

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of:	:	
	:	
Teamsters Local Union No. 436	:	10-MED-12-1826
	:	
and	:	FACT FINDING REPORT
	:	FINDINGS AND RECOMMENDATIONS
	:	
The Board of Education of the Cleveland Metropolitan School District	:	February 24, 2012
	:	

APPEARANCES

For the Union:

Brian Smith, Attorney
S. Ben Barnes, Attorney
Rich Keppler, Joint Council 41 Organizer

For the Employer:

W. Michael Hanna, Attorney
Dennis Kubick, Deputy Chief Financial Officer/Comptroller
Nicholas Jackson, Deputy Chief of Business Operations
Lester Fultz, Chief of Safety & Security Department

**Daniel G. Zeiser
Fact Finder
P.O. Box 43280
Cleveland, Ohio 44143-0280
440.449.9311**

I. BACKGROUND

The Fact Finder was appointed by the State Employment Relations Board (SERB) on October 4, 2011, pursuant to Ohio Revised Code Section 4117.14(C)(3). The parties mutually agreed to extend the fact-finding period as provided under Ohio Administrative Code Rule 4117-9-05(G). The parties are the International Brotherhood of Teamsters, Local 436 (Union) and the Board of Education of the Cleveland Metropolitan School District (Employer or District). The Union represents safety and security employees of the District. The Employer is the largest school district in Cuyahoga County and one of the largest in Ohio, serving approximately 44,000 students and employing a staff of 6,631 employees. It bargains with ten (10) employee units, nine (9) for support staff and one (1) for certificated staff (teachers).

The bargaining unit consists of about 211 employees, in addition to 25 full time and 50 part time employees who are currently laid off. They are employed in the following classifications: Security Officer, Gang Task Force Officer, Dispatcher, Mobile Patrol Officer, and Investigating Counselor. The unit was represented by Local 701 of the Service Employees International Union. However, the Union won a challenged election and was certified as the exclusive bargaining representative on December 13, 2010. This fact finding is the result of the parties negotiating the initial contract. They have agreed to extend the terms and conditions of the prior agreement between the District and Local 701 while the negotiating and fact finding process continues.

II. THE HEARING

The fact-finding hearing was held on January 17 and 18 at the offices of the Federal Mediation and Conciliation Service (FMCS), 6161 Oak Tree Boulevard,

Independence, Ohio. Each party provided a pre-hearing statement. The parties used the services of the FMCS without reaching an agreement, so the Fact Finder did not attempt to mediate. During negotiations, the parties reached a number of tentative agreements on various contract provisions. The Fact Finder hereby incorporates those tentative agreements into this report.

The parties jointly introduced the following exhibit into evidence:

1. Agreement, National Conference of Firemen and Oilers, Local No. 701, SEIU Safety & Security and Board of Education for the Cleveland Municipal School District.

Additionally, the parties introduced the following exhibits into evidence:

Employer Exhibits

1. Contract with SEIU.
2. Resolution to Approve Negotiated Agreement between the City, County and Waste Paper Drivers Union Local 244, Affiliated with the International Brotherhood of Teamsters, and the Board of Education of the Cleveland Municipal School District.
3. How to Read a Five Year Forecast.
 - A. Five Year Financial Forecast September 2009.
 - B. Five Year Financial Forecast May 2010.
 - C. Five Year Financial Forecast and Summary of Significant Forecast Assumptions May 2010 Update.
 - D. Five Year Financial Forecast October 2010.
 - E. Five Year Financial Forecast and Summary of Significant Forecast Assumptions October 2010 Update.
 - F. Five Year Financial Forecast May 2011.
 - G. Five Year Financial Forecast and Summary of Significant Forecast Assumptions May 2011 Update.
 - H. Five Year Financial Forecast October 2011.
 - I. Five Year Financial Forecast and Summary of Significant Forecast Assumptions October 2011 Update.
4. Recommended Reduction in Force by Union/Group.
5. FY11 Calculation Factors.
6. April 13, 2011 Memo From Peter Raskind, Interim CEO to CMSD Staff.
7. June 9, 2011 Memo From Peter Raskind and Eric Gordon to Central Office Staff.
8. Financial Update Presented to the Board of Education September 13, 2011.
9. Board Update Presented to the Board of Education September 27, 2011.
10. Cost-Reduction Scenario Budget Analysis Fall 2011.

11. CMSD Budget Reduction Plan and Implementation Timeline Tuesday, October 18, 2011.
12. November 9, 2011 ODE letter.
13. November 17 2011 email from Bryan Dunn to Dennis Kubick.
14. Real Estate and Public Utilities Collection Information.
15. Tentative Agreement with Custodians.
16. Tentative Agreement with Building Trades and Carpenters.
17. Division of Safety & Security Job Positions.
18. Teamsters Local 436 2010-11 Longevity.
19. Safety & Security Positions.
20. Safety & Security Investigator Counselor.
21. CMSD FY2011 Fringe Benefit Table.
22. CMSD Levy History.
23. Cost Savings Day 4.62% Reduction by Union.
24. How the District Closed a \$58.4 Million Deficit.
25. Independent Accountants' Report.
26. CMSD Historical Plan Costs August 30, 2011.
27. CMSD October 2011 Five Year Forecast - before board approved reductions - if 401 teachers were not recalled.
28. CMSD October 2011 Five Year Forecast - before board approved reductions.
29. CMSD October 2011 Five Year Forecast - with board approved reductions.
30. Local 436's Proportional Share \$58.M Deficit.
31. District Counterproposal to Union's 12/29/2011 5:00 PM Proposal December 29, 2011.
32. Teamster Local Union No. 436 Proposal December 29, 2011.
33. Proposal.
34. ADA/ADM Statistics Report.
35. January 17, 2012 email re cost savings.

Union Exhibits

1. Position Statement.
2. Union January 16, 2012 Proposal.
3. CMSD December 20, 2011 Proposal.
4. CMSD Position Statement.
5. Current CBA.
6. Tentative Agreements.
7. Union Layoff Cuts Analysis.
8. CMSD October 25, 2011 Five Year Financial Forecast.
9. CMSD October 2011 Five Year Financial Forecast.
10. Cleveland Teachers Union CBA.
11. SEIU 1199 CBA.
12. Local 244 CBA.
13. Local 777 CBA.
14. Local 407 CBA.
15. Contract language.

16. Layoff/Reduction Costs for Safety & Security May 2011 to December 2011.

The District proposed four (4) issues. First, all wage rates and differentials will be reduced by 5% effective July 1, 2011. Second, longevity is to be frozen at 12:00 a.m. June 30, 2012 for all bargaining unit members hired prior to July 1, 2011. Bargaining unit members hired prior to July 1, 2011 with less than twenty (20) years, will be eligible to receive longevity compensation at his or her twenty (20) year mark and then will be frozen at the twenty (20) year mark. Any employee hired after July 1, 2011 will not be eligible at any time to receive longevity. Third, effective January 1, 2012, employee contributions shall be \$45/month for single coverage, \$110/month for family coverage, and \$160/month for family coverage with a working spouse. Fourth, the contract should expire on June 30, 2012. Current contract language should be maintained for all other provisions.

The Union proposed to freeze base wages, accept a \$35 per paycheck deduction to all full time bargaining unit employees and \$20 to all part time bargaining unit employees, for twenty-two pay periods, effective upon ratification. It agreed to accept the District's longevity proposal and adopt the proposed health care increases, though with an effective date of ratification. The Union also proposed to eliminate time and one-half for individuals working on Sundays when that is part of their regularly scheduled shift. Additionally, it suggested the contract end on June 30, 2013 and submitted the following issues:

1. Article 1, Recognition and Coverage.
2. Article 3, Rights of the Union.
3. Orientation
4. New Article, Seniority.
5. Article 5, Working Conditions.
6. Article 6, Job Protection, no subcontracting.

7. New Article, Layoff and Recall.
8. Article 8, Hours, Inspection, and Overtime Compensation.
9. Vacancies.
10. Article 22, Sick Leave and Attendance Policy.
11. Leaves of Absence.
12. Article 16, Discipline.
13. Article 17, Grievance and Arbitration.
14. Article 18, In Charge Duties.
15. New Article, FMLA.

Thus, the issues remaining at impasse for the fact-finding included:

1. Health Care.
2. Wages.
3. Duration.
4. Recognition and Coverage.
5. Part Time Employees.
6. Seniority.
7. Working Conditions.
8. Layoff and Recall.
9. Hours, Inspection, and Overtime.
10. Sick Leave.
11. Discipline.
12. Grievance and Arbitration.
13. In-Charge Duties.
14. Attendance.
15. FMLA.

The Ohio public employee bargaining statute provides that SERB shall establish criteria the Fact Finder is to consider in making recommendations. The criteria are set forth in Rule 4117-9-05(K) and are:

- (1) Past collectively bargained agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

- (3) The 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;
- (4) The lawful authority of the public employer;
- (5) Any stipulations of the parties;
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of the issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

The Fact Finder hopes the discussion of the issues is sufficiently clear to the parties. Should either or both parties have any questions regarding this Report, the Fact Finder would be glad to meet with the parties to discuss any remaining questions.

III. ISSUES AND RECOMMENDATIONS

Introduction

The District has had financial difficulties for a number of years and continues to experience them. Its property tax collection rates are at a historic low. State and federal funding for education are declining and student enrollment continues to decline. Add to this changes in Ohio's funding formula for schools and the District could lose millions of dollars this year and in future years. While revenues have decreased, costs have increased.

The District has taken a number of cost saving steps. It has closed approximately 25 schools in the last two (2) years, reduced Central Office staff, and cut discretionary spending in each department. Personnel expenses count for almost 70% of the

District's budget, so cutting other costs only goes so far. The District cannot cut the expenses needed without cutting personnel costs. As a result, it has negotiated concessions with other bargaining units to reduce these costs. Despite its cost cutting, the District faces a carryover balance of only \$100,000 from a budget of over \$600,000,000. This is much too small a balance, given the District's expenses.

Additionally, the District's projections are unfavorable. It forecasts student enrollment to fall from 40,461 in FY 2012 to 36,164 in FY 2016. This will result in a decrease in state education funding, which provides 65% of its revenues. While total state foundation revenue is projected to remain roughly the same, this includes money that the District must turn over to charter schools. When the charter school portion is excluded, revenues are predicted to fall from over \$300 million in FY 2012 to \$268 million in FY 2016. The real estate crisis hit the city of Cleveland particularly hard. There are thousands of foreclosures. During the 1990s, property tax collections were over 90%. In 2009, they fell to 84% and, in 2010, to 81%. The collection rate has fallen consistently for almost 20 years and the trend is expected to continue. The bottom line is that the District projects a deficit of \$66 million for fiscal year 2013.

The Union acknowledges that the District faces a large budget deficit. The operating budget of the Safety and Security Department was approximately \$14.5 million. During this fiscal year, the District eliminated approximately one-third (1/3) of the unit. Meanwhile, the District decided to return a number of laid off teachers, requiring further reductions to non-teaching positions. The District asked for a 5% reduction from each department effective December 1, 2011. According to the Union, the District has cut a total of about \$2.7 million from the Safety and Security

Department's budget since the end of 2010, bargaining unit employees have gone without a raise for about seven (7) years, agreed to a 4.6% wage reduction in 2010, have endured increased health care costs, and the District has already cut more than the 5% wage reduction it seeks. It contends that the projected deficit is the result of a funding problem, not an expense problem. Concessions by the unit will not solve the problem and the number of employees has been cut to the minimum necessary for it to operate safely. Cutting the unit more will not cure the budget deficit and is not safe or economically feasible to the employees.

Issues Agreed to during the Hearing

During the hearing, the Union agreed to several District proposals in its December 20, 2011 offer. The Union accepted the District's proposal to delete the memoranda of understanding as to Jurisdiction, Bullet Proof Vests, and Training. The Union agreed to the freeze on Longevity for certain employees as proposed by the District. Finally, the Union accepted the District's proposal on Article 11, Vacations, and a new article replacing Article 12.5 as to Severance Pay and Retirement Inducement Bonus.

Additionally, the parties reached tentative agreements on a number of issues:

1. Article 3, Rights of the Union. The tentative agreement entered into on May 17, 2011 is adopted, except that the current language will be maintained for the remaining open Section 3.2
2. New Article, Orientation. The parties agreed to memorialize in a side letter the practice of permitting the Union one (1) hour during orientation to address members.

3. Article 5, Working Conditions, Section 5.12, maintain the current language.
4. Article 5, Working Conditions, Section 5.31, Limitations on Non-Bargaining Unit Members Doing Bargaining Unit Work. The parties agreed in principle that supervisors and other non-bargaining unit personnel will not perform bargaining unit work except in limited circumstances. The parties and the Fact Finder attempted to work out language, but were not able to during the hearing. The parties agreed to work out the language needed to express their intent.
5. Article 6, Job Protection - No subcontracting. Current language will be maintained.
6. Article 8, Hours, Inspections, and Overtime Compensation. The parties reached a tentative agreement on November 1, 2011. That proposal was modified so that employees can choose their start-time assignments prior to the beginning of the school year and the District can adjust the start times prior to the start of the second semester, within the ranges set forth in Section 8.02, provided the District discusses the changes with the Union.
7. Article 8, Section 8.0.7. The Union withdrew its proposal regarding Summer Work.
8. Article 8, Section 8.1.4. The Union agreed to the District's December 20, 2011 proposal to eliminate time and one-half pay for individuals working on Sundays, when Sunday is part of the individual's regularly scheduled shift.
9. Article 8, Section 8.3. The parties agreed to maintain current language.
10. Article 9, Vacancies. The parties agreed to continue the current language regarding Preferential Lists, so long as it does not contradict the following language:

1. Vacancies that occur after the beginning of the school year shall be filled through position posting and job bidding through electronic applications.
 - 1.1 A vacancy is created when an employee resigns, dies, or is terminated, a new position is created, or a vacancy occurs because an employee bids into another position.
 - 1.2. When it is determined by the District to fill a vacancy after the beginning of the school year, the District shall post a notification of the vacancy within ten (10) working days, setting forth a description of the position, rate of pay, and building or other location. The District shall post the vacancy across the entire District so that all Safety & Security employees are aware of the vacancy.
 - 1.3. In the event an opening develops during the summer months, a notice of such vacancies shall be posted on the District's website.
 - 1.4. Applications for posted position(s) may be made electronically on the District's website.
- 11.** Article 12, Sick Leave. The parties agreed that donations of sick leave can be made between any District employee and is no longer limited to donations between Local 436 employees.
- 12.** Article 12, Section 12.1.1, Special Privilege Leave. The current language will be maintained.
- 13.** Article 12, Jury Duty. The Union accepted the District's December 20, 2011 proposal.
- 14.** Article 12, Personal Leave of Absence. The Union withdrew its proposal.

15. Article 12, Longevity Anniversary Increments. The current language will continue except that there will be a freeze to certain employees as proposed by the District.
16. New Grievance/Arbitration Procedure. Current Sections 17.0.10 and 17.0.11 will be moved to Article 16, Discipline.

These withdrawn issues and tentative agreements are incorporated into this Report and Recommendation.

Unresolved Issues

Issue: Wages

Position of the District: All wage rates and differentials shall be reduced by 5% effective July 1, 2011.

Position of the Union: Maintain a wage freeze with a \$35 per paycheck deduction to all full time bargaining unit employees and a \$20 per paycheck deduction to all part time bargaining unit employees, for twenty-two (22) pay periods, effective upon ratification.

Findings: As noted above, the District is experiencing financial difficulty. It has negotiated concessions with other bargaining units. In 2010, Teamsters Local 407, which represents bus drivers and bus attendants, agreed to a three (3) year contract with no economic reopeners. Teamsters Local 244, which represents District truck drivers, agreed to a two (2) year contract in 2011 that included a 5% wage reduction, froze longevity pay, eliminated all double time, required employees to pay 10% of the health insurance premiums, and provided no increase for the 2012-13 school year. The Custodians, Carpenters, and Building and Trades Unions have agreed to two (2) year deals with a 5% wage cut for FY 2012 and a 7% cut for FY 2013. The Cleveland

Teachers Union has agreed to insurance and wage concessions. The fact finding with Local 860 was held in September of last year and the parties are awaiting a decision. The fact finding for Local 1199 was held on February 8, 2012.

The Union is offering concessions, but not as much as the District contends it needs. The Union argues that this unit has already lost approximately a third (1/3) of its work force this year, had a pay cut in 2010, and had to increase health care costs. Asking more of this unit is not reasonable.

There is no dispute the District is facing a large deficit. It has cut expenses and taken action to reduce the deficit, including closing about 25 schools in the last two (2) years. Since personnel costs are approximately 70% of its costs, though, cutting non-personnel costs can only go far. Most of the cost savings have to come in the form of wages and benefits to employees. The Fact Finder understands that this unit has experienced pay cuts, increases in health insurance, and layoffs. But so have most, if not all of the other bargaining units. Simply put, the District is losing revenue and must cut its costs. If not through wages and benefits, then additional layoffs is the next reasonable option. While the Union offers wage concessions, they are for twenty-two (22) pay periods. The District needs ongoing help. On this record, the Fact Finder concludes that the 5% wage concession is justified.

The District asks that the concession be effective retroactive to July 1, 2011, the beginning of FY 2012. Doing so, though, would require the bargaining unit to bear a full year's cut in the four (4) months remaining in the 2012-13 school year. The Fact Finder concludes this is too great a burden on employees who are accepting other concessions for this contract and have accepted other concessions in recent years. An

effective date of January 1, 2012 will give the District cost savings for half the school year and will not be too great a burden on the unit. Since the Fact Finder also recommends the health care costs be effective January 1, 2012, it makes sense to make both effective at the same time.

Recommendation: The District's proposed 5% cut is to be effective retroactive to January 1, 2012.

Issue: Health Care

Position of the District: The health care contributions should be effective on January 1, 2012.

Position of the Union: Health care changes to be effective upon ratification.

Findings: The parties have agreed that the health care contributions are to be \$45/month for single coverage, \$110/month for family coverage, and \$160/month for family coverage with a working spouse. The only dispute is as to the effective date. The Fact Finder has already concluded that the District's request for wage and benefits relief is justified in these circumstances. He has also concluded that the wage concession should be effective January 1, 2012. It is reasonable to make the health care contributions effective at the same time.

Recommendation: The health care contributions are to be effective January 1, 2012.

Issue: Article 24, Duration

Position of the District: The agreement should be effective until June 30, 2012 only.

Position of the Union: The agreement should expire on June 30, 2013.

Findings: There is no dispute that the District faces a deficit and it projects its financial situation to continue to decline. It argues that it must balance its budget, certify the funds for the 2012-13 year, and is not comfortable certifying funds beyond 2012. It contends that it will likely need cuts in the second year of this contract if it expires in 2013.

In 2010, the District agreed to a three (3) year contract with Teamsters Local 407. In 2011, it negotiated a two (2) year agreement with Local 244. Local 777, the Carpenters, and the Building and Construction Trades Council have also agreed to two (2) year deals, though with an additional 7% wage cut for FY 2013. The District is still in fact finding with two (2) other unions. It asserts that its situation has continued to deteriorate, projects even fewer students for the 2012-13 year, which will result in lesser revenue, and has new information as to its finances that it did not when it negotiated other contracts. Given this new information, an expiration of 2012 is necessary.

The Union responds that negotiations have been ongoing for almost a year and this fact finding process will not end until sometime in March. It has been a long and arduous process. An expiration this June will mean negotiations must begin almost as soon as this process ends. The Union is new to this unit and the unit was neglected by its previous representative, so it needs time to work with the unit and get to know its members.

An expiration date of June 2012 is too soon. Negotiations have been going on for an extended time and a break would give the parties some perspective and breathing room. Further, the District has negotiated contracts beyond June 2012 with most of its other unions. While some of these contracts call for additional wage cuts in FY 2013,

the District has achieved concessions in this fact finding that should save it significant money. The additional time will give the District an opportunity to see how the money saved with this and other units changes its finances. Forcing the parties back to the table almost immediately is not recommended.

Recommendation: An expiration date of June 30, 2013.

Issue: Article 1, Recognition and Coverage

Position of the Union: The Union proposes that the tentative agreement entered into on May 17, 2011 be adopted and that current language be maintained for the remaining open Section 1.2.

Position of the District: The District seeks the language of the tentative agreement and Section 1.2 with the understanding that part time employees be made a separate classification.

Findings: The current agreement between SEIU Local 701 and the District does not specifically include part time employees as part of the bargaining unit, though it permits the creation of part time employees. On December 13, 2010, when Teamsters Local 436 was certified as the bargaining representative, SERB certified the unit to include

All full-time and part-time Security Personnel including Investigator Counselor, Security Officer, Mobile Response Officers, Field Assistant, Dispatcher, Gang Task Force, School Resource Officers, Cleveland Municipal School District Mobile Deputies, Flex Team Officer, Mobile Patrol Officers, and Lead Security Officer.

The tentative agreement of May 17, 2011 is consistent with the unit certification and clarifies that part time employees are in the unit. The Union submits that the language of Section 1.2 should be maintained as no issue has been raised as to its application.

The part time force is designed to handle the morning arrival at schools, which requires more security than the rest of the day. The part time schedule is generally 7-11 a.m. or 8 a.m. - 12 noon. Part time employees primarily operate the metal detectors and x-ray equipment for the morning arrival. According to the District, it does not need a full force for the remainder of the day. Additionally, Chief Lester Fultz testified that part time employees permit the District to have an officer in every building and it did not have a presence in each building without part timers. On this record, the District established the need for part time employees.

Creating part time employees as a separate classification is another matter, however. While there is a need for part time employment, in today's working environment, part time employment has its advantages. It is reasonable that a full time employee might want to switch to part time employment. And in the case of layoffs, where bumping into part time work might be the only alternative for a full time employee, a part time position would be even more desirable. Creating part time employment as a separate classification could prevent this and permit a newly hired employee to remain as a part timer when a longer term full time employee is laid off.

Recommendation: The tentative agreement from May 17, 2011 should be adopted. The current language of Section 1.2 should be maintained.

Issue: New Article, Seniority

Position of the Union: The Union proposes language to define seniority, including either District seniority or classification seniority, when seniority is broken, and to address when there is a tie in seniority as follows:

1. Seniority shall accrue to all employees in accordance with the provisions of this Agreement. District seniority shall be defined as the uninterrupted length of service with the District as computed from the most recent date of hire. Classification seniority shall be defined as the uninterrupted length of service by an employee in a particular job classification as computed from the most recent date of entry into such job classification.
2. Seniority shall be broken when an employee:
 - a. Quits or resigns;
 - b. Is discharged for just cause;
 - c. Is laid off for a period of time exceeding sixty (60) months;
 - d. Becomes unable to perform the duties of his or her job due to illness or injury and is unable to return to work after twelve (12) consecutive months;
 - e. Fails to report to work when recalled from layoff within five (5) working days from the date that the employee receives a recall notice and/or fails to report to work within five (5) days after such notification by certified mail with return receipt to the employee's last known address as shown on the District's records.
3. The District shall maintain a current seniority list that includes District and Classification seniority and make the list available for inspection for all bargaining unit employees.
4. In cases of identical seniority, the employee with the lowest last four (4) digits of their Social Security Number shall be considered the most senior.

Position of the District: The District does not object to defining seniority. It has proposed freezing seniority when an employee is in not in pay status and objects to the use of seniority in certain situations.

Findings: The Union asserts that its language should be adopted. It addresses extended leaves of absence, which should meet the District's concern about seniority when an employee is not in pay status. Agreeing with the District that seniority does not accrue for certain absences penalizes employees for sickness or absence. The Union's proposal rewards employees for working. Further, the Union does not believe the District can administer seniority that does not accrue when an employee is not in pay status and too many disputes will arise.

The District responds that its other collective bargaining agreements provide that seniority does not accrue when an employee is out of pay status. Leave time is considered being in pay status, but the problem arises when leave time runs out. Also, it needs short term assignments where specific skills, for example, computer skills, are required, which the most senior officer does not necessarily have. These positions are limited to ninety (90) days, so the unit is protected from abuse.

Union membership has its benefits, one of which is seniority. It rewards employees who have worked for an employer long term and provides some stability. It also allows employees to know where they stand regarding certain benefits and privileges, such as vacation time and bidding. It helps employers by encouraging employees to continue working rather than move to another job. The Union's proposed language is a reasonable attempt to define seniority, when it is broken, and how to address ties in seniority. The District's concern as to the use of other factors for short term assignments can be addressed. For example, the language regarding short term assignments can be amended to allow the District to select the most senior employee who also has the required skills. Finally, the Union's language addresses when an employee runs out of leave time.

Recommendation: The Union's proposed language is adopted. The language regarding short term assignments should be clarified to allow the District to select the most senior employee who also has the required skills.

Issue: Article 5, Working Conditions, Section 5.30, Emergency - Definition

Position of the Union: The Union seeks to define what is an “emergency” for purposes of permitting non-bargaining unit members to do bargaining unit work. It submits the following language.

5.30 Emergency - Definition: Whenever used throughout this Agreement, an emergency shall mean an incident that involves the immediate safety of students, teachers, administration personnel, or the public, but shall not include an occurrence that is normal or reasonably foreseeable by the employer.

Position of the Employer: Do not define “emergency” here for the entire agreement. Emergency is also defined elsewhere in the Agreement, e.g., page 36, for particular purposes and one overall definition does not work for all contract provisions.

Findings: In a number of situations, the Agreement allows the District to ignore the restrictions of the collective bargaining agreement when there is an emergency. The Union wants to define what is an “emergency” to eliminate those situations that are reasonably foreseeable. It has proposed what it believes is common sense language to define the word. The District is leery of trying to define an emergency. For example, it suggests that fights between students are, unfortunately, normal and foreseeable yet would endanger the immediate safety of students, teachers, and others.

The idea of defining “emergency” is a good one. However, as the District points out, there are a number of situations that are normal and foreseeable, yet would endanger the immediate safety of those in the school buildings. During winter and stormy months such as April, weather related events are common and foreseeable, but could be a threat to safety. Today, bomb threats and other such scares are not uncommon. Trying to define what could and could not be “normal and foreseeable” is problematic at best. Such language could lead to disputes and costly grievances and

arbitrations. The parties are best able to define the term, but they do not agree here. At the very least, the Fact Finder is not in the best position to decide what should constitute an emergency. He has no knowledge of the history between the parties (including the Union's predecessor) and what they have considered to be emergencies. While the Union's language is a good start, there is simply too much the Fact Finder does not know about the bargaining history and relationship to decide upon a definition.

Recommendation: No definition of "emergency."

Issue: New Article to replace current Section 7.1, Layoff and Recall

Position of the Union: The Union proposes the following language:

1. If it should become necessary to reduce the size of the labor work force and employees are to be laid off, the following order of layoffs shall apply:
 - a. volunteers in any of the classifications where the layoffs occur,
 - b. then any new hires serving their probationary period,
 - c. then any part timers in the classification(s) where the layoffs occur, beginning with the least senior by date of hire,
 - d. then full timers in the classification(s) where the layoffs occur, beginning with the least senior by date of hire.
- A. At least thirty (30) days prior to the effective date of layoffs, the Board shall prepare and post for inspection on the Board website a list containing the names, seniority dates, and classifications of those employees to be laid off. An electronic copy shall be provided to the Union. Employees laid off shall be paid for all earned but unpaid vacation days to which they are entitled (if the employee so requests) no later than thirty (30) calendar days following the layoff. Employees shall be entitled to vacation leave accrued to their credit for the two (2) years immediately preceding their layoff and the prorated portion of their earned but unused vacation leave for the current year.
- B. Reductions shall be made from the bottom of the seniority list with the least senior employee in the classification being laid off first. An employee affected by the layoff in his or her classification may elect to displace a bargaining unit member who holds a lower position on the District Seniority list in a different classification, provided the employee who decides to bump into a classification (other than his or her current one):

such a recall list exists. However, the employees who wish to be on the day-to-day, substitute, or temporary help list must inform the District of that in writing at the time their layoff becomes effective. The District will offer each employee the appropriate request form to be placed on that list prior to the last day of work of that individual laid off employee. If the day-to-day, substitute, or temporary position shall be for more than sixty (60) days, the position shall be considered a vacancy and shall be filled by the employees on the recall list for that classification in the order in which the employees are ranked on the list.

Position of the District: The District wants part time employment as a separate classification. It opposes employees who bump maintaining their current wage rates, i.e., red circling.

Findings: The parties reached a tentative agreement on most of a new article regarding layoff and recall. There are two (2) issues of disagreement remaining. The first is whether a new classification of part time employees should be created. The second is whether an employee forced into a lower paying position as a result of bumping should be paid at the rate of the new position or guaranteed no loss of pay.

According to the Union, the District should layoff part time employees before full time ones and recall full timers before part time ones. Otherwise, the District could lay off full time and keep part time employees. The Union fears the District will create a part time work force. The Union contends full timers have seniority and full time employment is better for employees and their families. Additionally, the parties have traditionally considered classifications by duties performed, not hours worked. Employees who bump into another position should not have their pay reduced. After all, it is no fault of the employee that he or she was transferred.

The District submits that it needs a separate seniority list for part time employees, especially when it comes to layoffs. It argues that the MOU regarding part time

employees and was included in the agreement essentially created a separate classification and should be recognized.

Part time employees are relatively new to the Safety & Security Department. In 2008, the District negotiated a Memorandum of Understanding (MOU) with Local 701 permitting the use of some part timers. It became Article 24. As noted above, the part time force is designed to handle the morning arrival at schools, when additional manpower is needed. Section 24.1 provides that two (2) part time employees must be laid off for every one (1) full time employee. Under Section 24.6, the District cannot use part time employees if it results in the layoff of full timers.

The District introduced evidence that it has laid off two (2) part time employees for each full time employee laid off. The Union believes this violates Section 24.6. However, this appears to be consistent with Section 24.1. Additionally, red circling is not tied to layoffs, according to the District. Rather, it only applies when an employee is transferred from one building to another and lesser pay would result. In such a case, the employee is allowed to keep his or her current rate. The District negotiated with Laborers Local 860 to keep a similar provision intact.

The District has not persuaded the Fact Finder that creating a separate classification for part time employees is warranted. The current system appears to work well enough. Article 24 permits it to employ no more than 100 part time employees and use them so long as it does not result in laying off full timer employees. When laying off employees, the District must layoff two (2) part time employees for every full time worker. Creating part time employment as a separate classification could lead to more

part time and less full time employees. While this would give the District more flexibility and save it money, it could also erode the bargaining unit.

As to red circling, there is some confusion. The Union introduced a page of the Agreement that included Section 7.7 Red-Circling of Wage Rate. However, the current collective bargaining agreement introduced by the parties shows that 7.7 was deleted. In any event, the Fact Finder finds merit in the Union's proposal. Layoffs allow the District to reduce overhead by eliminating positions. Permitting the District to reduce the salaries of employees who bump as a result of layoffs could encourage the District to layoff more employees than it otherwise might to save even more money. Employees who bump into another position as a result of layoffs should not have their pay cut. Doing so would affect their ability to support their families and pay bills. It would also give the District added incentive to make certain that layoffs will achieve the cost savings it seeks.

Recommendation: The Union's language should be adopted. No separate classification for part time employees.

Issue: Article 8, Hours, Inspection, and Overtime Compensation

Position of the Union: The Union asks that Section 8.2 be modified to read:

Hours Included in Computing Overtime. In the computation of overtime, an excused, paid absence shall be considered as time worked for the time you were on the paid, excused absence. Overtime shall be paid by the pay period following the period in which the overtime was earned, provided the employee timely submits the documentation.

Position of the District: Maintain current language.

Findings: The Union's language is based on the District's earlier proposal to eliminate non-worked time from computing overtime. At the hearing, though, the District proposed to keep the current language of 8.2. The Union's language seeks to maintain the status quo. Given the District's changed position, maintaining the current language maintains the status quo. There is no need to adopt the Union's proposed language.

Recommendation: Keep the current language of 8.2.

Issue: New Article from Section 12.0 to 12.0.10, Sick Leave, and Article 22, Attendance Policy

Position of the Union: Change the language so that a doctor's note is only required when an employee misses more than three (3) consecutive days of work rather than requiring a doctor's note for every absence.

Position of the District: Keep the current requirement of a doctor's note for every absence.

Findings: The Union is not certain how the current language is applied. Additionally, with health care costs increasing, now employees will be required to go to the doctor for each absence. The typical language in a collective bargaining agreement is three (3) days before a doctor's certification is required. The Department has not claimed that there is an abuse of sick leave. This will be both a cost and an inconvenience to employees and a cost to the District to administer it.

The District and Local 701 negotiated a no fault attendance policy (Article 22). If the employee obtains a note from his or her doctor, the absence is excused. An employee is not required to get a doctor's note, but, if he or she does not, the absence

is unexcused. In a ninety (90) day period, an employee can accumulate three (3) unexcused absences with no consequences. After three (3) unexcused absences, the disciplinary process starts. Once an employee begins the disciplinary process under the policy, he or she must go twelve (12) months without an unexcused absence.

No fault attendance policies are common today. They are designed to prevent excessive use of sick leave and remove the uncertainty of what is and is not an excused absence. Obtaining a doctor's note makes an absence excused, not doing so makes it unexcused. Supervisors are relieved of the discretion of deciding an absence and the process is the same for all involved. In seeking to change the language to a doctor's note only for absences of more than three (3) days, it is incumbent on the Union to persuade the Fact Finder of the need to make the change. The Union has not done so. It goes without saying that there could be increased costs to employees since health care costs will increase and it is inconvenient for an employee to get a doctor's note for every absence. But getting a note may not always require a visit to the doctor. The policy also builds in some leeway for employees. Only after three (3) unexcused absences in ninety (90) days does discipline start, so an employee need not get a note for every absence, though it might be wise to do so.

Increasing the absence to more than three (3) days, though, makes a big difference. It will increase sick leave and could easily lead to abuse. Admittedly, employees currently have a tough choice to make sometimes. That is, go to work, take the day off and get a doctor's note so the absence is excused, or take an unexcused absence. But that is what no fault policies are designed to do, make the choice a difficult one to discourage absences and abuse. Allowing employees to take three (3)

days off without a doctor's note will greatly reduce the effectiveness of the policy. The Family and Medical Leave Act prevents certain absences from being counted under a no fault policy, so employees have additional protection. On these facts, the Fact Finder is not persuaded of the need for the change.

Recommendation: Keep the current requirement of a doctor's note for each absence for it to be excused.

Issue: Article 16, Discipline

Position of the Union: Replace current Article 16 with the following:

1. Employees covered by this Agreement shall be disciplined, suspended, or discharged only for just cause.
2. The District shall apply the concept of progressive discipline, employing first a verbal notice, then a written notice, then a series of suspensions of three (3) days, then five (5) days, then ten (10) days, and then termination. The District has the right to bypass any or all steps of the progressive discipline system for serious violations such as theft, gross insubordination, physical assault upon another, falsifying documents, deliberate destruction of District property, and selling drugs or alcohol on school property.
3. No suspension or termination may be taken until an employee has had the opportunity to have a pre-disciplinary conference. A pre-disciplinary conference is only to be employed once the District has investigated the disciplinary offense by the employee and has made a determination to suspend or discharge the employee, following the rules of progressive discipline. The pre-disciplinary conference may be waived in those situations where a supervisor may suspend for the balance of his daily work assignment an employee whose physical or mental condition is believed to be such that he or she may jeopardize his or her own safety or that of others. The supervisor must confirm the employee's condition with another person of management and a Union steward, if one is immediately available. All pre-disciplinary conferences shall be in private and a Union official shall always be allowed in attendance, either as the representative or as an observer. Any necessary witnesses may attend the pre-disciplinary conference without loss of pay. Any employee has the right to waive his or her pre-disciplinary conference.

4. All investigations of alleged misconduct shall take place at the location of the alleged misconduct. No bargaining unit employee shall be required to report to the administration building to give a statement regarding the misconduct under investigation.
5. An employee and the Union shall receive all documents upon which the District may rely to suspend or terminate an employee at least seventy-two (72) hours before any pre-disciplinary hearing. Failure to do so will cause the hearing to be delayed until the District complies with the seventy-two (72) hour provision. If discipline is to be imposed after the pre-disciplinary hearing, it shall be imposed within thirty (30) days after the completion of the hearing. The Union shall supply a list of witnesses to the District prior to the hearing.
6. The District shall have sixty (60) days to complete its investigation of any violation that could lead to suspension or termination and issue discipline, the sixty (60) days beginning when the District became aware of the violation. If the District does not complete the investigation within the sixty (60) day period, then the violation shall be reduced to a written warning. If the District needs more than sixty (60) days to investigate, then it shall make a request to the Union stating its reasons for the continuation and, if the Union finds the request reasonable and with cause, it may grant the request.
7. Any employee covered by this Agreement shall be afforded full treatment and protection under his or her *Garrity* rights. Refusal to answer questions on the grounds that answers may incriminate the employee shall not be subject to disciplinary action.
8. There shall be no disciplinary transfers of employees under the terms of this Agreement.
9. Oral or written reprimands shall not be used for purposes of the progression of discipline beyond one (1) year from the date of issuance, unless there is an intervening discipline for the same offense within the one (1) year.
10. Suspensions shall not be used for purposes of the progression of discipline beyond eighteen (18) months from the date of issuance, unless there is intervening discipline for the same offense within the eighteen (18) months.

Position of the District: Current language should be continued.

Findings: The proposed language is similar to what currently exists. It expands progressive discipline and provides for pre-disciplinary conferences for suspensions and

terminations only. Currently, employees must travel to the administration building to receive warnings. It costs employees gas and parking to go to the administration building. Paragraph 5 is currently in the grievance procedure and provides the employee and the Union will receive documents forty-eight (48) hours before a pre-disciplinary hearing, rather than the seventy-two (72) proposed here. Paragraph 6 is similar to current paragraph 17.0.11. It shortens the investigation stage to sixty (60) days from the current ninety (90). Paragraph 7 is similar to 17.0.7 and sets forth employees' rights. Paragraph 8 eliminates disciplinary transfers, a right the District currently has. According to the Union, this prevents principals from showing favoritism or acting on their own in certain situations, such as when two (2) employees do not get along. The agreement provides other methods to deal with such situations. Paragraphs 9 and 10 set limits for how long discipline is effective.

The District does not object to much of the proposed language. It does seek to retain its ability to make disciplinary transfers. It also objects that requiring an employee to commit the same offense before discipline can drop off limits the District too much.

Paragraph 1 is a reiteration of current language. Paragraph 2 should make clear that the list of serious offenses is not all inclusive. Paragraph 3 reiterates some current language and limits pre-disciplinary conferences to time off situations. The District does not object to it. During the hearing, the parties discussed that some investigations must be done at the administration building. The Union indicated it would not object to removing paragraph 4.

Providing seventy-two (72) hours notice of documents the District will use at a hearing is reasonable. Shortening the investigation stage from ninety (90) to sixty (60)

days is questionable, in the Fact Finder's opinion. Some investigations, such as sexual harassment and investigations of criminal conduct, can take an extended period. Leaving the investigation stage at ninety (90) days is reasonable. Paragraph 7 shortens the explanation of *Garrity* rights already in the contract and makes sense to relocate from the grievance and arbitration article.

The Union argues that the contract provides avenues to deal with problem employees. However, it did not explain what those are and how they apply. The District introduced evidence that certain situations, such as sexual harassment claims, might require that an employee be transferred immediately. On this basis, the section on disciplinary transfers should remain.

Finally, providing that discipline more than one (1) year or eighteen (18) months, respectively, cannot be used for purposes of progressive discipline unless there is another offense of the same kind is too lenient. Progressive discipline is designed to correct behavior rather than punish employees. It must also reasonably allow employers to terminate employees who refuse to correct their behavior. Using this language, an employee could commit numerous offenses of different kinds, but only be verbally warned for each one. It is unlikely that even an employee who refuses to correct his or her behavior would advance along the progressive discipline system sufficiently that the District could terminate that problem employee. The Fact Finder also serves as a labor arbitrator. In his experience, the vast majority of employees are hard working and dependable and take pride in their work. They rarely commit offenses and cause few, if any, problems for employers. To the contrary, they help make a good employer. The Fact Finder is confident that this bargaining unit is much the same. It

goes without saying, though, that some employees can be quite resourceful in gaming the system, that is, violating rules just enough that they cannot be discharged under the progressive discipline policy and then, when they are close to termination, complying until past discipline drops off and they can start all over again. Good employees tend, with good reason, to resent those who game the system, because it makes their job that much harder. Allowing discipline to be used only if for the same offense and fall off after a year or eighteen (18) months gives these employees too much room to operate. Even good employees need some protection, since everyone makes the occasional mistake. The Union's language, however, gives too much protection to those employees who would take advantage of it and would make it unreasonably difficult for the District to terminate a problem employee.

Recommendation: The Union's language is adopted with certain changes. In paragraph 2, the language in bold should be inserted: "... for serious violations such as, **but not limited to**, gross insubordination..." Paragraph 4 is not necessary, so paragraph 5, 6, and 7 become 4, 5, and 6. Current Section 16.2, Transfer for Just Cause, becomes new paragraph 7. Paragraphs 9 and 10 are renumbered 8 and 9. The sixty (60) day investigation period in proposed paragraph 6 (now 5) is changed to ninety (90) days, consistent with current language. Paragraph 9 (now 8) is amended to "... unless there is intervening discipline within the one (1) year." Paragraph 10 (now 9) is amended to "... unless there is intervening discipline within the eighteen (18) months."

Issue: Article 17, Grievance and Arbitration

Position of the Union: The Union suggests adding language that failure to comply with time limits by the District will result in granting the grievance and failure to comply with time limits by the Union will result in denial of the grievance.

Position of the District: The District opposes penalizing the parties for failing to meet a deadline.

Findings: The Union alleges that it typically does not get a timely Step 3 response from the District. Yet the current language contains no consequences for failure to meet the deadline. Its language has consequences and will force the parties to meet their deadlines or lose the grievance. The District counters that there are certain situations when the timelines cannot be met. While some of its collective bargaining agreements contain penalties, e.g., its contract with Local 407, the parties here have not negotiated one.

Time limits are just as enforceable as any other provision of a collective bargaining agreement. They are intended to be kept. Arbitrators typically will enforce time limits and grant or deny grievances when they are not kept. The District has negotiated time limits and has gone beyond it to negotiate language to indicate that the time limits should be kept. Yet the Union introduced evidence that the District routinely does not comply. To enforce the language, the Union would have to take it to arbitration or file a separate grievance and take it to arbitration. This is costly to both sides. Further, there is language in the current agreement that failure to timely comply on the part of the employee or Union will result in denial of the grievance. It is reasonable that the District's failure to timely comply should have similar consequences.

Recommendation: Add language that failure to comply with the time limits set forth in the agreement will result in the granting or denial of the grievance.

Article 18, Section 18.1, In-Charge Duties

Position of the Union: Replace Article 18 with the following:

In-Charge Duties.

A. Building (Security Officer): Where three (3) or more security officers are assigned to a building, the Chief of Safety & Security is to designate one (1) qualified person as in charge to assist in the coordination of the security staff and other duties as assigned by the Chief; in-charge rate to apply. For purposes of this provision, a part time employee shall be counted as one (1) of the three (3) employees. Part time employees shall not be eligible for the in-charge rate.

B. A person performing “in-charge” duties under this section shall not perform Administrative or Supervisory duties and responsibilities.

Position of the District: Paragraph A above is current language and part of its December 20, 2011 proposal. There is no objection. It objects to Paragraph B as written. In its December 20, 2011 proposal, it removed the word “not” from and added “as directed by management” to paragraph B and seeks that language.

Findings: The Union’s proposal deletes all of Article 18 except current Section 18.1, paragraphs A and D. The District does not object to deleting Section 18.0 and retaining paragraph A of current Section 18.1. Adding the District’s suggested language to paragraph B is reasonable.

Recommendation: The Union’s language is recommended, except that paragraph B shall read “A person performing “in-charge” duties under this section shall perform Administrative or Supervisory duties and responsibilities as directed by management.”

Issue: New Article, Family and Medical Leave Act (FMLA)

Position of the Union: The Union offers to include the following language regarding the FMLA.

1. The parties agree to be bound by the provisions of the Family and Medical Leave Act of 1993 and as set forth herein below.
2. Any leave taken by an employee, whether paid or unpaid, for the following reasons, shall be applied against the employee's entitlement to twelve (12) work weeks of leave during the twelve (12) month period commencing with the first use of the leave.
 - a. The birth of a son or daughter, and to care for the newborn child;
 - b. The placement with the employee of a son or daughter for adoption or foster care;
 - c. To care for the employee's spouse, son, daughter, or parent with a serious health condition; and
 - d. Because of a serious health condition that makes the employee unable to perform the functions of his or her job.
3. The annual twelve (12) month period shall commence and be measured forward from the date the employee first uses the leave set forth above.
4. No employee shall lose seniority during the period of paid time off which is attributable to the Family and Medical Leave Act.
5. Eligible employees will be required to certify their request for FMLA thirty (30) days in advance by use of the Department of Labor Form WH380 when possible.
6. Sick leave events that continue two (2) weeks or more will require completion of a WH380 Form.
7. Eligible employees will be required to recertify their requests for FMLA leave every thirty (30) days.
8. Leave for the birth or adoption of a child or for the placement of a child in foster care may be taken on intermittent or reduced schedule upon approval of the Superintendent, which approval shall not be unreasonably withheld.
9. Employees using FMLA leave may elect to use vacation leave or sick leave during his or her leave under this agreement.

Position of the District: The District does not believe a statement of FMLA rights is needed.

Findings: According to the Union, employees are not certain of their FMLA rights and voiced concern that they do not know what they are. Including a statement of rights will educate them so they are aware of their rights and duties. The District is already obligated to comply with the FMLA. The District responds that the Human Resources Department meets annually with employees to review policies, including FMLA leave.

Employees should know what their rights and duties are under the FMLA. There is evidence that the District's Human Resources Department meets annually with employees to review policies, including the FMLA, so employees should be somewhat aware. The District is also obligated to post notices of FMLA rights and duties, giving employees additional information. While the Fact Finder encourages an explanation of FMLA rights and duties, he is hesitant to include a summary in the contract. The FMLA is somewhat complicated and a summary cannot provide all the information an employee needs. Additionally, the Union's language is not entirely correct. Paragraph 3, for example, requires the twelve (12) month look forward basis to calculate FMLA leave. Under the Act, though, the District is entitled to choose one (1) of several methods to determine leave. Further, if employees are uncertain of their rights under the FMLA, the District has a Human Resources Department that should be able to answer any questions. Employees should contact Human Resources to ask about their rights.

Recommendation: No new article regarding the FMLA.

Dated: February 24, 2012

A handwritten signature in blue ink, appearing to read "Daniel G. Zeiser".

Daniel G. Zeiser
Fact Finder