

IN THE MATTER

STATE EMPLOYMENT
RELATIONS BOARD

OF

FACTFINDING

2009 JAN 20 A 10: 20

BETWEEN THE

CLARK COUNTY BOARD OF MR/DD

AND

THE PROFESSIONAL GUILD OF OHIO

Issue: Factfinding
Date of Hearing: December 19, 2008
Location: Early Childhood Center; Springfield, Ohio
Case No: 08-MED-06-0680
Date of Award: January 15, 2009

Union Representative:

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Board Representative:

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REPORT AND RECOMMENDATIONS

Michael Paolucci
Factfinder

Administration

By letter dated October 16, 2008, from Ms. Torriero, the Attorney for the Board, the undersigned was informed of his designation to serve as Factfinder in a factfinding procedure between the Parties. On December 19, 2008, a hearing went forward in which the Parties presented testimony and documentary evidence in support of positions taken. The record was closed at the end of the hearing and the matter is now ready for a factfinding report with recommendations.

Unresolved Issues presented

The following five (5) issues were presented for factfinding:

1. Article 15 - Hours of Work and Overtime;
2. Article 16 - Wages;
3. Article 16 - Shift Differential;
4. Article 16 - Longevity Pay;
5. Article 19 - Holidays

* * *

Under R.C. 4117.14(E) & (G)(7), a Factfinder is required to give consideration to certain factors in choosing between the Parties' proposals, on an issue-by-issue basis. That statute reads as follows:

(e) The board shall prescribe guidelines for the fact-finding panel to follow in making findings. In making its recommendations, the fact-finding panel shall take into consideration the factors listed in divisions (G)(7)(a) to (f) of this section.

* * *

(G)(7) After hearing, the conciliator shall resolve the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the party's final settlement offers, taking into consideration the following:

- (a) Past collectively bargained agreements, if any, between the parties;

- (b) Comparison of the issues submitted 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;
- (c) 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;
- (d) The lawful authority of the public employer;
- (e) The stipulations of the parties;
- (f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

* * *

The unresolved issue has been addressed giving consideration to all of the necessary statutory elements.

Factual Background

The Board is responsible for providing services to mentally retarded and developmentally disabled citizens in Clark County, Ohio, an area surrounding Springfield; its approximately fifteen (15) full-time and three (3) part-time nurses are represented by the Union. The Board provides numerous services to those who qualify, and it refers to these qualifying individuals as “consumers.” The Nurses provide medical services to consumers with appropriate needs.

The Nurses in the bargaining unit are comprised of both R.N. and L.P.N licensed workers. The full-time nurses work eighty (80) hour pay periods, and the part-time nurses work either 72 or 64 hours a pay period. The Agreement between the Parties expired on September 16, 2008, and was the second collective bargaining agreement between them. Since the Board’s fiscal year is July 1st, retroactivity of wages is not at issue, and the Board concedes the fact.

The residential facilities, also referred to as cottages and family homes, operate twenty-four (24) hours a day, seven (7) days a week on three shifts. The Board also operates an adult services facility (aka “the Workshop”) and the shift in that facility is 8 a.m. to 4 p.m.

The Board focused on the economic condition of the county, state, and local governments since all of the remaining issues are economic. It cited the fact that the Board was notified that it would be losing \$469,000.00 in Adult Service funding to the Intermediate Care Facility for the Mentally Retarded (ICFMR, or residences). The cut in funding was made with only three (3) weeks notice and was followed by an additional \$343,000.00 cut in subsidies that was made in September 2008, by the Ohio Department of MRDD. These cuts are expected to continue as the State has indicated to the Board. Since all losses in funding must be made up from the unrestricted local levy monies, and since that source of revenue is difficult and limited, it contends that its financial condition is bad and getting worse.

The Board cited numerous facts to bolster its claim that the financial problems it faces are great. These include: the Federal Government has indicated a reduction in Federal Financial Participation funds of up to 18%. The Federal Financial Participation program refunds to the Board \$0.60 of every dollar the Board spends on Medicaid eligible expenses. Again, every dollar lost from this source would have to be made up from local revenue sources, and it would affect every aspect of Board operations. There is other evidence that the revenue sources that the Board has come to rely on are going away and that its economic future is dire.

The Board showed that it is doing everything it can to find new funding sources - including working with its consumers. This would include moving them from the ICFMR to other living arrangements that would allow access to federal waiver monies; but that such will

take until the end of 2009 and into 2010 before it can be done. To balance the budget, the Board predicts that it will have to reduce personnel costs by approximately 12%.

It is against this backdrop of economic problems that the issues must be considered.

Contentions of the Parties

1. Article 15 - Hours of Work and Overtime.

Current Language – The Agreement requires that all hours over 80 in a pay period or over 8 in a day be at the overtime rate (1 ½ wage).

The Board proposes language that would allow the parties to negotiate a change to the alternative method of paying overtime if an alternative schedule would be beneficial to the operation of the residence. The proposed language add to 15.3 would read:

The parties agree to negotiate a change in overtime calculation to overtime paid for hours worked in excess of forty (40) hours actually worked in a work week, if a change in scheduling is required during the life of the agreement due to changing work load operations. Appendix A will expire at that time.

The Union proposes the *status quo*.

There was also a presentation on a new electronic timekeeping system. A recommendation will be presented below.

Party Positions

The Board argues that the system locks it into a schedule of both eight (8) hour days and ten (10) work days per pay period. It points to the standard in the medical community, and to its own needs, in support of its need to change the system. It seeks flexibility so that it can assign ten (10) hour workdays, or other similar changes that would give it the ability to better cover shifts; provide services to its consumers; and to hire employees who might be more willing to work non-traditional shifts. Since it only avoids overtime with eight (8) hour days and ten (10) day schedules; and since such

unfairly restricts its abilities to manage the workforce; it proposes a change to give it more flexibility. It seeks options that would include 10 or 12 hour days, and it claims such would be vital to the financial health of the Board, and would allowed targeted staffing.

The Union opposes the changes and describes the Board's proposal as a "concession." It contends that the new language would allow the Board to unilaterally eliminate overtime for more than 8 hours in a day, and would essentially limit the Union to effects bargaining on the matter. It complains that the current system has been in place for several years, and that the overwhelming majority of members do want to work more than eight (8) hours shifts. It contends that if the bargaining unit agrees to this item, then many members feel as though they should just work for another employer with similar hours, but more pay. It asserts that this restriction is one of the major reasons these employees chose to work for this employer. It contends that the Board has offered nothing in return for giving up daily overtime, and that as a result it would be a huge concession for the Union.

Recommendation

The Union's position is one of stubborn refusal with insufficient explanation or alternatives. Indeed, it refuses to even consider allowing new hires, even those who might desire such alternative shifts, as being allowed to be assigned such shifts. This intransigence without adequate reasoning is difficult to understand, and undermines the remaining position of the Union that is otherwise reasonable. It is fair to paraphrase the

Union's position as one in which they don't want the change because they don't want the change.

As such, it is fair to find that the Board has legitimately identified a problem; has presented several alternative methods to address the issue; and that the Union has steadfastly refused to engage without any attempt at recognizing the issue as being legitimate. The Board's reasonable attempt to change the method is fair in that it is an agreement to bargain over a change. The Board identified a legitimate reasonable problem, and it proposed a change. The answer from the Union was a simple "no", which, if recommended would leave the Board with a problem that has no solution. This is not what collective bargaining is supposed to be about, and it is recommended that something be done to address the problem.

Since the current schedule is out of sync with industry standards; and since there is an admitted problem without an alternative solution to choose from, the Board's proposal must be recommended as the only choice presented that would address the legitimate problems.

The Board's proposal is recommended.

As it pertains the electronic timekeeping system, the Parties agree that the Board should be permitted to employ such a system, and the only objection from the Union was that it be done fairly and reasonably. Its position was essentially that it was not opposed, it just wanted specifics, and it wanted the system to be fair and consistent.

It is recommended that new language be added that would be expressly allow the Board to institute a "fair and consistent" electronic timekeeping system that does not

negatively impact any of the employees from their current method of being paid for time worked. Moreover, before the Board institutes such a timekeeping system, it shall notify the Union of all of the specifics 30 days in advance of its use, and the Union will have the ability to comment on the specifics. Upon institution of the electronic timekeeping system, the Union shall reserve the right to grieve the application of the system and any potential unfair or inconsistent result for six months from the expiration of the 30 day notice.

The intent is to give the Board the power to begin use with fair notice to the Union. Since the negative impact is the Union's concern, and since six (6) months should provide the Union with sufficient time to evaluate the application of the system, then the long period of grievability should give the Parties sufficient time to judge the fairness of the system.

2. Article 16 – Wages.

The City proposes wage increases of 2.25% for each year of a three (3) year Agreement.

The Union proposes wage increases of 2.75% for each year of a three (3) year Agreement.

Party Contentions

The Board contends that although the difference between proposals is not great, the difference is significant because of the impact that the add-ons like pension and worker's compensation will have based on the increase that is imposed.

The Union's position is that its proposed increase matches that provided to the non-bargaining unit members, including management. Further, the other two (2) bargaining units are

scheduled to receive wage increases between 2.5% and 4.4% over the next two (2) to three (3) years. Although the Board claimed sudden cuts in funding, it argues that it has known that some cuts were coming for at least a year. It focuses on the Board's carryover each year of more than three million dollars (\$3,000,000.00). Since this cost is relatively small, it contends that its proposal would have minimal impact on the budget.

Recommendation

It is recommended that the bargaining units receive a 2.5% wage increase in each year of a three (3) year Agreement; but that such be increased to 2.75% upon the Parties reaching an agreement under the Hours of Work and Overtime issues. The Union's case is difficult to ignore on the internal comparables. This is mitigated by the fact that this bargaining unit has such a lock on the schedule. Until the Board receives more flexibility in the schedule, and thereby obtains the ability to save some money in that regard, the otherwise justified position of the Union is without full support. Because of this lack of full support based on the entire package, it is reasonable to reduce the recommended wage increase.

3. Article 16 - Shift Differential

Current: There is no shift differential for hours worked on the weekend.

The Union proposes adding language to pay employees a shift differential for all hours worked on the weekend.

The Board proposes the *status quo*.

Party Contentions

The Union argues that weekends are precious and these nurses must work every other weekend. It contends that losing the important time during the weekends should be compensated.

The Board contends that no other bargaining unit gets this benefit, and that the tough economic times do not support such a large, new benefit. Since the nurses signed up for this job knowing it was a twenty-four (24) hour operation, then there is no reason for this benefit.

Recommendation.

There is sympathy for the Union's position, and it has some attraction in a different economic climate. It has no justification during this contract period.

4. Article 16 – Longevity.

Current: Employees receive \$35.00 per year, for each year of service after 10 years. So an employee with 10 years of services receives Longevity Pay of \$350.00; and that amount increases by \$35.00 each year thereafter.

The Union proposes changing this benefit so that the employee would receive \$40.00 per year increases after fifteen (15) years; and \$50.00 per year increases after 20 years; and \$60.00 per year increases after 25 years. This change would mirror the UAW Agreement

The Board describes the proposal as negligible, but would only agree if the remaining economic issues were determined in a favorable manner.

Party Contentions

The City contends that although the difference between proposals is not great, the

difference is significant because of the impact that the add-ons like pension and worker's compensation will have based on the increase that is imposed.

The Union looks to the other bargaining units, and asks that it receive the same longevity pay as those employees.

Recommendation

Because of the remaining economic issues, the Union's proposal is recommended.

4. Article 19 – Holidays

Current Language – The current language states that employees who work on a holiday will be paid the “applicable rate of pay.”

Board Proposal. The Board proposes the *status quo*.

Union Proposal. The Union proposes the *status quo*.

Party Positions

The Parties agree on the current status of the Agreement on this issue. The Board believes that the current language's proper interpretation is that employees are not *guaranteed* premium pay for a holiday unless the holiday is actually worked, and unless the time worked is over eight (8) hours in the day or eighty (80) hours in the pay period. However, the application (or past practice, depending on the position) of this language has been that employees who work a holiday receive double-time and one-half. This is based on the pay being time and one-half, plus the regular holiday pay that employees received whether they work the holiday or not.

In early 2006 the Board wrote to the Union and informed it that it intended to eliminate the practice and enforce the language “as written.” The Union responded that the zipper clause in the Agreement prevented the Board from engaging in mid-term bargaining. The issue was dropped with neither Party conceding its position.

From the inception of this set of negotiations, the Board has maintained that it will begin enforcing the Agreement as it is written. The Union disagreed that the language was ever unclear and claimed that the benefit was already being paid “as written.” For this factfinding, the Union took that position, and proposed the *status quo*. However, at the hearing the Union made a verbal proposal to “clarify” the language so that it matches the practice that is in dispute. The Union’s proposal is thus, to make the term “applicable rate of pay” to mean time and one-half when a holiday is worked.

For purposes of identifying the costs, the holiday benefit includes ten (10) holidays, each of which is staffed at the residences with between eight (8) and thirteen (13) employees scheduled over the three (3) shifts. The change would save several thousand dollars per year. The Union’s position was that the language was written as intended; and that it was applied as intended. It claims that all other bargaining units receive the benefit as it is currently paid, not as the Board claims. It only asks that it be treated the same.

Recommendation

When a past practice is inconsistent with clear language, arbitral authority supports a method for nullifying the past practice and enforcing the language as written. The recognized authority requires the Party who wants the clear language to be enforced, and who wants to nullify the past practice, to notify the opposing side of this intent. The notification is to be

provided before or during negotiations for a new agreement, and the purpose is to make the language applicable “as written” upon the signing of a new agreement.

Once this notice is provided, it is incumbent on the opposing party to either obtain a clarification of the language during negotiations, or to leave the language unchanged. If new language is negotiated (either consistent with the practice, or otherwise changed) it is enforced in the new Agreement. If the language is not changed, the past practice is nullified and any claims that the opposing party might have under the past practice argument are lost.

Presumably, this is the objective of the Board in this case. It notified the Union of its intent, and it is incumbent on this Union to either obtain new language, or it will waive the argument. Moreover, although the Union made a verbal proposal regarding a clarification of the disputed language, the undersigned does not have a copy of that proposal.

A review of the current language supports an interpretation consistent with the Board’s position. The employees receive Holiday Pay regardless of whether they work. They then, if they work the holiday are, by contract, to be paid the “applicable rate of pay” which is fairly interpreted to mean their then current rate of pay, and overtime if justified by the number of hours worked. Double time and one-half is an exceptional rate of pay, and if the Parties intended this benefit, it is reasonable to expect that it would have been more explicit, and better clarified. It was not, and the Union’s position lacks support. Therefore, the Parties’ positions must be evaluated as if the current benefit were really double time if the Holiday is worked, and only double time and one-half if the remaining work hours justify overtime.

Thus, the Board’s position must be interpreted as wanting the *status quo* (through nullification of the practice), and the Union’s position is that a “new” benefit (matching the practice) be provided. Because it is not uncommon for employees to receive this benefit in the

form of double time and one-half, the Union proposal is not outrageous. It just must be evaluated as a “new” benefit in a time of economic trouble. While the Union’s proposal might have traction in non-troubled economic times, it is not today. The Union has received an unexpected benefit in the form of the Board’s improper application of the language, and should accept the benefit it received as being an extra that was not actually negotiated. Since this negotiation must treat that prior practice as being a gift, then it has no support as a continued benefit. If the Union were to continue the benefit, it would have to provide better justification, or a cost savings in another area to the Board. Lacking such an offer here, the Union’s proposal must be rejected, and the Board’s proposal for the *status quo* to have the meaning as originally intended must be recommended.

The only *caveat* and unclear fact is whether the remaining bargaining units get paid for worked holidays the same as this bargaining unit has been in the past, or whether they have been paid like the City proposes here. Whatever the true fact, this bargaining unit should not be treated differently.

It is recommended that the Board’s position be adopted, but that new language be added that states that this bargaining unit will be paid the same on this benefit as the remaining bargaining units; and that if for any reason any of the other bargaining units are receiving pay based on a different calculation, then this bargaining unit shall be paid based on the same method of calculation.

Therefore, the foregoing recommendations are made.

January 15, 2009
Cincinnati, Ohio



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STATE EMPLOYMENT
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2009 JAN 20 A 10: 20

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VIA E-MAIL and REGULAR MAIL

RE: Clark County Board of MR/DD -and- Professionals Guild of Ohio
SERB Case No.: 08-MED-06-0680
Issue: Factfinding

To Each:

Enclosed please find two (2) copies each of the Factfinder's Report and Recommendations, as well as the Factfinder's Bill for the above-captioned matter. Thank for the opportunity to serve the Parties. I look forward to working with you again in the future if the occasion should so allow.

Please contact me if you need anything further.

Cordially yours,

Michael Paolucci

Cc: SERB ✓

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