

08-MED-10-1108

IN THE MATTER

STATE EMPLOYMENT
RELATIONS BOARD

OF

2009 JUN 15 A 10:43

FACTFINDING

BETWEEN

DEERFIELD TOWNSHIP

AND

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION 100

Hearings: May 1, 2009
SERB Case Nos.:
Date of Report: June 12, 2009
Issue: Factfinding

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REPORT AND RECOMMENDATIONS

Michael Paolucci
Factfinder

Administration

By letter dated April 6, 2009, from the Ohio State Employment Relations Board, the undersigned was informed of his designation to serve as Factfinder for the Parties. On May 1, 2009, a hearing was scheduled and mediation took place. Said mediation was unsuccessful. Following mediation, the Parties submitted the issues to the undersigned through a formal hearing. The record was closed at the end of the hearing on May 1, 2009, and is now ready for a Factfinding report.

Factual Background

The Township is located in southwestern Warren County, and is in and around the city of Mason, Ohio. It is a home rule township with approximately 33,000 residents. Its approximately five (5) road crew and maintenance employees are represented by the Union – although only three (3) are dues paying members. This is the third (3rd) contract between the Parties, and the most recent contract expired on December 31, 2008. The Township employs 55 full-time employees; and 57 seasonal and part-time employees in the Parks Department and the Fire Department.

The Township lies along the I-71 corridor that is rapidly growing just north of Cincinnati, Ohio. It is governed by a Board of three (3) Trustees and a Fiscal Officer who are all elected to four (4) year terms. The citizens of the Township are mostly professional, with a relatively high household income. The bargaining unit is in the Public Works Department, and it provides the community with construction, design and maintenance for roads; water and sewer lines; and cemeteries. *The bargaining unit also provides snow and ice control for Township roads.*

The only other bargaining unit in the Township are firefighters and both Parties used that as an internal comparable. For external comparables the Township used Liberty Township, West

Chester, Anderson Township, Colerain Township, Miami Township, Union Township, Greene County, and Warren County. The Union used counties contiguous to Warren County, and used townships of similar size (20,000 to 45,000 population) in those counties with a unionized workforce similar to the highway crews in this bargaining unit. It used the townships of Harrison, Miami, Union, Anderson, Delhi and Springfield based on this criteria, as being the only similarly sized townships with a unionized workforce.

The Township focused on the national economy and its impact on tax revenues that is expected. With the real estate market being hard hit by the recession, and because the Township depends on real estate tax revenue, it asserted that it expects declining tax revenue during the term of the new agreement. It also presented a "Consensus Economic Forecast" dated December 10, 2008 from the State of Ohio which paints a bleak picture regarding the state of Ohio's economy. In addition the Township has a road tax levy which has been one of two sources of revenues for the Road Division (the other being gas tax revenues). In 2009 the budgeted expenses exceed 2009 revenues. The Township argued that it will have to rely on reserves and transfers from its general fund to cover the deficiency. In 2009 the County will undergo its triennial reappraisal. The Township expects such to result in an additional decline in real estate tax revenue. Thus, the Township claimed that it expects lower real estate tax revenue; flat, at best, gas tax revenue; and higher labor costs and increased expenses for fuel, asphalt, and salt. It claimed that its financial shortcomings must be considered when considering the proposals.

Section 4117-9-05 of SERB's administrative rules addresses the issues that a factfinder must consider when making recommendations. That section, in pertinent part, reads as follows:

(K) The fact-finding panel, in making recommendations, shall take into

consideration the following factors pursuant to division (C)(4)(e) of section 4117.14 of the Revised Code:

- (1) Past collectively bargained agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (4) The lawful authority of the public employer;
- (5) Any stipulations of the parties;
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment. (emphasis added)

The Parties reached tentative agreement on many issues, and they are recommended as tentatively agreed to.

The following issues were presented at hearing:

1. Article 3 - Check off dues/Union Security.
2. Article 12 - Discipline.
3. Article 13 - Compensatory Time.
4. Article 21- Wages/Retroactivity

The issues will be addressed giving consideration to all of the required factors.

1.

ARTICLE 3
Check off/Union Security

The Union proposes adding new language that would provide for “fair share fee” language.

The Township opposes any “fair share provisions” and proposes the *status quo*.

There are currently five (5) bargaining unit members, and only three (3) are dues paying members.

Union Position

The Union argues that fairness requires all employees who potentially derive a benefit from the Union’s efforts should have to pay for those efforts. The administration of the Agreement is not free, and it asks that a fair fee be required of those who receive the benefit of the Union but do not pay for it. Since it is a financial burden, the Union contends that it may not be able to continue the services to those who do not pay for the benefit. It cites external comparables in four (4) of the jurisdictions that have fair share fee provisions.

Township Position

The Township believes that employees should have a free choice of whether or not to become a member of the Union, and it claims that the Union’s proposal is unreasonable in light of the fact that 60% of the bargaining unit has chosen to not pay dues. It also objects to the new language that would eliminate indemnification of the Township for the dues deductions. It argues that the lack of membership is at least partly the Union’s own fault since they engaged in “members only” bargaining, and they proposed that raises be allocated to dues paying members only. Moreover, it cites the fact that it has never processed a grievance for any non-paying bargaining unit members. Finally, it points out that the firefighters unit does not have a fair share fee provision.

RECOMMENDATION

Fair share fee proposals are rarely recommended. There are numerous reasons supporting this reluctance. These include the fact that it is the Union's burden to convince non-members to see the benefit of joining. It is better that the Union do this work by convincing reluctant non-members rather than having a third party impose the obligation. Factfinders do not know nor understand all of the workplace issues that might exist, and it would be difficult to believe that it is possible to know more through one day of a factfinding hearing. The idea is that the Union must do the convincing, and a Factfinder should only respond to identified, specific facts that would justify imposing the fair share language.

Lacking specific supporting facts that would justify including this benefit, it can not be recommended. A review of the Union's position shows that it is a very general complaint and does not involve specific facts that would justify recommending the change. The Union's position is just the ordinary fair share fee complaint about the benefit being conferred without cost to those who benefit. Even though it may be true, it is not specific enough to support a fair share fee provision in this case, and it can not be recommended.

2.

ARTICLE 12 Discipline

RECOMMENDATION

At the hearing, the Parties agreed to keep the language unchanged. Such is recommended.

ARTICLE 13
Compensatory Time

3.

The current Agreement gives the Employer the option of allowing employees to take compensatory time off in lieu of overtime (1 ½ comp time per 1 hour of overtime unless the overtime is double time when the calculation goes to 2 for 1). The maximum accrual of compensatory time is 240 hours, and is only permitted with the prior approval of the Township.

The Township proposes elimination of the benefit by ending more accrual; and by giving accrued compensatory time as cash or taken at the employees' option.

The Township also proposes changing eligibility for overtime based on the term "active status." The change would remove vacation, jury duty, compensatory time, and sick leave for purposes of calculating overtime payments.

The Union proposes *status quo* for compensatory time, and proposes adding to the overtime calculation by adding court leave to the group that counts toward overtime.

Union Position

The Union cites its comparables for proof that both compensatory time, and overtime benefits are similar to what it is proposing. The external comparables for compensatory time were universal- every other comparable jurisdiction provides it. Moreover, overtime is calculated relatively the same as the current language. The Union concedes that one (1) employee has a large amount of compensatory time used – Bill Wallace. Since he is retiring soon, it argues that the change should not be made simply because of his large use of compensatory time. Since the Township has control of when and whether compensatory is used, it contends that problems are of its own lack of control.

The Union is not opposed to changes, it just complains that the Township's position is too extreme in response to minor problems. It cites the fact that the Parks Department uses compensatory time in the same manner and if it is such a problem then it would be expected that that department would already have it changed. It asserts that both internal and external comparables justify keeping the benefit the same.

Township Position

The Township has two (2) large issues with this proposal and two (2) small. The small issues are that it takes a lot of time to track compensatory time, and it is an unfunded liability. Since it is not paid out completely until employment is separated, then it becomes an unfunded liability until the time it is paid out. The larger issues are more involved.

The Township complains that the overtime problem has to do with weather related accruals. Since most of the overtime is incurred during snow storms or wind storms, then the compensatory time off has occasionally presented coverage problems for the Township. It points out that compensatory time was eliminated for all salaried employees three (3) years ago. It contends that in the days following a snow event, the compensatory time benefit has affected its ability to provide quality service to its citizens. It contends that part of the problem is the misperception in the bargaining unit that overtime pay somehow causes tax rates to increase. Because of the mistaken belief, many bargaining unit employees will ask for compensatory time off during the same week in which the overtime is worked. Thus, when heavy snowfall occurs, the City complains that the early days of the snowfall will require overtime, and the later days will be used by the bargaining unit as compensatory time. It argues that this affects the later days of a storm when it would rather the

employees continue salting and providing service to the citizens. It complains that the benefit prevents it from providing the best possible service to its citizens.

The Township argues that it must comply with the Department of Labor regulations. Since those regulations require that compensatory time be given unless it causes an employer a “hardship” and since the term “hardship” is not easily defined, then it contends that it must grant compensatory time requests, even in the days immediately following a snowstorm when there is still plenty of work to be done. It contends that the changes it asks will address this problem.

The Township asserts that unlimited compensatory time also creates an unfunded liability where employees could allow it to accrue until retirement when they get paid at the then current wage rate. It contends that these problems all justify a complete elimination of the compensatory time benefit. Since its proposal is to allow the accrued compensatory time to be paid out or used in the future, and only eliminates the future benefit, then it argues that it is reasonable. It contends that the change needs to be made to provide better coverage for snow storms, and to remove the unfunded liability. Since it is consistent with the change made to salaried employees, it argues that it is comparable to other employees.

RECOMMENDATION

It is recommended that changes be made to the compensatory time benefit, but that its elimination is too extreme to be appropriate. The Township has identified real and persuasive problems, but its solution of complete elimination is an overreaction. Instead, it identified a problem that focused on what occurs during snowstorms, and a solution should be based on that identified

problem.

It is recommended that language be included that defines a hardship as any compensatory time that is requested within seven (7) days of a snowstorm. In this way, by defining the term the Parties are allowing the Township discretion in allowing or disallowing compensatory time requests.

The problem with Department of Labor compliance should be managed, and the Township will have better control of compensatory time. If this exception is carved out, the Township's claims regarding service coverage is eliminated. Moreover, the benefit would essentially remain with little change for the employees and this bargaining unit would remain comparable to both the internal and external comparables. These comparables are overwhelmingly in favor of having a comp time benefit – and as a result the Township's proposal is completely eliminate the benefit is without support from any perspective. To avoid this outcome, the recommendation to make minor changes is justified.

With regard to the computation of hours worked, it is improper to count compensatory time or sick time in the calculation of overtime, and it is recommended that that portion be removed from the definition of hours worked. However, holidays should remain as should scheduled vacation.

4.

ARTICLE 21 **Wages/Retroactivity**

The Union proposes a 4.5% wage increase for each year of a three (3) year Agreement. The Union also proposes that wages be made retroactive.

The Township proposes in the alternative. It proposes first that effective on the date of ratification (not retroactive) the bargaining unit would receive a 2% wage increase for the remainder

of the year plus a \$200.00 signing bonus. It proposes a wage re-opener on March 1, 2010, for April 2010 and 2011. In the alternative, it proposes automatic changes to this bargaining unit based on what all other employees in the Township might receive in years 2010 and 2011.

The Township proposes increasing the pay of new employees from \$14.46 per hour to \$16.39 per hour.

The Union pointed out that three (3) of the bargaining unit employees are making less than \$16.39 per hour, and that 2 of the 3 will not surpass \$16.39 even with the proposed 2% increase. The Township's proposal on this point would mean new hires would be paid more than bargaining unit employees.

The bargaining unit received 3.25% wage increases in the previous three (3) years of the last Agreement.

Union Position

The Union claims that the firefighters union's wage increase is the best direct comparable. Since they received a 4.5% increase for 2008, 2009 and 2010, then it argues that it deserves similar treatment. It cites comparables for evidence of what is considered fair. It claims that this bargaining unit is not overpaid, but are similarly situated. It points out that the bargaining unit has always received retroactive pay, and it claims that such is appropriate here. It agrees that January 11, 2009 is appropriate as the start day for calculating retroactivity since that is when other employees received their wage increase. Since there is no evidence that the Parties have done anything other than engage in fair collective bargaining, then it asserts that no retroactivity is unreasonable.

Township Position

The Township contends that it is not able to accurately project its financial situation in 2010 or 2011. Since it gave all other employees a 2% wage increase effective January 11, 2009, then it contends that this bargaining unit deserves the same. It contends that the comparables show that this bargaining unit is more highly compensated than nearby government employees performing the same or similar work. Since they are earning above market wages, and since they earn more than other employees in the Township, then it asserts that the Township's proposal is fair.

The Township contends that the firefighter's union is not comparable. It focuses on the fact that that bargaining unit was underpaid compared to other firefighter's in the area, thus necessitating their larger wage increase. To avoid recruiting problems, it contends that the wage was justified, and was not comparable here. Moreover, it points out that that wage increase was done over a year ago before the current economic downturn was understood. Finally, it contends that it "bought" an overtime benefit that saved it \$100,000 per year. Since the firefighters agreed to allow the use of part-time firefighters for specific reasons, then the Township saved money which justified a higher than normal wage increase. It contends that each of these facts make the firefighter's case different.

The Township argues that this bargaining unit is well paid, and will continue to be under its proposal.

RECOMMENDATION

It is recommended that the bargaining unit receive a 2.5% wage increase for one (1) year; and that a wage re-opener be made for the second (2nd) and third (3rd) year of a three (3) year agreement. As a parenthetical observation, the Township's proposal in the alternative of having this

bargaining unit's wage increase in years 2 and 3 to be tied to the remaining employees would be fair if not for the IAFF. Although the Township explained the problem with comparing this unit to that, it must be recognized that they are still getting a large wage increase in a time of turbulent economic conditions. While it may be justified for some of the wage increase, it still must be recognized that they are receiving the wage increase when the Township is asking that this bargaining unit tie their wage increase to the remaining employees who are almost guaranteed to get something much less than the IAFF. For that reason, that alternative proposal must be rejected.

In any other environment the IAFF raise would carry great weight and a higher wage increase would be justified. However, it is impossible to ignore the economic predictions that the Township presented. A modest increase is justified and should be sufficient to keep up with cost of living increases, but little else. The Parties comparables are pretty close in that the bargaining unit is paid fairly with external comparables, but such must recognize that this Township is in an area of higher wage earners than the comparables and its wages would be expected to be a little higher.

In order to consider all of the competing factors, the Township is mostly correct on the economic condition; and a small adjustment must be made because of the fairness in comparing this bargaining unit with the IAFF. To balance these competing elements, it is recommended that a 2.5% wage increase be made in the first year of the Agreement, and that a re-opener be made for the second and third year to allow the Parties to adjust the fairness of a wage increase based on the actual economic conditions that exist in those years.

As for the retroactivity, the Township's position on this issue is not reasonable. Nothing was shown to justify no retroactivity. It is well accepted in public sector collective bargaining in Ohio that retroactivity is standard unless there is evidence of bad faith bargaining. Such is difficult to

prove, and retroactivity is rarely not awarded. In this case, the Parties history shows that many Tentative Agreements were made; that the Parties met and proceeded through the steps of collective bargaining as designed by the statute; and there is absolutely nothing that would support a recommendation against retroactivity. Therefore, the Township's position on this issue must be rejected. Based on the Union's position at the hearing, the retroactivity is recommended to be back to January 11, 2009.

The Parties mutually agreed that the December 31st expiration date was inconvenient. A date of March 31, 2009 was agreed to as the new expiration date. Such is recommended.

Tentative Agreements:

All tentatively agreed to issues are incorporated herein by reference as if included in their entirety. All such tentative agreements are recommended as tentatively agreed to.

June 12, 2009
Cincinnati, Ohio



Michael Paolucci