

In the Matter of the Fact-Finding between)
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Service Employees International Union,)
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District 1199,)
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Union,)
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--- and ---)
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Hamilton County Educational Service)
)
Center Governing Board,)
)
Employer.)
_____)

Case No. 11-MED-04-0688

Fact-Finding Report

The Ohio State Employment Relations Board notified the fact-finder of his appointment on July 9, 2011. By agreement of the parties, the fact-finding hearing was held on November 22, 2011, from 4:00 p.m. to 8:00 p.m. at the employer's administrative offices at 924 Waycross Road, Cincinnati, Ohio. Mark Turpin, Representative, District 1199, S.E.I.U., represented S.E.I.U. in the hearing. Michael Fischer, attorney, represented the Hamilton County Educational Service Center Governing Board, hereinafter called the "Board." Both parties submitted evidence to support their positions and gave arguments for their positions.

Factors

The fact-finder considered the following factors in deciding the issues in this case; (1) past collective bargaining agreements and settlements; (2) comparisons of the unresolved issues with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification found; 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 and agreements of the parties; and, (6) such other factors, not limited to those 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. ORC 4117-9-05 (K) (1) – (6).

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

Issues

The parties submitted written position statements prior to the hearing. These statements set forth the unresolved issues and the positions of the negotiating parties on these issues. The parties set out four unresolved issues. These are proposals to change articles in the current agreement. These four issues are:

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| 1. | Retirement (severance) | Article 23 Section C |
| 2. | Holiday | Article 16 |
| 3. | Vacation | Article 17 |
| 4. | Wages | Article 25 |

Following is the positions of the parties on each issue, the fact-finder's consideration of the evidence, and his recommendation on each issue.

The Background of Negotiations

Negotiations do not exist in a vacuum. When a union and employer negotiate it occurs within an economic climate. The employer, Hamilton County Educational Service Center Governing Board, operates federal Head Start classrooms. HCESCGB is the Cincinnati-Hamilton County Community Action Agency (hereinafter referred to as "CCA" for brevity) that receives funds from the federal government and then passes the funds through delegates, such as HCESCGB (hereinafter referred to as "Board" for brevity), to operate the programs.

The cash funding for the program is totally from the federal government and the program receives local in-kind contributions such as use of facilities from local contributors. The Head Start program is funded on an annual basis through the federal budgeting process. The amount the CCA receives is fixed from year to year and does not

change unless the federal government grants a cost-of-living adjustment (COLA) and the money passed through to the Board remains fixed as well.

The Board received \$4,279,724.00 to operate the Head Start program during the fiscal year starting November 1, 2010, and ending October 31, 2011. There was no COLA granted this year. Therefore, the grant that the Board will receive to operate the program will remain the same as the last fiscal year, which just ended --- \$4,279,724.00. The Board is not permitted to carry over funds. All funds must be spent or they revert to the federal government. Therefore, unlike some school employers who might, if they are lucky, have unencumbered cash balances, the Board started the 2011-2012 fiscal year with a zero balance and the same revenue appropriated for the program as last year. There is no “new money,” a term often used by negotiators to refer to increased revenues coming to the employer.

The bargaining unit members work a “school year” similar to those worked by Ohio school teachers. All but two work a 10-month year comprised of 186 work days and eight paid holidays including New Year’s Day, Martin Luther King’s Birthday, President’s Day, Memorial Day, Labor Day, Thanksgiving Day, the day after Thanksgiving, and Christmas Day. Two members of the bargaining unit, enrollment personnel, work during the summer and are paid for Independence Day. The bargaining unit members receive one more holiday than Ohio law provides for Ohio teachers.

There are 57 employees in the bargaining unit. There are 851 “slots” serviced by the program. A “slot” is one child. There has been a decrease in the number of employees in the bargaining unit during recent years. Testimony at the hearing made it clear that bargaining unit members and administrators and supervisors are all doing more work to cover the work of the lost positions.

During 2010-2011, an additional \$42,501 was approved and increased the total revenue to \$4,327,575.00. The \$42,501 was for a “one-time request” for training materials, classroom items to support children with disabilities, play space, electronic gate, sidewalk repairs, wireless access points, fencing, and new vision screening equipment. It is “one-time” money earmarked for specific projects and items and not available for any of the expenditures that are proposed in this fact-finding.

The Board will have to fund the Head Start program in fiscal 2011-2012 on no more money than it had in fiscal 2010-2011. That is the bad news. To make matters worse, as a result of the budget process there will be an automatic 1.5 % decrease in funding from the federal government. That would immediately create a \$64,195.86 shortfall. Lest one think that manna might fall from heaven, budget talks in Washington, D.C., have constantly contained talk of cutting or eliminating Head Start. In other words, this program might well be totally or partially thrown under the train as a part of a grand budget compromise at the wellspring of its revenues, Washington, D.C.

With these storm clouds gathering above, we turn to the issues in this fact-finding.

Retirement (Severance)

The union is proposing changes in the current contract Article 22 – Retirement. This currently provides that each employee upon retirement will receive one-fourth of the employee’s accumulated sick leave to a maximum of fifty-five (55) days. The employees may accrue sick leave up to 220 days now.

The union proposes that the cap on accumulated sick days be raised to 300 days and that the severance pay be 100 % of accumulated days up to the proposed cap of 300 days.

The Board rejected this proposal.

The Board provided a cost-out showing the change in cost to the employer if the union’s proposal were to be implemented. The total cost to the employer paying the current benefit of 25% of accrued sick leave (up to 220 days) will be \$169, 346.28. If the employer were to pay the union’s proposal, the total cost to the employer would be \$677,385.11, or \$508,038.83 more. Admittedly, this extra cost would be paid out over a number of years as employees retire, but a half million dollars is huge no matter how it is paid out. Some of these payouts could be in the \$30,000 range for some of the teachers with the current 220 maximum. Two or three retirements would destroy this year’s budget.

The union contends that the cost to the employer is the same whether the employer pays the sick leave benefit during any given date of active employment or at the time of severance. That would be true but for the fact the payment under the contingency of severance is 25% while this proposal is for 100%. So, does the employee suffer a loss when the employee does not take the sick leave during active employment and only gets 25% on severance? Not really. These kinds of provisions are common in school contracts and the accumulated sick leave, not as common in the private sector, provides a kind of disability insurance to the employee while actively employed that would have to be filled by an expenditure on disability insurance.

Obviously this Article, and specifically Section 2 (C) , represents agreements reached over time in negotiations between the employer and the union, and the fact-finder is reticent to dive into this scheme and drastically change it by way of a fact-finding report. For that reason and its cost, the fact-finder recommends that no change to the current Section 2 (C) of Article 22 be made.

For the sake of brevity, the fact-finder recommends the parties keep their current language on Article 22 in its entirety.

Holidays

The union is proposing that each employee receive a paid holiday on the employee’s birthday.

The union contends “that there is contractual language addressing a 9th paid holiday and feels that this non-budget impacting proposal ... would boost employer employee relations.” The employer rejected this proposal.

The Head Start employees already have eight paid holidays, nine for the two employees who work 220 days and are scheduled before and after July 4. This number of holidays is comparable to those of other employees in head start programs and Ohio public school teachers. In fact, Butler County Head Start employees have one less paid holiday, the day after Thanksgiving. See page 29 of the Butler County contract. Applying the factor of comparability to this proposal leads to a conclusion that no more paid holidays are needed to bring these Head Start employees into the range of holidays paid to comparable workers.

All of the currently paid holidays do not have the extra cost of covering the classroom with a paid substitute. Even the day after Thanksgiving would not ordinarily be a scheduled school day and would not be an additional cost. On the other hand, granting this extra paid holiday for an employee’s birthday would almost certainly require extra cost of about \$4,275.00, 57 employees times \$75 per day substitute pay. This proposal is, in reality, a paid personal leave day. In normal economic times this \$4,275.00 would be small change and it would be tempting to recommend it. This is not the time to do it with the budget battles being waged in Washington, no new money, in fact 1.5% less money, increases in other budget expenditures, to add a benefit not necessary to bring this bargaining unit up to levels of comparable employees.

For all of these reasons, the fact-finder does not recommend the union’s proposal for a floating paid holiday on the employee’s birthday. The recommendation is that the parties keep their current contract language on Article 18 - Holidays with no changes.

Vacation

The union proposes changes to the vacation days provision in the contract, Article 17. Currently employees with a 12-month contract, 261 days or more, are entitled to 2 weeks paid vacation after 1 year of continuous service; 3 weeks paid vacation after 10 years of continuous service; and, 3 weeks paid vacation after 20 years continuous service. Employees who are employed for less than 261 days are not entitled to paid vacation.

The union proposal reads as follows:

“Employees with a 12-month contract (190 days or more) shall be entitled to paid vacation benefits as described below:”

The current language would follow providing 2 weeks after one year of continuous service, and so on. The union’s proposal strikes current language of “(e)mployees employed for less than 261 days are not entitled to paid vacation...”

The 194 days (8 of them holidays) of the 55 members of the bargaining unit who would benefit from this proposal is not a “12-month contract.” It is a 10-month contract. So, the proposal creates a fiction, which is okay in collective bargaining as long as both parties agree to the fiction. In this case, the employer is not likely to accept a fiction that someone who works 194 days is employed 12 months when the current 261+ days comes closer to a usual number of days for a 12-month employee.

If this proposal were recommended it would give each of the 55 employees who do not work 261 days or more at least 2 weeks, 10 days, of vacation, in some cases even more. At a minimum this would cost 55 (employees) times 10 (days) times \$75 (sub pay) for a total of \$41,250 per year because each of these absences due to vacation would result in a need to hire a substitute. As the employer points out, learning from a substitute may sometimes be necessary, but it is not as ideal as learning from the regular classroom teacher.

Teachers on nine and 10-month contracts almost never receive vacation pay. While the fact-finder admits he has not seen every single teachers contract in existence, but having worked as a mediator, fact-finder, and interest arbitrator in this area since 1973, the fact-finder cannot remember one contract with such provisions. For 11 and 12-month teachers, there are sometimes vacation provisions.

Therefore, considering the cost of this provision in this years with static or even reduced revenue and the fact that no one has pointed to a comparable bargaining unit with 10-month teachers that has vacation days, the fact-finder recommends against this proposal. The recommendation is that the parties retain the current contract language and provisions of Article 17 – Vacations.

Salary

The union recognizes that the employer is not awash with money for fiscal year 2011-2012. So, the union is proposing that the Board pay the bargaining unit members a lump sum “signing bonus” at the start of the 2011-2012 school year. The current salary schedule has a salary range for employees in various classifications. The union notes that not one employee is at the top of the salary range and proposes that all employees be paid at the top of the salary range of their classification. The union also proposes a three-year contract with wage reopeners in August of 2012 and 2013.

The union says, “The union realizes that the 2011 negotiations is a completely different set of negotiations but wishes to stress that the proposal rejected by management during bargaining in 2011 is realistic for the current financial environment.”

The union continues, “The Union considers the proposal concerning wages a (as) fair and equitable. The \$500 lump sum payment to employment (employees) by the agency is \$23,000.” The fact-finder finds that the \$500 lump sum proposal would cost more like \$28,500 [57 employees X \$500 = \$28,500. The employer points out in its

exhibit showing teacher by teacher increases from current to maximum range salary would cost \$296,807.00.

The employer rejected the union's proposals on salary.

First, the fact-finder rejects the union's proposal that all teachers be paid at the maximum of the salary range after three years. The year-end fiscal report of expenditures for fiscal year 2010-2011, the year just ended, shows that the employer paid \$2,031,733.00 for personnel (wages) plus \$922,783.00 for fringe benefits, such as health insurance. This totals \$2,954,516.00 for salary and benefits, and the employer has only \$2,698,280 budgeted in these two categories, personnel and fringe benefits, for fiscal 2011-2012. This appears to be a shortfall budgeted at \$256,236 below actual realized 2010-2011 expenditures. The fact-finder did not quiz the employer's representatives on this during the hearing because, quite frankly, careful scrutiny occurred later while studying the evidence and writing the report. One thing is clear, however, and that is that the employer cannot put every employee at the top of the salary ranges at a cost of \$296,807.00, 10% increase over the \$2,954,516.00 actually expended in 2011-2012.

For two reasons the fact-finder rejects the proposal to have employees paid at the top of the range. First, it is way too costly. Second, it is a fairly intricate pay schedule developed by the parties over time and ought not to be tampered with by a third-party neutral, fact-finder. The employer and union should negotiate any changes to it.

Now the lump sum signing bonus must be dealt with. The fact-finder does not disagree with the union that the proposal is fair and equitable. Paying employees who make \$17,000 to \$29,000 a \$500 one-time bonus is hardly extravagant. The employer would probably have jumped on this proposal and accepted it if the administrators believed it could be funded. It is about 1 ½ % of the \$2,031,733.00 paid for personnel in 2010-2012. Of course, the personnel and fringe categories on the current budget and the 2010-2011 fiscal expenditures include administrators, supervisors, and support personnel. And, the revenue available is going to be 1 ½ % less than last year.

In looking at this salary proposal it is unavoidable that one must look at the source of the revenue and the likelihood it will increase. The source of the revenue, funding, for this program is the federal government. Except for the in-kind local contributions, there is no other source of money. Cash. So, what is the condition of the wellspring of funding---the federal government. Here are some facts.

Federal spending for 2011 is estimated to be \$3.77 trillion. Revenue is estimated to be \$2.15 trillion. This means the federal government will have an estimated \$1.62 trillion annual deficit. The fact is that there will not be additional revenues for Head Start programs this year, and this fiscal year is all the fact-finder is focusing on in this report. The parties informed the fact-finder that this program and others like it were on the table for partial cuts or total elimination during recent budget deficit reduction costs in Washington, D.C. Drastic cuts or elimination are real possibilities considering the federal spending, revenues, and positions of the Washington decision-makers.

The history of bargaining between these two parties, SEIU and HCESGCB, the Board, has evolved into a pattern. The program receives the same revenue unless there is a COLA granted to the CCA. As a result, when there is no increase in funds resulting from a COLA, there is no raise. When there is an increase, the bargaining unit has received an increase in salaries equal to the COLA. On August 1, 2009, the bargaining unit employees received a 3.06 % wage increase because the federal government authorized a 3.06 % COLA in the spring of 2009. In the spring of 2010, the federal government authorized a 1.84 % COLA for fiscal 2009-2010, and the bargaining unit employees received a 1.84 % wage increase for the 2010-2011 school year. THERE WAS NO COLA AUTHORIZED BY THE FEDERAL GOVERNMENT IN THE SPRING OF 2011 FOR THE 2010-2011 FISCAL YEAR, SO THERE IS NO COLA TO CARRY OVER TO 2011-2012. Or, the employer puts it, "There are no funds to increase wages effective August 1, 2011. The non-union employees have not received a wage increase either.

Last December, the President of the United States of America, froze wages for federal employees. This was not a part of negotiations on deficit reduction. He just did it to reduce the deficit. As the fact-finder understands it, there is a proposal in current negotiations to continue that freeze for two more years and reduce the federal work force by 200,000 employees. The fact-finder is not able to predict what might happen and never bets money on future events. This is raised just to show the gravity of the situation with respect to the possibility of obtaining funds from the only source, the federal government. Hopefully it will not happen, but it could happen that this program and other like it will not be funded at all, or be drastically cut.

Under these circumstances, the fact-finder cannot recommend the payment of the proposed one-time signing bonus of \$500.00. Given that the employer spends all money from the prior fiscal year, this probably poses a problem of having cash on hand for a \$28.500 pay out just weeks into the fiscal year. If, by squeezing the nickel, the administrators can eke out savings from budget items, these monies won't be available until later. Given that the employer has operated on essentially the same money for several years, with no COLA this year, 1.84 % for 2010-2011, and 3.06 % in 2009-2010, it is likely that all budget categories have already been squeezed down to the bone, if not the marrow, and extra funds are unlikely.

The employer did not ask for or argue that it needs some extra cash for unforeseen circumstances such as high utility costs, inflation in cost of supplies, increase in need for substitutes, and whatever else. Since there is no carry-over of funds, there is no operating balance or "rainy day" fund. This is not a set of circumstances under which the fact-finder is certain that there is an ability to pay an increase.

Could it be there will savings or efficient use of the funds to realize savings and extra cash? Maybe. But one cannot be sure.

With respect to comparison of employees in similar situations, the employees of the Butler County Head Start Program are very comparable. Given no COLA authorization, they did even negotiate this year. It was for good reason. The union and employees wanted to retain their health insurance benefits and did not think any raise that might happen would be worth risking putting the health insurance benefits on the table. They passed on negotiation.

There is already a substantial reduction in the number of employees in the bargaining unit and these recommendations are made to hopefully keep from there being more reduction in staff.

One more thing should be mentioned. A \$500 one-time signing bonus would be subject to federal, state, and local income taxes, SERS contributions, and FICA (payroll) taxes. The parties did not deal with this issue, but the fact-finder believes that, after taxes at the marginal rates, close to half of the \$500 would be taxed and the take home might only come to about \$5.00 a week take home. The fact-finder will defer to the representatives of the union and employer to calculate what the withholding might be and stand corrected if wrong. However, whatever the calculation, it is likely the resulting increase in weekly take home pay would be barely noticeable. The fact-finder prefers to put such small amounts in non-taxable benefits so that they are not reduced by withholding, but there are no proposals here for increases in such benefits, so this is not a consideration.

The employer notes that the federal government may belatedly authorize a COLA for the 2011-2012 fiscal year, and if it does the bargaining unit employees will receive a wage increase retroactive to November 1, 2011, which will be carried over to the 2012-13 fiscal year. If this happens, the history of bargaining, pattern of bargaining, should be followed inasmuch as both sides seem to have followed it in the past. If there is a COLA authorized for CHCCAA for 2011-2012 which passes through to HCESGCB, Hamilton County Head Start Program, then a raise equal to the percentage of the COLA should be granted retroactive to November 1, 2011, (first day of fiscal year) and this raise will be carried over to the 2012-2013 fiscal year.

Summary

The statute requires a summary of the recommendations. Following is the summary.

So, the fact-finder's recommendation is that there be no wage increase effective August 1, 2011. Further, the fact-finder recommends that there be no \$500 one-time signing bonus paid at any time. The fact-finder does not recommend that employees be paid at the top of the salary range of their classifications.

The fact-finder recommends that the contract be for a term of three years with wage reopeners in August of 2012 and August of 2013.

In the event there is a COLA authorized for 2011-2012, then it is recommended that the salary of each employee be raised effective November 1, 2011, by a percentage equal to the percentage of the COLA. Of course, the budget for 2012-2013 would remain fixed at the 2011-2012 level as amended by the COLA monies, and the raise would carry over to 2012-2013.

The fact-finder recommends that the current contract language of Article 25 – Wages remain unchanged. Section F contains language on past raises, but it isn't harming anything in the future to leave it there until the parties change it. Of course, if there is a belated COLA for 2011-2012 and the salaries are increased equal to the percentage of the COLA, the fact-finder recommends the parties jointly prepare a new salary schedule to reflect such an increase which would be, it is recommended, effective November 1, 2011.

The fact-finder recommends that there be no change in the contract language of Article 16 – Holidays. The recommendation is that there be eight paid holidays for all employees except for the two employees who work during the summer and are currently paid for July 4, Independence Day.

The fact-finder recommends that there be no change in the contract language of Article 17 – Vacations.

The fact-finder recommends that there be no change in the contract language of Article 22 – Retirement, including but not limited to, Section C – Severance Pay.

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

These recommendations are respectfully made this 3rd day of December, 2011.

By: _____
Donald G. Russell, Fact-Finder

