

Before The State Employment Relations Board

In the Matter of Fact Finding Between the:

Butler County Board of Mental Retardation and
Developmental Disabilities

Employer

- and -

SERB Case No. 08-MED-09-0826

Professionals Guild of Ohio

Union

Appearances:

For the Employer:

Donald L. Crain, Esq.
Frost, Brown, Todd, LLC
West Chester, Ohio

For the Union:

John Campbell-Orde, Esq.
Professionals Guild of Ohio
Columbus, Ohio

REPORT AND RECOMMENDATIONS OF THE FACT FINDER

Frank A. Keenan
Fact Finder

Background

Historically, since 1967, Butler County, through the Butler County Board of MR/DD, has provided services, support, and assistance to Butler County residents who need help with a family member who is mentally retarded or developmentally disabled. The record reflects that some 1900 County residents currently receive such help and assistance from the MR/DD Board. The MR/DD Board currently provides its services, help, and assistance to County residents needing same, both directly, with Board of MR/DD employees, such as the seventy (70) plus para-professional employees in the bargaining unit involved in this proceeding, and the 17-18 professional early intervention specialist employees, also represented by the Professionals Guild of Ohio, in a separate bargaining unit,” and indirectly, by contracting with partner agencies and other entities to furnish certain of its services, help, and assistance. Services provided by the MR/DD Board include, among many others, such matters as educational support for the County’s school aged mentally retarded or developmentally disabled children; support for the families of the mentally retarded or developmentally disabled residents of the County; a wide variety of activity programs; and skills training designed to facilitate the integration of the mentally retarded and the developmentally disabled into the greater community. Thus the mentally retarded or developmentally disabled receive training in social skills; in how to maintain physical mobility; in physical exercise; and in domestic skills, such as cooking, among others. Professional early interventionists, previously referred to, provide intervention services from birth to 36 months for families and their infants who have, or at risk of, mental retardation or a developmental disability or a developmental delay. Both the MR/DD Board’s direct services and the indirect services are provided to the County’s mentally retarded/developmentally disabled residents and their families at numerous locations throughout

the County, such as workshops, residential facilities, schools, and places of employment, among others.

Process:

Pursuant to the provisions of Ohio Revised Code Section 4117.14, the undersigned was appointed as Fact Finder in the instant case. Thereafter a Fact Finding Hearing was held in Hamilton, Ohio on August 27, 2009. Prior to said hearing, the parties, the Butler County Board of Mental Retardation and Developmental Disabilities, the Employer, and the Professionals Guild of Ohio, the Union and the exclusive collective bargaining representative of the Board's para-professional bargaining unit employees, reached a tentative three year collective bargaining agreement covering years 2009 through 2011.

The Commissioners for Butler County constitute the "legislative body," within the meaning of O.R.C. Section 4117.10 (B), and accordingly, two of the three Commissioners had to approve the parties' tentative collective bargaining agreement for it to become effective. The parties' tentative agreement was submitted to the Commissioners for approval on June 4, 2009. One Commissioner moved to accept the tentative agreement, but said motion failed for lack of a second. This parliamentary procedure caused some concern as to whether the vote of June 4, 2009, constituted a "rejection" of the tentative agreement within the intendment of O.R.C. 4117.10 (B). If it did not constitute a rejection of the tentative agreement on June 4, 2009, then, pursuant to O.R.C. 4117.10 (B), ". . . the submission shall be deemed approved if the legislative body fails to act within thirty days after the public employer submits the [tentative] agreement." To avoid any such "approval" consequence, the Commissioners again formally convened on June 8, 2009. At that meeting one of the Commissioners voted to accept the parties' tentative collective bargaining agreement; two of the Commissioners voted against acceptance of the

parties' tentative collective bargaining agreement. This rejection by a majority of the legislative body, the Butler County Commissioners, set in motion the statutory impasse resolution provisions set forth in Ohio Revised Code Chapter 4117, Public Employees' Collective Bargaining, more particularly, Fact Finding, and the undersigned's appointment as Fact Finder.

At the Fact Finding hearing herein the advocate for each party submitted evidence and presented arguments in support of the "Recommendations" they urged the Fact Finder to make. Further in this regard both parties were agreed at the hearing herein that the only issue at impasse, and the only issue concerning which they sought and needed a "Recommendation from the undersigned Fact Finder was the language for Article 37. wages, subparagraph 2. of their tentative agreement. In this regard, in the course of their negotiations the parties had tentatively agreed to the following language for Article 37. Wages, paragraph 2:

"

Article 37. Wages

...

2. A two percent (2%) wage increase for 2009 will be effective the first full pay period following approval of the Contract. The interim period shall be compensated for by a lump sum equal to two percent (2%) of each classification's average salary/wage, rounded up to the nearest tens. Effective the first full pay period in January 2010 and 2011, all employees will receive two percent (2%) across the board salary increases. The 2010 and 2011 base wage increase may be greater than two percent (2%) if the base wage increase for the other PGO represented Employees is increased greater than two percent (2%) for either such year."

In reaching the “Recommendations” set forth hereinafter, the Fact Finder has taken into consideration the factors listed in divisions (G) (7) (a) through (f) of O.R.C. 4117.14, where relied upon and/or supported by the record evidence, to wit:

“O.R.C. 4117.14 (G) (7) –

“(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 Evidence and The Parties’ Arguments:

The record reflects that shortly after the enactment of Ohio’s public employee collective bargaining legislation, the para-professional staff of the County’s MR/DD Board took advantage in 1986 of their newly conferred rights to elect an exclusive collective bargaining representative to bargain their terms and conditions of employment with the MR/DD Board, said terms to be set forth in a Collective Bargaining Agreement between the Board and the Guild for the para-professional bargaining unit. In light of the fact that, since that initial Agreement, the terms of all successor agreements, except for minor changes in benefits and yearly changes in wages, have remained essentially unchanged, it is clear that in their initial Collective Bargaining

Agreement both parties bargained carefully, constructively, and most certainly, thoroughly. This fact, standing alone, is testament to what can only be characterized as an exceptionally good collective bargaining relationship over the past two decades plus, between the MR/DD Board and the Guild with respect to the terms and conditions of employment of the MR/DD Board's para-professional bargaining unit employees. The wisdom of getting off to such a sound start, and of maintaining good Labor/Management relations is also to be found in the Board's record of never having been found by the State Employment Relations Board as having engaged in any unfair labor practices, and, until now, never having to resort to the formal statutory Fact Finding procedures such as those involved here. This is so because over their two decades plus of collective bargaining the parties have not reached impasse with respect to any issue, and the legislative body, the County Commissioners, have heretofore approved all the Agreements as tentatively agreed to at the bargaining table.

Then too, especially noteworthy about the parties' past collective bargaining agreements for its para-professional employees, and the current tentative agreement for same, is their uniqueness with respect to the method of compensation of the para-professional bargaining unit. Thus, contrary to the overwhelming majority of the public sector collective bargaining agreements in Ohio, the bargaining unit here has signed on for, and agreed to, what amounts to an essentially pay-for-performance (and good attendance) compensation system, as sought by the MR/DD Board. Furthermore, neither the tentative agreement negotiated here nor any predecessor collective bargaining agreement provides for the typical annual "step" increases in pay as a component of the bargaining unit employees compensation system. This lack of the typical annual "step" increases concept saves Management money. And suffice it to say that such pay for performance and attendance compensation systems as are contained in the parties'

tentative agreement are typically fiercely resisted by Labor Organizations. Accordingly, when obtained at the bargaining table, as here, Management highly regards them, and rightly so, as they constitute a particularly strong incentivizer for employees to perform well.

I note that in November, 2008, the seventeen (17) member early intervention specialists bargaining unit and the MR/DD Board tentatively negotiated the following wage provision:

- “1. . . .
2. Effective the first full pay period in January, 2009, 2010 and 2011, all Employees will receive two percent (2) across the board salary increases. Provided, further, in January, 2010 and 2011, the two percent (2%) across the board increases will be supplemented by the same amount, if any, received by the majority of other Board professional employees.”

The record reflects that initially the County Commissioners, the “legislative body,” did not approve the parties’ tentatively agreed-to collective bargaining agreement for the early intervention specialists’ bargaining unit, citing concern that public funding could not support the contractually negotiated yearly pay increases of 2%. However, upon meeting with the MR/DD Board Superintendent and Finance Director, Ms. Hurr, and receiving assurances that the tentatively agreed to annual across-the-board wage increases of 2% were supported by projected revenue, the Commission approved the early intervention specialist’s tentative agreement in November, 2008, including perforce the annual 2% across-the-board wage increases included therein.

The record additionally reflects that all MR/DD Board staff employees not represented by any labor organization, some 126 employees in number, received annual 2% increases as well, effective January 1, 2009.

With respect to the MR/DD Board's revenue sources, the record reflects that the entirety of the Board's operations are funded from three (3) sources, to wit: (1st) a 3 mil levy first put on the ballot (and passed) in 1987. The record shows that said levy has been successfully renewed several times (thereby demonstrating taxpayer support for the work of the MR/DD Board and Management's running of the Board), and that the Board has not sought since 1987 any greater millage than the 3 mils originally voted on in 1987, the MR/DD Board opting instead to adjust to the yield of the 3 mil levy; (2nd) State of Ohio monies; and (3rd) Federal government monies. No funds from the County's General Fund go toward the MR/DD Board's expenses. The record also reflects that whereas it is unlawful for the MR/DD to direct any of its funding sources' monies for any County function other than for the duties of the MR/DD, to the contrary, it would not be unlawful to direct monies from the General Fund to the MR/DD Board for its operations. Nevertheless, no General Fund monies have in fact been sent to the MR/DD Board since 1967. An inference to be drawn is that 1967 marked the beginning of adequate funding from sources other than the General Fund commencing in 1967. Still further in this regard, the record shows that there were occasions in the 1990's when County employees working for agencies funded in whole and/or in part from the General Fund, received wage increases that MR/DD Board employees did not receive. Put another way, on these occasions, no General Fund monies were transferred to the MR/DD Board in order that the MR/DD Board's employees could receive the same pay raise received by County employees paid from the General Fund.

The record shows that since 2005 the MR/DD Board has faced a series of State funding decreases and Federal (Medicaid) funding changes, and that in response thereto the Board has made numerous changes in how it does business in order to continue to serve an increasing number of County residents needing its services despite declining resources. For example, in

budgeting for 2009, the Board decreased its planned budget for 2009 by \$3.9 million from last year, 2008. The record additionally shows that since 2005 the Board has decreased some of its direct services (which are furnished by the bargaining unit here and the early intervention specialist bargaining unit employees); encouraged users to rely on other providers for some services; and reduced existing contracts for indirect services, all cost-saving measures which since 2005 have resulted in a 27% staff reduction. Furthermore, the record reflects that in preparing its annual budgets the Board projects a budget scenario ten (10) years out, all toward the goal of maintaining a stable and highly trained direct service staff.

Additional record evidence shows that over the last 5 years the average annual increase for MR/DD para-professionals has been 2.9%. The record also shows that when compared to other County MR/DD Boards throughout the State, the para-professionals annual 2% across-the-board increase of over three years which the parties' tentative agreement provides for at Article 37, paragraph 2, serves to put the para-professionals bargaining unit modestly below the statewide average compensation increase for other County MR/DD para-professional employees performing the same kind of duties as are performed by the bargaining unit.

The record reflects that the Commissioners met on June 4 and 8, 2009, to vote for approval of, or rejection of, the parties' tentative agreement for the para-professionals..

The record shows that the MR/DD Board Superintendent addressed the Commissioners on June 4, 2009, taking on at the outset the precipitous decline in General Fund revenues since November 2008, and pointed out that "the Board of MR/DD operates with "0" [zero] County General Funds" and "if we did operate with County General Funds, we would not be here today asking for this contract to be approved." These statements; the act of bringing the tentative agreement to the Commissioners seeking its approval; the totality of the Superintendent's June 4,

2009 address; all coupled with her assurance in November, 2008 that the MR/DD Board's funding sources as projected were sufficient for the 2% sought by the professional early intervention specialists, lead inexorably to the conclusion that once again the Superintendent was seeking to assure the Commissioners that, notwithstanding the precipitous decline in General Fund revenues, the MR/DD Board's three (3) revenue sources, each separate and apart from the General Fund, were sufficient, and projected to remain so, to fund the annual 2% wage increases tentatively agreed to with the Guild. The record is devoid of evidence to show otherwise.

Counsel for the County argues vigorously that, in light of the precipitous and ongoing decline in revenues that go into the General Fund, a decline which, with the possible exception of the depression of the 1930's, is unprecedented, coupled with the gloomy economic forecasts with respect to the prospect of any trend toward the return of more normal revenue flows within the next eighteen (18) months or so, a majority of the commissioners believe that for them to approve the para-professionals tentatively agreed to annual 2% across-the-board increase for 2007, 2010, and 2011 would be contrary to, and inconsistent with the need to impose a wage freeze on unrepresented employees, and to seek cooperation for a wage freeze from the Union's represented County employees whose wages are now set in a collective bargaining agreement still in effect; inconsistent with furloughs already made, and the possibility of the need for more to come; and inconsistent with the layoffs of some County employees and the possibility of more layoffs to come. Thus the record shows that by letter dated June 4, 2009, the County Administrator wrote to all the Unions with which it had collective bargaining agreements, including perforce Guild Counsel Campbell-Orde, stating in pertinent part as follows:

“Because personnel costs make up a majority of the County’s general fund expenditures, we must respectfully request our collective bargaining units to join us in addressing the economic and fiscal crisis. For non-bargaining unit employees, we have already imposed wage and step freezes, pay reductions of highly paid production heads and senior officials, and layoffs. We are now looking at the option of furloughs, further layoffs, and reducing operating hours to cope with the situation. The new actions and strategies are expected to take effect during a period starting July 1, 2009 and extending through the calendar year of 2010.”

It was the view of a majority of the Commissioners at the June 4, 2009 Commissioner’s meeting that all of the County’s employees, as County employees, are on the same team. The press quotes the spokesman for the majority as stating that “there really shouldn’t be any reason why part of our team has to suffer, while the others prosper.” The Commissioner dissenting from this viewpoint, reports the press, argued that “the County wouldn’t be withholding pay raises for General Fund departments if the General Fund were in the black and MR/DD were in the red.” This dissenter further argued, states the press, that the Commissioners “shouldn’t be painting the funds that are different with the same brush. Other funds [such as the MR/DD Board’s dedicated 3 mil levy] that have absolutely nothing to do with the General Fund should be looked at separately.” The record reflects that at the Commissioners’ June 4th meeting, the minority spokesman, who moved to approve the parties’ tentative agreement, additionally stated that the Commissioners should be looking to the specific revenue source funding the employees in question here, and the projections with respect thereto, in determining whether to approve the parties’ contract. Doing so the tentative agreement warranted approval. The majority spokesman retorted that whatever the source, it was taxpayer monies and the taxpayer can’t pay anymore.

At the hearing herein, Counsel for the Guild indicated that the Guild was unwilling to reopen the Guild's Contract for the professional early intervention specialists for the making of concessions, and unwilling to modify the parties' tentative agreement for the para-professionals, principally because the personnel costs of both bargaining units were in no way dependent on the General Fund, and since 2005 the MR/DD Board has trimmed personnel to accommodate decreases in its separate funding sources, which remain adequate, both presently and through 2011, according to the Superintendent's projections, projections for which she has consistently and historically been correct. In sum, in light of the view taken by two of the three Commissioners to reject the parties' tentative agreement, Counsel Crain urges that the undersigned recommend a two (2) year base wage freeze, with a reopener on base wages sixty (60) days prior to January 1, 2011. Counsel argues that wage freezes at the County level are the norm all over Ohio. Collective bargaining contracts that have come up for review at the County level throughout Ohio have been frozen. Counsel points out that Counties rely on sales tax revenue for the majority of County employee compensation, and since the economic downturn hit full stride in late 2008, most County budgets statewide are down 15-20%, Butler County is no different, asserts Counsel.

Counsel for the Guild, however, urges the undersigned to recommend the parties' tentative agreement concerning Article 37. Wages, paragraph 2, fully set forth hereinabove. He concurs with the minority view put forth at the Commissioner's June 4, 2009 meeting. The Guild argues in effect that notwithstanding the crisis with respect to the General Fund's revenue, since the MR/DD Board, and perforce the compensation of the para-professional bargaining unit involved here is funded totally independent of the General Fund. Hence, argues the Guild, the crippled state of the County's General Fund is simply of no relevance here. Rather, argues the

Guild, the three funding sources which fund the MR/DD and the bargaining unit involved here, are, as the Superintendent indicated, financially sound; projected to remain so, despite the severity of the economic downturn; and adequate to fund the three years of 2% wage increases tentatively agreed to. Additionally, argues the Guild, internal comparables favor and support the parties' tentatively agreed to 2% increases, that is, the MR/DD Board's professional bargaining unit has already received the same increases the guild urges be recommended here..

Rationale For The Fact Finder's Recommendation:

Both parties emphasize the "ability to pay" statutory factor. This makes sense since in the presence of ability to pay circumstances, or perhaps better put, inability/great difficulty in paying the wage sought by the labor organization, and said factor looms large with any Fact Finder, yours included, notwithstanding that the statute does not mandate any particular weight to be given to the various statutory factors to be considered. Thus were the bargaining unit funded from the General Fund, given its problems, the County would be in a strong position to succeed with the Recommendation it urges here. Directly to the point however, the unassailable fact is that the bargaining unit here (and indeed the sister professional bargaining unit) are not funded by the General Fund in any manner. Logic dictates, therefore, as the Guild argues, that the drastic state of the General Fund is, leastways as a no "ability to pay" contention, out of the case and not a relevant consideration to be taken into account here.

Implicit in the County's contention however is a larger "morale" issue, the morale of the County's team of all its employees.. Morale issues are in my view part and parcel of the statutory factor of "other factors" to be considered, as well as part and parcel of the statutory factors of the "interests and welfare of the public" and "the effect of the adjustments on the normal standard of

public service.” If ever there were public servants whose morale was a relevant factor with respect to the quality of care they give to the vulnerable segment of the public they serve, it is the bargaining unit employees here. As was observed in the course of the hearing herein, their duties require not only great skills, but a “great heart” as well. In the face of a “past practice” (another relevant statutory factor) of greater annual increases than that tentatively agreed to here, there can be no serious question but that a wage freeze for two years, and uncertainty with respect to compensation in the third year of the Contract would be greatly demoralizing. This is especially so given the avant garde and desirable (especially to Management) pay-for-performance system of compensation which is in place. One asks rhetorically, with a demoralizing pay freeze, what incentive is there for employees to put forth one’s best effort? Put another way, a wage freeze in the face of adequate non-General Fund sources, as here, puts in jeopardy the benefit to the bargaining unit of the pay-for-performance system of compensation. In my judgment the risk of demoralizing employees who serve this vulnerable public simply outweighs the, at best, only arguable “morale” issue of the bargaining unit sharing the pain of the County’s General Fund funded employees. This is especially so where, as here, the record is devoid of any evidence that the Superintendent’s judgment, with respect to the adequacy of the MR/DD Board’s funding sources for the three year increases sought here, is in error.

As for the contention that General Fund monies could, and perhaps would, be given to the MR/DD Board were the MR/DD Board’s resources inadequate, such is unpersuasive, given the “past practice” of not doing so in the past, such as in the ‘90s. Then too, since by law the MR/DD Board could not reciprocate such a gesture, it appears that the General Fund employees might themselves be demoralized by such a theoretical transfer of General Fund monies.

As for the “external comparables” statutory factor, relied on by the County, the record fails to show that the statewide trend of wage freezes the county discusses included freezes for MR/DD Board bargaining unit employees, as well as General Fund employees, apparently a consequence of the fact that MR/DD Boards are not funded by a County’s General Fund, so hard hit by the current severe economic downturn. As has been seen, some Commissioners contend that the circumstance that the MR/DD Board is funded from a dedicated fund, and not from the General Fund, is not a significant circumstance because both funds are taxpayer money. In my judgment this contention is unpersuasive, because the voters who passed, and therefore approved of the last dedicated levy, knew at the time that it would extend through to 2012.

Appreciating the fact that the Guild has boot-strapped its internal comparables argument by declining to reopen the professionals’ Contract, nonetheless some slight weight must be given to this “internal comparable” evidence, inasmuch as the Guild was not obliged to renegotiate the professionals’ Contract.

In light all the foregoing it is readily apparent that the statutory factors upon which the Fact Finder must rely clearly favor the Guild’s position, and I so find.

RECOMMENDATION:

It is recommended that the parties’ tentative agreement at Article 37. Wages, paragraph 2., fully set forth hereinabove, be set forth and contained in the parties’ Collective Bargaining Agreement.

This concludes the Fact Finder’s Report and Recommendations.

September 17, 2009

Frank A. Keenan
Fact Finder