unit described in this agreement who are not members of the union shall pay to the Union a fair share representation assessment as determined by the Union, the amount of which shall not exceed the amount of dues, fees and assessments paid by members of the Union.

In response to the Employer's opposition to this proposal, the Union advanced the current proposal on September 22. The Union submitted documents to support its claim that it currently holds signed authorizations from 60% of the bargaining unit. Due to the turnover in employment within the Program, there are always probationary employees who hesitate to join the Union until they pass their probation period.

The Employer stated that it opposes requiring employees to pay a fee to the Union, to keep their jobs. The Program is basically an educational program, and asserted that, historically, fair share fee provisions are not included in collective bargaining agreements covering educational employees in the first several agreements, after a substantial majority of the employees in the collective bargaining unit have voluntarily joined the union. There are 108 employees, and 58 of them have joined the union. Since 54% of the bargaining unit have voluntarily joined the Union, 46% have chosen not to do so. The Employer urged the Fact Finder not to do the Union's work for it, and turn the Program into a collection agency for the Union.

Finding of Facts and Rationale:

Ohio law permits unions to bargain for “fair share” agreements with public employers, and does not require the unions to prove that more than a bare majority of bargaining unit employees have become members before asking for a fair share clause. Unions have a duty to represent all employees fairly, not just dues-paying members, and many public employee unions in Ohio have successfully argued that it is equitable for employees who benefit from representation to pay for the cost of representation.

In a previous fact finding case where I was faced with a similar issue,¹ I wrote:

In the opinion of the undersigned, the establishment of fair share fees requiring so-called “free riders” to reimburse a union for services it renders them is an equitable step which may benefit the Labor Organization without significant likelihood of harm to the Employer. Moreover, removing the irritant of non-paying unit members may contribute to more harmonious labor relations between these parties. I note that the Employer currently withholds from paychecks various kinds of deductions and presumably could easily accommodate one more deduction. The burden of determining the amount of the annual fair share fee and ensuring that it is properly allocated to legitimate collective bargaining purposes will fall upon the Labor Organization, not the Employer.

Because I believe that the future relationship of the parties will benefit from this clause, which is usual in contracts covering similar bargaining units in the area, I will recommend that a fair share article be included in the collective bargaining agreement.

Fact-Finder Recommendation:

It is recommended that the parties include in their new collective bargaining agreement the following new section in Article 4, “Union Rights”:

Fair Share. All bargaining unit employees who do not join the Union or remain members in good standing shall be required to pay to the Union through payroll deduction a fair share representation assessment, as a condition of employment. This obligation shall commence upon the successful completion of the probationary period. This provision shall not require any employee to become a member of the Union, nor shall the fair share fee as determined by the Union exceed dues paid by members of the Union in the same bargaining unit. The deduction of a fair share fee by the Employer from the payroll check of the employee and its payment to the Union shall not require the written authorization of the employee. The Union agrees to indemnify the Program for any cost or liability, including the attorney fees and punitive damages, incurred by the Program as a result of the implementation and enforcement of the above fair share fee provision.

¹ Princeton City School District and Princeton Association of Classroom Educators, 94-MED-03-0185, May 31, 1994.

Issue 2: Article 4.G. Union Leave

The most recent collective bargaining agreement included the following:

- G. Union Leave. The Union shall be granted a total of three (3) paid days per year for Union business, which may be used in half-day increments. The Union shall be granted an additional two (2) days of unpaid leave for Union business per school year.

Union Position:

The Union proposed to change the above language to the following:

- G. Union Leave. The Union shall be granted a total of five (5) paid days per year for Union business, which may be used in half-day increments. The Union shall be granted an additional five (5) days of unpaid leave for Union business per school year. Union leave may be used in half day increments.

A leave of absence up to but not more than one (1) year without pay will be granted to one employee to work in the Union Office at the request of a Union official. Any employee on such leave shall have the right to reinstatement. Credit for length of service and for benefits status granted prior to going on leave is retained by the employee upon return. The employee is eligible to receive any increases which would have accrued if the employee had been on the job. The rules governing COBRA shall apply.

Once each contract year, all stewards and officers will be given paid release time to attend a single four (4) hour training session scheduled by the Union. The Union shall notify Human Resources, in writing, at least two weeks in advance of the training the date and time of the training and will supply Human Resources with the names, location and supervisors of the stewards and officers to be released to attend. All such trainings will be scheduled on Friday.

Paid Release Time. Contract negotiations will be scheduled during regular working hours. The Union's team members shall be given paid release time to attend.

Management Position:

The Employer opposes the proposed new provision.

Evidence and Arguments:

The Union contends that increased time is needed for union business. One employee may be needed for up to a year, and others will need a couple of days for union conferences, all of which would be time paid by the Union. Regular Union business meetings are held on Fridays, which does not conflict with most members' schedules because only 3 of the 22 Head Start centers operate on Fridays, but the Union wants to open the meetings, which occur three or four times per year, to other members. Training in Columbus is scheduled on Friday and Saturday, and currently it does not cause the Program to find substitutes for employees who attend.

The Employer submitted evidence that it already spends over \$75,000 per year for substitutes to cover for staff absences. Absenteeism is a problem, as there are staffing requirements provided by law, and it is difficult to find substitutes, as well as costly. Unit employees also use an average of 15 days for sick leave each year. A majority of the unit employees work nine months per year. Employees are scheduled to work only 175 days per year, leaving 190 days available for Union training. The Program schedules its training on Fridays, as well. Finally, the Employer points out that the contract already provides up to three days of paid union leave and two days of unpaid union leave, and asserts that the Union has not shown any need for more days off for union business.

Findings of Fact and Rationale:

The Union has not shown that any comparable agencies provide more time for union business than is already available under the most recent contract. No evidence was provided to support the proposition that the time currently available is insufficient to conduct Union business. It is clear that any additional time when employees are away from their duties will be a burden on the Program, whether the time off is paid or unpaid. Absent a clear reason to do so, when the parties are in disagreement, a fact finder should not fix a contract provision which is not broken. The language in the most recent contract was agreed upon by the parties, and should remain undisturbed in these circumstances.

Fact-Finder Recommendation

It is recommended that the parties retain the language of Article 4.G. of the most recent collective bargaining agreement, and not add the language proposed by the Union.

Issue 3: Article 7.B. Vacancies

Article 7, "Vacancies" in the most recent Agreement included the following:

B. Vacancies. . . . A vacancy shall be posted for five (5) working days. A vacancy posting shall include the date of posting, the application deadline, the qualifications for the position, the hours of work, the months of employment, and the rate of pay. During the summer months, notice of vacancies will be sent to the entire bargaining unit. The five (5) day posting time period will begin two (2) days after the date of mailing.

A vacancy shall be filled by the most qualified applicant. In the event all relevant factors are equal, the applicant with the greatest seniority will be offered the position. Relevant factors include, but are not limited to:

- (a) the employee's knowledge, skill and training necessary to perform the job as judged by the interview team and/or reported by the employee's supervisor.

- (b) the employee's evaluations.
- (c) the employee's attendance record.

Current employees who apply for a vacant position shall be interviewed for any vacant position for which they meet the qualifications.

Union Position:

The Union proposes to delete subparagraphs (b) and (c) of section B, above.

Management Position:

The Employer opposes the deletion.

Evidence and Arguments:

The Union contends that skill and training are legitimate concerns when filling a vacancy, but employee evaluations and attendance records are unfair to a current employee when competing for a job with a candidate from outside the Program, who has no evaluation or attendance record. Absences should not be held against an employee if they are due to legitimate use of sick leave. Promotions, which share the selection criteria with vacancies, are not at issue here.

The Employer believes that vacancies should be filled by the most qualified applicants, and an employee's performance evaluation and attendance record are measures of the employee's qualifications to perform a particular job. The Employer should not have to award a vacancy to a more senior employee with marginal evaluations and a poor attendance record if a less senior employee is better qualified. Head Start centers are self-contained, and the Program needs to have employees get along together and show up for work. The Employer cannot put two employees with poor attendance at the same center, for example. An average of twenty vacancies are filled each year, and only one grievance was filed about them, so there is no cause to be concerned about injustice to employees or abuse by the Employer.

Findings of Fact and Rationale:

The parties agreed to include evaluations and attendance records in the list of qualifications for filling vacancies, and now they are in disagreement about whether to remove those two factors. There has been no showing that there will be continuing serious problems if these two criteria are left in the new agreement. Absent agreement by the parties or a pressing need to correct an intolerable situation, a fact finder should not disturb an arrangement voluntarily entered into by the parties in a previous contract.

Fact-Finder Recommendation

It is recommended that the parties include in their new contract the language in subsections (b) and (c) of Article 7, section B, "Vacancies" of the previous contract.

Issue 4: Article 7.C. Assignments/Reassignments

The most recent Agreement included the following in Article 7, "Vacancies":

C. Assignments/Reassignments. The Program retains under this contract the sole authority and discretion to assign and reassign employees, except as such authority may be specifically limited by this contract. Assignment/reassignments shall be based on the staffing needs of the Program and/or performance reasons, but shall not be for arbitrary or capricious reasons. An employee may be involuntarily reassigned to a position in another classification only if the position to which the employee is to be transferred has first been posted pursuant to the provisions of this article and no one qualified to fill the position applied for the position.

Union Position:

The Employee Organization proposes to replace section C with the following:

C. Assignments / Reassignments. There shall be no involuntary transfers/reassignments.

The Program shall create a transfer request list. Employees shall indicate at the end of each school year their request for transfer in writing to the Human Resources Director.

Management Position:

The Employer opposes the proposed change.

Evidence and Arguments:

The Union explained at the hearing that it wishes to establish a process for transferring and reassigning employees. Currently, the Employer decides reassignments over the summer and announces them without explanation, sometimes sending an employee to a center far from the employee's residence, and creating child care problems. The Union said its proposal would create a process in which employees could request a transfer. Other Head Start programs have a process in which employees are allowed to transfer if a vacancy occurs within their classifications. The Hamilton County Head Start collective bargaining agreement provides, in part:

An employee will not be involuntarily reassigned to a location more than 15 miles from the employee's current location unless it is necessary in order to prevent the closing of a location. Additionally, employees will not be permanently involuntarily reassigned more than once a Program year unless a site opens or closes or is in jeopardy of losing a contract. Seniority and whether or not an employee had been involuntarily reassigned once in the last two years will be part of the criteria relied upon by the Program in selecting an employee to be voluntarily reassigned.

The Union produced a copy of the “Labor Management Committee’s Minutes” of August 2, 2002, in which the notes state:

Job Placement

- A. Staff Assignments are based upon the strength of the staff and the needs of the program.
- B. Decisions regarding placement of staff are made to benefit the children and families being served in the center.
- C. The evaluations of staff are reviewed in making effective placements.
- D. It was advised to ask staff how they would like to be notified if their assignment is changed, either by phone or by letter. It was recommended that notice of placements should be accompanied by putting in writing the reasons why a change in placement is being made.

The Union related that the Employer did not adopt the recommendation, indicating that reasons for a change of assignment are sometimes “confidential.” Other Head Starts give employees reasons for their transfers, the Union said, but this Employer currently does not. This Head Start has the most movement of employees at the start of the school year. The Employer could accommodate the needs of its employees, and create less turmoil at the start of the year, according to the Union.

The Employer’s pre-hearing statement said that there are any number of reasons why it is necessary to reassign an employee from one center to another, from time to time. The majority of these reassignments are made during the summer for the following school year; it is rare for an employee to be transferred during the school year. The Employer asserts that its commitment in the previous collective bargaining agreement, not to make assignments or reassignments which are arbitrary or capricious, is sufficient to protect employees from being reassigned for reasons not related to the staffing needs of the agency. In order to accomplish its purpose of providing pre-school children an educational opportunity they would not otherwise have, the Program must have the flexibility to place employees where it believes they can be most effective. The Employer has agreed to provide the reasons for the reassignment to an employee who is reassigned.

The Employer noted in the hearing that the Hamilton County Head Start agreement has the language proposed by the Union, but its centers are more spread out. The 17 Butler County centers are concentrated in the cities of Hamilton, Fairfield, and Middletown, and they are all leased. When finances required the Program to close some

centers, the Employer met with the Union and explained. One grievance was filed, and it went only as far as the second step. The Employer offered to give an employee a written reason for reassignment, if requested. The locations of the centers and number of students change from year to year, and the Program must meet State requirements regarding certification of staff members. The Employer has explained that it would not be possible to totally eliminate involuntary assignments, but the Employer takes its staff members' needs into account.

The Union responded, at the hearing, that there has been no management commitment to avoid reassignments, although the Employer did rescind some reassignments. A lot of personnel movement causes stress, so if the Employer was able to send employees back to their earlier location, why move them in the first place? The Hamilton County Head Start collective bargaining agreement includes geographic limits to reassignments. Students and their families lose when a familiar teacher is reassigned. Attachments of families to teachers are so important that families move a child to follow a teacher to the new assignment. Teachers are upset when required to move to a center further from home; they have added expense for gasoline and auto repairs, and they may have to change their child care arrangements. When one teacher's request for transfer to her child's center was denied, she resigned. Postings of vacancies do not list locations.

The Employer explained that vacancies are posted for a job title, and when a candidate is selected, the employee is assigned to a location. The locations of the 17 centers change from year to year. Over the summer, the Program determines where the centers will be located, and staffs them according to their needs. In the example of the teacher who resigned, her assignment was the only part-time position; moreover, regulations state that a child cannot attend the same center which employs the parent. The Employer repeated that the previous contract already forbids transferring an employee for arbitrary or capricious reasons. The grievance mechanism is available if an employee feels the contract was violated.

The Union concluded by asserting that, instead of placing an employee according to program needs, there is no logic to the assignments, which causes employees to worry

about where they will be working. Some employees have to coordinate with second jobs. There is too much movement, and no rhyme nor reason for the reassignments.

Findings of Fact and Rationale:

Assigning employees to jobs is a basic management function which an employer needs to retain in order to accomplish its mission and provide services to its clients. In this case, the Employer's exercise of the function has created dissatisfaction among some employees. Part of the cause for the dissatisfaction, identified at the hearing, is the Program's perceived failure to communicate effectively with the employees regarding the reasons for their reassignments. The Employer has agreed to provide the reasons for the reassignment to an employee who is reassigned. In the opinion of the undersigned, if the Employer provided a written reason for a reassignment, an employee could then evaluate the situation and decide whether to file a grievance claiming that the reassignment was arbitrary or capricious. I will therefore recommend that the contract language incorporate the Employer's agreement to provide a written reason for the reassignment to any reassigned employee who requests the reason.

Fact-Finder Recommendation:

It is recommended that the parties retain in their new contract the language of Article 7. C., and add to it the following:

The Program will provide an employee with a written explanation of the reasons for the employee's reassignment, upon request by that employee.

Issue 5: Article 20. Bereavement Leave

Article 20 of the most recent contract, "Paid Leaves," provides for sick leave, personal leave, assault leave, and jury duty.

Union Position:

The Union proposes to add the following:

Bereavement Leave

A. Three (3) days of bereavement leave with pay shall be granted to all employees in case of death in the employee's immediate family. The term "immediate family" includes children, mother, father, spouse, grandparents, grandchildren, brother, sister, mother-in-law, father-in-law, step-children, step-parents. An employee shall be granted one (1) day bereavement leave of absence with pay for time lost from his/her regularly scheduled work because of attendance at the funeral of any person not listed in the prior sentence. Additional paid leave may be authorized in writing by the employee's supervisor.

Management Position:

The Employer opposes the proposed new benefit.

Evidence and Arguments:

The Union said that it is requesting three days specifically in case of the death of a close relative, and one day for the funeral of another person, in order to avoid an employee needing to use sick leave in those situations. The Union has contracts with two area Head Start programs which include bereavement leave.

The Employer pointed out that employees already have fifteen days of sick leave and three days of personal leave available each year to use in case of bereavement, or to attend a funeral, and that those 18 days are 10% of the 178 work days in a year. Unused sick leave accumulates from year to year to a maximum of 220 days. Employees do not need more paid time off. The Program already pays \$75,000 per year for substitutes to cover for staff absences, due to a serious attendance problem. Employees are absent an average of 15 days per year. One of the examples the Union has cited as a Head Start program with a contract providing bereavement leave is not a state agency, and therefore is not comparable to the Employer

Findings of Fact and Rationale:

There has been no showing of a need for bereavement leave. There was no evidence that employees have run out of sick leave and personal leave because of bereavements. Only two of the area Head Start agencies under contract with the Union have this benefit in their agreements, so there is no showing that the benefit is needed to enable the Program to compete with comparable employers in the job market. On the other hand, the Employer has made a case against expanding the number of paid days off, which has the potential to exacerbate an absenteeism problem. I conclude that the proposed benefit is a solution in search of a problem, and should not be added to the collective bargaining agreement .

Fact-Finder Recommendation:

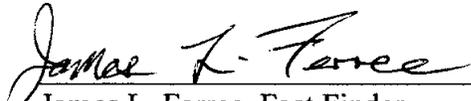
It is recommended that the parties include the existing Article 20, as it appears in the most recent contract, without a new bereavement leave section.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Fact Finders Report regarding the findings of fact and recommendations on the unresolved issues has been sent by overnight mail carrier to the Employer's representative J. Michael Fischer, Esq. at: Ennis, Roberts & Fischer, 121 West Ninth Street. Cincinnati, Ohio 45202-5718; and to the Union's representative Julie Jones, Administrative Organizer, at Service Employees International Union, 1216 E. McMillan Street, Suite 300, Cincinnati, Ohio 45206-2211.

A copy of the report has been sent by regular mail to Dale A. Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213..

Issued at Loveland, Ohio this twelfth day of December, 2003.



James L. Ferree, Fact Finder

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