

FACTFINDING REPORT

STATE EMPLOYMENT
RELATIONS BOARD

STATE OF OHIO

2009 DEC 11 A 11: 20

STATE EMPLOYMENT RELATIONS BOARD

December 10, 2009

In the Matter of:

The City of Broadview Heights)

and)

Broadview Heights Service)
and Recreation Workers)

Case No. 08-MED-10-1185

APPEARANCES

For the City:

William E. Blackie, III, Esq.

For the Union:

Bradric T. Bryan, Esq.

Factfinder:

Richard P. Gortz

INTRODUCTION

The Union is The Association of Broadview Heights Service and Recreation Workers, an independent, unaffiliated union. The Bargaining Unit is composed of approximately 28 employees of the City of Broadview Heights in the Recreation and Service Department. The current labor agreement was effective January 1, 2006, through December 31, 2008. The parties had several bargaining sessions and reached impasse on the terms of a follow-on agreement. The Parties selected the undersigned to conduct a fact-finding hearing. By mutual agreement, the hearing was scheduled and held on Tuesday, December 1, 2009, at 10:00 AM in the City Council conference room in City Hall.

Representing the Association was attorney Bradric T. Brian, and representing the City was attorney William Blackie, III. Both spokespersons represented their parties well and ably.

Issues at Impasse

Issues submitted to the Fact-Finder are:

Article 3, Non-Discrimination

Article 8, Seniority

Article 23, Grievance Procedure, Step 3, Loser Pays

Article 25, Health Insurance

Article 29, Wages

Article 29, Crew Leader Pay

Article 29, Shift Differential

Article 29, CDL Stipend

Article 29, Snow Plowing Standby Pay

Tentative Agreement of the Parties

Prior to fact-finding, the parties reached tentative agreement on the following:

Article 33, Drug and Alcohol Testing

Article 23, Grievance Procedure, Step 3, oral and written warnings

Article 17, Disability Leave

Article 22, Overtime

The parties suggested presentation of evidence on all unresolved issues prior to the Fact-Finder's attempting to mediate settlement. Following presentation of evidence, issues were explored with the parties and alternatives recommended. As a result of these discussions, Article 25, Health Insurance was tentatively agreed.

The above resolved issues are incorporated herein by reference.

Statutory Considerations

The recommendations of the Fact-Finder are based upon the criteria set forth in Section 4117-9-05(k) of the Ohio Administrative Rules. They are:

- (a) Past collectively bargained agreements, if any, between the parties;
- (b) 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;
- (c) The interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effects 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 mutually agreed upon dispute procedures in the public service or in private employment.

Background

The City of Broadview Heights is an outer suburban city of approximately 17,000 residents, located ten miles south of the City of Cleveland. It has a small industrial base, and generally relies upon a tax base of commercial, retail and residential development. Like political jurisdictions generally, the recession has hit the City hard. It has been forced to cut its 2009 budget more than \$860,000 as compared with the 2008 budget. Property valuation for purposes of real estate tax has been devalued approximately 7% by

the County Auditor, resulting in further income declines for next year. Budget forecasts continue to be bleak, with no turn-around visible at this time. Income tax represents nearly 2/3 of the City's revenue, and receipts from that tax has decreased almost \$300,000 this year as compared with last year at this time.

Three service department employees were laid off in the last several months, and one vacant position has not been filled, for a reduction of 12% in that department. Other departments have seen similar cuts. The Mayor testified that he had two full-time and one part-time administrative assistant positions, and now has only one full-time. Most elected officials, including Mayor Alai, have refused wage increases mandated by Charter for 2009. Non-bargaining employees have had wages frozen for 2009.

The City's health insurance premiums rose 7.6% in 2009. That increase was absorbed by the City on behalf of its employees.

Three other unions represent City employees; FOP for Police, IAAF for fire and Teamsters for city hall and administrative white-collar employees.

Fire employees' contract provides for a 2.0% increase effective July 1, 2009, with a 1% wage increase on January 1, 2010, subject to reopening at that time by either party.

Police agreement provides 2% on July 1, 2009, with the agreement expiring on December 31, 2009. Police and the City are presently in negotiations for 2010. Corrections Officers and Dispatcher bargaining unit agreement has not been resolved. A fact-finding report providing no wage increase for 2009 and 2010 with a 5% increase for dispatch and 6% for CO's effective October 1, 2011, was rejected by the Union. The Unit is awaiting final and binding conciliation. The Teamster CBA expires on January 1, 2010.

In the Recreation/Service unit, the previous agreement provided wage increases of 3% per year for 2006, 2007 and 2008.

Issues and Recommendation

Article 3, Non-Discrimination

Current Contract:

Section 3.1. The Employer and the Union recognize their respective responsibilities under Federal and State Civil Rights Laws, fair employment practice acts, and other similar constitutional and statutory requirements. Therefore, both parties hereby reaffirm their commitments not to discriminate in any manner relating to employment on the basis of race, color, creed, national origin, age, sex, disability, disabled veteran, or veteran of Viet Nam era.

City Proposal:

Section 3.1. The Employer and the Union recognize their respective responsibilities under Federal and State Civil Rights Laws, fair employment practice acts, and other similar constitutional and statutory requirements. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Ohio Civil Rights laws, Rev. Code § 4112 et seq., or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles 23) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination

Position of the Parties:

Union: Current language

City: Based upon the decision of the U.S. Supreme Court in *14 Penn Plaza*, the parties may agree to take issues of alleged discrimination to arbitration and only arbitration,

rather than the current system of the potential of arbitration and Ohio Civil Rights Commission.

Discussion:

The Supreme Court in *14 Penn Plaza* stated that where the parties had agreed, and where the contract language is clear and unambiguous, issues of alleged violation of non-discrimination laws could be taken to arbitration as an exclusive remedy. The Supreme Court did not mandate such an agreement. Civil rights laws are complex. Arbitrators have historically been confined to the “four corners of the agreement” when deciding rights cases. Should the parties strongly agree to use that venue for resolution of discrimination claims, arbitrators will comply, but such is certainly not the norm at this time.

The Union objects to this proposal, and the Fact-Finder agrees. In cases of mixed motive claims, both venues may be appropriate, but in claims of pure violation of the non-discrimination clause, the OCRC may be the best venue to resolve the issue.

Recommendation:

Current Language.

Article 8, Seniority

Current Contract

Section 8.4. In the event of a lay-off, members of the bargaining unit shall be laid-off in accordance with their departmental seniority, or "last hired, first laid-off."

City Proposal

Section 8.4. In the event of a layoff, members of the bargaining unit shall be laid-off and recalled within the affected Classification Series. Those laid off within a classification series may bump less senior members within that classification series, provided the employee has the requisite skills to perform the duties of the less senior “bumped” member. Seniority shall be considered full-time seniority with the City regardless of

how long the employee has been in the Classification Series or Department. Members shall not be permitted to bump across Classification Series. There are three (3) Classification Series: Classification Series 1 – Parks and Recreation; Classification Series 2 – Building Maintenance; and Classification Series 3 – Service. Those employees in the position of Automotive Mechanic, Maintenance Machine Operator, Construction Maintenance and Environmental Maintenance Specialist shall be in Classification Series 3. Those employees in the Position of General Mechanic shall be in Classification Series 2. Those employees in the positions of Maintenance 1st Class, Maintenance 2nd Class, Maintenance 3rd Class and Service and Recreation Department Laborer shall be in Classification Series 1, Classification Series 2 or Classification Series 3 in accordance with the employee's assignment as designated by the Service Director who shall maintain a seniority list for each Classification Series.

Position of the Parties

Union: For purposes of layoff, maintain current language and system of layoff in the bargaining unit strictly by unit seniority.

City: There are 10 classifications under this collective bargaining agreement, ranging in skill from laborer to automotive mechanic. Some classifications require CDL licenses, some require skill to maintain the City's sophisticated HVAC system, and others require experience in maintenance of equipment, trucks and autos. The CBA requires the City to layoff strictly by seniority. This system may cause the City to lose a necessary and valuable skill because the least senior employee is not in the department or classification which the City wishes to reduce. Bumping could then occur with employees displaced from their skilled jobs into jobs with which they are unfamiliar.

The City proposes a system whereby there is classification series based upon skills. Employees could bump within the class series only if they have the requisite skills to perform the job to which they are bumping.

Discussion:

This unit is composed of classifications ranging from the very skilled to entry level labor positions. Layoff by strict seniority makes little sense when the City is faced with reducing the labor force, since it may be forced to layoff a skill which is necessary to the operation of the department, and retain employees in skills which may be temporarily eliminated. Service to the residents could suffer more than necessary under the circumstances.

On the other hand, the City proposes bumping in class series only when an employee has the requisite skill to do the job immediately. The main reason to establish classification series is to put progressively more complex jobs in order so there is logic to promotion and layoff/bumping.

The Fact-Finder recommends the City position, but with bumping by seniority to lower positions within the class series. If the system works properly, employees in higher rated positions should be able to perform lower rated jobs. Accordingly, no "acid test" is necessary. Seniority is defined in Section 8.2 of this article, and does not need to be redefined in this section.

Recommendation:

Section 8.4. In the event of a layoff, members of the bargaining unit shall be laid-off and recalled within the affected Classification Series by seniority. Those laid off within a classification series may bump a less senior member ***in an equal or lower rated position*** within that classification series, ~~provided the employee has the requisite skills to perform the duties of the less senior "bumped" member. Seniority shall be considered full-time seniority with the City regardless of how long the employee has been in the Classification Series or Department.~~ Members shall not be permitted to bump across Classification Series. There are three (3) Classification Series: Classification Series 1 – Parks and Recreation; Classification Series 2 – Building Maintenance; and, Classification Series 3 – Service. Those employees in the position of Automotive Mechanic, Maintenance Machine Operator, Construction Maintenance, and Environmental Maintenance

Specialist shall be in Classification Series 3. Those employees in the Position of General Mechanic shall be in Classification Series 2. Those employees in the positions of Maintenance 1st Class, Maintenance 2nd Class, Maintenance 3rd Class and Service and Recreation Department Laborer shall be in Classification Series 1, Classification Series 2 or Classification Series 3 in accordance with the employee's assignment as designated by the Service Director who shall maintain a seniority list for each Classification Series.

Article 23, Grievance Procedure

Current contract:

Article 23, Section 2, Step 3 states, in part:

The fees and expenses of the arbitrator and the cost of the hearing room, if any, will be shared equally by the parties. Neither party shall be responsible for any of the expenses incurred by the other party.

City proposal:

The fees and expenses of the arbitrator and the cost of the hearing room, if any, will be borne by the losing party, which party shall be expressly identified in the report of the arbitrator. Neither party shall be responsible for any of the expenses incurred by the other party.

Position of the Parties:

Union: Current language

City: A "loser pays" clause will work toward keeping unwarranted and insignificant complaints from costing the City and Union money. These issues should be resolved in-house.

Discussion:

What may be insignificant or unwarranted to the one party may be an issue with broad implications and/or precedent to the other. One primary reason for grievance procedures with final and binding arbitration clauses is to ensure employees have a venue in which to resolve problems and perceived wrongs. A "loser pays" clause may deter the union from

taking an otherwise important issue to arbitration. In such a case, neither party wins because the issue is left to fester. No evidence was presented at the hearing to show that the Union has abused the arbitration clause of the CBA.

Recommendation:

Current language

Article 29, Wages

- Crew Leader Pay
- Shift Differential
- CDL Stipend
- Snow Plowing Standby Pay

Current Contract:

(in pertinent part)

Section 29.1. The following represents the top hourly wage rate for employees who have been employed by the City for three (3) or more years, have completed appropriate training programs and have completed the one (1) year probationary period:

	3%	3%	3%
	Effective	Effective	
	Effective		
	<u>01/01/06</u>	<u>01/01/07</u>	<u>01/01/08</u>
Automotive Mechanic	\$22.42	\$23.09	\$23.78
General Mechanic	\$20.91	\$21.54	\$22.19
Maint. Machine Operator	\$20.91	\$21.54	\$22.19
Construction Maintenance	\$20.91	\$21.54	\$22.19
Env. Maint. Specialist	\$19.48	\$20.06	\$20.66
Maintenance 1st Class	\$19.24	\$19.82	\$20.41
Maintenance 2nd Class	\$17.06	\$17.57	\$18.10
Maintenance 3rd Class	\$16.01	\$16.49	\$16.98

Service / Rec. Stan	\$9.70	\$9.99	\$10.29
Laborer 12 months	\$11.07	\$11.40	\$11.74

Section 29.4. Employees assigned by the Service Director or the Recreation Director to perform crew leader duties shall receive the following additional pay, per hour, for hours assigned and worked in that capacity:

- January 1, 2006 through December 31, 2006- \$1.50
- January 1, 2007 through December 31, 2007 -\$1.60
- January 1, 2008 through December 31, 2008 - \$1.70

Section 29.6. "Shift Differential" - Employees scheduled to work the following shifts shall be entitled to the following shift differential per hour for such hours scheduled and worked:

- January 1, 2006 through December 31, 2006 - \$0.80 (Night shift (3rd shift) only – generally 11pm -7am)
- January 1, 2007 through December 31, 2007- \$1.00 (Second and Third shift)
- January 1, 2008 through December 31, 2008 -\$1.10 (Second and Third shift)

Section 29.7. Full-time employees shall be reimbursed for licensing, certifications and/or training fees necessary for the performance of their job (i.e. HVAC, Applicators license, Mechanic Certifications). This reimbursement is not for CDL or drivers licenses or other like licensing and/or certification requirements. Prior approval of the Service Director is required and employees must pass licensing and/or certification requirements to be reimbursed.

Section 29.8. Employees in the Sewer Department and the Environmental Maintenance Specialist assigned standby during non-scheduled hours of work and required to be available for immediate response shall be entitled to an additional thirty dollars (\$30.00) per week when so assigned effective January 1, 2006 and thereafter. These sums shall be considered add-ons and shall be excluded from any and all economic calculations based

on wages. Employees who are assigned standby under this section shall also be paid for time actually worked at their applicable rate of pay. Employees so assigned under this Section who are not available to respond or do not respond within thirty (30) minutes when so notified shall forfeit payment for that week and may be subject to disciplinary action depending on the individual circumstances. In the event more than one (1) standby situation is required, the greater weekly stipend shall be paid.

Section 29.11. Service Department shall be subject to the following seasonal snow removal standby procedure:

1. No later than November 1st of any given year, Management will identify the seasonal dates which will constitute the standby period.
2. The beginning date will be no later than November 15th. The beginning of a pay period will be normal. The ending date will be March 15. The end of a work week will be used.
3. The standby list will be six (6) primary standby employees and six (6) secondary standby employees. In the second week, the primary standby and secondary standby crew will rotate.
4. The stipend for primary standby will be \$50.00 (fifty dollars) per week. The stipend for secondary standby will be \$30.00 (thirty dollars) per week.
5. Employees eligible for shift differential will not receive standby pay. The primary standby and secondary standby crews may be reduced in size during the period in which second and third shifts are utilized.

Any employee designated on standby status who does not report within one (1) hour of a call-in will forfeit the stipend for that week.

Union Proposal:

Section 29.1 Wages: 2.0% retroactive to 1/1/2009. Repoener for wages for 2010 and 2011.

Section 29.4 Crew Leader Pay: Increase by \$.10 each year.

Section 29.6 Shift Differential Pay: Increase by \$.10 each year.

Section 29.7 CDL License Stipend: Annual license stipend for members with a CDL-A of \$600, and CDL-B of \$500. Union proposes signing bonus in lieu of CDL stipend as an alternative.

Section 29.11 Snow Plow Crew Standby Pay: Increase stand-by snow plow from \$30/wk. to \$40/wk.

City Proposal:

Section 29.1 Wages: Freeze wages for three years. No increase in Crew Leader Pay, Shift Differential Pay. No License Stipend or signing bonus

Section 29.11. Snow Plow Call-In Pay – Reduce the call-in list from 6 on primary and 6 on secondary to 3 on primary and 3 on secondary, and pay \$40/wk to all on standby list.

Discussion:

The City's financial plight has been reviewed in the "Background" section of this report. One controlling issue is perceived "fairness" of any wage increase or wage freeze. With six bargaining units, four of which have access to final and binding conciliation, arriving at a wage package for all employees that is consistent and within the ability of the city to fund is an extremely difficult balancing act. Employees of one unit or more will undoubtedly feel slighted or cheated.

The City has claimed that any wage increase will result in lay-off of more employees. When a public entity is faced with a financial crisis, reduction of services may be necessary, and that reduction may have to be accomplished through reduction of staff. The public can not expect to have services at the same level during a financial turndown

as when the coffers were fat. Something must give, and that is a reduction in services provided to the public. Those employees who are not on layoff may expect to receive wage adjustments equivalent to those of their fellow employees. The City's proposal of a three year wage freeze cannot be recommended. While the City's financial situation may be dire at this time, no one can predict what financial health the City will be in 2010 or 2011, although a turnaround in early 2010 is unlikely.

Should this bargaining unit accept a three year wage freeze and the police and fire units receive some adjustment through negotiation or conciliation, employees in this unit would justifiably feel slighted and unfairly treated. The City opposed a proposal for reopening the agreement due to the cost of negotiations and the impasse procedure. Accordingly, as much as this Fact-Finder dislikes a "me-too" clause, it is justified in this special case.

Recommendation:

Wages:

In order to balance the City's financial plight against fairly treating the employees in this unit, I recommend that the following paragraphs be added to Section 29.1 of the CBA:

- 1) Each member of the Bargaining Unit on January 1, 2010, and who was in the bargaining unit as of January 1, 2009, shall receive a signing bonus of \$500.¹
- 2) Wage rates shall be frozen for the duration of this agreement, unless any other bargaining unit in the City receives a general wage increase through negotiation and/or action of City Council for the years 2010 and/or 2011, and then that general wage increase shall also be applied to the wage schedule above, effective at the same time as the wage increase on which it is based.
- 3)

¹ Note: This bonus is approximately 1% for 2009, but will not increase the base wage nor will it be compounded for overtime.

No change is recommended in Shift Differential Pay or Crew Leader Pay, Snow Plow Crew Standby Pay, and no CDL stipend is recommended.

Snow Stand-by Pay:

The City indicated that it is now operating with 3 primary and 3 secondary stand-by employees, and use all six on call-outs. It is recommended that only one list be created at the current stand-by pay of \$50/week. No increase in stand-by pay is recommended.

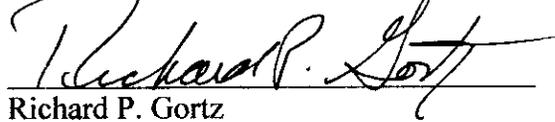
Section 29.11 is recommended to be modified as follows:

Section 29.11. Service Department shall be subject to the following seasonal snow removal standby procedure:

1. No later than November 1st of any given year, Management will identify the seasonal dates which will constitute the standby period.
2. The beginning date will be no later than November 15th. The beginning of a pay period will be normal. The ending date will be March 15. The end of a work week will be used.
3. The standby list will be six (6) primary standby employees and six (6) secondary standby employees. ~~In the second week, the primary standby and secondary standby crew will rotate.~~
4. The stipend for primary standby will be \$50.00 (fifty dollars) per week. ~~The stipend for secondary standby will be \$30.00 (thirty dollars) per week.~~
5. Employees eligible for shift differential will not receive standby pay. ~~The primary standby and secondary~~ Standby crews may be reduced in size during the period in which second and third shifts are utilized.

Any employee designated on standby status who does not report within one (1) hour of a call-in will forfeit the stipend for that week.

Respectfully submitted this 10th day of December, 2009:



Richard P. Gortz
Fact-Finder

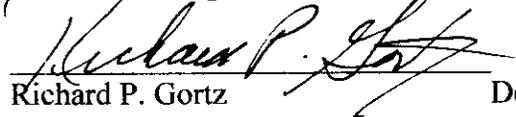
Proof of Service

I certify that an exact copy of this report has been sent by UPS Courier this 10th day of December, 2009 to the following:

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December 10, 2009