

STATE EMPLOYMENT RELATIONS BOARD

STATE EMPLOYMENT
RELATIONS BOARD

May 10, 2004

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In the Matter of the Fact-finding Between:

CITY OF CLEVELAND

And

MUNICIPAL CONSTRUCTION EQUIPMENT
OPERATORS' LABOR COUNCIL

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SERB Case No. 03-MED-06-0685

APPEARANCES

For the City:

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Witness

Fact-finder

Virginia Wallace-Curry

INTRODUCTION

This matter concerns the fact-finding proceeding between the City of Cleveland, (the "City") and the Municipal Construction Equipment Operators' Labor Council (the "Union" or "MCEO Union"). The bargaining unit consists of approximately 50 construction equipment operators and master mechanics. The parties are negotiating their first collective bargaining agreement. For many years, the equipment operators and support personnel were represented by the International Union of Operating Engineers Local 18 ("Local 18"). However, Local 18 was never "certified" as the union's representative, and the City and Local 18 never entered into a collective bargaining agreement.

In attempting to negotiate their first collective bargaining agreement, the City and the new MCEO Union met in June 2003. After one negotiating session, the negotiations were shut down by the Union. They recommenced in November 2003. After two meetings, the parties believed they reached a Tentative Agreement on all issues on December 9, 2003. However, the City disagreed with the Union's draft of the Agreement regarding the Recognition and Craft Jurisdiction sections of the Tentative Agreement. When the parties were unable to reach agreement on those issues, the City stated that the Tentative Agreement was no longer viable and reopened several issues for Fact-finding.

Virginia Wallace-Curry was appointed Fact-finder in this matter by the State Employment Relations Board. A fact-finding hearing was held on March 11 and March 12, 2004, at which time the parties were given full opportunity to present their respective positions on the issues. The fact-finding proceeding was conducted pursuant to Ohio Collective Bargaining Law and the rules and regulations of the State Employment Relations Board, as amended.

In making the recommendations in this report, consideration was given to criteria listed in Rule 4117-9-05 (K) of the State Employment Relations Board.

BACKGROUND

Historically, the wages of this bargaining unit were set by the City's Charter, because there was no collective bargaining agreement. The City's Charter requires that they be paid a "prevailing wage rate" as established by industry contracts in the geographic area. Hence, the City's equipment operators were paid a rate commensurate with private industry, and, like construction equipment operators in the private sector, they did not receive benefits, such as vacation, sick leave, longevity and health care.

In 2003, the equipment operators voted in the MCEO Union as its bargaining representative. It did not become a member of the Building Trades Council, a group of trades unions representing City employees which bargain together and have a single joint collective bargaining agreement. The MCEO Union and the City began negotiations for their own separate agreement in June 2003.

The parties believed they reached a Tentative Agreement in December 2003. The City argues that it made it clear that the final proposal was a package deal that must be accepted or "all bets are off." The Union prepared a draft of the Tentative Agreement and the members voted to accept it. However, when the Tentative Agreement was sent to the City, the City asserted that the Union incorrectly drafted the language the parties had agreed to. The City found three substantive changes in the draft, two of which the City argued significantly impacted the issues being externally litigated by the Union against the City. The Union initially agreed that two of

the three “changes” noted by the City could be deleted from the final draft, but insisted that the “Craft Jurisdiction” language remain as drafted by the Union.

The City had initially proposed that the language from the Trades Council Agreement be used as a guide in drafting the Craft Jurisdiction provision. However, the City argued that since the MCEO Union was not a member of the Trades Council, the specific references to that entity would need to be excised. In the draft agreement, references to the Trades Council Agreement were deleted; however, the Union made reference instead to the Construction Employer’s Agreement. The last sentence of the Union’s draft states: “The City will give special weight to the description of work to be performed by a [sic] Operating Engineers, as described in the current Building Agreement between the Operating Engineers and the Construction Employers Association.”

The City took issue with this language, because the City argued that, by inserting the reference to the Building Agreement, the Union was attempting to create a recognition of the Construction Employers’ Association Agreement (“CEA Agreement”), which is an issue being contested by the City before the Ohio Supreme Court in a separate litigation. The City responded that either no reference to an outside contract be mentioned or that the Highway Heavy Agreement be referenced as a guide for jurisdictional issues. The City believes that the Highway Heavy Agreement is the more applicable agreement. The Union rejected the City’s proposals. Because the parties were unable to resolve the matter, it is now before the Fact-finder.

The City reopened six issues:

- Craft Jurisdiction
- Wages and Benefits
- Insurance

- Hours of Work and Overtime
- Recognition
- Duration

The Union initially proposed maintaining the language on all issues as drafted in the parties' "Tentative Agreement," which the Union sent to me on January 21, 2004. Again, on March 3, 2004, in an email, the Union reiterated that it was proposing the language of the "Tentative Agreement" as its positions at fact-finding. The Union did not submit a pre-hearing brief beyond its January 21, 2004, correspondence. On the eve of the day before the fact-finding hearing, the Union, in response to the City's pre-hearing brief, emailed the City and me changes to its original proposals on Craft Jurisdiction and Duration.

The City objects to the Union's "last minute" changes. The City argues that the parties had agreed to exchange the proposals to be argued at fact-finding by March 17, 2004, which the City did. The Union insisted from January 21, 2004, until the day before the hearing that its position was contained in the "Tentative Agreement" as written. The City argues that the Union should not be permitted to change its position at 6:15 PM of the night before the hearing.

I find it ironic that the Union believes it is OK to change its position at the last minute, when, in an email to me and the City's representative, dated March 3, 2004, the Union's representative insisted on knowing what the City intended to argue at fact-finding, "[u]nless Cleveland plans to keep its response to this inquiry secret until April 7, 2004. . . ." The Union had ample opportunity to reply and alter its position after receiving the City's proposals on March 17, 2004, yet chose to communicate its final proposal until late on April 6, 2004, the evening before the Fact-finding hearing.

Nonetheless, in making my recommendation, I will consider the Union's changes to its

originally proposed positions, even though it is beyond the deadline set by the parties. First, according to statute, the parties must submit their positions on unresolved issues prior to the day of the hearing. Technically, the Union submitted its changes to its positions prior to the day of the hearing, even though they were communicated at 6:15 PM of the evening before. Second, the City already expressed its intent to open these issues for discussion, and I doubt that the City's positions would have changed with more notice by the Union. Third, as to the issue of duration, the Union's original proposal to follow the expiration date as stated in tentative agreement was moot, because the expiration date of March 31, 2004, had already passed. It made no sense to propose that the agreement should expire on date long gone.

The issues on which the City and the Union still agree are listed as such at the end of this report and are incorporated therein.

ISSUES AT IMPASSE

I. Craft Jurisdiction

Union's Proposal

Cleveland agrees that those persons identified in the Recognition article of this collective bargaining agreement shall be employed by it to operate, maintain, repair and have exclusive jurisdiction over the following equipment: articulated loader, with any attachment; skid steer loader, with any attachments; basic tractor, with any attachments; trenchers; pavers and pavement finishing machines; rollers; track drive tractors, bulldozers, loader, backhoes and excavators; graders and grader tractors, with any attachment; pavement grinders and road planers; self loading tractors with conveyors; tractor mounted snow blowers; gradall or rubber tire excavators, backhoes, cranes or drag lines; all terrain forklifts. Except in cases of emergencies, all work with respect to the equipment described in this Article shall be performed by the CEO Union, and there shall be no interruption of work. The Union can file a grievance at Step 2 of the Grievance Procedure

for alleged violations of this Article.

The Union argues that the most appropriate description of the Craft Jurisdiction of the bargaining unit would be to list the equipment for which the bargaining unit has exclusive jurisdiction to operate, maintain, and repair. The Union argues that this would eliminate the need to reference the Building Agreement between the Operating Engineers and the Construction Employers Association, to which the City objected. The testimony of members of the bargaining unit demonstrates that these are the types of equipment that MCEO members operate, maintain and repair on a regular basis. Cleveland's Civil Service Commission's description of these employees' equipment is out of date, incomplete and does not accurately reflect what equipment these employees are tested on by the Civil Service and are required to use and repair on a daily basis. The Union seeks to avoid an agreement that allows the Civil Service Commission to make changes to this list of equipment.

The Union argues that the language proposed by the City is deficient because 1) it includes the Civil Service Commission's identification of what equipment these employees operate, repair and are tested on, which is inaccurate and incomplete, and 2) it will encourage the City to continue to use persons whom it employs but have not been subjected to competitive testing by the Civil Service Commission to operate or repair this equipment, contrary to the mandate of the City's charter.

City'S Proposal

The City agrees to abide by the City Civil Service Commission description of the work to be assigned to employees and will attempt not to assign work falling within their craft jurisdiction to other employees. Further, in cases of emergencies, overlapping, or ambiguous descriptions of work assigned to a particular craft or other City employees, there shall be no interruption of

work. The Union can file a grievance at Step 2 of the Grievance Procedure for alleged violations of this Article.

The City argues that it is without question that what the Union presented as a tentative agreement on Craft Jurisdiction was not what was proposed or agreed to by the City. Indeed, the Union's unilateral modification of this Article, in large part, led to the unraveling of the "Tentative Agreement." The City argues that the Union's modification was unacceptable because it imposed upon the City a recognition of the jurisdiction provision of the Construction Employers Association contract, a provision that has little application to these members and would greatly expand the jurisdiction of their work.

As presented at the hearing, the work of the City's construction equipment operators falls substantially within the jurisdiction description of the Highway Heavy Agreement. However, since the Union strenuously objected to referencing that Agreement in the parties' contract, the City has proposed a very employee-favorable article which captures the spirit of the true tentative agreement reached by the parties, referencing the Civil Service description for construction equipment operators and master mechanics.

Recommendation

The City agrees to abide by the City Civil Service Commission description of the work to be assigned to employees who are members of the CEO Union and will attempt not to assign work falling within their craft jurisdiction to other employees. Further, in cases of emergencies, overlapping, or ambiguous descriptions of work assigned to a particular craft or other City employees, there shall be no interruption of work. The Union can file a grievance at Step 2 of the Grievance Procedure for alleged violations of this Article.

The above recommended language is modeled on the "Tentative Agreement" reached by

the parties regarding Craft Jurisdiction, minus the last sentence which the City argued was never part of the deal. The omitted sentence states: "The City will give special weight to the description of work to be performed by a [sic] Operating Engineers, as described in the current Building Agreement between the Operating Engineers and the Construction Employers Association." I believe that the City would not have agreed to the inclusion of this sentence for several reasons. First, the CEA contract description of the work performed by the Operating Engineers does not precisely match the description of work performed by the City's Operating Engineers who are members of this bargaining unit. For example, the list of equipment that operating engineers under the CEA contract operate and repair does not match that given by the Union in their proposal. Only a small fraction of the equipment listed in the CEA contract is applicable to this bargaining unit. Such a blanket reference to the CEA contract would be overly inclusive and inaccurate.

Second, the Union and the City are currently litigating before the Ohio Supreme Court which contract, the CEA contract or the Highway Heavy contract, is more applicable to this bargaining unit in determining the appropriate prevailing wage rate to be used. The City would never have agreed to craft jurisdiction language that would have compromised its position in that lawsuit.

Consequently, I believe that the above passage is the closest to what the parties intended. The passage given to the Union by the City as a guide, the Trades Council Agreement, has a sentence similar to the one omitted above and in contention, but the sentence makes reference to unions affiliated with the Trades Council. Because this MCEO is not affiliated with the Trades Council, the Union substituted reference to the CEA Building Agreement. That could not have

been what the City had in mind. Omission of the sentence is more logical.

The Union's proposal on Craft Jurisdiction which lists equipment over which the bargaining unit would have exclusive jurisdiction is not recommended, because it seeks to secure a monopoly on the use of equipment that is shared by other bargaining units. The City cannot afford to be limited in that way.

II Wages and Benefits

City's Proposal

Employees will continue to earn their current wage rates with no increase provided. Wages shall be determined by this Agreement and not through reference to external contracts. This proposal also contemplates that for allowing employees to maintain their current wage rates, the contract will specifically state that the employees will not be entitled to other benefits, including but not limited to longevity, paid sick leave, holidays, vacation and employer-paid health and life insurance. Finally, the contract shall specify that this Agreement shall supercede the City Charter as it applies in any way to these employees. (Moreover, this proposal shall not be construed in any way as an admission or a reflection of the City's position regarding what the "prevailing wage" is as referenced under the City Charter).

The City argues that the members of the bargaining unit should not receive a wage increase. The City asserts that the employees have been over-paid for years, because they were paid the "prevailing rate" for construction employees, who do not perform the same kind of work as the bargaining unit. The work performed by this bargaining unit more closely resembles that of employees covered by the Highway Heavy Agreement, who are paid at a lower rate than the construction employees.

The City admits that they have paid this bargaining unit at the higher wage rate. But upon

reexamination of the job duties of the bargaining unit, the City believes that it should be paying them at the rates in the Highway Heavy Agreement. Although Union witnesses testified as to construction-like jobs they have performed over the years, that represents a minute fraction of the work they regularly perform. Employees spend nearly all of their time doing work described in the Highway Heavy Agreement, doing repair work to City streets or to address broken or worn pipelines.

Consequently, wage increases should not be granted. However, because this bargaining unit has not had an increase in the two or more years after the MCEO became the exclusive representative of the group, their wages are now below those stated in the Highway Heavy Agreement. Therefore, at most, their wages should be brought up to the level equaling those in the Highway Heavy Agreement.

Because of the serious financial difficulties that the City is facing, no other wage increases would be warranted. The City has had to implement massive budget cuts and layoff over 750 employees to compensate for a \$61 million debt.

The City also rejects that Union's proposal that employees be paid at 80% of the prevailing wage rate plus benefits. This offer was removed from the City's proposal when the Tentative Agreement fell through because of the Union's substantive changes to the original agreement. Therefore, the City propose that employees be paid their current wage rate (or 100% of the prevailing rate of the Highway Heavy Agreement) and no benefits. For years, the Union has opted for the full payment without benefits, and the City proposes that this practice be continued.

However, if benefits are provided, employees should receive 80% of the "wage" and

“health and welfare” line items of the Highway Heavy Agreement. The Union seeks the introduction of substantial benefits and an 80% multiplier which includes all of the monetary line items of the CEA contract, including credit for pension and others, such as apprenticeship and CISP. The Union seeks credit for the private-sector pension line item even though its members receive a 13.55% PERS contribution from the City toward their public sector pension benefits. The City has rightfully taken an offset for the PERS contributions since 1994 and this should not be eradicated by the Fact-finder.

Union's Proposal

Cleveland recognizes that the CEO Union is the sole and exclusive representative of those persons who are employed by the City and its departments to operate and repair the construction equipment that is described in the Craft Jurisdiction section of this Collective Bargaining Agreement. Those Cleveland employees are divided into the following job classifications, which are all craft positions recognized by Cleveland's Civil Service Commission.

- **Construction Equipment Operator A**
- **Construction Equipment Operator B**
- **Master Mechanic**

The persons in these job classifications employed by Cleveland shall be paid at the rate of eighty percent (80%) of the prevailing hourly wage rates which have been established by the most current version of the Construction Employers Association Building Agreement (the “Building Agreement”) between the Operating Engineers and the Construction Employers Association. The presently applicable Building Agreement is attached as Exhibit “A” to this Contract. The City of Cleveland and the CEO Union have agreed that the prevailing hourly wage rate shall be determined by adding the basic wage rate, plus a health and welfare component, plus a pension component, plus apprenticeship, plus CISP.

As of May 1, 2003, those hourly wage rates for Operating Engineer Group “A”, Group “B” and Master Mechanic respectively are: \$36.80, \$36.65 and \$37.30; 80% of those hourly wage rates respectively are: \$29.44; \$29.32 and \$29.84.

As of May 1, 2004, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$38.00, \$37.85 and \$38.50; 80% of those hourly wage rates respectively are: \$30.40; \$30.28 and \$30.80.

As of May 1, 2005, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$39.20, \$39.05 and \$39.70; 80% of those hourly wage rates respectively are: \$31.36; \$31.24 and \$31.76.

The Union asserts that the above passage was a part of the "Tentative Agreement" agreed to by the parties. It reflects the Union's agreement to accept 80% of the prevailing wage rate received by employees covered by the CEA Agreement, in exchange for health insurance, longevity pay, paid sick leave, holidays, vacation and other benefits. The 80% of the prevailing wage rate should not be calculated by deducting the City's contribution to PERS.

All other trade unions, including ironworkers, carpenters, cement finishers, and electricians receive 80% of the prevailing wage rate, without deductions for PERS or anything else, in exchange for the above benefits, and the Union is only asking to be treated likewise. The amount of the prevailing wage rate for these unions is established by the relevant contract that the Building Association has with Local 18, or other outside contractor, or is published by the Ohio Department of Commerce Wage and Hour Division. For years the City has used the prevailing wage set out in the Building Agreement of the Construction Employers' Association and Local 18 Operating Engineers. During current negotiations, the City agreed to pay bargaining unit members 80% of the prevailing wage of the CEA Agreement in exchange for benefits and without any deductions for PERS, Apprenticeship or CISP. The Union merely argues that the City should stand by its original agreement.

Recommendation

The persons in the job classifications covered by this Agreement and employed by Cleveland shall be paid at the rate of eighty percent (80%) of the prevailing hourly wage rates which have been established by the most current version of the Construction Employers Association Building Agreement (the "Building Agreement") between the Operating Engineers and the Construction Employers Association. The City of Cleveland and the CEO Union have agreed that the prevailing hourly wage rate shall be determined by adding the basic wage rate, plus a health and welfare component, plus a pension component, plus apprenticeship, plus CISP.

As of May 1, 2003, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$36.80, \$36.65 and \$37.30; 80% of those hourly wage rates respectively are: \$29.44; \$29.32 and \$29.84.

As of May 1, 2004, those hourly wage rates for Operating Engineer Group "A", Group "B" and Master Mechanic respectively are: \$38.00, \$37.85 and \$38.50; 80% of those hourly wage rates respectively are: \$30.40; \$30.28 and \$30.80.

It is recommended that the Union's proposal, with a few modifications, be adopted. The Union's proposal is imbedded in the Recognition article of the Agreement. The above recommended language may be added to the Recognition clause or it may be a separate article unto itself. The matters contained in the Recognition portion of the Union's proposal that are at issue will be dealt with in a separate section of this report regarding Recognition. Also removed from the Union's proposal was the sentence requiring that the current CEA Agreement be attached to the parties' Agreement. In the City's January 19, 2004, letter to the Union regarding the Union's draft of the Tentative Agreement, the City objected to language requiring the attachment of the CEA Agreement to the parties' Agreement, and the Union agreed to make this deletion. Therefore, reference to the attached CEA agreement is not included in the recommended language here. Also deleted is the last paragraph referencing a wage rate for May

2005 which is beyond the recommended expiration date of the Agreement. (See Duration section below.)

Also, the recommendation that employees be paid 80% of the prevailing wage rate must come with the proviso that the City had originally put on their tentative agreement to this proposal, as reflected in the City's December 2, 2003, package proposal. The City's agreement that employees will be paid 80% of the prevailing wage from the Construction Employers Association Building Agreement is **"not to be construed in any way as an admission by the City as to what the 'prevailing wage' is."** If the parties do not have such an agreement in writing, then the proviso, as stated here, should be included in the language of the Agreement. The City's proviso is meant to preserve its position in the current litigation on the proper prevailing wage to pay these employees.

The City argues that the Union should be paid at the prevailing wage of those operating engineers covered by the Highway Heavy agreement, not the CEA agreement. It is my understanding that this issue is a subject of litigation between the parties. It appears to me that the Highway Heavy agreement is more applicable, but neither it nor the CEA agreement is a perfect match. However, because the matter is the subject of litigation, where more (and better¹) evidence will likely be presented, I am reluctant to change the longstanding practice of paying these employees at the rate established by the CEA Building Agreement based the information

¹The City presented as evidence of the proper contract to be used for comparison affidavits from Steven DeLong, Business Agent and District Representative of Local 18 of IUOE and William Fadel, the attorney who represented Local 18, who both stated that they believe the MCEO bargaining unit work more closely resembles the Highway Heavy work rather than the work in the CEA Agreement. However, neither of these individuals were available for questioning and I have only the limited information on the affidavit. At trial, the evidence would be more fully developed.

available to me. The City has admitted that it has paid these employees the prevailing wage rate established in the CEA Agreement. Although the City argues that it recently realized that it was paying these employees at the wrong wage rate, it seems more likely that the City has had its doubts as to the appropriate wage for years and has just now chosen to propose the lower wage rate. As of December 2, 2003, the City was still proposing employees be paid 80% of wage rate in the CEA Agreement.

The City's proposal to deny all benefits to these employees in exchange for 100% of the prevailing wage of the Highway Heavy seems like a punitive stance to take at this point. Although these employees have opted in the past to take the full wage rate in lieu of benefits, the Union has made it clear throughout the negotiations that it wanted to take advantage of the same option that other building trade employees have, i.e. benefits in exchange for less money. The City had agreed until the Tentative Agreement came unraveled at the 11th hour.

By recommending that employees receive 80% of the prevailing wage rate of the CEA Agreement, I am also recommending that employees receive the benefits that the parties originally agreed would be given in lieu of the cash. These benefits are reflected in the articles entitled Longevity, Maternity Leave, Sick Leave With Pay, Sick Leave Without Pay, Holidays, Life Insurance, Vacation and Health Coverage, as written in the Tentative Agreement drafted by the Union. The City had no problem with these articles as written.

It is also recommended that the prevailing wage rate not exclude deductions for pension or other matters, as proposed by the City. Again, the City's proposal of December 2, 2003, did not mention that the City would be taking these deductions. Rather, the City illustrates what the prevailing wage would be with an example: "(Ex. - for Group A Employees $\$36.80 \times .80 =$

\$29.44).” This calculation reflects 80% being take of the full prevailing wage of \$36.80, which the Union’s proposal cites as the Group A wage in 2003. No deductions were made before calculating the percentage. The City argues that it is entitled to take a deduction for its PERS contribution, but, again, the statute is not crystal clear on that issue, and it is a subject that is being litigated between the parties and should not be decided in this fact-finding.

After the close of the hearing, the City submitted a ruling by the Ohio Supreme Court which finds that the City is not in contempt of court in the suit filed by the Union regarding the payment of the prevailing wage. The City argues that this implies that the City was correct in deducting the PERS payment. The Union, of course, disagrees with this interpretation. I do not believe that it really affects my recommendation. If I had chosen to recommend the City’s position that it pay employees 100% of the prevailing wage rate, then maybe the PERS contribution could be deducted, because they would really be paying more than 100% of the prevailing wage rate, if the City’s interpretation is correct. However, the recommendation here is that the City pay less than 100% of the prevailing wage rate. The 80% portion is just a number that the City believed at one point was a fair reflection of cost to the City to provide the benefits listed. The City did not propose taking out the deductions for pension, apprenticeship and CISP. Therefore, it not recommended here. If indeed the City is correct, and it would cost the City more than 20% to cover the cost of all the benefits, including PERS, it can propose a different percentage of the prevailing wage rate as a rate of pay for these employees during the subsequent negotiations.

The City also argues that the employees should receive no wage increase, citing the City’s dire financial problems. However, this Union has had its wages on hold for the two or more

years since the MCEO has represented these employees. The dire financial problems do not impact these employees the same way as others. They perform work for propriety departments, such as the Water Division and Municipal Light and Power, which are revenue producing departments. None of these employees were subject to layoffs and most of the salaries are not heavily dependent on the General Fund, which is the fund that is suffering the most.

III. Insurance

City's Proposal

Those employees who wish to be covered under the City's insurance plans will have the option of purchasing one of the City's plans at the premium cost charged to the City by the carrier.

The City seeks the continuance of the status quo regarding insurance, as with other benefits. As noted, in the past, the bargaining unit had opted for 100% of the "prevailing wage rate" in exchange for not receiving benefits. This wage rate included a \$3.61 an hour component for health insurance. However, the City permitted these employees to purchase insurance at the City's cost. Currently, the City is proposing a maintenance of the 100% wage rate payment (in accordance with the Highway Heavy Agreement) and no benefits. Given that these members receive a monetary value for insurance coverage, they are not entitled to paid coverage. They will be permitted to purchase health care coverage at the premium cost charged to the City.

Union's Proposal

The Union proposes that employees receive the same health care insurance package as all other employees. In exchange, the Union will agreed to take 80% of the prevailing wage as stated in the CEA Agreement.

Recommendation

For all the reasons stated in the section on Wages and Benefits, it is recommended that the City provide health insurance to this bargaining unit in exchange for accepting 80% of the prevailing wage rate, as set forth above.

IV. Hours of Work and Overtime

City's Proposal

The normal work week for regular full-time employees shall be forty (40) hour per week. The City reserves the right, as operational needs and conditions require, to establish and change hours of work, shifts and schedules of hours.

Overtime shall be paid in accordance with the Fair Labor Standards Act.

The proposal of the Union would seriously hamper operations and create built-in overtime for equipment operators. Although the City proposed this language during negotiations, it realized later that the language created overtime due to the flex schedules routinely and historically worked by a significant number of equipment operators. As testified to by Commissioner Ciaccia, the Water Division runs a seven-day per week, 24-hour operation which requires coverage on the weekends and during off hours. A significant number of his equipment operators work regular schedules that encompass weekend and late-hour work at straight-time pay. The Union's proposal would require overtime payment for schedules that have been worked at straight-time for many years. The City's proposal, on the other hand, maintains the historical flexibility it has enjoyed. The City cannot effort significant overtime costs to be built into these Departments.

Union's Proposal

Hours of Work

The normal work week for regular full-time employees shall be forty (40) hours of work in five (5) eight (8) hour days, exclusive of time allotted for meals, during the period starting at 12:01 a.m. Monday to 12:00 midnight Friday. The normal workday may be any eight- (8) consecutive hours, Monday through Friday, between the hours of 7:00 a.m. and 4:30 p.m., with one-half (½) hour lunch.

- A. All employees who work a regular day shall be allowed no less than thirty (30) uninterrupted minutes for a scheduled lunch period, except for other mutually agreed upon schedules with the Union.
- B. There shall be two (2) fifteen (15) minute rest periods on each shift each workday. The rest periods, to the extent practicable, will be scheduled during the middle two (2) hours of each half shift, but they may not be scheduled immediately before or after the meal period or at the start or end of a shift.
- C. When an employee works beyond his regular quitting time, the employee shall receive a fifteen (15) minute rest period if the employee works two (2) hours, but less than four (4) hours for each four (4) hour period, and in addition, a thirty (30) minute meal period if the employee works four (4) hours or longer.
- D. The City will dock employees on the basis of one-tenth (or six (6) minutes per hour) of one hour (or six (6) minutes).

All regular full-time employees shall be on a compensation basis of two thousand-eighty (2080) hours per year.

For those bargaining unit employees on the normal eight (8) hour day, five (5) day per week work week, shifts are defined as follows:

- 1st shift The majority of his normal hours of work fall after 7:30 a.m. and before 3: 00 p.m.

- 2nd shift The majority of his normal hours of work fall after 3:00 p.m. and before 12:30 a.m. and an employee on such shift is to receive a shift premium of fifty cents (\$.50) per hour.

- 3rd shift The majority of his normal hours of work fall between 12:30 a.m. and 7:30 a.m. and an employee on such shift is to receive a shift premium of seventy-five cents (\$.75) per hour.

Employees equally rotating between all three shifts shall receive twenty-five cents (\$.25) per hour. All shift premiums are paid on an hours-paid basis only.

There shall be no pyramiding of overtime due to these shift premiums or for any other reason.

Shift premiums are available only to employees assigned to the 2nd and 3rd shifts and not to employees assigned to another shift who may work overtime that occurs during a shift that is subject to a (higher) shift differential.

Overtime Premium Pay

The City shall be the sole judge of the necessity for overtime. All employees shall receive time and one-half (1-1/2) their regular rate of pay for all hours worked in excess of eight (8) in one (1) day, or forty (40) hours in the normal workweek. Overtime is to be calculated in thirty (30) minute increments.

All employees shall receive time and one-half (1-1/2) their regular rate of pay for all hours worked on Saturdays and Sundays, outside the period of their workweek, in compliance with the Hours of Work section, if applicable.

All employees shall receive time and one-half (1-1/2) their regular rate of pay for all hours worked on holidays, in addition to their holiday pay.

All paid holiday hours, paid sick leave hours, and paid vacations hours shall be counted as hours worked for the purpose of computing overtime.

There shall be no pyramiding of overtime or other premium pay compensation, no overtime pay shall be computed on whatever total overtime hours are the greater for the week, either on a daily or a weekly basis, but not on both.

Overtime shall be distributed as equally as possible within each classification in each work unit on a continuing basis. The City shall credit employees for all overtime hours worked and/or for overtime hours offered for which employees have declined or failed to work for any reason.

Emergency overtime cannot be refused. An emergency is defined as an impairment to City services or operations which cannot be delayed until the beginning of the next regular workday. However, an employee shall be excused from emergency overtime provided the City can obtain a replacement in time to meet the emergency.

Overtime shall be equalized on a continuing basis. The City shall credit employees for all overtime hours worked and/or for overtime hours offered or which employees have declined or failed to work for any reason.

The City will use its best efforts to provide employees with twenty-four (24) hours notice for overtime, with the understanding that by its

nature, overtime that results from an “emergency” is not susceptible to such notice.

The Union argues that this language was proposed by the City during contract negotiations. Even employees in the Water Division work set Monday through Friday schedules. Those who work on the weekends as part of their regularly scheduled work week do not receive overtime on the weekends. Other trade union employees follow the above schedule, and this bargaining unit is merely asking for the same benefits. The City’s proposal would allow the City to change shifts at will and does not provide predictability for employees.

Recommendation

The above proposal is recommend as written by the Union. However, the Hours of Work and Premium Overtime provisions as written apply to employees who are not regularly scheduled to work on Saturdays or Sundays. In addition to the above proposal, it is recommended that the parties draft a provision or addendum that would address employees who work in departments that have 24/7 scheduling. Both parties agree that currently employees in the Water Division who work on Saturday or Sunday as a part of their regular work week do not receive overtime on the weekends. I do not believe that the City intended to build in automatic overtime for these employees. Therefore, a limited exception for these few employees must be written into the agreement to avoid the automatic overtime. The City’s proposal, as stated above, is too open and vague. It would place the City in a position to change schedules and shifts as it pleases, which would seriously disadvantage the employees who desire predictability in scheduling. The City’s proposal throws out all the above crafted language merely to avoid a situation for a few. The better idea is to keep the language, as written in the Union’s proposal above, and add a

modification to keep the practice as it has been for employees regularly scheduled on Saturdays and Sundays, thus avoiding automatic overtime.

V. Recognition

City's Proposal

The following job classification are recognized and are represented on a sole and exclusive basis by the CEO Union:

- **Construction Equipment Operator A**
- **Construction Equipment Operator B**
- **Master Mechanic**

As with its “hours of work” proposal, the City is attempting to keep the language for this first contract straightforward and simple. The City’s proposal recognizes the MCEO Union as the sole and exclusive representative for the three job classifications which it represents.

This article represents another provision of the “Tentative Agreement” that was unilaterally changed by the Union in its draft. Again, the Union sought the inclusion of references to the CEA Agreement and also attempted to bind the City to the CEA contract for future increases that would occur beyond the expiration of this Agreement – items that were never proposed or agreed to by the City. The Union also unconventionally seeks the inclusion of wages in the Recognition article. Overall, the Union’s proposal is nothing more than an effort to have a traditionally simple article serve as a vehicle to secure its position in the hotly-contested and litigated “prevailing rate” litigation.

The City’s proposal is simple language traditionally seen in recognition clauses. Nothing more is needed.

Union's Proposal

Cleveland recognizes that the CEO Union is the sole and exclusive representative of those persons who are employed by the City and its departments to operate and repair the construction equipment that is described in the Craft Jurisdiction section of this Collective Bargaining Agreement. Those Cleveland employees are divided into the following job classifications, which are all craft positions recognized by Cleveland's Civil Service Commission.

- **Construction Equipment Operator A**
- **Construction Equipment Operator B**
- **Master Mechanic**

This is only a portion of the Union's proposal on Recognition. The entire proposal is stated in the section on Wages and Benefits. It seeks to recognize the job classifications of this bargaining unit as "craft positions," which require qualification by Cleveland Civil Service Commission. The City offered no evidence to dispute that testing requirement or "craft position" status. Nor did the City present evidence to dispute that the MCEO Union should be recognized as the sole and exclusive representatives of all person who operate and repair the construction equipment identified by Mr. Madonia, President of the MCEO Union. Mr. Richiutto, City's Director of Public service, testified that he had no problem with the concept that only the construction equipment operators employed by the City should operate and repair the construction equipment. Recognition of a job classification without an explanation of what equipment is operated by persons who hold that job classification is meaningless.

Recommendation

The following job classification are recognized and are represented on a sole and exclusive basis by the CEO Union:

- **Construction Equipment Operator A**
- **Construction Equipment Operator B**
- **Master Mechanic**

The City's proposal on Recognition is recommended. The Union's proposal on recognition references the equipment listed in the Craft Jurisdiction article, and the Union's version of that Article was not recommended. (See above.) The City's version is simple and closely tracks the language of the "Tentative Agreement."

In the "Tentative Agreement," the Recognition clause also contains information on wage rates. I have dealt with these issues separately, and they may be combined or put in separate sections. If combined, they will be nearly identical to the language in the "Tentative Agreement" minus the clauses with which the City took issue, i.e. attachment of the CEA Building Agreement, and tracking the wage rate increases as stated in the Building Agreement beyond the expiration of the Agreement. It is my understanding that the Union had originally agreed to remove these references prior to the Tentative Agreement coming unraveled.

VI. Duration

City's Position

The City proposes that the Agreement expire on June 30, 2004. The parties had initially agreed to an expiration date of March 31, 2004. However, since the parties are now beyond that date without a contract, the City proposes the expiration date of June 30, 2004. The City had contracts with approximately thirty other unions. Every one of those agreements expires on March 31, 2004. It is the City's desire to get this Union on the same timetable as the City's other Union contracts. However, the incorporation into the contract of an expiration date that has already passed does not make sense. Likewise, it is not reasonable to allow this small group of

employees to set a wage pattern for the City's 7,000 unionized employees, which would happen if an expiration date of March 31, 2006 or 2007 were recommended. It is the City's intention to propose an expiration date of March 31, 2007 during its negotiation of a successor agreement with this Union, which will be occurring a couple of months. It should be noted, as well, that the Union's proposal was, until the evening before the fact-finding hearing, for the contract to expire on March 31, 2004. It was willing to accept a short time frame for the agreement, even back in December 2003.

Union's Proposal

The Union proposes that the Agreement begin on January 1, 2004 and expire on April 30, 2006. The City's proposed expiration date of June 30, 2004 is irrational. The parties will have, at best, an agreement which lasts 39 days.

The Union's proposed expiration date would coincide with CEA Building Agreement, which the City has stipulated has long been the basis for determining these employees' pay. The inception date of January 1, 2004, is based upon the date that the City promised it would start the benefits noted above. The City should be held to this start date. The Agreement must last longer than 39 days and the Union proposes it last until April 30, 2006.

Recommendation

It is recommended that the Agreement between the parties have a retroactive start date of January 1, 2004 and extend until March 31, 2005. I believe that it is absurd and a waste of precious resources for the City and the Union to be required to renegotiate this Agreement in 39 days. This has obviously been a very contentious negotiation. The parties should live with an Agreement longer than just 39 before having to start back into negotiations again. In March

2005, the City should have their negotiations with other unions finished and will have the pattern set by unions larger than the MCEO. At that time, the City and the MCEO can negotiate a contract with expires in 2007 to get this Union back on track with the expiration of other union employees. By March 2005, the parties also may have a resolution of the pending litigation which may be helpful in negotiating the appropriate prevailing wage rate to use.

The retroactive start date of January 1, 2004, is recommended. This is the date the City originally planned on starting the benefits before the negotiations soured. This Union has been without a pay raise for a couple of years. Although a retroactive date may not work for health care benefits, all the other benefits are monetary based can easily be effective retroactively to January 1, 2004.

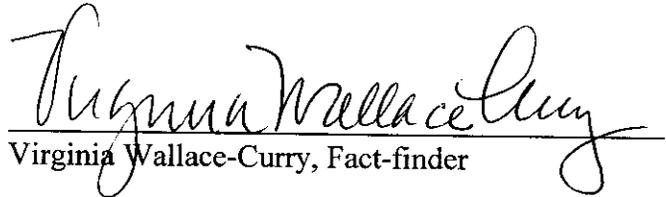
Tentative Agreements

The parties have agreed that the following Articles, which were part of the Union's draft of the Tentative Agreement, are still viable and should be incorporated into this fact-finding report as written in that document. They are:

- Purpose
- Management Rights
- Union Rights
- No Strike/No Lockout
- Limited Right to Strike
- Non-Discrimination
- Union Security and Check Off
- Union Representation
- Union Visitation
- Seniority
- Probationary Period
- Labor Management Committee
- Lay Off
- Recall
- Leave of Absence

- Military Leave
- Family Medical Leave
- Call In Pay
- Personnel Records
- Discipline
- Parking Ticket
- Grievance Procedure
- Voluntary Dispute Settlement Procedure
- Addendum B - Drug Testing
- Addendum C - Injury Pay Program

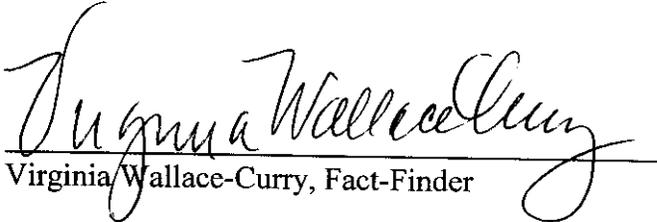
Submitted by:


Virginia Wallace-Curry, Fact-finder

May 10, 2004
Cuyahoga County, OH

CERTIFICATE OF SERVICE

Originals of this Fact-finding Report and Recommendations were served upon Jon M. Dileno, Esq., Duvin, Cahn & Hutton, Erieview Tower, 20th Floor, 1301 East Ninth Street, Cleveland, Ohio 44114, and upon Stewart D. Roll, Esq., Persky, Shapiro & Arnoff, Signature Square II, 25101 Chagrin Blvd., Suite 350, Cleveland, Ohio 44122-5687, by email and by express overnight mail, and upon Dale A. Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, by regular mail, this 10th day of May, 2004.


Virginia Wallace-Curry, Fact-Finder

Virginia Wallace-Curry
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TO: Mr. Dale A. Zimmer
Administrator, Bureau of Mediation
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