

STATE EMPLOYMENT RELATIONS BOARD

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RELATIONS BOARD

In the Matter of the Fact-finding between

2009 JUN 18 P 1:54

American Federation of State, County,

and Municipal Employees,

Employee Organization,

-and-

Shelby County Department of Job

and Family Services,

Employer.

Case No. 08-MED-11-1347

Fact-finding Report

The State Employment Relations Board notified the fact-finder of his appointment by letter dated April 14, 2009. The parties agreed to utilize mediation services in order to either reach total agreement or settle some issues and reduce the number of issues submitted in fact-finding. The fact-finding was set for, and held on, May 19, 2009, commencing at 9:00 a.m. at the Shelby County DJFS office at 227 S. Ohio Avenue, Sidney, Ohio. The hearing ended at 1:15 p.m. Joe Wilson, Staff Representative, represented AFSCME in the hearing. He was assisted by David McIntosh, Staff Representative. Frederick J. Lord, Senior Consultant, represented the DJFS. Both parties submitted considerable evidence in large three-ring binders setting for the issues, their positions, and arguments for their positions. The parties also testified and argued their positions orally to the fact-finder.

Factors

The fact-finder considered the following factors in deciding the issues in this case. Normally past collective bargaining agreements are considered. However, since this is the first agreement between these parties, it is obviously not possible to consider this factor. The second factor is to make comparisons 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 classifications involved. A third factor is the public

interest — “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.” A fourth factor is the lawful authority of the public employer. Finally, other factors were considered which are normally and 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.

The fact-finder does not consider fact-finding to be like grievance, or rights, arbitration where the arbitrator determines if there are rights in the contract that should be enforced on behalf of an employee, or the union, or the bargaining unit. In fact-finding, and interest arbitration, the fact-finder is present because the parties were unable to negotiate a collective bargaining agreement between themselves. The fact-finder should endeavor to give them the agreement they would have reached if they had not reached a bargaining impasse. This often means that issues that might appeal to a fact-finder as just and fair are not recommended because it is not likely they would be agreed to by these two parties at this time and place. This is an important consideration in Ohio fact-finding because, regardless of how a fact-finder views a particular issue, the fact-finding report must be submitted to the principals for a vote of approval. Recommendations that follow in this report should be seen in that light.

Issues

The parties resolved a considerable number of issues during their bargaining, the mediation session, and several more on the morning of the fact-finding hearing. The issues that were agreed upon, tentative agreements, were included in the employer’s fact-finding presentation behind the tab titled “tentative agreements” and were set out as articles for the contract by the union on a page under the heading ARTICLES TENTATIVELY AGREED UPON. Three were added to that list. They were vacation leave, wages, and sick leave. The parties gave the fact-finder a list of other tentative agreements including seniority, emergency closing, working out of class, management rights, insurance (health and life), and printing of contract.

The following unresolved issues were argued and submitted to the fact-finder. Sometimes an issue has sub-issues and, if one wishes to be a nit picker on detail, they might be counted separately and change the number. The issues submitted to the fact-finder included dues deduction, hours of work / overtime, layoff and recall, work rules, grievance procedure, subcontracting, holidays, leave donation, disability separation, successor clause, duration of contract.

The SERB documents for this case can be found behind the first tab in the employers presentation binder. The parties advised the fact-finder that by mutual agreement he may have thirty days from the date of the hearing to complete the fact-finding report.

Dues Deduction

AFSCME has proposed a dues deduction provision which includes payroll deduction of

membership dues, initiation fees, and assessments by the union, deduction of a fair share fee for employees who chose to not join the union, and payroll deduction of employees' voluntary contributions to AFSCME's P.E.O.P.L.E¹. program. There are these three sub-issues under this general issue of dues deductions.

There is no real difference between the parties with respect to payroll deduction of membership dues, initiation fees, and assessments. The employer's dues deduction article is well drafted and it is recommended that it be accepted except for the following additions and deletions:

The second paragraph of Section 2 shall be deleted and replaced by the following:

"Authorization cards for payroll deduction of union dues shall be submitted anytime after the signing of this agreement and shall continue in effect until such time as the employee revokes the authorization."

The third paragraph of Section 2 shall be deleted.

Add the following to the end of Section 3:

“, or such other address as designated by AFSCME in writing to the employer.”

Employers often argue that payroll deductions create additional administrative and clerical work, and they are usually right about that. To require annual authorizations of dues deductions creates an additional administrative and clerical burden on both parties. It's only purpose seems to be to make it more difficult for the union to fund its functions. As long as the state law permits it, the authorizations should be continuing until the employee revokes authorization or some other event, such as those in Section 5, occurs.

AFSCME argues it should have fair share fees deducted from those members of the bargaining unit who are not members of the union. The employer does not wish to do this. This is the real issue under "dues deduction."

The employer is probably correct that "fair share" is a permissive, not mandatory, subject of bargaining. This fact-finder finds this distinction to be not very helpful because sometimes permissive subjects of bargaining are critical to one party or the other and should be looked at carefully. This fact-finder's experience as a negotiator was to bargain anything and everything, mandatory or permissive, keeping in mind that one can always say "no." This approach is a little more problematical in public sector bargaining when binding interest impasse resolution procedures make saying "no" somewhat less effective. While the fact-finder will not recommend that "fair share" be in the contract, it is not because it is a permissive item of bargaining.

¹ Public Employees Organized to Promote Legislative Equality.

AFSCME argues that it is required to bargain on behalf of all the members of the bargaining unit and to administer the contract on behalf of all members of the bargaining unit. The union is required to file and process grievances for all members of the bargaining unit as well as to deal with various disputes which might rise between the employees and the employer. For these reasons, the fact-finder agrees it is only fair that everyone pay for the activities that the union carries on for all employees. The FOP has a fair share clause in its agreement with the Shelby County Sheriff.

The employer argues that it is unfair to require employees who chose to not support the union should have to pay fees to finance its activities which they may not see as necessary or desirable. The fact-finder finds nothing wrong with requiring those who clearly benefit from having a bargaining agent to help pay for the union's efforts. However, like many bargaining issues, this is not a question whether an argument has merit, because both parties' arguments have merit. This is a question of what the parties would likely agree to if there were no impasse and third party neutral imposing a settlement.

While the fact-finder would not say that fair share should never be recommended in a report, there should be compelling reasons for it and not just good arguments for it. Not only is it something employers feel strongly about, but it also affects other persons who have no say in the negotiations at all. It is something that may come along later in a more mature bargaining relationship between the union and employer and agreed to by them rather than imposed by an outside third party neutral. The first agreement is not the one in which a neutral should impose it. For these reasons, the fact-finder recommends against the inclusion of fair share language.²

Finally, the parties disagree on whether the employer should deduct voluntary contributions to the AFSCME P.E.O.P.L.E. program. The fact-finder does not recommend that this be included in the agreement.

The union argues that the program is voluntary and is used to support local tax levies and other community programs. This is, no doubt, true. But, the employers points out that the program also may support initiatives that the Job and Family Services agency may not support. Why, then, would the employer facilitate that?

This is something a fact-finder ought not easily recommend. One reason for this is that it can be done easily without the employer serving as a middleman. The union can prepare electronic fund transfer documents and give them to the employees to sign and submit to their banks so that monthly payments may be made from the employees' checking accounts to P.E.O.P.L.E. There is no compelling reason for it to be in the collective bargaining agreement.

² There was some consideration of continuing membership provisions and grand fathering of the current non-members but providing for a fair share fee for new hires. These were not negotiated and the fact-finder is unsure what the parties might think of them.

Hours of Work and Overtime

The parties have some common ground on this issue and some disagreement. The areas of disagreement are whether to include leaves and holidays as part of the calculation for eligibility for overtime. There is also disagreement as to whether the employee should be allowed to select between being paid for overtime or receiving compensatory time. The employer disagrees with AFSCME's proposal that voluntary overtime be offered on the basis of seniority considering ability to perform the work.

The best way to approach this tangle is one section at a time

The fact-finder recommends that the parties include Sections 1, 2, 3, 4, and 5 of the Employer's Fact-Finding Proposal on Hours of Work/Overtime article. The fact-finder also recommends the inclusion of Section 6, but some commentary on this is needed.

The fact-finder believes that the employer is correct in the assertion that Job and Family Services employees are not fungible. They are very different with different backgrounds, job requirements, experience, and skill sets. In other words, the employer cannot easily utilize an employee to do certain kinds of work. Some tasks, of course, can be done by any employee and selecting by seniority in those cases would be alright. However, while the supervisors and employees may thoroughly know and understand their job responsibilities and tasks, a fact-finder who has visited for less than a day should not be diving into this area and recommending something that may not work. If anything is done with respect to seniority in assigning voluntary overtime, it should be a negotiated settlement between the parties, not imposed by impasse resolution processes. For this reason, the fact-finder does not recommend that seniority be a factor in the assignment of voluntary overtime.

The fact-finder also recommends the inclusion of Section 7 of the employer's proposal. Again, some explanation is in order. The Shelby County Family and Social Services agency is running a serious fiscal deficit due to decreases in state funding. There has been a recession going on since December of 2007 and times are tough. One result of this is that the agency must get control of, and keep control of, its spending for overtime. The agency expects to end the fiscal year with a \$30,000 deficit and finish fiscal 2010 with a \$70,000 deficit. Belt tightening will happen. The overtime payments in 2008 totaled \$105,672.37. It is not unreasonable, and can really be expected, that the agency curb overtime as much as possible so that it can avoid a deficit. Therefore, this discussion about overtime may be time spent on something that isn't going to happen very much during the term of this agreement.

The fact-finder also recommends the inclusion of Sections 8, 9, and 10. There should not be any serious disagreement about them.

Two other matters must be dealt with here. First, the employees currently have their overtime eligibility determined by including actual hours worked, compensatory time off, hours on paid

vacation leave, and hours on paid holidays are calculated in reaching the 40 hours. Time and a half is paid for time over 40 hours, or the employee receives compensatory time at time and a half. Recognizing that this may not help keep overtime expenditures under control, the fact-finder nevertheless cannot recommend on this first contract that the employees accept a change on how their overtime is calculated even though there is not likely to be much of it during this contract. The same is true with respect to electing to take compensatory time off at time and a half in lieu of cash payment. That is also current policy and shouldn't change. Therefore, the fact-finder recommends the addition of the following to Section 4 as the third paragraph:

“Notwithstanding any provisions above, for the purposes of determining the employee’s eligibility for overtime, in calculating whether the requisite 40 hours of work is met, the calculation shall include actual time worked, compensatory time off, hours on paid vacation leave, and hours on paid personal leave. All other hours for which the employee is compensated but does not actually work shall not be included in determining eligibility for overtime.”

While the fact-finder agrees with the employer that leaves of all kinds should be dealt with in separate articles or sections and not be woven into other provisions, in this case, how these leaves are earned is appropriate for another section, but if earned and used, they will be calculated in the reaching the 40 hours.

Current practice is to allow the employee to elect to earn compensatory time in lieu of being paid cash for overtime. The current practice should be continued. Cash is the default method and the employee may elect compensatory time. Therefore, the following provision should be added to Section 4 as the fourth paragraph.

“Employees may elect to take compensatory time off in lieu of receiving cash payment for overtime at the rate of one and one-half hours off for each hour of overtime worked.”

Layoff and Recall

AFSCME wants notice of impending layoff and negotiations concerning alternatives to layoffs. AFSCME wants to prohibit the use of layoffs for disciplinary reasons. AFSCME also proposes that the employer decide which classifications in which layoffs will occur and that layoffs occur with consideration of seniority and ability to perform the work without further training. The provision also provides that if employees are relatively equal in experience, skill, ability, and qualifications, the person with the least senior classification seniority is laid off.³ AFSCME wants laid off employees to have recall rights for eighteen months after the effective date of the layoff. The

³ The fact-finder is an arbitrator, and as such, he is very fond of this provision because it is vague and complicated enough to be a full-employment clause for arbitrators. However, including a clause in a contract which is almost certain to end up in arbitration or court is not a good idea for the parties.

current recall time is twelve months. AFSCME proposes that the employer not hire new employees while laid off employees are on the recall list. There is a proposal on how to handle notice of recall, the return date, and bumping by employees who are laid off.

Needless to say, the employer is cringing from these proposals and vehemently opposes most of them for obvious reasons. Primarily the employer wishes to maintain its management right to hire, fire, and lay off, determine the size of the work force, direct the work force including who works on which jobs. We return to the fact that the work force at Job and Family Services is not a large one and the jobs performed vary widely in what is done and what an employee's experience and background should be. This is not a large factory with hundreds of blue collar workers who can more or less do most any job in the plant. To begin to restrain the employer's right to determine the kind of employee needed to get the job done, and prohibit hiring of special types of employees would cripple this kind of office.

The fact-finder is not saying that some parts of the union's proposal might not be appropriate, but the fact-finder is not qualified to wade into this morass and hand the parties a workable contract clause that deals with the union's proposals.

The fact-finder recommends that the parties include the employer's proposal⁴ in the collective bargaining agreement. It provides for a reasonable notice of an impending layoff. It is the same as the union proposal on Section 1. The employer is maintaining control of its right to determine the workforce while actually giving the union the relative ability provision.⁵ The fact-finder recommends the inclusion of Section 3, except the fact-finder recommends that the recall time be extended to eighteen months instead of the employer's recommended one year. There are some places in the work world with far more than that, in some cases recall rights are equal to the time the employee has in service when laid off. Under current circumstances, the eighteen months is not unreasonable. Sections 4 and 5 should be included. Section 6 is also recommended with some trepidation because the fact-finder does not feel the classifications were clearly outlined for him in the hearing, but noting it is a concession by the employer to do what the employer has proposed and the union does not oppose it, it is okay with the fact-finder and therefore it is recommended. As it is, it may lead to arbitration, and including the bold-faced addition in the union's Section 6 would only serve to complicate matters further.

There is nothing immoral or improper about dealing with these provisions. Negotiating partners do it all the time. But, if it is to be done, it should be by the parties through thorough preparation and understanding of the jobs, classifications, employee licenses, certifications, training, and so on. It is not a swamp that a fact-finder should wander into unless only a small issue remains so that he can have a thorough understanding of it. The fact-finder believes the employer's proposal

⁴ It has a fax line at the top showing 05-15-2009.

⁵ The fact-finder predicts this will lead to an arbitration within a short time after this contract is effective.

gives the union and its members what they need.

Work Rules

In the private sector the issue of work rules is fairly simple. The company has a management rights clause reserving its inherent management rights and then sets out explicit contractual management rights too. The management rights are limited by express terms of the contract and subject to the grievance procedure in case the union believes the company violated the contract. Usually, although not always, the company has the right to make reasonable rules and enforce them subject to the just cause discipline procedure which is part of the grievance and arbitration procedure. It works pretty well.

The dispute between the Shelby County Job and Family Services agency and AFSCME is a more complex due to the fact this is a public employer. Here is how the fact-finder sees it and following are his recommendations for contract provisions which should be included and the rationale for them.

The employer has a proposal on this issue dated May 15, 2009. The fact-finder recommends inclusion of Section 1, which really is not in dispute. Of course the employer retains its inherent management rights and those expressed here and in Article 2 on management rights (a tentative agreement) subject to express limitations imposed by the contract. Additionally, the employer also enjoys a third source of management rights, ORC 4117.08.

The fact-finder also recommends Section 2.

Section 3 starts out okay, and the fact-finder recommends the inclusion of the first two sentences. Then the proposed language becomes troublesome and unfair. The employer is proposing that it may unilaterally change a contract provision if it gives notice to the union, bargains for a while, and reaches impasse. The fact-finder does not believe the union will go through the rigors of negotiation, reach agreement, ratify it, and have its terms subject to change by mere notice and mid-term negotiation. The remainder of Section 3 should be dropped.

There are several possible changes. There might be a change which has an effect on a contract clause. In most of the world, there is no duty to bargain during the term of the agreement on matters negotiated and agreed to within the contract. In the real world, for practical reasons, parties amend their agreements, but they don't have to do so. There might be a change in a subject of bargaining that was negotiated by the parties, but no contract provision was agreed upon. There usually is a duty to bargain these subjects mid-term if there is a demand to bargain. Sometimes, when a party explicitly drops something in return for receiving something in the bargaining or in the unusual case of a well-drafted and enforceable zipper clause, there may not be a duty to bargain. There might be a change in a matter that was not bargained at all. Usually there will be a duty to bargain these matters, unless, of course, they are permissive subjects of bargaining or illegal subjects of bargaining. All of these possible scenarios are subject to the grievance procedure, unfair practice

recommends the parties develop a good bargaining relationship so that they can deal with these when and if they arise, or otherwise have them resolved in the appropriate forum.

The *Toledo* case cited by the parties is interesting. The fact-finder recommends that the parties keep it in mind and try to stay within its two-part test. The fact-finder confesses that he does not understand how any legislative body can impair the obligations of contract in light of the U.S. Constitution and the Ohio Constitution, Article II, Section 28. It is probably a good idea to follow the *Toledo* test. It is not a good idea to try to deal with all the possible disputes that may arise in the future in the collective bargaining agreement except by procedural clauses rather than substantive ones.

Section 4 should be included.

Grievance Procedure

The parties do not have much common ground on the issue of what should be in the grievance procedure. The employer pointed out that the parties more or less agreed to work from the employer's draft proposals on most issues. These drafts are well written and the fact-finder has found them useful. However, on this issue, the union has set out its own draft proposal and the parties are literally not on the same page with most of these issues. The fact-finder will draft a grievance procedure from the submissions and arguments of the parties.

Here is Section 1.

Section 1. A grievance is a dispute which the union or a bargaining unit member has concerning the interpretation, application, or alleged violation of this agreement.

This gives the union the right to bring a grievance. Collective bargaining means that the employees have decided by a majority vote to have a union represent them in matters concerning wages, hours, terms and conditions of employment. The contract represents the agreement reached by the employer and bargaining representative on certain issues. It only make sense that the union may bring a grievance in order to insure that the contract is followed and sometimes to enforce union security clauses such as dues deduction. This is a first contract, but the relationship should be mature enough that the agency management can talk to and deal with the union.

Section 2. A group of employees may file a grievance concerning the interpretation, application, or alleged violation of this agreement affecting each of them in a similar way. Such a grievance shall be defined as a group grievance. Each employee affected, grievant, shall be named in the grievance or as soon thereafter as practicable and each shall sign the grievance at Step 2 or later indicate willingness to be a grievant in the group grievance.

Group grievances make sense. They reduce the effort each side has to make to process the grievance as opposed to several single grievances. Even so, the settlement or resolution may affect one or more of them in a different way because of different circumstances even though in general their interests are similar. For that reason, it is important that each one submit to the jurisdiction and results of the grievance procedure.

Section 3. A grievance must be submitted within thirty (30) calendar days of the day on which the act or condition giving rise to the grievance occurred and the employee knew, or should have known, of the acts or conditions giving rise to the grievance. Time limits set forth in this grievance procedure shall be strictly followed. Time limits may be extended or steps waived by agreement of the parties.

The fact-finder suspects that the employer intends to strictly adhere to the time limits in this agreement. If the time limits are going to be strictly enforced, they should be large enough that a grievance can be properly prepared. This is especially true since the fact-finder also suspects that the employer will not eagerly or frequently agree to extensions of time. This clause permits the filing of continuing grievances on situations that are continuing. This is not unusual. A continuing violation may be found to have occurred in many situations. The union should recognize, however, that if an arbitrator finds a continuing violation, the remedy may be limited to the period which is within the time limits for filing the grievance. For example, improper payment may be considered from the last pay day even though it began a year ago, but back pay may be limited to the period from the last pay day and not extend beyond, or prior to, the time the grievance should have been filed. It is fine to provide that a contract may be only modified or changed by written agreement, but it is ineffectual because as Corbin and Williston will tell all law students, any contract may be amended by the parties if they make a new contract and the new contract may be oral. However, a word to the wise, an oral contract is very often only worth the paper it is written on. Best practice is to write everything down.

Section 4. A grievance must be in writing and contain the following:

1. The name of the grievant(s).
2. The grievant(s) classification(s).
3. The date the grievance is being filed.
4. The date(s) on which the grievance occurred.
5. A description of the facts and circumstances surrounding the dispute over the interpretation, misapplication, or alleged violation of this agreement including specific references to the articles, sections, and parts of the agreement allegedly violated.
6. The relief requested.
7. The signature of the grievant or union representative.

The parties discussed AFSCME submitting an official AFSCME grievance form, whatever

that is, for the submission of grievances. The fact-finder does not recommend that be in the contract. The important thing is that the grievance contain what is set out in Section 4. If the AFSCME form does that—fine. If a Wobbly form does that— fine. If they do not, it doesn't comply.

Section 5. Each grievance will be processed in the following manner:

Step 1. A grievant, employee or union, will first bring the complaint, verbally or in writing, to his/her immediate supervisor. The grievant may be accompanied by a union representative at all stages of the grievance procedure. The supervisor shall discuss the grievance with the employee, and within seven (7) calendar days of the discussion, the supervisor shall give an answer to the grievant. In the case of group grievances, the the single "grievant" above means "grievants." If the employee and/or union is not satisfied with the answer given by the supervisor, the grievant shall have the remaining days of the thirty days time limit in Section 3 to reduce the grievance to writing and advance it to Step 2 by serving a copy of the grievance on the Division Administrator, his designee, or in their absence any other supervisor. A failure of the supervisor to give an answer shall be deemed to be a denial of the grievance qualifying it for advancement to Step 2.

Step 2. Division Administrator

The Division Administrator, or his designee, upon receipt of a grievance, shall meet with the grievant and a union representative within seven (7) calendar days of receipt of the grievance. Within seven (7) calendar days after the Step 2 meeting, the Division Administrator shall give a written response to the grievance. *If the grievant and/or union are not satisfied with the written response, or if no response is given within the time limits, the grievance may be advanced to Step 3.*

Step 3. Director — Within fourteen days of written receipt of the grievance which has been advanced from Step 1 and Step 2, the parties shall meet in a Step 3 meeting with the Director, or his designee, the grievant(s), and a union representative present. The grievance shall be discussed in the meeting. Within fourteen (14) calendar days of the meeting, the Director, or his designee, shall serve a written response to the grievance upon the grievant(s) and the union representative. If the grievant and/or union is not satisfied with the Step 3 response, or if no response is given within the time limits, the

union may submit the grievance to arbitration, Step 4.

Step 4. Arbitration — Written notice of submission of the grievance to arbitration shall be served within fourteen (14) calendar days of receipt of the Step 3 response, or the last date on which it could have been served, but was not.

A representative of each of the parties shall attempt to agree upon an arbitrator. If the representatives of the parties are unable to agree upon an arbitrator, the arbitrator shall be selected in the following manner:

A request shall be made to Arbitration Mediation Services (AMS) to provide a panel list of nine (9) arbitrators. Representatives of the parties shall alternately strike names of arbitrators until only one (1) name remains. The party making the first strike shall be decided by a coin toss. Each party may reject the list one time and request another list with nine names from AMS until an arbitrator is selected.

The arbitrator shall limit his decision to the interpretation, application, or enforcement of specific articles or sections of this agreement. The arbitrator may not modify or amend the agreement.

The paragraphs 1, 2, 3, 4, setting out the powers and limitations of the arbitrator should not be included. They are redundant. Of course the arbitrator should not go outside the four corners of the contract and amend Ohio law. He should not, but he might. The parties, or a party, should then appeal the matter to a court for judicial review.

The arbitrator's decision is final and binding upon the grievant(s), union, and employer, except, of course, it is subject to judicial review. The arbitrator shall be requested to issue his decision within thirty calendar days of the close of the hearing, which is the date upon which the last document, usually a post-hearing brief, is received.

The fees and expenses of the arbitrator shall be borne by the employer and union on the following basis:

The employer to pay fifty percent (50%) and the union to pay the remaining fifty percent (50%). Each party shall pay any fees of its own representatives and witnesses.

The fees of a court reporter shall be paid by the party asking for the reporter with such fees split equally if both parties desire a reporter or request copies of a transcript. Any bargaining unit member whose

attendance is required for such hearing shall not lose pay or benefits to the extent such arbitration hearing hours are during normally scheduled working hours on the day of the hearing.

When employees covered by this agreement elect to represent themselves or hire counsel for the presentation of grievances, any adjustment of such grievances shall be consistent with the terms of this agreement or be approved by the union. The union has the right to be present at the adjustment of any grievances.

A bargaining unit employee who has been removed, suspended for more than three days, fined, or reduced in pay or a position for a disciplinary reason may file a grievance on that matter and process the grievance through Step 3. If the grieving employee is not satisfied with the employer's response at Step 3, the employee (grievant) may file an appeal with the State Personnel Board of Review under the established procedures pursuant to R.C. 134.24.

If a bargaining unit employee is disciplined and suspended for three days or less, said employee may file a grievance on that matter and, if the grievant is not satisfied with the employer's response at Step 3,

the union may submit the matter to expedited arbitration by the rules of AMS (Arbitration and Mediation Service). Disputes over discipline shall not be subject to arbitration except as provided for above in cases involving discipline of a three-day suspension or less.

If arbitrability, procedural or substantive, is an issue in a grievance submitted to arbitration, the presentations by the parties shall first address the issue of arbitrability and, after the hearing on arbitrability is concluded, the substantive issues of the grievance shall be heard by the same arbitrator. This may be done in the same hearing, but if either party requests a bifurcation of the hearing, then the arbitrator will first hear and decide the issue of arbitrability; and, then if the arbitrator finds that the grievance is arbitrable, a second hearing on the merits will be held.⁶

⁶ The arbitrator did not feel it is fair for the employer to be able to suspend an employee for up to three days and the employee would have no recourse at all. Setting aside whether it is fair, the fact-finder did not think the union would agree to something that would allow the employee to pick the unit to death with one and two day suspensions. This is why the expedited arbitration was added while giving the employee the current SPBR process. The fact-finder gave the

Hopefully this covers the waterfront on the grievance and arbitration issue.

Subcontracting

The parties differ widely on the issue of subcontracting. AFSCME wants there to be no subcontracting while any bargaining unit employees are on layoff. The union's proposal also prohibits the subcontracting of work normally performed by bargaining unit employees. The employer's proposal merely restates its obligation under the Ohio public sector collective bargaining law — if the employer exercises its right to subcontract work, a right it has short of a contract prohibition, it must meet and negotiate the effects of its decision. This would be true even if no one currently working in the bargaining unit is affected. It would seriously damage the relationship between the employees and the employer if subcontracting occurs. Even so, in the near term, the employer may need to utilize outside sources for some specialized work or to get the workload under control. Maybe outside sources will do the work for less, although long term public policy considerations would have to be considered due to the need for transparency and accountability in these services. The union's proposal is not outrageous. It is a common clause in many contracts. It is, however, not a clause ordinarily agreed to in the first contract between parties.

For all of the above reasons, the fact-finder recommends that the employer's clause be included in the contract with the deletion of the words "that would result in the layoff of any employee in the bargaining unit,".

While the fact-finder is not inclined to give the union the contract rights it is seeking, he is also not inclined to diminish the union's statutory rights.

Holidays

AFSCME wants to add Christmas Eve (½ day) as a paid holiday. The employer is opposed to this. The employer is proposing the same holidays given to all other non-bargaining unit employees and those in the other bargaining unit with the addition of one more holiday for a total of eleven paid holidays. That is enough. The fact-finder does not recommend the addition of Christmas Eve as a paid holiday.

The union wants to include paid holidays at part of the calculation of hours in qualifying for overtime. The fact-finder has recommended this in the section on overtime.

The fact-finder recommends the inclusion of the Holiday language in the union's May 11, 2009, proposal except (1) the words "11. Christmas Eve December 24 (half-day)" should be deleted and the number "12" before Christmas Day should be changed to "11." The fact-finder notes that

employer the right to insist on a bifurcated hearing if arbitrability is an issue while making it possible for the parties to try the arbitrability issue but save time and expense by moving on to the merits at the same time.

some words have a line through them and are presumed to be deleted while there are some boldfaced words that are presumably added.

Leave Donation

The fact-finder was informed at the hearing that the parties are “close” to agreement on this issue. The fact-finder encourages the parties to reach agreement on this issue and include the agreement in the collective bargaining agreement.

The fact-finder retains jurisdiction of this case to be able to make a recommendation on this issue if notified by the parties within two days of this report that they are unable to resolve this issue. If the parties do not notify the fact-finder, the fact-finder will regard his status as *functus officio* and not deal with this issue at all.

Disability Separation

AFSCME is seeking disability leave for employees who can no longer perform the essential functions of their position. The employer contends that disability leave is inappropriate for county employees because the Ohio legislature determined this type of leave is inappropriate for county employees, but is appropriate for state employees.⁷ The employer has no other bargaining unit or non-bargaining unit employee with disability leave. The employer notes that its other employees have a disability separation process available for use and it provides the employee the ability to be reinstated into a like or similar position if he can provide medical documentation of his ability to perform the work.

The fact-finder recommends the inclusion in the agreement of Section 5.11, Disability Leave Separation, from the Shelby County Employee Handbook. This allows the employees to retain the benefit they now have and does not add anything new to their benefit package. The fact-finder reasons that Section 5.11 cannot be very oppressive to the employer since the employer unilaterally drafted it before the arrival of the union and collective bargaining. By adding the section to the agreement, it will make the process subject to arbitration.

The fact-finder urges the parties in future negotiations to consider how Social Security Disability benefits and disability insurance benefits might be utilized to help employees on unpaid disability leave.

Successor Clause

AFSCME proposes a clause that will protect the bargaining unit members from losing their

⁷ Now is the time when men work quietly in the fields and women weep softly in the kitchen; the legislature is in session, and no man's property is safe." Usually attributed to Daniel Webster, but perhaps erroneously.

rights in the event the services provided by Jobs and Family Services are assumed or merged with some other County entity. This has happened in the past, and the union believes there is no guarantee it will not happen in the future.

The employer does not believe it is appropriate to pass a contract along to a successor entity that assumes the services or merges with Jobs and Family Services.

The fact-finder regards this area as a legal swampland with tall weeds and is not going to venture into it. Whether the event the union fears is one the employer has any control of is highly questionable. Moreover, the liability of a successor employer is a murky legal area too, but it is best left to the SERB and the courts if disputes arise. At this time, it is not possible to know what shape such a future entity would have and it is, therefore, not possible to draft contract language to deal with it. This is particularly true in light of the *Toledo* tests which permit legislative bodies to impair the obligations of contract, a legal concept unfamiliar to the fact-finder and outside his ability to manage.

For these reasons, the fact-finder recommends no contract language on this issue and leaves the parties to the vagaries of Ohio public sector labor law.⁸

Duration of Contract

The parties advised the fact-finder that they are “close” on this issue and no arguments were made on it. The fact-finder assumes the parties will settle it, but if they do not, he retains jurisdiction to decide it if the parties notify him within two days of this report that it remains an open issue.

Summary

The statute requires a summary of the recommendations. The summary follows here:

RECOMMENDATION The parties shall incorporate their tentative agreements from bargaining into their final agreement.

RECOMMENDATION The employer’s dues deduction proposal should be included in the final agreement except as follows:

The second paragraph of Section 2 shall be deleted and be replaced by the following sentence:

“Authorization cards for payroll deduction of union dues

⁸ Speaking of vagaries, it is equally difficult to predict the outcome of legal cases in other states, like Indiana. Ohio is not unique in that respect.

shall be submitted anytime after the signing of this agreement and shall continue in effect until such time as the employee revokes the authorization.”

Add the following clause to the end of Section 3:

“ , or such other address as designated by AFSCME in writing to the employer.”

RECOMMENDATION

No “fair share” provisions should be included in the agreement nor should there be a provision for payroll deduction of contributions for the P.E.O.P.L.E. program.

RECOMMENDATION

The employer’s proposal on Hours of Work/Overtime, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 should be included as in the final agreement except as follows:

The following language should be added to Section 4, to wit:

“Notwithstanding any provisions above, for the purposes of determining th employee’s eligibility for overtime, in calculating whether the requisite 40 hours of work is met, the calculation shall include actual time worked, compensatory time off, hours on paid vacation leave, and hour on paid personal leave. All other hours for which the employee is compensated but does not actually work shall not be included in determining eligibility for overtime.”

The following should be added to Section 4 as the fourth paragraph:

“Employees may elect to take compensatory time off in lieu of receiving cash payment for overtime at the rate of one and one-half hours off for each hour of overtime worked.”

RECOMMENDATION

The employer’s proposal on layoff and recall should be included in the final agreement, specifically Sections 1, 2, 3, 4, 5, and 6, except:

The last sentence of Section 3 should be deleted and the following sentence replace it:

“An employee shall be eligible for recall for a period of eighteen months after the effective date of the layoff.”

- RECOMMENDATION The employer's proposal on work rules should be included in the final agreement as follows, Sections 1, 2, 3 (the first two sentences), and 4 should be included, except:
- The remainder of Section 3, from the words "If the employer..." through "... waiving the employer's rights." shall be deleted and not included in the final agreement.
- RECOMMENDATION The sections drafted by the fact-finder, using the parties positions and language, on grievance and arbitration procedure should be included in the final agreement. It would be unduly redundant to set them out here, but they are clearly set out in the discussion of the issue above.
- RECOMMENDATION The employer's clause on subcontracting only has one section and it should be included in the final agreement except:
- The words "that would result in the layoff of any employee in the bargaining unit" should be deleted.
- RECOMMENDATION The union's May 11, 2009, proposal on Holiday language should be included in the final agreement except:
- The words "11. Christmas Eve December 24 (half-day)" should be deleted and the number "12" before Christmas Day should be changed to "11."
- RECOMMENDATION The fact-finder retains jurisdiction of the leave donation issue, but expects the parties to reach agreement on it within the next two days and include their agreement in the final agreement. If the parties are unable to reach agreement on the issue and notify the fact-finder of this within two days of the issuance of this report, the fact-finder will make a specific recommendation on the issue as an addendum to this report.
- RECOMMENDATION The parties should include Section 5.11, Disability Leave Separation, from the Shelby County Employee Handbook as an article in the final agreement.
- RECOMMENDATION No contract language on the successor clause should be included in the final settlement agreement between the parties.
- RECOMMENDATION The fact-finder retains jurisdiction of the issue of duration of the contract because, based upon what he was told at the hearing, the parties are "close" and will settle this issue and it is recommended their

settlement of it be included in the final agreement. If the parties are not able to settle this issue, the parties are directed to notify the fact-finder within two days of the issuance of this report and the fact-finder will exercise the retained jurisdiction and issue an addendum to this report recommending a duration of the contract.

The fact-finder requests that the parties acknowledge receipt of this report and advise the fact-finder whether the two issues he has retained jurisdiction of have been settled by the parties. This should be done as expeditiously as possible.

The fact-finder wishes to thank the parties for excellent presentations and the opportunity to serve as fact-finder in this case.

These recommendations are respectfully made this 17th day of June, 2009.

By: Donald G. Russell

Donald G. Russell, Fact-finder