



STATE EMPLOYMENT
RELATIONS BOARD

FACT-FINDER REPORT

2006 NOV -9 A 11: 55

**Before the
State Employment Relations Board
State of Ohio**

In the Matter of:]

**AMERICAN FEDERATION OF]
STATE, COUNTY, MUNICIPAL]
EMPLOYEES, OHIO COUNCIL 8,]
LOCAL 101, AFL-CIO]**

Employee Organization]

and]

CITY OF KETTERING, OHIO]

Employer]

Case No. **05-MED-11-1363**

HEARING

A Hearing was convened on October 23, 2006 in the City of Kettering, Ohio at the Government Center and was opened at 9:30 AM.

Attendance

Present were:

For the Employee Organization:

- Michael McNew, Staff Representative
- Lynn Thomasson, Sr. Staff Representative
- Kelly Clark, Chapter Chairperson
- Rob Bales, Streets Steward
- Keith Mathews, Streets
- John Koogler, Parks

For the Employer:

Daniel G. Rosenthal, Attorney, Denlinger, Rosenthal & Greenberg
 Rick Strader, Human Resources Director
 Jessica Sletten, Para Legal
 David R. Miller, Street Department
 Thomas O. Weghorst, Human Resources

Fact-Finder:

Richard J. Colvin

INTRODUCTION

This matter concerns the fact-finding proceeding between the City of Kettering, Ohio (the “City”) and the Kettering Unit, Public Service Union Local 101 and the Ohio Council #8, The American Federation of State, County and Municipal Employees, AFL-CIO (collectively the “Union”).

Richard J. Colvin was duly appointed as Fact-Finder pursuant to ORC Section 4117.14 (C) (3) on September 26, 2006. At the direction of the parties, October 23, 2006 was scheduled as the date for the evidentiary hearing in this proceeding and the date of November 15, 2006 as the date the Fact-Finder’s report was to be issued pursuant to OAC Rule 4117-9-05 9 (G). At the hearing, however, the parties requested the Fact-Finder to issue his report on November 7, 2006, and send the parties a facsimile copy on November 8, 2006. This was acceptable to the Fact-Finder.

Timely, in advance of the evidentiary hearing, the parties provided the Fact-Finder with the statements required by Ohio Administrative Code Section 4117 – 9 – 05 (F) and Ohio Revised Code Section 4117.14 (C) (3) (a). The Fact-Finder was requested by the parties to attempt mediation and the attempt was made, without any success. As no issues were resolved, the parties then requested that the hearing be opened and argued their respective positions before the Fact-Finder.

BACKGROUND

The Union presented the following issues as being unresolved:

1. **Article 11, Section 9, Personal Leave.** Currently all employees in the Unit are entitled to three (3) days of paid personal leave per year. The Union proposes to bring the total to four (4) personal leave days.
2. **Article 6, Section 7, Compensatory Time.** The bargaining unit currently is able to accumulate up to forty (40) hours of compensatory time in lieu of receiving overtime. This time off may be only used with the consent of the supervisor. The Union has proposed to raise the compensatory time limit to 80 hours in an effort to reduce the disparity between this bargaining unit and other bargaining units within the City.

3. **Article 2, Section 3, Dues Deduction/Fair Share.** The Union has proposed a revision of the dues deduction provision of the collective bargaining agreement to include a fair share fee, as provided for in Ohio Revised Code § 4117.09 (C). As a part of the Union's proposal, the Union has agreed that its fair share procedure will be in compliance with both State and Federal law.
4. **Article 23 & 5, Wage Increase/Effective date.** The Union has proposed that the effective date of the wage increase be moved from its current time in March to have an effective date of January 1 for each year of the Contract. The Union initially made this proposal through a requested change in the duration of the Contract, Article 23. However, the Union later modified its proposal to keep the Contract duration dates the same (March 2006 – March 2009) and instead adjust the effective date of the wage increase to January 1.
5. **Article 5, Section 1, Wages.** The Union is presently requesting a 3.0% increase to base wages in each year of the Contract, retroactive to March 19, 2006, the date of expiration of the last agreement. This 3% increase is consistent with what was awarded to non-union city employees as well as the other collective bargaining units. A 3% increase to base wages in each year of the contract, retroactive to March 19, 2006 is also equal to what the City proposed in its “last-best” offer.

The City proposed that the terms and conditions of the **TENTATIVE AGREEMENT of June 20, 2006** be implemented by the Fact-Finder, except that it now it proposes there be **no retroactivity** in the first scheduled wage increase pointing to the stipulation in the **TENTATIVE AGREEMENT** that: “***NOTE: Retroactivity dependent upon a prompt settlement.**”

The Union and the City are parties to a collective bargaining Agreement effective March 10, 2003 through March 19, 2006 and by extension through May 31, 2006.

The parties included in the bargaining unit are all Street Department employees, Vehicle Maintenance Center employees, Facilities Department employees, Parks, Recreation and Cultural Arts Department employees, and Sign Shop employees. Excluded are all office clerical employees, confidential employees, technical employees, survey employees and drafters, building inspectors, seasonal and casual employees, and all foremen, supervisors and superintendents.

There are approximately 86 employees in the existing bargaining unit. The parties met on January 5, 2006, February 22, 2006, February 24, 2006 and May 16, 2006 without reaching an agreement. On June 20, 2006 they entered into a Tentative Agreement containing the following items:

TENTATIVE AGREEMENT

FOR NEGOTIATED SETTLEMENT ONLY

Between The
Kettering Unit, Public Service Union Local #101
Ohio Council #8, AFSCME / AFL-CIO

AND

The City of Kettering

WAGES: Increases shall be effective as follows: 1st Year – 2006 3.0% (*Retroactive to (03/06/06); 2nd Year – 2007 3.0% (03/05/07); and 3rd Year – 2008 3.0% (03/03/08). ***NOTE: Retroactivity dependent upon prompt settlement.**

DURATION: Three-year Agreement expiring on 03/15/09.

GRIEVANCE PROCEEDURE: ARTICLE 16 – Grievance Procedure – Section 7. Add the following as the second sentence in the paragraph. *“Once a request for arbitration is made for an arbitrable grievance, the Union or the City may request grievance mediation, which will occur if both parties agree. The mediator will be requested from the Federal Mediation and Conciliation Service. Any charges will be shared equally by the Union and the City.”*

OTHERWISE: Current Agreement.

NOTE: - City agrees to provide the Union with Letter of Understanding on the following:

- Longevity Listing of Union covered employees.
- Meeting to review Safety Shoe Policy within 30 days of Agreement signing.

FOR THE CITY OF KETTERING:

FOR KETTERING UNIT, PUBLIC
 SERVICE UNION LOCAL #101 & OHIO
 COUNCIL #8, AFSCME / AFL-CIO:

/s/ Richard L. Strader
 6/20/06

/s/ Lynn Thomasson, Sr.
 6/20/06

This Tentative Agreement was rejected by the membership.

The Fact-Finder's Analysis and Recommendations:

In making these recommendations upon the unresolved issues, the Fact-Finder has been guided by the parties' discussions and presentations on the issues, by evidence produced during this proceeding and by the factors set forth in Ohio Revised Code Section 4117.14 (C) (4) (e) and (G) (7) (a)-(f) and Ohio Administrative Code Rule 4117-9-05 (K) (1) (6):

- (1) Past collectively bargained agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to final offer settlement relative to the employees in the bargaining unit involved 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 interests 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 in above, which are normally or traditionally taken into consideration in the determination of the issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

Analysis

1. The City vigorously disputed the Union's assertion that there remained five (5) unresolved issues. The City's argument was that the **TENTATIVE AGREEMENT** of June 20, 2006 had resolved all previously open items. In reaching this **TENTATIVE AGREEMENT**, the parties had specifically resolved:

1. Article 11, Section 9, Personal Leave Days
2. Article 6, Section 7, Compensatory Time
3. Article 2, Section 3, Dues Deduction/Fair Share
4. Article 23 & 5, Wage Increase/Effective Date

These four proposals were a part of the Union's original proposal put forth in December 2005. All that now remains of the parties' original proposals are those contained in the **TENTATIVE AGREEMENT**.

The City also argued that this document speaks for itself: It is a signed tentative agreement and not as the Union has designated it, a “last-best” or “final best” offer. The Union has not presented any formal proposal to the City since the rejection of the **TENTATIVE AGREEMENT** on August 30, 2006. What has been done is that the Union has selected these several issues from its December 2005 proposal to present to the Fact-Finder. This is improper at this late stage and those proposals should be rejected on that basis. Moreover, they should be rejected as inconsistent with the **TENTATIVE AGREEMENT**. Further, they should be rejected on the merits.

Recommendation and Rationale:

What is an unresolved issue in the instant proceeding? The Fact-Finder after having considered the position of each party, the evidence and argument presented at the hearing, and after having reviewed the provisions of Ohio Revised Code 4117.14 (C) (3) (a), has determined that the Union has erred in presenting issues 1. to 4. *supra* to this fact-finding panel since:

- A. The parties have previously engaged in collective bargaining on each of these four (4) issues and;
- B. The Union, by entering into the **TENTATIVE AGREEMENT** with the City on June 20, 2006, has constructively dropped or withdrawn all issues not contained in that agreement and;
- C. Since those issues were no longer being bargained collectively, they could only be construed as having been resolved.

Recommendation and Rationale:

If issues that have been resolved are permitted to be reintroduced into the fact-finding process, it frustrates the intent and purpose of the applicable provisions of the Code and the Rules. In the normal process of collective bargaining when a tentative agreement is reached by the parties, lacking any clearly documented reservation to the contrary, allegations of fraud or duplicity, then all other open issues not contained in the tentative agreement are deemed resolved. What is taken to the membership is the final proposal mutually agreed to by both parties. The party submitting the tentative agreement does not inform the membership that, while you are voting on this proposal remember, keep in mind, we still have these other four (4) items on the table, in reserve. The **TENTATIVE AGREEMENT** represented the culmination of the collective bargaining process: Fact-Finding does not represent an extension of the collective bargaining process to resolved issues.

These issues having been resolved will therefore not be considered by the Fact-Finder.

2. **Wages.** There is no dispute as to the wage proposal made by the City. Both parties at this hearing have agreed the proposed wage offer is acceptable. The proposal is consistent with wage settlements made by the City with other represented and unrepresented units.

Recommendation and Rationale:

I therefore recommend that the wage proposal advanced by the City be adopted: 3.0% in the first year; 3.0 % in the second year and 3.0 % in the third year.

3. **Retroactivity.** The dispute centers upon the City's withdrawal of its previous offer of retroactivity in the **TENTATIVE AGREEMENT** of June 20, 2006. The City in justifying its position points again to the provision in the **TENTATIVE AGREEMENT** that preconditions retroactivity as being dependent upon "prompt settlement". Retroactivity according to the City is meant to foster a prompt settlement and the membership's failure to ratify, disqualified it. The wage proposal should be effective upon ratification only.

The Union argues that there was an undue delay because of the City's financial condition at the time of collective bargaining. Fortunately, the citizens of Kettering passed an income tax increase in May of 2006, which is expected to go into effect in January 1, 2007. This delayed the negotiations, by mutual agreement, however. After the initial rejection, the City requested that we take back the proposal again but there was no change in the membership's opinion. We then agreed to fact-finding. Retroactivity is applicable here and the City has awarded retroactivity to those where applicable!

Recommendation and Rationale:

There comes a point when the interest and welfare of the public should be considered as being paramount. There was no argument advanced that the City is unable to pay the retroactivity. Reasonable minds could only conclude that it is time this dispute is ended. Words such as "prompt settlement" are hardly words of art. What is a "prompt settlement"? These negotiations began in the Winter of 2005 and are about to end very close to the Winter of 2006. Neither party has alleged bad-faith bargaining in these negotiations.

Using the argument that you rejected our proposal, so you do not qualify for any retroactivity now is not persuasive, at least with this Fact-Finder. As long as the parties are actively and mutually attempting to settle this dispute, reasonableness and fairness on both sides should be observed.

I therefore recommend that the effective date of the first years wage increase be March 3, 2006 as the parties in their **TENTATIVE AGREEMENT** of June 20, 2006 originally agreed.

Attached to this Fact-Finder Report and made a part thereof, as requested by the parties, is an **Appendix A** which reflects all of the recommended agreements and understandings negotiated by the parties in the year 2006.

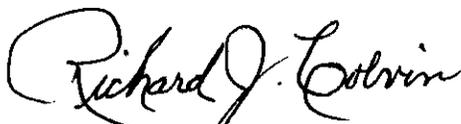
CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Fact-Finder Report regarding the findings of fact and recommendations on the unresolved issues has been sent on November 8, 2006, by facsimile and by overnight mail to the Union's representative, Michael McNew, at 15 Gates Street Dayton, Ohio 45402-2917, and that a true copy has been sent on November 8, 2006 by facsimile and by overnight mail to the City's representative, Daniel G. Rosenthal, at 425 Walnut Street, Suite 2300, Cincinnati, Ohio 45202-3918.

A copy of the Report has been sent by regular mail to the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213.

Issued at Mason, Ohio, County of Warren, this seventh day of November 2006.

Respectfully submitted,

A handwritten signature in black ink that reads "Richard J. Colvin". The signature is written in a cursive style with a large initial "R" and "C".

Richard J. Colvin
Fact-Finder

APPENDIX A
RECOMMENDED SETTLEMENT

ARTICLE 5 – WAGES

Section 1. Wage rates in each pay grade shall be increased by 3.0 % effective March 6, 2006. In the second year of this Agreement, effective March 5, 2007, wage rates in each pay grade shall be increased by 3.0 %. In the third year of this Agreement, effective March 3, 2008, wage rates in each pay grade shall be increased by 3.0 %. The “A” steps in each pay grade will only be used for employees hired after February 19, 1996. (See Pay Grade – Position Classifications and Step Tables in the Addendum beginning on Page 25).

ARTICLE 16 – GRIEVANCE PROCEDURE

Section 7. Step 5. Arbitrable grievances which have not been settled by the above steps may be submitted to binding arbitration. *Once a request for arbitration is made for an arbitrable grievance, the Union or the City may request grievance mediation, which will occur if both parties agree. The mediator will be requested from the Federal Mediation and Conciliation Service. Any charges for mediation will be shared equally by the Union and the City.* Grievances which involve a matter over which the Civil Service Commission has jurisdiction are not arbitrable unless (1) the employee, in writing, waives his right to appeal the matter to the Civil Service Commission (including subsequent appeal steps) and (2) the Union and the City concur. Such grievances (those over which the Civil Service Commission has jurisdiction) shall be filed at Step 4 of the grievance procedure within the same time requirement of filing grievances at Step 1. In the case of arbitrable grievances, if the Union is not satisfied with the answer of the City at Step 4, it may within 30 days give written notice to the City of its intent to submit the grievance to arbitration.

ARTICLE 23 - DURATION

This Agreement shall be in full force and effect through March 15, 2009. The initial wage provisions of this Agreement shall be effective as of March 6, 2006. All other provisions shall be effective from and after the original signing date of this Agreement, unless otherwise specified, or as soon thereafter as benefit coverage can be obtained in the normal course of business or as provided by law. If either the City or the Union desires to terminate, modify or negotiate a successor agreement, it shall serve written notice upon the other party of its desire not less than 90 days prior to the expiration date of this Agreement.

Letter of Understanding

The City agrees to provide the Union with Letter of Understanding on the following:

- Longevity Listing of Union covered employees.
- Meeting to review Safety Shoe Policy within 30 days of Agreement signing.

These changes represent the only changes to be made to the current labor Agreement between the parties other than changes of a housekeeping nature necessitated by these negotiated changes.