

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of Fact Finding	*	
Between	*	
	*	FINDINGS
MUNICIPAL CONSTRUCTION	*	AND
EQUIPMENT OPERATORS'	*	RECOMMENDATIONS
LABOR COUNCIL	*	10-MED-1635
	*	2010-MED-10-1635
and	*	Anna DuVal Smith
	*	Fact Finder
CITY OF CLEVELAND	*	
	*	

Appearances

For the Municipal Construction Equipment Operators' Labor Council:

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I. HEARING

This matter came for hearing at the Cleveland Water Division Administration Building in Cleveland, Ohio on May 31 and June 1, 2011, before Anna DuVal Smith who was appointed Fact Finder pursuant to Chapter 4117 O.R.C. Testifying on behalf of the Municipal Construction Equipment Operators' Labor Council (“MCEO”) were Scott Naelitz, Abdel Jawad, Darius Johnson, Joseph Loduca and Warren Yambor. Giving evidence for the City of Cleveland were Sharon Dumas, Rolfe Porter, Thomas Nagel, Frank John Woyma, Phillip Haddad, and Deandre Benson. Both parties were afforded a complete opportunity to examine witnesses (who were sworn or affirmed), to present written evidence, and to argue their respective positions. Pre-hearing position statements were timely filed. A stenographic record of the proceeding was made by Charles L. Butera. The oral hearing concluded at 4 p.m. on June 1, 2011, whereupon the record was closed. The parties subsequently granted the Fact Finder extensions in rendering her Findings and Recommendations.

In rendering these Findings and Recommendations, the Fact Finder has given full consideration to all reliable information relevant to the issues and to all criteria specified in §4117.14(C)(4)(e) and Rule 4117-9-05 (J) and (K) O.A.C., to wit:

- (1) Past collectively bargained agreements 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) 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.

II. BACKGROUND

Situated on the south shore of Lake Erie and the nucleus of the Greater Cleveland Metropolitan Area (population approx. 2.9 million of which Cleveland’s is 396,000¹), Cleveland

¹2010 U. S. Census estimate

has been losing population for some time, experiencing a drop of about 17 percent from the 2000 census. Its estimated median household income is \$27,761 (2009), which is 54 percent of the national household income of \$51,425. Cuyahoga County and the State of Ohio have both faced fiscal crises in recent years with the result that fewer resources have been provided. The impact of these sources on the City's General Fund are estimated losses of \$12.5 million (2011), \$23.1 million (2012) and \$29.5 million in 2013. Cuts in various other state and federal resources can also be expected to require additional support from the General Fund.

For some years the City has struggled to maintain services and a balanced budget. Austerity measures allowed the City to carry over \$26 million (5% of budget) to support a balanced budget in 2008. According to the City, it operates with more than 600 fewer full-time employees than in 2003. Additional measures were taken in 2009, but the tax budget for 2009 and 2010 still reflect \$54 million and \$63 million deficits respectively. To address this situation it took additional measures: sale of land, passing legislation to capture 100 percent of the excise tax from Cleveland Public Power, and imposing a collection fee for the City's waste collection services. To address expenditures, it imposed concessions from non-union employees: 10 days of unpaid leave and suspension of longevity payments (or equally valued alternative). It then turned to its unions. Approximately 23 of the unions agreed to the concessions including the MCEO.² The remainder (11) did not. The City then laid off 66 patrol officers and demoted 30 police supervisors.

These measures barely allowed the City to balance its 2010 budget. According to the City, 2011 poses yet another similar challenge to maintain a balanced budget as the City faces a \$25 million budget deficit. It will be receiving \$20 million for the Convention Center, but this is a one-time payment. Without it more concessions and layoffs would be necessary. As it stands, the City is not in a position to increase wages in 2011 or 2012 as the economic outlook remains poor. Moreover, the City must implement some cost-shifting measures in medical insurance.

²MCEO nevertheless filed a grievance and a lawsuit.

Turning to matters peculiar to the Water Division, perhaps the most significant is the fact that, unlike most City departments, the Water Division is funded through a separate “enterprise fund” instead of the City’s General Fund.³ The significance of this is that as population, business and service enterprises and the economy have declined, consumption of City water has abated and with it, revenues (even with a rate increase), all the while as operating expenses have continued to rise in the form of overtime and needed capital improvements to modernize its facilities and improve the water system’s aging infrastructure.

The MCEO represents approximately 90 employees in the City’s Division of Water and Division of Property Management. In July of 2007, the bargaining unit changed representation from Local 18-S of the International Union of Operating Engineers to the present one. Negotiations ensued for an initial collective bargaining agreement while status quo conditions were maintained. Agreement eluded the parties despite the fact that the City offered the same 2%-2%-2% increases for the 2007-2009 cycle the City’s other unions (but one—the Communications Workers Union) had accepted. The parties entered into fact finding in 2009 after the City’s financial position had declined. That fact finder recommended only a single 2% raise retroactive to April 4, 2009, citing the changed financial conditions and the Union’s delay in completing negotiations while pursuing unfair labor practice charges. The Union rejected that fact finder’s recommendation. A strike ensued. Twelve days later and after the City made another offer, the Union called off the strike and returned to work while the parties litigated whether there had been an agreement. Eventually the parties were able to reach a tentative agreement for the 2007-2010 cycle, but it was rejected by the bargaining unit. Further litigation ensued. A new notice to negotiate was filed for a January 1, 2011-December 31, 2013 contractual period, 10-MED-10-1635. During the winter of 2010-2011 the parties met with two

³Division of Property Management employees are funded by the General Fund rather than an enterprise fund.

different mediators and made some progress, but still had a significant number of issues to resolve.

On March 23, 2011, the undersigned was appointed fact finder. Hearing was set for April 25 and 26. Pre-hearing statements were timely filed. Mediation on April 25 disposed of a number of the 12 outstanding issues. Mediation continued on May 18. All together these efforts resolved Article 25 (Hours of Work), Article 31 (Holidays), Article 32 (Vacations), Article 33 (Call-In Pay), and Article 46 (Staffing). Those settlements are incorporated herein as if written at length. Issues remaining for the Fact Finder are Article 3 (Management Rights), Article 6 (Fair Share Fee), Article 17 (Sick Leave with Pay), Article 26 (Overtime), Article 27 (Equalization of Overtime), Article 40 (Work Rules), and Article 47 (Wages). A hearing on the unresolved issues was convened at the Water Division facility on Harvard Road in Cleveland, Ohio, on May 31 and continued on June 1.

Throughout mediation, in briefs and at hearing the City argued the following points:

1. It needs to maintain a fiscally sound operation in order to obtain funds to service debt;
2. Personnel costs (approximately 31% of all costs) continue to rise;⁴
3. It needs to reduce its operating costs in the form of limiting unnecessary, wasteful and extraordinarily high overtime costs (now 258 hours per employee) and abusive sick leave (100 hours per employee).

The Union argued that it should be treated the same as other City employees and that the City can afford to do so.

⁴1,063 employees and 24 bargaining units.

III. IMPASSE ITEMS

Article 3 - Management Rights

The language of the base contract⁵ contains the following provision regarding privatization and subcontracting:

- L) Privatize or subcontract services. At least thirty (30) calendar days prior to the award of any subcontract of bargaining unit work, the City shall notify and meet with the Union and fully disclose all the particulars concerning the subcontract, including the scope, nature and cost of the contract. Thereafter, the Union shall have ten (10) working days to present a proposal demonstrating that the bargaining unit members it represents can perform the work for the same or similar cost. If so, the City shall not subcontract the work but, instead, shall assign it to the appropriate bargaining unit classification.

In the event the Union cannot successfully compete with the subcontractor, prior to any layoff, affected employees shall be offered employment by the subcontractor. If the employee declines the offer, he shall be subject to layoff.

The City would replace this with language to require meet and confer only if subcontracting would result directly in the layoff of employees. (City Br., p. 31) Reacting to a proposal made in mediation, the Union objects to that proposals changes on two grounds: (1) the proposed language takes away rights except when layoffs result from subcontracting; current text prevents subcontracting if the Union proposes same or similar cost alternatives; the proposed text adds additional requirements of improved operating efficiency and/or better quality of service; and (2) none of the other City's bargaining units have provisions any different than what this union has. Additionally, the City admitted there was no problem which required a different solution than presently exists.

The Fact Finder recommends language developed in mediation which addresses the Union's concerns and meets the City's needs:

- L) Privatize or subcontract services. However, for subcontracting which would result directly in either the layoff of employees, or the performance of work within the jurisdiction of those employees as defined by the Cleveland Civil Service

⁵2004-2007 IUOE

Commission, the City shall follow the following process: Sixty-five (65) calendar days prior to such subcontracting the City shall meet and confer with the CEO Union on no less than a weekly basis and the City shall provide the CEO Union with a copy of its solicitation for any request for proposal, all responses to such requests, all proposals, all analysis of such proposals, and shall disclose the nature, supervisory labor costs, and costs of the proposed contract. When the City proposes to privatize or sub-contract services, the CEO Union shall have the right to make an offer of a competitive alternative. If that alternative offers equivalent or better financial benefit, equivalent or improved operating efficiency, and/or equivalent or better quality of service genuinely equivalent to or greater than those the City can achieve through subcontracting, the City shall halt its effort to privatize or sub-contract services and shall accept the CEO Union's alternative.

Should employees be subject to layoff as a result of the decision to subcontract, the City will make a good faith effort to assign those employees to vacant positions for which they are qualified or can be trained to become qualified within a reasonable period of time and submit a list of laid off employees to outside contractors.

The City and the CEO Union agree that if there is a disagreement regarding the above, including over the true value of the Union's competitive alternative (financial savings, improved efficiency, quality of service - including the payment of a living wage), the CEO Union will have the right to submit the issue of whether the CEO Union's alternative "genuinely" meets or exceed the City's objective to final and binding arbitration by requesting arbitration with the American Arbitration Association within fourteen (14) days of the expiration of the 65-day meet-and-confer period.

In the event that Cleveland declines the CEO Union's alternative or none is offered, prior to any layoff affected employees shall be offered employment by the subcontractor. If the employee declines the offer, he shall be subject to layoff. (City Ex. HH)

Article 6 - Fair Share Fee

The expired contract contains a provision requiring fair share fee deductions from all bargaining unit members when at least 65 percent of the bargaining unit are dues-paying members. The Union wishes to retain this. The City wants to eliminate the provision because, it says, the Union has continually sought to litigate its differences with the City rather than negotiate, to assert jurisdiction where jurisdiction does not exist, and to undo negotiated agreements. This creates doubt about whether the Union is willing or able to administer such a program without breaking the law. Moreover, the Union collects voluntary dues from a number of employees and remains fiscally solvent.

The Fact Finder recommends the Union's 65 percent threshold for fair share fee deductions. She is also persuaded by the litigious relationship of these parties in conjunction with the 6th Circuit case cited by the City⁶ that the City needs the protection of language developed in mediation but not agreed to therein. She therefore recommends adding the following which is based upon what the parties developed but could not fully accept at the time:

The City and the CEO Union agree that if any legal challenge is made to the terms of Article 6, Paragraph 18, both parties will defend its validity until there is a final judgment of the highest court or tribunal to which the matter may be pursued. The CEO Union agrees that its counsel will be the lead counsel during any such litigation and the City agrees that its counsel will fully cooperate in such litigation.

The CEO Union represents to the City that:

- a. Within 30 days after ratification, the CEO shall, to the extent required by R.C. §4117.09©), establish an internal rebate or advance fee reduction procedure in accordance with that section of the Ohio Revised Code;
- b. A procedure for challenging the amount of the fair share fee has been established within 30 days after ratification and will be given to each bargaining unit member who does not join the Union.
- c. Such procedure and notice shall be in compliance with all relevant state and federal laws and the Constitutions of the United State and the State of Ohio.

The City shall be permitted to challenge the constitutionality and/or legality of the CEO Union's internal rebate or advance fee reduction procedure and any notice provided to fair share fee payers through appropriate legal means, including but not limited to immediately demanding arbitration or commencing a declaratory action in a court of competent jurisdiction.

Annually, the CEO Union shall provide the City, within thirty (30) days after communicating with fair share fee payers, if any, a copy of each communication, if any, relating to the deduction of fair share fees, including but not limited to a copy of the internal rebate or advanced fee reduction procedure, provided, however, that the CEO Union may delete any information which sets forth amounts of monies the CEO Union spends in various categories or either specific information not necessary to comply with constitutional requirements.

⁶*Weaver v. City of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), City Ex. XX

Sick Leave and Absence Abuse

Article 17 - Sick Leave with Pay

The City proposes to modify several sections of Article 17. First, it would strike “fifteen (15) work days per year” from the sentence “All regular full-time employees shall be credited with paid sick leave at the rate of ten (10) hours per month or fifteen (15) work days per year.” Its rationale is that all other city employees accumulate 10 hours of sick leave per month which equates to fifteen 8-hour work days per year. The bargaining unit employees who work 12-hour shifts have, therefore, been receiving more sick leave than any other employee in the City. The City also points out that the existing language came in before the advent of the 12-hour shift.

Second, it would require employees to call off at least an hour before the start of their shift when they are utilizing sick leave. The Fact Finder should recommend this modification because it would obviate the need to hold over WPOs who have already worked their 12-hour shifts and represents a reasonable attempt to address concerns about finding a replacement.

Third, it needs verification of illness for absences if leaving work or if declining mandatory overtime, noting in particular that there have been instances when Stationary Engineers and Boiler Operators have responded to mandatory overtime assignments with all too convenient claims of illness. The City wants both verification of the illness and the need for an emergency absence.

The Union agrees with 10 hours per month and that employees need to call off “no later than one (1) hour prior to the employee’s scheduled starting time. However, in the same paragraph it proposes for “absences not reported as stated above” it would say that they “shall nonetheless be excused where they are caused by force majeure events. The employee shall document force majeure events to the employer’s reasonable satisfaction.” Then, in paragraph e it proposes “An employee who wishes to take sick leave either after reporting to work or in response to a need to work mandatory overtime may be required to supply a certificate from a licensed physician verifying the emergency situation....”

The Fact Finder recommends the City's proposals on these issues. First, there is no reasonable justification for 12-hour employees to have more sick time than their 8-hour brothers and sisters, particularly since the benefit was negotiated before the era of 12-hour shifts. Second, the Union's choice of language for paragraph c contains a phrase ("Where they are caused by force majeure events...") which is in the vocabulary of Latin teachers, priests and lawyers but few others. Third, its language about physician's verification would require verification of an emergency situation but not an illness. Therefore, since the City supported its position of suspicious claims of illness justifying such a clause and its language is simpler, its language is recommended.

An employee who wishes to take sick leave either after reporting to work or in response to the need to work mandatory overtime may be required to supply a certificate from a licensed physician verifying the emergency situation. Such certificate must be supplied within 24 hours upon returning to work unless unusual circumstances reasonably satisfactory to the City exist for granting additional time.

Article 26 Overtime and Article 27 Equalization of Overtime

The City wants several modifications to the language of the base document. First, it would make WPOs eligible for overtime pay after 40 hours in a work week rather than 12 hours in a day (§70a). Second, it would strike §71 of the base document which provides overtime pay after 8 hours worked in a day. Third, it seeks language in §74 prohibiting an employee from refusing an overtime assignment "deemed necessary for emergency or operational needs, provided that equalization of overtime efforts have been exhausted before the start of their shift." Finally, it asks the Fact Finder to endorse an agreement made in mediation to eliminate paid sick leave hours as counting for hours worked for the purposes of computing overtime (§73).

The Union's proposal is for overtime pay in excess of 8 hours worked in a 24-hour period and for all work in excess of 40 hours during a 7-day period. It would also agree to strike §71. With respect to refusing an overtime assignment it proposes:

“deemed necessary for emergency, which includes a scheduled employee calling off work less than one hour before their start time,⁷ provided that equalization of overtime efforts have been exhausted.”

The Fact Finder recommends the parties’ agreements in mediation for paragraphs 71 and 72, in paragraph 73 to state that paid sick leave does not count for computing overtime. As for paragraph 74, the Union’s proposal does not account for “operational needs” other than a scheduled employee calling off work less than 1 hour before their starting time. She also awards the City’s proposal for ¶70a to be consistent with her recommendation below on Article 40.

Article 40 - Work Rules, Policies and Directives

Paragraph 118a states “For Water Plant Operators scheduled for 12-hour shifts, the City shall increase absence abuse hours from 30 hours per quarter to 40 hours per quarter.”

The City says this language came in to address the different length of the day to benefit WPO’s who work 12-hour shifts. The City now believes that such preferential treatment is no longer justified and it points out that WPOs who work 12-hour shifts already have nearly 90 more workdays off than eight hour employees and therefore do not need as many sick leave days.

The Union opposes these changes as they are contrary to past practice and would create a real hardship for employees and members of their families. They may also be contrary to state law sick leave requirements.

The Fact Finder recommends the City’s proposals as set forth in the City’s “Final Pre-Fact Finding Unresolved Proposals” (City Ex. GG) on these issues. First, there is no reasonable justification for 12-hour employees to enjoy more sick time than their 8-hour brothers and sisters, particularly since the benefit was negotiated before the era of 12-hour shifts. Second, despite the claim of the Union to the contrary, requiring call-offs to occur at least an hour before the start of the shift provides a reasonable period of time both for the employee to know whether he requires

⁷With no reference to “operational needs.”

sick leave and for the employer to find a replacement. This proposal is also justified by the internal comparables. Finally, the City supported its claim of abuse.

Article 47 - Wages

The City offers a wage freeze in the first year of a 2-year agreement to be followed on April 1, 2012, by a 1% increase (City Ex. GG). In addition, it requests a new paragraph to read:

To receive any retroactive wage payments and negotiated wage increases employee must be active on the City's payroll on the date that the Mayor signs a collective bargaining agreement with any negotiated wage increase, retroactive or otherwise. To be considered "active on the City's payroll", an employee must have an employee status of either "Active" or "Authorized Paid Leave of Absence". An employee with an employee status of either "Retired" or "Terminated" is not entitled to retroactive wage payments and negotiated wage increases. An employee with an employee status of "Unpaid Leave", "Suspended" or "Layoff" is not entitled to any retroactive wages payments and negotiated wage increases until he or she returns to "Active" employee status. Employees on approved, paid or unpaid FMLA or military leaves are eligible for retroactive wage payments and negotiated wages increases.

The Union, pointing to a long history of pattern bargaining between the City and its unions, wants what other unions received, three years of annual 2% increases in the 2007-09 bargaining cycle to be followed by 0%-0%-3% on April 1 of a three-year collective bargaining agreement (2010-2012). In support, the Union claims the major impediment to achieving a new CBA during the previous cycle was the bargaining unit's belief that their wages in 2007 were not comparable to bargaining units in other large Ohio cities, and the City's refusal to offer its internal pattern. It also claims the City can afford to the Union's request, noting in particular the \$74 million surplus in the Water Enterprise Fund and the reduction in staff. Moreover, the City made a better offer on May 4, 2010, which would have cost (along with the 3% pattern for 2012) \$605,584. That proposal contemplated a lump sum payment and a 4% wage increase retroactive to April 1, 2009.

Discussion and Recommendation of the Fact Finder: It should go without saying that it is long past time for the parties to put the past behind them and move on. 2007-2009 is history and the current cycle is nearing its end without a complete agreement. Indeed, the City's proposal

that the Union relies upon was already nearly a year old when the Fact-Finder first met with the parties in mediation in April of 2011 and it was predicated on resolving all outstanding issues. As for the economy and Cleveland's finances, it is still far from clear what direction they are taking. Additionally, although most bargaining unit employees are paid from an enterprise fund and the Water Department has raised the price of water it provides, demand is declining and the Department has on-going, necessary capital improvement projects which depend on low interest rates. Finally, like Fact Finder Fitts before her, this Fact Finder rejects catch-up wage increases for the years in which the Union bore "considerable responsibility for the delay in completing negotiations." Thus, the recommendation on wages is 3 percent effective April 1, 2012, plus a \$1,800 lump sum payable upon ratification. She also recommends the eligibility language proposed by the City.

IV. SUMMARY OF RECOMMENDATIONS

<u>Item</u>	<u>Recommendation</u>
Article 3 Management Rights	Subcontracting as stated on page 7
Article 6 Union Security	Fair share fee at the 65% threshold with a procedure to challenge the amount and protections for the City
Article 17 Sick Leave with Pay	*10 hours/month *Delete 15 work days per year *Call off at least 1 hour before start of shift *Verification of illness and need for absence may be required
Article 26 Overtime and Article 27 Equalization of Overtime	*WPOs receive 1.5 the regular rate of pay for hours over 40 in a workweek. *Delete Section 71 *No refusals under certain circumstances. *Delete "paid sick leave hours" as "hours worked"
Article 40 Work Rules	*Delete paragraph 118a specifying 40 hours of absence abuse for WPOs.
Article 47 Wages	*3% effective April 1, 2012 *\$1,800 lump sum payable upon ratification *Eligibility clause

Respectfully submitted,



Anna DuVal Smith, Ph.D.
Fact Finder

Cuyahoga County, Ohio
February 8, 2012

CERTIFICATE OF SERVICE

I certify that on the 8th day of February, 2012, I served the foregoing Report of Fact Finder upon each of the parties to this matter by emailing a copy to them at their respective addresses as shown below:

Steward D. Roll, Esq.
George S. Crisci, Esq.

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I further certify that on the 8th day of February, 2012,, I submitted this Report by emailing it to the State Employment Relations Board at med@serb.state.oh.us.



Anna DuVal Smith, Ph.D.
Fact Finder