

**FACT FINDING REPORT  
STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD  
June 15, 2009**

STATE EMPLOYMENT  
RELATIONS BOARD

2009 JUN 17 A 11:43

In the Matter of:

Public Health Dayton & Montgomery County  
Board of Health

07-MED-12-1258

and

Ohio Council 8, American Federation of State,  
County and Municipal Employees, Local 101

**REPORT AND RECOMMENDATIONS OF FACT-FINDER  
TOBIE BRAVERMAN**

APPEARANCES

For the Employer:

Brian M. Wakefield, Counsel  
Michael Matis, General Counsel  
Jennifer Smith, Human Resources Director  
Steve E. Pilkenton, Director of Administration

For the Union:

Stacey Benson-Taylor, Staff Representative  
David McIntosh, Staff Representative  
Gordon McRoberts  
Betty J. Wallace

## **INTRODUCTION**

The undersigned was duly appointed by SERB by letter dated March 5, 2009 to serve as Fact-Finder in the matter of the Public Health Dayton & Montgomery County Board of Health (hereinafter referred to as "Employer") and Ohio Council 8, American Federation of State, County and Municipal Employees, Local 101 (hereinafter referred to as "Union") pursuant to OAC 4117-9-5(D). The parties agreed to extend the deadline for the Fact Finder's Report until June 15, 2009. Hearing was held at Dayton, Ohio on May 18 and May 22, 2009. The Union was represented by Stacey Benson-Taylor, Staff Representative, and the Employer was represented by Brian M. Wakefield, Counsel. The parties were permitted to present testimony and exhibits concerning each of the outstanding provisions on which agreement had not been reached. The parties have waived service of this Report via overnight delivery, and have agreed that statutory time lines will run from receipt of fax and email delivery of the Report and Recommendations.

Pursuant to Ohio Revised Code §4117.14, the Fact-Finder has considered, to the extent submitted by the parties, previously bargained collective bargaining agreements, the comparison of the issues submitted relative to other public employees doing comparable work, the interests and welfare of the public, the ability of the Employer to finance and administer the issues proposed, the effect of the adjustments on the normal standard of public service, the lawful authority of the Employer, and other factors traditionally considered in the determination of issues submitted.

## **FACTUAL BACKGROUND**

The Employer operates the Public Health Department for Dayton and Montgomery County, Ohio. It employs approximately 380 employees to carry out its mission to achieve the public health goals of prevention, promotion, and protection. It is governed by a nine member Board and is funded through the Department of Health with funds that are separate from Montgomery County. The bargaining unit involved here is the only represented group within the Employer. It consists of

approximately 30 employees employed at the Employer's Center of Alcohol and Drug Addiction Services (commonly referred to as CADAS). The Union was certified by SERB as the exclusive bargaining representative for the Employer's CADAS Counselors, Technicians and Specialists on November 19, 2007. This is the initial collective bargaining agreement between the parties. The Union also represents several other bargaining units of employees in Montgomery County, Ohio. Those bargaining units have been presented as relevant internal comparable bargaining units by the Union. Those other bargaining units are: Montgomery County Board of County Commissioners, Montgomery County Public Defender, Montgomery County Veterans Service Commission, and Montgomery County Clerk of Courts. Although all of these bargaining units are within Montgomery County government and are represented by the Union, and some contain some of the same classifications of employees as this bargaining unit, none includes all of the same classifications of employees, and the Employer of all is the Board of County Commissioners, not the Board of Health.

The parties met in bargaining from April, 2008 through January, 2009 and reached agreement on a substantial number of contractual provisions. The Articles agreed upon, either in whole or in part are referenced in the attached Exhibit A, and are incorporated herein by reference and adopted as part of the parties' final agreement. Additionally, the parties were able to reach agreement on or withdrawal of the following items in the course of mediation at the time of hearing, and those agreements are additionally adopted as part of the parties' final agreement. Those items include the following:

Article 10 - Discipline and Discharge Procedures

Article 17 - Seniority

Article 20 - Layoff and Recall

Article 21 - Leave of Absence Without Pay

Article 26 - Successor

Article 32 - Education Leave

Article 42 - Longevity

Article 43 - Wages (in part)

Article 47 - Duration of Contract

The remaining unresolved issues are as follows:

Article 11 - Non Discrimination

Article 18 - Vacancy & Transfer

Article 33 - Tuition Reimbursement

Article 39 - Sick Leave

Article 43 - Wages

Article 34 - Health Insurance

## **ISSUES**

### **ARTICLE 11- NON-DISCRIMINATION**

Union Position: The Union proposes the inclusion of language in the Agreement which acknowledges that there will be no discrimination upon the basis of union or non-union membership and which acknowledges the responsibilities of the parties under state and federal civil rights laws. The proposed language further provides that allegations of discrimination or harassment will be made through either the Employer's work rules or the grievance arbitration provisions of the Agreement. The Union argues that this language both acknowledges that the parties will abide by applicable discrimination laws and further demonstrates a true commitment on the part of the parties to upholding the requirements of these laws. Additionally, the Union points out that the Agreements of the other bargaining units within Montgomery County include similar language to that proposed here.

Employer Position: The Employer contends that it is clear that it is responsible to uphold all applicable discrimination laws without regard to whether or not this language is included in the Agreement. What the Union's proposal does, however, is place the Employer in the position

of risking the possibility of having to litigate discrimination claims in multiple forums. With the inclusion of the proposed language, an employee may pursue his discrimination claim under the grievance procedure as well as to file a claim with the Ohio Civil Rights Commission or other applicable agency. The end result is that the Employer is obligated to defend itself in both forums and could face the risk of conflicting decisions. Further, the arbitration forum does not include the protections of the rules of evidence and rights to full discovery which are available in the courts.

Discussion: As the Employer points out, it is clearly obligated to abide by the dictates of all discrimination laws in its day to day operations without regard to whether or not anti-discrimination language is included in the *Collective Bargaining Agreement*. Although the language proposed by the Union is primarily intended to simply reiterate that fact, it does, as the Employer argues, make discrimination claims subject to the grievance procedure. This clearly could subject the Employer to the multiple litigation of the same claim in different forums and could lead to the possibility of conflicting interpretations of discrimination laws. Although labor arbitrators are uniquely suited to the adjudication of most claims made in the collective bargaining context, many are not fully versed in the myriad nuances of discrimination laws. Those determinations are often better left to the courts. Since the language is not necessary to the protection of employee rights against discrimination but could lead to deleterious effects for the Employer, it should not be included in the Agreement.

Recommendation: The proposed language should not be included in the Agreement.

## **ARTICLE 18 - VACANCY AND TRANSFER**

Union Position: The Union proposes a requirement which would prohibit the posting of a vacancy externally until it is determined that no internal candidate will be selected for an available vacancy. The Union argues that this provision is necessary in the otherwise agreed upon language which requires internal posting of a vacancy before external posting. Because

Section 3 of the Article includes a provision which states that nothing in the Article limits the Employer's right to consider external candidates, the proposed language is necessary to prevent the requirement that vacancies be posted internally first from becoming a mere empty formality.

Employer Position: The Employer argues initially that this Article is not necessary because there is no demonstration that the Employer has failed to consider and transfer internal candidates who are qualified and express a desire to transfer to an open position. In fact, a qualified employee desiring an internal transfer was only recently transferred to a vacancy. The Union proposes this language primarily out of a lack of trust and fear, not out of a concrete concern regarding the issue. The issue of hire and transfer is one of inherent managerial authority, and the Employer has already given away all of the inherent rights regarding transfer which it cares to relinquish. The Employer seeks to retain its ability to consider both internal and external applicants, particularly in the instance where it does not believe there are qualified internal applicants.

Discussion: The parties substantially agreed upon the disputed language of the Vacancy and Transfer Article of the Agreement during mediation. The disputed language at this juncture comes down to a single sentence. The impact of that single sentence is that it requires the Employer to post, consider and reject internal applicants for an available position before considering outside applicants, as opposed to the language without the sentence, which would require only posting internally prior to considering outside applicants. After completion of the five day posting period, internal and external candidates could be interviewed and considered simultaneously.

Although the Employer argues that there has not been an issue regarding transfers in the past, the Union contends that in fact employees have been hired from the outside prior to due consideration to internal candidates. Although the proposed language does require consideration and rejection of internal candidates prior to hiring from outside, it retains wide latitude on the part of the Employer to reject internal candidates based upon valid considerations of work record

and discipline. The Employer has not articulated any compelling reason to refuse to give preference to current qualified and experienced employees who desire to move internally within the Employer's operation other than its desire to not abdicate additional control. The ability of an employee to move within the operation, either for better pay or work conditions outweighs the Employer's desire in this instance.

Recommendation: The following language should be added as the fifth sentence of Section 1 of Article 18 as drafted on May 22, 2009: "If an internal candidate is not selected, the Employer may post the vacancy externally."

### **ARTICLE 33 - TUITION REIMBURSEMENT**

Union Position: The Union proposes increasing the current tuition reimbursement amount from its current \$1,500.00 per year to \$2,400.00 per year. This benefit is currently utilized by approximately five bargaining unit employees. Alternatively, the Union proposes maintaining the current tuition reimbursement amount, but permitting its use for employee license fees, which would be utilized by approximately fifteen bargaining unit members on a bi-annual basis. The cost of licensure is approximately \$230.00 per employee. The tuition reimbursement benefit is one which aids the Employer by permitting employees to continue their education and training which provides the Employer with a better trained and educated work force. Finally, the other County bargaining units have increased the benefit to \$2,400.00. This group should have a similar benefit.

Employer Position: The Employer argues that there is no justification for this increase. There were only four employees who used the benefit in 2007 and only two reached the maximum amount. Similarly, in 2008, only five employees utilized the benefit, and two of those used the maximum amount. This usage of the benefit indicates that there is simply no need for an increase of more than fifty percent. The budgeting for this benefit is done based upon past usage, and the increases proposed by the Union, particularly the payment for licensure which

would be used by up to fifteen bargaining unit members, would constitute an additional cost burden on an already over burdened budget. An increase simply is not justified.

Discussion: The evidence presented at hearing demonstrated that only a few members of the bargaining unit utilize the tuition reimbursement benefit, and of those only two per year in the last two years utilized the maximum amount. There does not seem to be significant need or demand for the increased benefit as proposed by the Union. Although other county bargaining units have increased the amount of the benefit in their Agreements, there was simply insufficient evidence presented here to demonstrate that an increase in the tuition reimbursement amount is warranted. Although a greater number of bargaining unit members would clearly benefit from the alternative proposal which would permit payment of the costs of licensing from the tuition reimbursement benefit, this benefit would be available to only one half of the bargaining unit and present an additional cost of approximately \$5,000.00 over the term of the Agreement during difficult economic times.

Recommendation: The following language should be incorporated into the agreement as Article 33 Tuition Reimbursement:

Section 1 The Employer will provide reimbursement for tuition and other institutional fees (books, administrative cost, student support) for full-time employees to further their potential by attending any accredited school or institution. The annual maximum reimbursement shall be \$1,500.00. Employees must remain in active employment status for one year following receipt of reimbursement for tuition. Employees leaving active employment status within one year following receipt of reimbursement for tuition are required to repay the Employer for the cost of the reimbursement. This repayment amount may be prorated based on the total months of employment following the reimbursement.

To be eligible to apply for reimbursement, the course must directly improve the employee's value to the Employer in his/her present position or enhance an employee's chances for advancement to another position with the Employer.

Section 2 The Employer will provide reimbursement for tuition and other institutional fees (books, administrative cost, student support) associated with earning a Masters of Public Health (MPH) degree at an Employer approved college or university. The Employer will provide reimbursement of 70% of both tuition and institutional fees in accordance with the Employers training policies. Employees must remain in active employment status for three (3) years from the date the MPH degree was awarded. Employees leaving active employment status within three (3) years following the date the MPH degree was awarded are required to repay the Employer for the cost of the reimbursement. The repayment amount will be in accordance with the Employer's training policies.

#### **ARTICLE 39 - SICK LEAVE**

Union Position: The Union proposes two changes to the sick leave language from that which is currently embodied in Employer policy. The Union proposes an increase in the maximum number of accumulated hours of sick leave from 1,200 to 2,000 which would increase the maximum payout to employees upon retirement from 600 hours to 1,000 hours. These employees do not receive longevity pay, and the Union has withdrawn its proposal on longevity. This benefit then, would reward long term employees who have used little sick leave upon their retirement. Other County Agreements include this benefit, and although these employees are not technically employees under the authority of the Montgomery County Commissioners, from the employees' perspective there is little difference. The Union's second proposal is to incorporate the Employer's sick leave policy regarding accrual and usage into the Agreement. The incorporation of this language will allow for clarity on the part of employees who will not be required to refer to multiple documents to determine their benefit, and will further make it clear that the terms for usage of sick leave have been agreed upon by the parties.

Employer Position: The Employer has already been advised that its funding will be cut for next year. The Union's proposal to increase sick leave accumulation is an expensive proposal

for which there is simply no available funding. There are currently three employees eligible to retire who would not reach this level of sick leave accumulation, but nonetheless, over time this proposal clearly will become an expensive and burdensome benefit from the Employer's perspective. Further, the Employer reiterates, although they may think there is no difference, these employees are not employees of Montgomery County. They are not governed or funded by the County Commissioners. The Employer cannot and should not be governed by the bargaining choices and budgetary considerations of that entity.

Discussion: As the Employer correctly notes, while the increase in sick leave accumulation and its concomitant pay out at retirement may not cost the Employer anything during the term of this Agreement, benefits of this type are very expensive over time and can result in burdensome Employer liabilities. In the current economic climate, it does not seem appropriate to commit the Employer to a potentially expensive benefit which inures to the benefit of only a few employees at the expense of benefits which are applicable to the entire bargaining unit. The Employer has not, however, provided any strong argument which would support the exclusion of the sick leave language from the Agreement.

Recommendation: The following language should be incorporated into the agreement as Article 39 Sick Leave:

Section 1. Accrual All full-time employees shall earn sick leave at the rate often (10) hours per month. An employee shall be credited with a complete month of service if the employee works or is on paid leave one-half ( $\frac{1}{2}$ ) or more of his/her scheduled work days in any one (1) month. Part-time employees shall earn sick leave on a pro-rated basis in accordance with the amount of time worked. Sick leave shall be accrued for all time in active pay status.

Section 2. Usage Employees may use sick leave for personal illness or injury, illness or injury of a member of the employee's immediate family which requires the employee's personal care and attendance, additional Bereavement leave, and doctors appointments. Sick leave can be used in increments of one-half ( $\frac{1}{2}$ ) hour.

When the use of sick leave becomes necessary, the employee or an immediate family member shall notify the immediate supervisor by telephone at the employee's scheduled starting time on the first day of absence, and on each succeeding day unless excused by the immediate supervisor or unless other arrangements are authorized.

Section 3. Conversion to Vacation Employees may elect to convert sick leave hours to vacation leave hours in accordance with the Sick Leave Conversion Policy, Section No. 311 of the Personnel Policy Manual. However, sick leave hours earned in excess of 1,200 must be converted to vacation. Conversion shall be made based upon the number of sick leave hours earned as of January each year.

Section 4. Conversion Employees taking retirement at age fifty-five (55) or over with at least ten (10) years of Montgomery County service credit under the Public Employees Retirement System, employees with at least thirty (30) years of service credit under the Public Employees Retirement System, and the estate of employees who die while employed full-time with the County shall receive cash payment for accumulated sick leave at the employee's base rate of pay at the time of separation at the rate of one (1) hour of pay for every two (2) hours of accumulated balance for the first 1,200 hours, up to a maximum of 600 hours total.

An employee may convert his or her sick leave credit balance to cash under the provisions of this Article only once.

Section 4. Transferring Sick Leave Credit An employee who transfers to CADAS from another public agency in Ohio shall be credited with the unused balance of his/her accumulated sick leave upon written verification of the accrued time, provided that the time between periods of public service does not exceed ten (10) years.

## **ARTICLE 43 - WAGES**

Union Position: The parties have agreed upon the wages for the first year of the Agreement, which have already been implemented. The Union proposes wage re-openers in

October of the second and third years of the Agreement when the finances for those years are clearer. The Union objects to the Employer's proposal that the Union accept parity with the wages determined for the non-organized employees in the second and third years of the Agreement. The parity proposed by the Employer is not parity with another bargaining unit, and therefore will not be the result of any negotiation. The Union seeks an opportunity to bargain on wages rather than accepting the wages as unilaterally determined by the Employer for non-bargaining unit employees.

Employer Position: The Employer proposes that rather than enduring the time and expense of a wage re-opener so soon after concluding the initial Agreement, the Union agree to accept parity with the wages as determined by the Employer for the remaining non-bargaining unit employees in the last two years of the Agreement. The Employer is, as is everyone, in difficult economic circumstances. It will nonetheless do what it can on wages in the second and third years of the Agreement for this group as well as all other employees. This is preferable over what could be a protracted re-opener.

Discussion: Wages for the first year of the Agreement from January to December, 2009 have been agreed upon and implemented. The sole issue with regard to wages is whether the parties should re-open to bargain concerning wages for the second and third years of the Agreement, or the Union should accept parity with the wages which the Employer determines it will provide to the remaining non-bargaining unit employees during that time period. As the Union points out, the parity which the Employer is proposing is not parity with the negotiated wages of another bargaining unit, but rather parity with the Employer's unilateral determination as to the wages of the unrepresented majority of its employees. While the former type of parity allows one union to piggy back on the bargaining efforts of another, this proposal in essence eliminates the recently won right to bargain as to wages for two of the three years of the collective bargaining agreement. Despite the preference to not undergo the time and expense involved in a wage re-opener, under the circumstances it is the best available solution. In the

current economic climate it is clearly unwise to lock in wages for the future. It is instead appropriate to examine the status of the Employer's finances in each year of the Agreement to determine the appropriate wages at that time.

Recommendation: Article 43 Wages should include the following language:

The parties will re-open to negotiate wages for the second and third years of this Agreement on October 1, 2009 and October 1, 2010.

#### **ARTICLE 44 - HEALTH BENEFITS**

Union Position: The Union proposes that the specifics of the employee's health insurance premium and benefits should be spelled out in Agreement so that the employees' health insurance benefits and obligations are spelled out in the Agreement. Since these employees are part of the Montgomery County health plan which has not yet negotiated rates for the second and third years of the Agreement, the Union proposes a re-opener in the second and third years of the Agreement to negotiate and set insurance contributions. The Union further proposes an increase in the life insurance benefit from its current amount equal to the employee's salary to \$50,000.00 per employee. This benefit is of great value and assistance to the families of employees, but of relatively low cost to the Employer.

Employer Position: The Employer reiterates its contentions regarding wages with regard to health insurance and life insurance. It objects to a re-opener upon the basis that re-openers are time consuming and expensive. Further, since this group is not subject to conciliation under the Collective Bargaining statute, it may be difficult to close the re-opener expeditiously. With regard to the increase in the life insurance benefit, this constitutes an additional cost which cannot be justified in the current economic environment.

Discussion: The parties agree that health insurance will continue to be provided as part of the Montgomery County health plan, and further acknowledge that rates cannot be determined for the second and third years of the Agreement until rates are determined by the carrier in conjunction with the County wide Insurance Committee, in which the Union is an active

participant. Although the Employer is reluctant to participate in a re-opener as to insurance, there does not appear to be any other way to set insurance rates for the remaining two years of the Agreement while maintaining the Union's right to bargain about benefits, an issue central to the reasons for which employees organize. The Employer has not presented any compelling reason for not including the acknowledged current benefits and contribution rates in the Agreement.

The testimony presented at hearing was that the increased life insurance benefit would benefit all employees of the bargaining unit who would have the same life insurance. The cost to the Employer for the proposed increased benefit is \$1,000. per year. This, unlike the tuition reimbursement increase, is an item of minimal cost which benefits all members of the bargaining unit, and would provide additional security to the families of all.

Recommendation: Article 44 Health Benefits should read as follows:

Section 1. Eligibility and Coverage All employees, excepting part-time (working thirty-two (32) hours or less per week), temporary, seasonal, and intermittent employees, shall be entitled to participate in the County's group health programs in accordance with the County's Section 125 Plan.

The Employer will contribute the following amounts to employees eligible for the waiver who choose to waive medical coverage: Employee with no eligible dependents: \$57.50 monthly for an annual total of \$690.00. Employee with one eligible dependent: \$90.00 monthly for an annual total of \$1,080.00. Employee with two or more eligible dependents: \$120.00 monthly for an annual total of \$1,440.00.

Employees may contribute to the Flexible Spending Account, either the Health Care Account or the Dependent Care Account or both, by redirecting a portion of their pre-tax income. Such salary redirection will be subject to all provisions of IRS Chapter 125.

Section 2. Employees who elect healthcare coverage will pay according to the following schedule:

Coverage Level	Monthly Payroll Deduction	
	Effective 7-1-08	
Employee Only	Enhanced	Value
	\$44.00	\$11.00
Employee + 1	\$88.00	\$22.00
Family	\$138.00	\$35.00

The Employer will contribute the difference between the fully insured equivalent for the level of coverage elected by the employee and the employee's monthly payroll deduction.

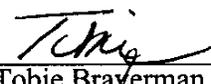
The parties will re-open negotiations in October, 2009 and October, 2010 to set contribution rates for the second and third contract years.

Section 3. The Employer will provide \$50,000 of group term life insurance to all employees, excepting part-time (working thirty-two (32) hours or less per week), temporary, seasonal and intermittent employees, for the duration of this Agreement in accordance with the Plan. The Employer will pay the entire cost of the group basic life insurance. Additionally, the Employer may provide optional supplemental term insurance which employees may choose to purchase and have the cost thereof be deducted from their normal wages through payroll deduction.

Section 4. Employee deductions and contributions will occur on a schedule of deductions, established by Montgomery County.

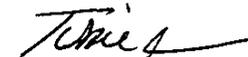
Section 5. The benefits provided for herein shall be provided through plans, programs or group coverage selected by the County.

Dated: June 15, 2009

  
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 Tobie Brayerman, Fact-Finder

## CERTIFICATE OF SERVICE

The foregoing Report and Recommendations was delivered via fax and email this 15th day of June, 2009 to, Stacey Benson-Taylor, AFSCME Staff Representative at (937) 461-9916 and [Day008@Ameritech.net](mailto:Day008@Ameritech.net) and to Brian M. Wakefield, Taft Stettinius & Hollister, LLP at (937) 228-2816 and [Wakefield@taftlaw.com](mailto:Wakefield@taftlaw.com).

  
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Tobie Braferman

## EXHIBIT A

Article 1	Purpose
Article 2	Management Rights
Article 3	Recognition
Article 4	Dues Deduction
Article 5	Union Business
Article 7	Personnel Records
Article 8	Grievance Procedure
Article 9	Labor Management Committee
Article 12	Severability/Agreement Complete
Article 13	Immunizations
Article 14	Work Rules
Article 15	Blood Donor
Article 16	Safety
Article 23	Court/Administrative Hearing Leave
Article 25	Bereavement Leave
Article 27	Subcontracting
Article 28	Probationary Employee
Article 29	Mileage and Parking
Article 35	Personal Leave
Article 36	No Strike/No Lockout
Article 37	Holidays
Article 38	Vacation
Article 40	Hours of Work
Article 45	Printing of Contract

**TOBIE BRAVERMAN**

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June 15, 2009

STATE EMPLOYMENT  
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Mr. Edward E. Turner, Administrator Bureau of Mediation  
State Employment Relations Board  
65 East State Street, 12<sup>th</sup> Floor  
Columbus, OH 43215-4213

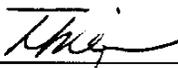
Re: Public Health Dayton & Montgomery County Board of Health and Ohio Council 8, American Federation of State, County and Municipal Employees, Local 101 Serb #07-MED-12-1258.

Dear Mr. Turner:

Enclosed please find my Report and Recommendations in the above-referenced matter.

Thank you in advance for your cooperation in this matter. If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,

  
\_\_\_\_\_  
Tobie Braverman

Enclosure