

STATE OF OHIO

STATE EMPLOYMENT
RELATIONS BOARD

BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

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FACT-FINDING PROCEEDING

07-MED-04-0568

Teamsters' Local Union No. 284,

Employee Organization

and

Springfield Metropolitan Housing Authority,

Employer

REPORT AND RECOMMENDATIONS OF THE FACT FINDER

Daniel N. Kosanovich

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REPORT AND RECOMMENDATIONS

I. Background

The bargaining unit in this case consists of all Clerical, Inspectors, Coordinators, and Resident Services employees employed by the Springfield Metropolitan Housing Authority. The job descriptions within the bargaining unit include Property Managers, Housing Inspectors, Maintenance/Clerical Employees, Case Managers, Section 8 Inspectors, Finance Specialists, and Procurement Specialists. There are a total of twelve employees within the unit.

The pertinent Collective Bargaining Agreement is a three year contract which expired by its terms on August 31, 2007. The parties began negotiations in July 2007. Some of the sessions were conducted solely between the parties themselves and others with the assistance of Federal Mediator, Steven Anderson. Through their efforts the parties were able to secure a tentative agreement on November 1, 2007. Said agreement was overwhelmingly rejected by the bargaining unit and the parties agree that there are three remaining issues to be resolved (hopefully on the basis of this fact-finding report).

In compliance with Ohio Revised Code Section 4117.14(C)(3), the State Employment Relations Board appointed the undersigned to serve as the fact-finder in this matter. The fact-finding hearing was scheduled to be conducted on February 5, 2008. Both parties submitted pre-hearing statements in a timely fashion and took the opportunity to present their respective positions on the three outstanding issues at the fact-finding hearing. It

must be noted that the undersigned offered to mediate the remaining outstanding issues before conducting the fact-finding hearing. The parties declined the offer.

II. Criteria

In compliance with Ohio Revised Code Section 4117.14(G)(7), and the Ohio Administrative Code, Section 4117-95-05(J), the undersigned considered the following criteria in making the recommendations contained in this Report:

- 1) Past collectively bargained agreements between the parties;
- 2) Comparison of unresolved issues relative to the employees in the bargaining units with those issues related to other public and private employers in comparable work, giving consideration to factors peculiar to the area of the classifications 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 normal standards of public service;
- 4) Lawful authority of the public employer;
- 5) Stipulations of the parties; and,
- 6) Such factors as not identified above which are normally and traditionally taken into consideration.

III. Findings and Recommendations

Issue 1 – Article XXII – Leaves of Absence (Section 22.1)

SMHA's POSITION

It is the position of the Springfield Metropolitan Housing Authority that Article XXII, Section 22.1 of the parties' Collective Bargaining Agreement should be deleted.¹

The Employer maintains the position that it constitutes a *single public agency* according to U.S. Department of Labor 29 CFR 825.108 (c)(1) and that as a single public agency it lacks the requisite number of employees to satisfy the eligibility threshold of the FMLA. It is clear that employees of public sector employers must meet all of the requirements of eligibility in order to gain coverage under the FMLA. (Citation omitted).

Additionally, according to the Employer, during negotiations its' representatives provided the Union with information demonstrating that several employees abused the leave provision by calling off work intermittently or claimed FMLA coverage for tardiness. "Given the small staff of SMHA and the impact of these unpredictable absences, management determined it can no longer voluntarily treat itself as being required to provide full blown FMLA coverage." (Employer's pre-hearing statement pages 5-6).

However, the management also contended that it had no intention of denying reasonable requests for use of sick leave or leave without pay. In fact, the Employer was willing to continue to pay for health insurance premiums during the approved leave period.

Under the circumstances, the SMHA's position should be adopted. It is consistent with the law and provides for situations where an employee will need to take unpaid leave for reasons relating to his or her health or that of a family member.

¹ Article XXII, Section 22.1 reads "Employees are eligible for Family Medical Leave pursuant to the terms of SMHA's Personnel Policy."

TEAMSTERS LOCAL 284's POSITION

It is the position of Teamsters Local 284 that Article XXII, Section 22.1 "ensures" that bargaining unit employees are eligible for coverage under the Family Medical Leave Act pursuant to the SMHA's Personnel Policy. The Union argues that at the time the contract was adopted in 2004 the Personnel Policy Manual provided that bargaining unit employees were covered by the FMLA and that the agency would comply with the Act. It must be noted that the language in question has been in the Collective Bargaining Agreement since the first contract in 2000.

The Employer has failed to demonstrate any undo burden cast upon it by the exercise of rights provided under this language of the contract. Thus there is no need to delete the provision.

Instead, the Employer seemed to attempt an end run when on October 19, 2005 (during the term of the Collective Bargaining Agreement) the Executive Director of the SMHA sent a note to all employees advising them that SMHA was considered to be a single public agency therefore not bound by the FMLA provisions. The Executive Director went further and informed the employees FMLA benefits would not be available and the Personnel Policy would be revised accordingly. On March 7, 2006 (again during the term of this Collective Bargaining Agreement) the Executive Director issued a reminder that bargaining unit employees were not eligible for FMLA benefits and would need to follow the appropriate procedures of requesting leave under the Personnel Policy Manual. On January 17, 2006, following the issuance of the Executive Director's first memo but prior to the second memo, the Union filed an unfair labor practice charge alleging the Employer had violated Ohio Revised Code Section 4117.11(A)(1) and (A)(5)

when it unilaterally altered its policy regarding FMLA coverage. A probable cause finding was issued and a hearing was directed. The parties agreed to mediate the dispute on June 14, 2006 and arrived at a settlement under which the Employer agreed to reinstate the FMLA policy provided the parties agreed to meet and bargain over the policy no later than August 23, 2006. Said negotiations were not fruitful and the FMLA policy provision would remain in effect until the expiration of the contract.

On November 1, 2007, the parties reached a tentative agreement on the Collective Bargaining provisions. The proposal with respect to Family Medical Leave coverage was reduced to a Memorandum of Understanding through which the employer committed to consider reasonable request for leave without pay which an employee may make due to the employee's inability to work resulting from a serious health condition of the employee or an employee's immediate family. Said Memorandum of Understanding was part of the package submitted to the Union membership for ratification. On November 5, 2007 the contract was defeated on the basis of this issue.

It is the position of Teamsters Local 284 that not only did the Employer fail to present evidence to demonstrate the language was burdensome or lead to employee abuse, the Employer's claim that another bargaining unit with which it negotiates (AFSCME Local 1608, Ohio Council 8) agreed to abandon FMLA coverage in its most recent Collective Bargaining Agreement is inaccurate. Stated differently, said contention is wholly without merit. The evidence indicates that AFSCME did not agree to wave or compromise FMLA coverage.

"If the Employer sincerely believes that the elimination of this benefit has some value to it, then the employer ought to have both provided the Union with some evidence of a

need for change in the contract language, as well as provided some quid pro quo to counterbalance the elimination of this benefit. The Employer did neither during these negotiations.” (Union’s pre-hearing statement page 6). Therefore, the Union’s position to maintain the current language ought to be adopted.

RECOMMENDATION

Two of the key factors to be considered in crafting a recommendation are the bargaining history between the parties and whether the provision in question has been collectively bargained. In this instance, it has been demonstrated that the predecessor agreements dating back to 2000 have incorporated the Family Medical Leave Act (FMLA) into the Collective Bargaining Agreement by reference, notwithstanding the fact that the Springfield Metropolitan Housing Authority is a single public agency and does not meet the threshold eligibility for the number of employees to be covered by the Act.² It is part of the fabric of the Collective Bargaining Agreement and has been so since 2000.

In support of its position, the Union presses the argument that the FMLA should not be cut out of the fabric of the Collective Bargaining Agreement without some justification. According to the Union, the agency has failed to provide or present any evidence to justify the elimination of the FMLA provision.

The Springfield Metropolitan Housing Authority, on the other hand, argues that it has had difficulty managing intermittent leaves and tardiness issues under the FMLA for at least two bargaining unit employees, which, given the size of the bargaining unit, is significant. Moreover, the agency contends that in order to be covered under the FMLA the employees must meet all of the eligibility requirements provided for in the Act. In this

² The Union concedes that the SMHA is a single public agency.

case they do not. Therefore, no basis in law is provided which would justify the continuation of FMLA coverage.

While the Union correctly points out that in order to secure a recommendation for elimination of a benefit provision of the Collective Bargaining Agreement such as Article XXII, Section 22.1, the Employer must offer some substantial justification for the change. The employee rights and benefits are realized in the provisions of the Collective Bargaining Agreement through the give and take of negotiations. Presumably, the Union had to offer something during the course of previous negotiations in exchange for the Employer's agreement to provide FMLA coverage. Thus, absent a compelling reason to change, alter, modify, or eliminate a provision of the contract, I would be constrained to find it appropriate to maintain the status quo.

As noted above, the Employer offers two reasons for the elimination of the FMLA reference in the contract. The most significant reason for eliminating the FMLA reference in the Collective Bargaining Agreement is that the Springfield Metropolitan Housing Authority does not meet the legal thresholds to be eligible for FMLA coverage. Therefore, the agency is not obligated to extend the FMLA coverage to its employees, nor can it be required to do so.

The absence of a legal foundation to provide FMLA coverage is significant to this recommendation. It serves as a compelling reason to adopt the Employer's position. When coupled with the issues raised by the Employer regarding the application of intermittent leave under the FMLA the agency's argument becomes even more compelling, particularly given the size of the unit.

Further, the employee threshold was established by Congress for a reason. It is reasonable to assume, the legislature concluded that the size of the bargaining unit had a direct impact on the Employer's ability to sustain the burden of extending FMLA coverage. Under these limited circumstances, the Employer has demonstrated a compelling reason to eliminate the reference to the FMLA. However, the Employer cannot escape its obligations to its employees completely. The elimination of the FMLA provision cannot result in a further hardship on the employees. Therefore, it is recommended that the language of the Memorandum of Understanding be incorporated into Article XXII, Section 22.1. Said language shall address the granting of leaves for reasonable cause and the continuation of the payment of insurance premiums for employees who elect to seek leave be adopted. It should read as follows:

It is the Employer's intention to consider reasonable requests for leave without pay which an employee may make due to the employee's inability to work resulting from a serious health condition of the employee or an employee's immediate family member.

The Employer shall continue to provide health insurance premium contributions for employees taking such leave(s) of absence.

This recommendation is consistent with the law and provides employees with the benefit of leave for reasons relating to health of the individual or a family member and continues their insurance premium payment for the appropriate period.³

³ Often times the parties have external and internal comparables for the fact-finder to consider in rendering his or her recommendation. The only established comparable in this case is with AFSCME. The record is muddled at best and is unpersuasive on the point. In other words, the AFSCME situation does not change the recommendation.

Issue 2 – Effective Date of Wage Increase

TEAMSTERS LOCAL 284's POSITION

It is the Union's position that the fact-finder should recommend retroactive pay increases back to the effective date of the contract which is September 1, 2007. To quote the Union: "The Union submits that the bargaining unit ought to be granted retroactivity back to the expiration of the previous Collective Bargaining Agreement which would be effective September 1, 2007. The parties have a history of providing for retroactivity. Each of the successor agreements has provided for retroactivity back to the expiration of the predecessor agreement. Usually, retroactivity is granted unless the parties (sic) seeking retroactivity has been the cause of unnecessary delay in the collective bargaining process. The Union submits that this collective bargaining process proceeded in a timely manner and awarding retroactivity to bargaining unit employees back to September 1, 2007 would not unduly burden the Employer." (Pre-hearing statement page 7).

SMHA's POSITION

The Springfield Metropolitan Housing Authority's position is that the wage increase for the first year of the Collective Bargaining Agreement should go into effect upon the acceptance of the fact-finder's report and not be retroactive. To quote the Employer: "It is SMHA's position that any wage increase should not be retroactive but should take effect upon both parties' acceptance of fact-finder's report. The prior contract expired August 31, 2007. The Employer's Final Comprehensive Proposal dated November 1, 2007 provided that increase would be retroactive to September 1, 2007 only if a tentative agreement was signed 11/1/07, otherwise, the increase would be effective upon ratification by the Union. The Teamsters bargaining team refused to sign this proposal as

a tentative agreement or agree to recommend it for ratification. When the Union vote was taken nearly three weeks later, the Union did not ratify the Employer's Final Comprehensive Proposal. As a result of these circumstances, the employer believes that an attractive increase is not warranted." (Employer's pre-hearing statement pages 6-7).

RECOMMENDATION

According to the Union, retroactivity in wages is usually granted unless the party seeking retroactivity has caused unnecessary delay in the collective bargaining process. The Employer, on the other hand, submits that the wage increase should not be retroactive but should take effect upon both parties acceptance of the fact-finder's report.

The record does not demonstrate any significant delay is attributable to either party in the collective bargaining process. Moreover, the Employer was willing upon ratification of its final comprehensive proposal to provide the employees in question with retroactive pay.

Individuals intimately involved in the negotiation process appreciate the difficulties that they are faced with in attempting to reach agreement on a new contract. Sometimes, through no fault of anyone, the parties exceed the expiration date of the predecessor agreement. Retroactivity is the norm as opposed to being the exception to the rule. Under these circumstances, it is recommended that the Employer provide retroactive wage increase back to September 1, 2007, the expiration date of the predecessor agreement.

Issue 3 – Retro Application of Article XXVIII – Layoff and Recall

TEAMSTERS LOCAL 284's POSITION

Teamsters Local 284's position as set forth in this pre-hearing statement is as follows:
"During negotiations, the parties tentatively agreed to insert new language into Article

XXVIII, Layoff and Recall, which would provide that an employee who was laid off and who bumps into a lower paying classification would be placed in a step equivalent to his or her previous rate of pay. If no equivalent step or rate of pay exists, the employee will nonetheless retain his or her previous rate of pay. The employee shall not advance to a new step or rate of pay until the classification step increases beyond the employees actual pay rate.

This issue arose as a result of a grievance filed by an employee, Lornia Jenkins. Ms. Jenkins filed a grievance when she was laid off from her position as a Lead Section 8 Case Manager which was a Pay Grade 6. Because of her years of service, Ms. Jenkins was at Step H. As a result of the layoff, Ms. Jenkins bumped down to Assistant Section 8 Housing Case Manager, which is in Pay Grade 5. The Union seeks that the provision in the collective bargaining agreement to which the parties have tentatively agreed be retroactively applied to Ms. Jenkins so that she would be reimbursed for the loss of pay she suffered as a result of the layoff.” (Union’s pre-hearing statement pages 7 & 8).

The information provided on the record indicates that Ms. Jenkins filed the grievance almost one year after her layoff and bump. The grievance filing was initiated because Ms. Jenkins felt other employees were treated differently.

SMHA’s POSITION

“A tentative agreement signed by the parties on August 23, 2007 addresses the issue raised by the Union during negotiations about the rate of pay of an employee whose position is eliminated as part of a RIF and who exercises her right to bump not decreasing in the new, lower position. There is no such language in the prior contract, and a RIF in bumping did occur in 2006. Lornia Jenkins is an employee who bumped and whose rate

of pay did decrease as a result. She filed a grievance a number of months afterwards; however, she did not request a retroactive pay adjustment in her grievance. SMHA offered as part of its final comprehensive proposal to address her rate of pay under the TAd language, along with a withdrawal of her pending grievance. Given management had no obligation to decrease Ms. Jenkins' salary, much less to adjust it under a new proposed language, the position of management is entirely reasonable and should be adopted by the fact-finder." (Employer's pre-hearing statement page 7).

In other words the fact-finder should resist the temptation to apply language of Article XXVIII retroactively to Ms. Jenkins' situation and find that the grievance should be withdrawn.

RECOMMENDATION

The parties managed to negotiate a tentative agreement on new language regarding layoff and recall. Said language provides that an employee who is laid off and who bumps into a lower paying classification will be placed in a step equivalent to his or her previous rate of pay. If no equivalent step or rate of pay exists, the employee will nonetheless retain his or her previous rate of pay.

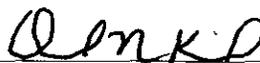
This issue arose when L. Jenkins allegedly discovered that other employees were treated differently than she was when she bumped from a Lead Section 8 Case Manager with a Pay Grade 6 to that of an Assistant Section 8 Housing Case Manager, which is Pay Grade 5. The bumping involving Ms. Jenkins occurred in 2006. Her alleged discovery and a grievance were filed almost one year later challenging the Employer's failure to retroactively apply the tentatively agreed to language of Article XXVIII. It is the SMHA's position as noted above that it has no obligation to adjust the pay retroactively

under the tentatively agreed to language. However, the agency did offer to adjust her pay prospectively under the terms of the newly negotiated language of Article XXVIII. This offer was, of course, conditioned on ratification of the entire Collective Bargaining Agreement by the membership and the withdrawal of the grievance.

Given the circumstances, it appears that management had no obligation to retroactively apply the language of Article XXVIII and was justified in refusing to do so. However, management did offer to adjust the wage rate for Ms. Jenkins prospectively upon the ratification of the Collective Bargaining Agreement and withdrawal of the grievance. In light of the fact that there is a significant issue with regard to procedural arbitrability that could be raised as a defense to the grievance and that management's posture on this issue is reasonable, the undersigned recommends the adoption of management's position on the issue of retroactively applying Article XXVIII, Layoff and Recall.

IV. Certification

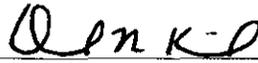
The fact-finding report and recommendations are based on the evidence and testimony presented to me as at a fact-finding hearing conducted on February 5, 2008. Recommendations contained herein are developed in conformity with the criteria for a fact-finding found in Ohio Revised Code 4717(7)(a-f) and the associated administrative rules developed by SERB.



Daniel N. Kosanovich
Fact-finder

V. PROOF OF SERVICE

This fact-finding report was mailed to Susan D. Jansen, Doll, Jansen & Ford, 111 W. First Street, Suite 1100, Dayton, Ohio 45402-1156 and Lauren M. Ross, Martin, Browne, Hull & Harper, P.L.L., P.O. Box 1488, One South Limestone Street, Suite 800, Springfield, Ohio 45501 on Monday, March 3rd, 2008. A copy of this Fact-Finding Report was also e-mailed and faxed to Ms. Jansen and Ms. Ross on Sunday, March 2nd, 2008.



Daniel N. Kosanovich
Fact-finder