

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the matter of
Fact-Finding between

CITY OF EASTLAKE
Employer

-and-

AFSCME OHIO COUNCIL 8, AFL-CIO AND
AFSCME LOCAL 3058, AFL-CIO

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SERB CASE NO. 2010-MED-09-1121

REPORT AND RECOMMENDATIONS

This matter was heard at Eastlake, Ohio on October 17, 2011. The parties' representatives are listed below:

For the Union:

Mark R. Davis
Bill Brandt
Paul Miller
Kevin W. Lesiak
Ralph Mastrocola

Staff Representative
Local President
Local 3058
Local 3058
Local 3058

For the Employer:

Sandy Conley
Michael Slocum

Employer Advocate
Finance Director

I. BACKGROUND

The Union represents a bargaining unit consisting of all full-time employees of the Service Department, plus various clerical and technical positions in other departments. Approximately 18 Service Department employees are directly affected by the issue in this proceeding. The prior Agreement between the parties had effective dates of January, 2008 through December 31, 2010. While they have negotiated numerous tentative agreements (“TA’s”) to be part of a successor agreement, the parties were unable to resolve a single issue, concerning the availability of Service Department employees for emergency call-outs.

Article 28 of the prior Agreement (“Overtime Pay/Call-Out/Standby Pay”) contains provisions governing “standby” assignments and pay. Basically these provisions allow the City to designate, at its discretion, up to four employees from the Service Department for standby assignment in anticipation of emergency or other unforeseen circumstances. Such assignments carry extra pay (two hours straight time per day on weekends; one hour straight time per day on weekdays), but require the employee to be available via phone or pager, and to remain within 30 miles from the Service Department garage. According to statements made at the hearing, the City did not utilize standby arrangements under the prior Agreement, or at any time since that agreement expired.

Apparently because it believes that standby assignments do not offer sufficient manpower under genuine emergency conditions, the City has presented a proposal for a new

contract article, "Emergency Services." The parties' inability to agree on the terms of the proposal – the Union is entirely opposed to the need for "emergency services" language in the successor agreement – has created an unresolved issue for fact-finding.

II. FACT-FINDERS REPORT

In reaching the Findings and Recommendation on the single issue at impasse, the undersigned has considered the parties' prehearing statements, oral presentations, exhibits and witness statements. Also taken into account were the factors mandated by statute:

Past collectively bargained agreements, if any, between the parties;

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;

The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

The lawful authority of the public employer;

Any stipulations of the parties;

Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of the issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

III. UNRESOLVED ISSUES

The City's proposal states:

NEW ARTICLE _____
EMERGENCY SERVICES

Section 1. In consideration of the nature of services necessary for the safety and wellbeing of residents and to maintain City systems and operations, the availability for and performance of emergency services by bargaining unit employees in the Department of Service (service, sewer and recreation) is a condition of employment. “Emergency services” as used herein means those services which are determined by the Service Director/Administration to be necessary prior to the commencement of the next regular work shift to correct an impairment/potential impairment to City services, operations or systems; and may include supplementing a shift with additional personnel. Emergency services may include snow and ice removal, snow and ice control, flood control or response to other natural disaster, or a potential pump station malfunction, etc. “Availability” for the performance of emergency services is not considered standby duty as set forth under Article 29.

Section 2. The performance of emergency service is a mandatory assignment and may not be refused or avoided. Employees must provide the employer with valid phone numbers for emergency contact and are expected to respond to such contact when it is reasonable to expect that the performance of emergency services may be imminent. Accordingly, employees who fail to be available for the provision of emergency services shall be subject to progressive discipline. Employees will not be subject to progressive discipline when advance notice of occasional unavailability has been provided to the Service Director. However, any abuse, excessive use, or patterned use of the unavailability notice shall be just cause for disciplinary action. Pre-approved vacation of two (2) consecutive work days or more will be considered notice of unavailability; employees may still be contacted, but a failure to respond to the contact will not render them as “unavailable” for purposes of this provision. Employees who request to be excused from the performance of emergency services for reasons of illness or injury when contacted may be required to provide medical evidence to justify the unavailability.

A. Positions of the Parties

City

In a prefatory “General Statement,” the City pointed to the reality that the times require governmental bodies to “tighten their belts” and “do more, or at best maintain services, with less.” The City of Eastlake is no exception, having experienced declining revenues to the point that deficit spending has been necessary in 2011. While a tax levy will help alleviate the

situation if approved in November, a \$300,000 shortfall is still anticipated. Therefore, “flexibility, efficiency, cost containment and cost reductions” are necessary.

Regarding the unsolved issue of emergency services, the City contends, contrary to the Union committee, that the standby assignment provisions of the prior Agreement did not relieve employees from being able to cover emergencies. According to the City’s prehearing statement:

“The very nature of these service provisions requires the performance of snow and ice removal, snow and ice control, flood control, response to other natural disasters, and response to potential pump station malfunction, etc., and thereby inherently includes reasonable availability for emergency response...”

The City was also insistent that the contract language include disciplinary penalties for failure to be available for emergency service work. Otherwise, it stated at the hearing, the employees might have to respond to emergency call-outs.

It was noted that the City’s proposal was originally presented as a policy; i.e. not part of the Agreement. However, after the Union committee vehemently objected to any notion of disciplinary action, the City decided to insist that the “emergency services” proposal be written into the successor agreement.

Union

In its pre-hearing statement, the Union set forth its opposition to the proposal. First, the City’s proposal would “effectively eliminate the standby provision,” by requiring immediate availability after the completion of the work day. Further the City could not provide a rationale for its proposal during the negotiations. The single example of an incident when employees allegedly failed to respond to call-outs for snowplow duty was not supported with any specifics.

The heart of the Union's position, stated in the pre-hearing statement and forcefully repeated at the hearing, was that the proposal was "punitive" in nature. That is, a strong concern of the employees was that the proposal – if ever incorporated into the successor agreement – could be used by the City administration to set them up for disciplinary action, including termination.

Thus the Union believes that existing language, particularly standby and mandatory overtime provisions, provides sufficient opportunity for the City to handle emergency situations. Such language, according to the Union, is "common throughout the public sector."

B. Findings and Recommendation

While it may be correct, as the Union contended, that the standby provisions set forth in Article 28 could be utilized to cover some emergency situations, it is not clear that these provisions are sufficient to provide the necessary manpower to cover major emergencies. By its very nature standby manpower is designed to anticipate emergencies. However, forcing the City to rely solely on standby arrangements could result in situations where the only available manpower (i.e. standby) is not sufficient to deal with unforeseen emergencies such as heavy snowstorms, flooding, etc. Even though the City could point to only one incident of Service Department employees being unavailable to handle a major snowstorm, weather and potential flooding, among other unforeseen conditions, are cause for concern in Eastlake. Thus the City presented a convincing argument for inclusion of "emergency services" language in addition to the standby provisions. Such language would create at least an expectation that Service Department employees be available for call-out in emergency situations.

The City also presented a reasonable argument for inclusion of potential discipline, in the event employees take deliberate action (shutting off their phones, for instance) to avoid a call-out. That eventuality is addressed in language from the Agreement between the City of Mentor, Ohio and Municipal, County and State Employees' Union Local 1099; included as an exhibit to the City's pre-hearing statement:

“...Failure to respond to or be available for an acceptable level of call-outs will be grounds for progressive discipline.”

On the other hand, the Union raised legitimate concerns that the language of the proposal, particularly the terminology stating that availability for emergency services as a “condition of employment,” is unduly harsh. Another concern is the manner in which the proposal could generate disciplinary action the first time an employee failed to respond to a callout. It was also important to the Union that the provisions of Article 28 concerning equalization of overtime, be taken into consideration when the City needs to cover emergency situations. Therefore, while reference to potential disciplinary action is appropriate, it is important to state that the purpose of “emergency services” language is to ensure emergency manpower, and not to provide a vehicle for punishing employees.

After considerable input from both the City and the Union, and having considered the legitimate concerns and suggestions raised by both parties, the undersigned recommends the following article covering “emergency services.”

NEW ARTICLE _____
EMERGENCY SERVICES

The parties recognize that employees may be called upon to perform emergency services separate and apart from standby duty as set forth under Article 28. Emergency services generally include work that is necessary to restore or maintain city services, operations and systems (examples are snow and ice removal; snow and ice control; flood control or response to natural disaster; pump station malfunction; response to some other unforeseen event that might affect the safety and well-being of the residents).

Employees in the Department of Service (service, recreation and sewer) are expected to be available for emergency services; and shall provide valid and up to date phone numbers (including cell phones) for emergency contact. Employees are further expected to leave their phones on and respond to calls when it is reasonably expected that the need for emergency services may be imminent. Failure to both provide valid contact information or respond, or be available for an acceptable level of emergency call-outs will be grounds for progressive discipline.

In making overtime assignments pursuant to this Article, the Employer will consider its obligations under Article 29 (equalization of Overtime).

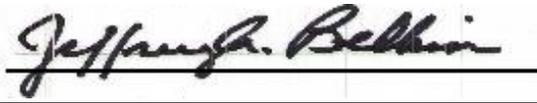
Employees who have provided an acceptable notice of unavailability, or who are on an approved vacation or other approved leave; are not expected to respond to an emergency call-out. Employees who are unavailable for emergency call-outs due to injury or illness, are expected to call in and explain their unavailability and may be required to provide medical evidence to justify their unavailability.

IV. TENTATIVE AGREEMENTS

Pursuant to the agreement of the parties, all TA's for a successor Agreement negotiated prior to this proceeding shall be incorporated in this Report and Recommendation.

Report and Recommendations issued this 24th day of October, 2011.

Respectfully submitted,

A handwritten signature in black ink, reading "Jeffrey A. Belkin", is written over a solid horizontal line.

Jeffrey A. Belkin
Fact-Finder