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STATE EMPLOYMENT
RELATIONS BOARD

Fact Finding Report and Recommendations

2003 DEC 15 A 10: 10

In the Matter of Fact Finding

Between

The Madison Township Board of Trustees

And

Fraternal Order of Police Capital City Lodge No. 9

SERB Case No.: 03-MED-02-0178
03-MED-02-0179

Marcus Hart Sandver, Ph.D.
Fact Finder

Hearing Date: November 7, 2003

Decision Issued: November 14, 2003

Representing the Township:

Mr. Michael Short, Attorney at Law
Schottenstein, Zox and Dunn
250 West Street
Columbus, Ohio 43215

Representing the FOP:

Mr. Robert Sauter, Attorney at Law
Cloppert, Latanick, Sauter and Washburn
225 East Broad Street
Columbus, Ohio 43215

I. BACKGROUND

This case arises from a collective bargaining dispute between the employer (Madison Township) and the Union (FOP Capital City Lodge No. 9). The parties have been signatory to a collective bargaining agreement since May of 1986. This dispute arose in the course of an attempt to negotiate an eighth successor agreement. The parties began negotiating in March of 2003 and met in several bargaining sessions, both with and without a state appointed mediator, until July of 2003. A tentative agreement was reached by the Sergeants but was rejected by the Police Officers. A request was made by the parties to SERB for a panel of fact finders. By mutual agreement, the parties chose Marcus Hart Sandver. By mutual agreement the parties chose November 7, 2003 as the date for the hearing. The pre-hearing briefs were submitted in a timely fashion.

II. THE HEARING

The hearing was convened by the fact finder at 9:30 AM at the Township Trustees chambers. In attendance at the hearing were:

For the Township:

1. Mr. Michael Short Attorney and Chief Spokesperson
2. Ms. Nanisa Osborn Administrator, Madison Township
3. Greg Ryan Chief, Madison Township Police

For the FOP:

1. Robert Sauter Attorney and Spokesperson
2. Larry Deck FOP Representative
3. Rich Lippolis Police Officer
4. Jim Galvin Police Officer
5. Tim Johnson Police Officer

The parties were asked to introduce exhibits into evidence. The following were marked as Township exhibits:

1. Township Exhibit # 1 Weekly Timesheet for Scott Clines
2. Township Exhibit # 2 Request for Public Records by Scott Clines

The following were marked as FOP exhibits:

1. FOP Exhibit # 1 Extending the agreement to July 1, 2003.
2. FOP Exhibit # 2 Interoffice memo from Elizabeth Allen to Richard Lippolis.
Subject: Comp. Time Corrections

In addition to the exhibits, each party submitted into the record a multi-page pre-hearing brief. At this point in the hearing, the fact finder notified the parties that the hearing would be conducted in accordance with the rules for fact finding as found in O.R.C. 4117 and associated administrative rules as promulgated by SERB. In addition, the fact finder further notified the

parties that the recommendation contained in the fact finder's report would be developed in conformity with the rules for fact finding as found in section 4117.14(g)(7)(a-f) of the O.R.C.

III. THE ISSUES

A. Sick Leave to be used in overtime computations

(1) Employer Position

The employer argues that sick leave should not be used in the computation of overtime. The employer points out in its brief, and in oral arguments, that an employee is not available for work when he or she is on sick leave and thus should not be considered in paid status when he or she is on sick leave.

The employer points out that the Fair Labor Standards Act does not require employers to compute the work week with sick leave time included in as regular hours worked in a work week. Thus, according to Federal guidelines, a "standard work week" does not include sick leave. This would be an argument of external comparability to private sector employers.

Finally, the employer makes the point that for purposes of internal comparability, no other employees of Madison Township are currently considered in paid status for the purpose of computing overtime when they are on sick leave.

(2) FOP Position

The FOP position on this issue is that all the other twenty police jurisdictions in Franklin County consider sick leave as paid status in computing overtime. This establishes a strong external comparability argument.

(3) Discussion

In taking all the relevant criteria found in 4117.14 into consideration, I recommend the Township position on this issue. The past collective bargaining agreement contained the sick leave exclusion. The external comparability to the FLSA bolsters the Township's argument as does the internal comparability argument to the other employees of the Township. The FOP data on the other police jurisdictions in Franklin County was persuasive but it was not substantial enough to be compelling.

(4) Recommendation

The Township position is recommended.

B. Retroactivity

(1) Township Position

The Township's position on this issue is that there should be no retroactivity to the agreement and that the scheduled changes to the wages

and benefits should take effect upon ratification. In defense of its position, the Township states that it is opposed to retroactivity “due to the negotiation conduct of the police officers’ bargaining representatives”. If the police officers had ratified the tentative agreement the Township was willing to pay retroactivity. A little further on the brief continues “the Township asserts that the police officers should not be rewarded for failing to ratify the tentative agreement reached by the parties”.

(2) FOP Position

The FOP position on this issue is that the Township is trying to punish the police officers for turning down the tentative agreement. The FOP asserts that such a retaliatory act would have a “chilling effect” on collective bargaining.

(3) Discussion

When I was a graduate student, some thirty years ago, there was a good bit of discussion in seminars about the “chilling effect” on collective bargaining. You don’t hear much about it today, but I’m glad to see it has not been forgotten.

The issue of retroactivity is a serious one here. It is now the middle of November and the police officers of Madison Township have not had a raise since May 1. By my count, that is 6 ½ months. Denying the officers a pay raise in July to teach them a lesson is one thing – denying them a

raise in November for whatever reason is quite another matter. I don't know how who voted for what back in July. We all know that there is a good deal of "intraorganizational bargaining" that goes on in negotiations (another grad school term that means "in-fighting"). A representative may go to the membership with a proposal that the other members of the bargaining team supported but that a particular individual didn't support individually. I certainly don't regard this as bad faith bargaining, and I certainly don't think it justifies denying everyone in the bargaining unit 6½ months of wage increases.

The time has come to put the experiences of July 2003 in the history books and to move on. The negotiated changes should be made retroactive to May 1, 2003.

(4) Recommendation

The FOP position is recommended.

IV. CERTIFICATION

This fact finding report and recommendations is based upon evidence and testimony presented to me at a fact finding hearing conducted in Madison Township on November 7, 2003.

Marcus Hart Sandver, PhD

Columbus, Ohio

November 14, 2003