FACT-FINDING DECISION

STATE EMPLOYMENT RELATIONS BOARD

STATE OF OHIO

September 18, 2012

In the Matter of:

Cuyahoga County Department of Public Works	)	
	)	Case No. 11-MED-10-1552
and	)	
SEIU District 1199	)	

APPEARANCES

For the County:

Ed Morales, Assistant Law Director
Barrett Principe, Extern
Keith Fletcher, Employee Relations Specialist
Michael Dever, Maintenance Administrator
Jason Sobczyk, HR Analyst
Ben Cunnon, Building Maintenance Superintendent

For the Union:

Marquis Frost, Administrative Organizer
Joseph Imbordino, Executive Board 1199
Debi Gagliardi, Grievance Chair
Christopher Carlow, Negotiating Team
David York, Grievance Chair
Gino Buceresco, Negotiating Team

Fact Finder:

Nels E. Nelson

BACKGROUND

The instant case involves the Cuyahoga County Department of Public Works and SEIU District 1199. The department provides a variety of services in the county. The union represents approximately 125 employees in the department who work in a variety of classifications, including Custodian, Parking Attendant, Auto Mechanic, Groundskeeper, and Mail Clerk/Messenger.

On December 6, 2011, the parties began negotiations for a successor agreement to the contract set to expire on December 31, 2011. When the parties were unable to reach an overall agreement, the fact-finding process was invoked. The Fact Finder was notified of his appointment on August 7, 2012, and a fact-finding hearing was held on August 29, 2012. When the Fact Finder's attempt to settle the dispute through mediation was unsuccessful, this report was prepared.

The recommendations of the Fact Finder are based upon the criteria set forth in Section 4117-9-05(K) of the Ohio Administrative Code. They are:

> (a) Past collectively bargained agreements, if any, between the parties;
>
> (b) 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;
>
> (c) The interest and welfare of the public, and 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;
>
> (d) The lawful authority of the public employer;
>
> (e) The stipulations of the parties;
>
> (f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed upon dispute procedures in the public service or in private employment.

ISSUES

The parties submitted seven issues to the Fact Finder. For each issue, the Fact Finder will set forth the positions of the parties and summarize the arguments and evidence they presented in support of their positions. He will then offer his analysis of the issue, followed by his recommendation.

1) Article 30 - Bargaining Unit Work, Section 2 - Supervisors Performing Bargaining Unit Work

- The current contract prohibits supervisors from performing bargaining unit work except in the case of an emergency or for training purposes. The county seeks to revise this provision to allow supervisors to do bargaining unit work "where there is a functional overlap between supervisory and bargaining unit classifications, in cases of emergency, where necessary to instruct and train employees, to demonstrate the proper method of accomplishing tasks, to avoid mandatory overtime, to allow the release of employees for union or other approved activities or to provide coverage for no-shows or multiple call offs." The union seeks to retain the current language and to add language defining emergency as "a hazardous situation that demands immediate attention (i.e., broken pipeline, etc.)."

County Position - The county argues that its position should be recommended. It states that despite the contract language "supervisors have always assisted, as a team, with the performance of some work that is customarily performed by custodial personnel …, particularly in response to the large number of call-offs among custodial staff on a daily basis." (County Pre-Hearing Statement, page 3) The county indicates that "buildings cannot be left unclean, bathrooms must be restocked; public entrances must be presentable." (Ibid.).

The county acknowledges that the union has protested supervisors doing bargaining unit work. It recognizes that grievances have been filed regarding the practice of supervisors assisting the custodial staff but stresses that no grievance has ever been advanced to arbitration for at least 14 years. The county also observes that the union recently filed an unfair labor practice charge at the State Employment Relations Board regarding the performance of bargaining unit work by non-bargaining unit personnel.

The County contends that work performed by Custodial Supervisors is not exclusively bargaining unit work. It points out that it "believes … that there is functional overlap between the job classification of Custodial Worker and Custodial Work Supervisor." (Ibid.) It claims that its "assignment of Custodial Supervisors in situations where bargaining unit personnel have called off has been consistent with the long-standing practice and with the intent of the contract language itself." (Ibid.)

The county maintains that the union's position in negotiations and its other actions represents a change from the status quo. It charges that "the Union is seeking to alter the current arrangement by seeking to apply the existing language in a way it was not applied before, and in a way that was never intended." (Ibid.) The county asserts that it is "requesting that the language be clarified to recognize the functional overlap between Custodial Workers and the Custodial Supervisors." (County Pre-Hearing Statement, page 4)

Union Position - The union argues that the Fact Finder should recommend its position. It points out that during the life of the contract, it filed approximately five grievances as a result of supervisors performing bargaining unit work in violation of Article 30, Section 2. The union notes that "in the majority of the cases, the Employer acknowledged that supervisors had been performing bargaining unit work and subsequently remedied the grievances by stating that it

would adhere to Article 30, Section 2 of the CBA, or, in some instances, administer directives to supervisors to cease-and-desist performing bargaining unit work." (County Pre-Hearing Statement, page 5)

The union contends that is necessary to add a definition of "emergency" to the contract. It claims that this must be done "so that the Employer does not misconstrue an emergency to mean an absent employee." (Ibid.) The union insists that an emergency is "a hazardous situation that demands immediate attention." (Ibid.)

The union maintains that the county's proposal will result in an erosion of the bargaining unit. It claims that "allowing supervisors to perform bargaining unit work to cover for no-shows or multiple call offs … is erosion of the bargaining unit, especially when coupled with the decrease in staffing levels, and no attempt by the Employer to fill vacated bargaining unit positions." (Union Pre-Hearing Statement, page 6) The union reports that staffing levels for custodial workers declined from 150 in January of 2009 to 108 in August of 2010 and to only 81 as of June of 2012. It observes that Custodial Workers represent approximately 73% of the bargaining unit.

Analysis - The Fact Finder cannot recommend either party's proposal. The county's demand comes too close to removing all protections of bargaining unit work. The union seeks language that appears to ignore an existing practice and fails to adequately address an ongoing question.

The Fact Finder believes that the record establishes that supervisors sometimes perform some bargaining unit work. It appears that the work done by supervisors follows from the county's financial difficulties and the resulting substantial cuts in the number of Custodial Workers. As the economy continues to improve, the county should be able to replace at least

some of the Custodial Workers which should reduce the controversy regarding bargaining unit work.

The Fact Finder recognizes that between 2009 and 2012, the union has filed five grievances charging that supervisors performed bargaining unit work in violation of Article 30, Section 2. He would note, however, that none of the grievances were pursued to arbitration. Furthermore, they were settled with nothing more than a promise to abide by the contract.

The Fact Finder's recommendation attempts to strike a balance between the interests of the parties. It allows supervisors to perform bargaining unit work in limited circumstances, including assisting with basic job duties of an absent custodial worker rather than leaving the work undone and a building in a less than satisfactory condition. At the same time, it prevents supervisors from taking over bargaining unit work and further reducing the number of custodial workers.

The Fact Finder believes that an important part of his recommendation is that the parties use the Labor-Management Committee to continue discussions regarding the issue of bargaining unit work. The county operates a number of buildings with different staffing and supervisory arrangements. Problems arising regarding bargaining unit work are best resolved with the knowledge of the work arrangements at each of the buildings.

Recommendation - The Fact Finder recommends the following contract language:

> Supervisors shall not be permitted to perform bargaining unit work except in the case of an emergency or for purposes of training or if a bargaining unit employee is absent, in which case a supervisor may assist with the basic job duties of that classification. The assistance provided by supervisors shall not reduce the hours or cause a layoff of bargaining unit members. The details as they relate to each location will be discussed at the Labor-Management Committee.

2) Article 31 - Group Health Insurance - The current contract provides for a MetroHealth plan at no cost to employees and other plans where employees are required to pay 5% of the cost of the plan. The county proposes a number of changes in the current health insurance provision. The union accepts the majority of the county's health insurance proposals but seeks three changes. First, it seeks to have the employee contributions for medical and prescription coverage effective January 1, 2013 (Sections 2 and 4). Second, the union wishes to retain the current contract language that states that any replacement of the Standard Benefit Plan shall not result in a reduction in benefits (Section 3). Third, it proposes limiting the implementation of cost-containment features to those consistent with the decision of Arbitrator Robert Stein in Locals 1746, 3366, 3631, AFSCME, Ohio Council 8 and Cuyahoga County, March 17, 2003.

County Position - The county argues that its health insurance demand should be recommended. It points out that its proposal calls for the members of the union to be covered by the same insurance as already covers more than 90% of all bargaining unit and non-bargaining unit employees. The county claims that its proposal is not only supported by the pattern it set in bargaining with other unions in the County but also by "external comparability."

Union Position - The union argues that the increase in the employee premium contributions should be effective January 1, 2013, rather than January 1, 2012. It reports that in the past, when contract negotiations have concluded after the expiration of the prior agreement, increases in premium contributions were implemented in the year following ratification. The union notes that in negotiations for the agreement effective January 1, 2009, which was concluded in August of 2009, insurance increases were not effective until January 1, 2010.

The union contends that the replacement of the Standard Benefit Plan should not result in a reduction of benefit levels. It indicates that health insurance is a mandatory subject for bargaining and that "any changes that result in a reduction to benefit levels shall be discussed with the union." (Union Pre-Hearing Statement, page 10) The union claims that the language it seeks is consistent with the language found in the contracts of other bargaining units.

The union maintains that the county's implementation of cost-containment changes should be consistent with the decision of Arbitrator Stein. It states that "although [it] has grudgingly accepted the increase in employee contribution rates and 'first time' deductibles proposed by the Employer, it strongly objects to allowing the Employer to increase cost-containment features which include a spousal exclusion provision and other cost-containment features." (Union Pre-Hearing Statement, page 10) The union claims that Arbitrator Stein's decision suggests that "an increase in cost-containment features is a subject of collective bargaining." (Ibid.)

The union argues that excluding a spouse from the county's health insurance plan is problematic. It points out that a spousal exclusion could mean that "the spouses may be subject to substandard and costly insurance plans offered by their employers." (Union Pre-Hearing Statement, page 11) The union complains that the county's proposal "would deny employees the ability to ensure that all members of their family have access to an adequate benefit plan and force employees and their families to incur the cost of two medical plans." (Ibid.)

The union suggests that the changes sought by the county are unreasonable. It indicates that "the increases in medical insurance are disproportionate to the wage increases proposed by the county and only serve to further erode the standard of living of the employee." (Ibid.)

Analysis - The union accepts the majority of the county's health insurance proposal leaving the Fact Finder with three issues. First, the county's demand for a January 1, 2012, effective date must be rejected. The record indicates that a majority of the county's bargaining units will not be covered by the new health insurance program until January 1, 2013. While the Fact Finder appreciates the county's concern about the time it has taken to negotiate the agreement, the parties appear to share responsibility for the delay.

Second, the union's demand that the benefits under the Standard Benefit Plan cannot be reduced must be denied. The county and the union need to be free to modify the health insurance plans to respond to rising health care costs. In many instances, employers and unions agreed that some reduction in benefit levels is preferable to large increases in costs and employee premium contributions. The union's demand would restrict options for dealing with rising costs.

Finally, the Fact Finder cannot recommend the union's demand to continue the contract language that limits the adoption of cost-containment features to those that are consistent with the decision of Arbitrator Stein. His conclusion that "gradual and targeted" changes are permitted but "broad and sweeping" changes are prohibited may be difficult to apply in practice and might lead to disputes that would delay the implementation of mutually beneficial changes in plan designs. More importantly, the Fact Finder is responding to the union's strong concern regarding changes in plan design by adding to the county's proposal a requirement that the county provide the union with an opportunity to meet prior to adopting any change in the health insurance plans.

Recommendation - The Fact Finder recommends the following contract language:

> Section 1. An eligible Employee is defined as a full-time Employee covered by this Agreement. The Flex Count Plan (the plan) is defined as the section 125 or cafeteria plan, which is provided by the Employer for health insurance benefits for county employees. The Employer shall provide eligible Employees the opportunity to enroll in the plan once during each plan year at its annual open enrollment period. The plan

year commences on January 1, and ends on December 31 of the calendar year, but is subject to change.

Section 2. Bi-weekly Employee contributions for medical and prescription drug benefits shall be determined as follows:

a) MetroHealth Plan

The county shall offer a plan through MetroHealth at no cost to employees.

b) Other Benefit Plans

The biweekly health insurance contribution rates shall be as follows:

1) Effective January 1, 2012: Current contribution rates;

2) Effective January 1, 2013: Employer 90% of plan costs; Employee 10% of plan costs; and

3) Effective January 1, 2014: Employer 90% of plan costs; Employee 10% of plan costs.

Section 3. The costs of the medical and prescription drug plans will be determined through an actuarially certified process that is verified through an outside party and that includes reserves necessary to sustain the plans. In successive plan years, the Employer may add to or delete plans/providers offered and/or Employees may be offered additional plans with reduced or increased benefit levels.

Section 4. Effective January 1, 2013, the Employer shall contribute 90% of the costs for the ancillary benefit plans (i.e. vision and dental) and the Employee shall contribute 10% of the cost for ancillary benefit plans.

Section 5. The Employer shall be entitled to increase the cost-containment features of the Flex Count plans which may include, but are not limited to, deductibles, co-insurance, and spousal exclusion provisions.

Section 6. The Employer may implement or discontinue incentives for employees to participate in Employer-sponsored wellness programs, including, but not limited to, the right to offer the opportunity to reduce employee contributions through participation in wellness programs as determined by the Employer.

Section 7. The Employer may offer incentives to encourage use of low cost providers/plans (including HSA plans) which may be discontinued or modified by the Employer in future plans years with notification to the Union.

> Section 8. A waiting period of no more than one hundred twenty (120) calendar days may be required before new Employees are eligible to receive health and/or other insurance benefits. During the waiting period, the Employer may require Employees who desire coverage to purchase it through a third-party vendor instead of participating in the county plans that are offered to regular full-time Employees. New Employees shall be eligible to participate in the county plans on the first date of the first month following completion of the waiting period.
>
> Section 9. Prior to the adoption of any and all changes to the health care plan(s), the County shall meet with a union committee comprised of the District 1199 Organizer and up to four bargaining unit members to discuss any changes and receive input.

5) Article 32 - Wages, Section 1-Wage Rates - The current contract provides single wage rates for ten classifications with rates ranging from $12.77 per hour for an Information Clerk to $21.62 per hour for an Auto Mechanic II and a four-step wage schedule for six classificatons with a starting wage of $12.79 per hour and maximum wage of $14.87 per hour after two years of service. The county offers a 1% increase effective July 1, 2012, and 2% increases effective January 1 of 2013 and 2014. The union accepts the percentage increases proposed by the county but demands that the 2012 increase be effective January 1, 2012, rather than July 1, 2012.

Union Position - The union argues that the 2012 wage increase should be retroactive to January 1, 2012. It points out that in the past, when collective bargaining agreements were concluded after the expiration of the previous contract, wage increases were paid back to the effective date of the agreement. The union notes that in 2011 a step wage increase was effective retroactively back to employees' anniversary dates.

The union contends that the county can afford to make the wage increase retroactive to January 1, 2012. It states that the cost of a 1% wage increase for approximately 111 employees, is only $35,253. The union claims that the county "is in a position to furnish the one percent retroactive wage increase, given that it is not experiencing a fiscal emergency, and especially in

light of the Employer receiving tax revenue from the Cleveland-based Horseshoe Casino in the amount of $2.3 million for 2012. (Union Pre-Hearing Statement, page 13)

County Position - The county argues that the 2012 wage increase should be effective July 1, 2012. It states that the July 1, 2012, effective date is intended to offset the fact that the new insurance program for the bargaining unit would not be effective until January 1, 2013. The county adds that it recently reached an agreement with AFSCME, Local 27, which covers employees in the Child Support Enforcement Agency, on the same terms it has proposed in the instant case.

Analysis - The Fact Finder sees no basis for changing the practice regarding the effective date of wage increases.

Recommendation - The Fact Finder recommends the current contract language.

> The wage rates for all classifications covered under the terms of the Collective Bargaining Agreement are set forth in Appendix B.
>
> 2012: Upon ratification of this Agreement, bargaining unit employees shall receive a 1% increase in their base hourly wage retroactive to January 1, 2012.
>
> 2013: Effective January 1, 2013, bargaining unit employees shall receive a 2% increase in their base hourly wage.
>
> 2014: Effective January 1, 2014, bargaining unit employees shall receive a 2% increase in their base hourly wage.

6) Article 32 - Wages, Section 5 - Wage Rate for Moving - The current contract requires the county to pay Custodial Workers who perform moving duties for three consecutive hours an additional $1.00 per hour and to pay the extra $1.00 per hour for the lunch period if the moving duties last the entire day. The union proposes that the county pay employees the prevailing wage for the movers for any time spent as a mover and pay the same rate for lunch if

the employees perform moving work before and after lunch. The county wishes to retain the current contract language.

Union Position - The union argues that its demand should be recommended. It points out that Article 19, titled Temporary Transfers, requires the county to pay employees who are temporarily transferred or assigned to another classification, the higher of their regular rate or the rate for the other classification. The union acknowledges that the mover's classification is not part of its bargaining unit but states that members of its bargaining unit should be paid less than the rate for moving in the AFSCME, Local 1746 agreement.

County Position - The county opposes the union's demand.

Analysis - The Fact Finder must deny the union's demand that the county pay bargaining unit members the prevailing wage for movers when Custodial Workers perform such work. First, while the Fact Finder does not know the prevailing rate for movers, he is sure that it is significantly higher than the contractual rate for Custodial Workers. The union was unable to present a convincing rationale for a substantially higher rate.

Second, the union's demand is unusual. It is demanding an increase in the rate of pay for work that appears to belong to the employees represented by AFSCME, Local 1746. Under the AFSCME contract, the top rate for Mover I is $14.29 per hour and $14.90 per hour for Mover II compared to the top rate for a Custodial Worker of $14.87 per hour. The Fact Finder does not believe that the Custodial Workers are entitled to a higher rate of pay for the work than the employees who customarily perform do it.

The Fact Finder, however, understands the union's complaints about the way the county has compensated Custodial Workers who have been assigned to do moving work. He will recommend that the county pay the current $1.00 per hour additional payment to Custodial

Workers who are assigned to moving work whenever the total job, as opposed to the duration of an individual employee's work time, requires three or more man-hours. At the same time, the Fact Finder will bar Custodial Workers from claiming the extra compensation when they do moving work that is part of their regular duties. He believes that the current contract language that requires the county to pay Custodial Workers the differential for their lunch break only when their moving duties encompass the entire workday should be retained.

Recommendation - The Fact Finder recommends the following contract language:

> A Custodial Worker who works all or part of a moving job that involves three or more hours in total shall receive a $1.00 per hour pay differential. The moving work for which a differential is due does not include work that is incidental to a Custodial Worker's usual job duties. Lunch time shall be paid at the custodial rate except when moving duties encompass the entire workday.

7) New Article -Work Schedules and Workload - The current contract has no provision covering workloads and staffing. The union wishes to restrict work requirements, limit the amount of work employees must perform when other employees are absent, ensure the union's right to arbitrate workload complaints, and establish limits on productivity requirements. The county opposes the union's demand.

Union Position - The union argues that its proposal should be adopted. It indicates that since January of 2007, the number of Custodial Workers has been cut by 69 or 46%. It complains that "the decline in the custodial workforce has made it challenging for current employees to maintain County buildings at maximum levels." (Union Pre-Hearing Statement, page 16)

The union contends that the workload is too great. It reports that Attachment A, dated March 1, 2011, indicates the industry standard is 15,000 square feet per custodial worker but in the county, employees have workloads that are from 3,685 square feet to 85,955 square feet over

the standard. The union observes that an industry trade publication reports that the median custodial productivity rate is 26,318 square feet per worker per day. It asserts that custodians in the county are cleaning far beyond this productivity rate.

County Position - The county argues that the union's demand must be rejected. It states that "staffing levels are a management right pursuant to Ohio Revised Code Section 4117.08 (C) and are not a mandatory subject of bargaining." (County Pre-Hearing Statement, page 9) The county claims that the union "has no right to bring negotiations to impasse over this issue and the Fact-finder has no authority to recommend the introduction of a permissive subject of bargaining into the CBA." (Ibid.)

Analysis - The Fact Finder rejects the union's demand for a new article. First, a number of demands included in the new article are covered elsewhere in the collective bargaining agreement or the law. For example, the contract gives the union very broad rights to grieve and arbitrate disputes and the ORC requires an employer to provide a union with the information it needs to process a grievance.

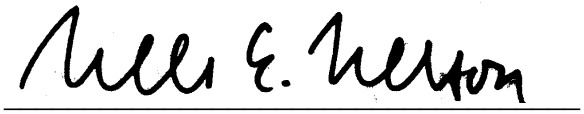
Second, a number of parts of the union's proposal involve management rights which under the ORC are permissive subjects for bargaining. This means that while the employer has the option of bargaining over these issues, the union cannot insist on bargaining to the point of causing an impasse. In the instant case, the county has made it clear that it does not wish to bargain over the union's proposal.

Finally, the Fact Finder recognizes the union's concern that some employees are being asked to perform an unreasonable amount of work. However, while the county has a right to demand employees to perform a reasonable day's work, if its demands go beyond that level and

the result is employee discipline, the employee has the right to file a grievance and the union has the right to pursue the case to arbitration.

Recommendation - The Fact Finder recommends that the union's demand for a new article titled Work Schedules and Workload be denied.

8) Tentative Agreements - The Fact Finder recommends that the the tentative agreements reached by the parties be adopted.



Nels E. Nelson
Fact Finder

September 18, 2012
Russell Township
Geauga County, Ohio