

IN THE MATTER OF FACT-FINDING
BETWEEN

STATE EMPLOYMENT
RELATIONS BOARD

2004 APR 20 A 10:10

OHIO ASSOCIATION OF PUBLIC
SCHOOL EMPLOYEES (OAPSE)/
AFSCME LOCAL 4, AFL-CIO AND ITS
LOCAL 330,

Case No. 04-MED-02-0110
Fact-Finder: Jerry B. Sellman

The Union,

-and-

FRANKLIN COUNTY BOARD OF
MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES,

FINDINGS
AND
RECOMMENDATIONS

The Employer

APPEARANCES:

FOR THE UNION:

Robert J. Walter, Esq. - Attorney with Buckley King, representing the Union
Dan Schoenster - Bus Driver for Franklin County Board MR/DD, Witness
Chad Caldwell - OAPSE Field Representative, Witness

FOR THE COMPANY:

David S. Blaugrund, Esq. - Attorney with Blaugrund, Herbert & Martin, Incorporated,
representing the Employer
Jud Morrison - Superintendent, Franklin County Board MR/DD, Witness
Dan Darling - HR Director, Franklin County Board MR/DD, Witness

I. **INTRODUCTION**

This matter concerns a fact-finding proceeding between the Franklin County Board of Mental Retardation and Developmental Disabilities (hereinafter referred to as the Employer) and the Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4 and its Local 330 (hereinafter referred to as the “OAPSE” or “Union”). The State Employment Relations Board (SERB) duly appointed the undersigned as Fact-finder in this matter. A Fact-finding hearing was held on April 7, 2004

The fact-finding proceedings were conducted pursuant to the Ohio Collective Bargaining Law as well as the rules and regulations of SERB. During the Fact-finding proceeding, this Fact-finder provided the parties the opportunity to present arguments and evidence in support of their respective positions on the issues remaining for this Fact-finder’s consideration.

This Fact-finder, in rendering the following findings of fact and recommendations on the issues at impasse, has taken into consideration the criteria set forth in Ohio Revised Code Section 4117.14(C)(4). Further, this Fact-finder has taken into consideration all reliable evidence presented relevant to the outstanding issues before him.

II. **BACKGROUND**

OAPSE is an employee organization as defined in O.R.C. 4117.01(D) and is the exclusive representative of all bus drivers and bus assistants employed by the Franklin County Board of Mental Retardation and Developmental Disabilities (“Employer”). The Employer is a public employer as defined in O.R.C. 4117.01(B).

OAPSE was certified as the exclusive representative in February 2003 (Case No. 2002-REP-03-0063). The bargaining unit consists of Bus Drivers and Bus Assistants; it excludes all other employees, including Maintenance, Secretaries, all other Office Personnel,

Case Management Van Drivers, Drivers/Recreation Assistants, and Drivers/Special Olympic Assistants. OAPSE and the Employer are currently involved in collective bargaining negotiations to attempt to reach an initial collective bargaining agreement. Between April 23, 2003 and February 6, 2004, the parties engaged in seventeen bargaining sessions (including the initial April 23 session at which proposals were exchanged). Impasse was declared on February 6, 2004, and a session with SERB mediator Thomas Worley (SERB Case No. 04-MED-02-0 110) on March 5, 2004, did not produce an agreement. The parties had reached a tentative agreement on 53 out of 55 contract articles, but were unable to agree on two articles and proceeded to fact-finding. Prior to the commencement of the hearing, the parties reached a tentative agreement on an additional article and only one article remained for the Fact-finder's consideration. The single article separating the parties concerns wages.

III. ISSUES FOR CONSIDERATION

A. Article 18-Wages

1. The Employer's Proposal

The Employer desires language that utilizes performance-based pay methodology for any wage increases. It considers its proposed contract language to be a continuation of the agency's long-standing practice of linking the wage raises of all agency employees to successful job performance. Employees are currently subject to job performance evaluations and, if job performance falls below acceptable standards, the affected employee will not receive the proposed increase in wages. In order to subject wage increases to job performance evaluations, The Employer's proposal regarding wages is as follows:

ARTICLE 18 - WAGES

Section 18.1. Retroactive to January 1, 2004, the hourly rates paid to Bus Assistants shall be increased by one dollar and five cents (\$1.05) per hour in active pay status.

Within thirty days of the execution of this agreement by all parties, each Bus Driver shall be issued a check in the amount of two hundred dollars (\$200.00).

Wage increases to be effective and shall be given in the same manner and amount or percentage as all other classifications of agency employees on or about (depending on the actual payroll date) July 1 of each year of this agreement.

The Employer provided evidence demonstrating that since 1984, it has had a written personnel policy giving its supervisors the discretion to consider performance in recommending whether to give employees a full raise, partial raise or no raise. Contending with a tightening budget in 1999-2000, the Employer re-emphasized the performance based pay system. The Employer's management staff regards this methodology as a highly successful means of promoting employee performance. Accordingly, even with the advent of unionization, the Employer has continued the practice on an agency-wide basis, having bargained to include performance-based pay features in the entire sequence of collective bargaining agreements for COPE/OEA teachers' unit, as well as the contract covering the OAPSE represented residential services employee unit (now privatized).

The Employer argues that the Union's Wage proposal, which omits the performance-based pay feature, would destroy the agency's carefully cultivated system of internal equity for no good reason. All other employees of the agency receive performance-based pay. Since the advent of Ohio's statutory dispute resolution procedure for public employees, it argues that Fact-finders have consistently recognized the importance of preserving internal equity among the various bargaining units and other employee groups of public employers. If all of the other employees (in other units) were subject to the performance-based pay features for wage increases, and the OAPSE bargaining-unit members were not, there would exist the potential for jeopardizing the efficient and effective administration of the system.

The Employer reasons that the performance-based pay concept provides employees a moderate inducement to strive for high job performance, without threatening them with disciplinary consequences for falling short of performance goals. It provided evidence indicating that very few employees agency-wide have received reduced or completely withheld raises under their performance-based system. In 2001, only eighteen (18) employees agency-wide, and five (5) employees in the Transportation Department, did not receive the maximum raise for which they were eligible.¹ In 2002, thirteen (13) employees agency-wide, and one (1) Transportation Department employee, failed to receive the maximum raise. In 2003, only twelve (12) employees agency-wide, and no bus drivers, failed to receive the maximum raise. For these reasons, it believes the dangers cited by the Union are unlikely to materialize.

It is argued that safeguards are built into the Employer's system to prevent any abuse of discretion in refusing to grant wage increases to employees who have performed poorly. Now, all employees are given the same increase in wages, unless an employee's supervisor determines that the proposed wage increase should not be given due to poor job performance. If an increase is not recommended, the supervisor's recommendation is reviewed by an independent committee. If the committee agrees with the supervisor, the committee's decision is reviewed by the Superintendent who has the ultimate decision. If the employee disagrees with the decision of the Supervisor, the employee can take the issue to arbitration.

¹The Employer employs approximately 1,725 employees agency-wide, including bargaining unit and non-bargaining unit employees.

2. The Union's Proposal

The Union proposes contract language that would guarantee members of the bargaining unit raises in each of the three years of the contract, at the maximum level available to all other employees in the agency, but without being subject to the performance-based pay system. The Union's proposal regarding wages is as follows:

ARTICLE 18 - WAGES

Section 18.1. Retroactive to January 1, 2004, the hourly rates paid to Bus Assistants shall be increased by one dollar and five cents (\$1.05) per hour in active pay status.

Within thirty days of the execution of this agreement by all parties, each Bus Driver shall be issued a check in the amount of two hundred dollars (\$200.00).

Wage increases to be effective July 1, 2004, July 1, 2005, and July 1, 2006 shall be as follows: the hourly rate of all employees in the bargaining unit shall be increased each July 1 by the same percentage increases as that given to other classifications employed by the Employer, provided, however, that if the percentage increases varied among employees, the employees in this bargaining unit shall receive the percentage increase equal to the highest percentage increase given to any classification employed by the Employer.

The language in the Union's final paragraph is a continuation of an interim agreement that the parties reached on wages during the lengthy course of bargaining. The interim agreement, executed on February 6, 2003, gave all bus driver bargaining unit members a one-time raise at the maximum level provided elsewhere in the agency on June of 2003 (retroactively applied), without application of the standard performance-based pay principles.

The Union initially proposed specific annual wage increases. Through negotiation, it changed its position and compromised on its current proposal which contains the "me too" language. The Union argues that the inclusion of "me too" language is more equitable

language for pay increases than the Employer's open-ended performance-based pay. A "me-too" provision means, to the Union, that if any one employed by the Employer receives a wage increase, all of the employees in the bargaining unit should receive the same increase (at the maximum level). No one in this bargaining unit would receive less than the raises given to other employees employed by this Employer. By eliminating the right of the Employer to "pick and choose" who will get a pay raise, employees will be more fairly treated and a perception of favoritism will be avoided.

The Employer's proposal requires employees in the bargaining unit to perform the same tasks for less money, if an increase is not given; this is inequitable. Other alternatives, including discipline, can be used to address lack of job performance. Restricting wage increases at the whim of the Employer is improper.

The Union established that the Employer could operate without a performance-based system. During the period of the interim agreement in 2003, where wage increases were given across the board, the Employer did not suffer any operational difficulties. Since a "me too" system has not been shown to negatively affect the Employer's operation, the Union's proposal should be adopted. There are many other Employers in the State of Ohio who do not have a performance-based pay methodology and they too have not had any negative impact on operations.

3. Discussion

Unlike a traditional wage dispute where the Union seeks specific percentage wage increases and the Employer offers something less or nothing, the current proposals by both the Union and the Employer contain no specific percentage increases for the employees. What separates the two parties on wages is the issue of either giving all employees in the bargaining unit a percentage increase equal to the highest percentage increase given to any classification

employed by the Employer or allowing the Employer to deny an increase to any employee who is deemed to have performed below standards. The language proposed by the Employer (wage increases shall be given in the same manner and amount or percentage as all other classifications of agency employees) allows the Employer to use the same performance-based pay methodology that is currently being used in other classifications of the agency's employees.

Based upon an analysis of the historical treatment of wage increases by the Employer, the unfairness and inequalities cited by the Union do not seem to exist. While a performance-based pay methodology could lead to employees doing the same work for less pay and dissension among the bargaining unit employees, such has not been the demonstrated experience of the Employer. Where wage increases have been given, almost all employees have received them. In the last three years, twenty-three (23), thirteen (13) and twelve (12) employees², respectively, out of a workforce of 1,725 did not receive such increases. It cannot be concluded from these statistics that any favoritism or abuse of discretion existed, nor can it be predicted that such a practice would be developed by the Employer in the future.

The Fact-finder believes that the Employer does have safeguards in place, through the grievance and arbitration provisions of the proposed bargaining agreement, to protect an employee against an arbitrary denial of a wage increase. For purposes of this initial agreement, the Union has not convinced the Fact-finder that the current performance-based system is unfair or unworkable.

4. Recommendation

It is the recommendation of this Fact-finder that the issue of Wages should be treated

²In 2002 only one (1) employee in the Transportation Department was denied a wage increase due to poor performance and no Transportation Department employees were denied such increases in 2003.

as proposed by the Employer and should be a part of the agreement as follows:

ARTICLE 18 - WAGES

Section 18.1. Retroactive to January 1, 2004, the hourly rates paid to Bus Assistants shall be increased by one dollar and five cents (\$1.05) per hour in active pay status.

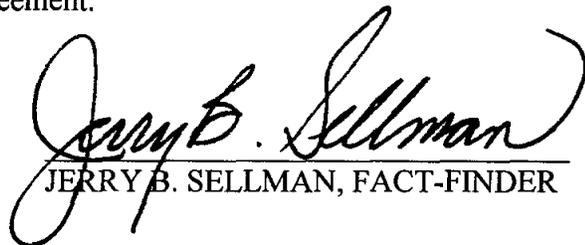
Within thirty days of the execution of this agreement by all parties, each Bus Driver shall be issued a check in the amount of two hundred dollars (\$200.00).

Wage increases to be effective and shall be given in the same manner and amount or percentage as all other classifications of agency employees on or about (depending on the actual payroll date) July 1 of each year of this agreement.

III. **CONCLUSION**

In conclusion, this Fact-finder hereby submits the above referenced recommendation on the outstanding issue presented to him for his consideration. Further, the Fact-finder incorporates all tentative agreements previously reached by the parties and recommends that they be included in the Parties' Final Agreement.

DATED: April 19, 2004


JERRY B. SELLMAN, FACT-FINDER