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FACT FINDING REPORT
STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD
February 17, 2012

In the Matter of:)	
)	
The Fraternal Order of Police/Ohio Labor)	
Council Unit 46)	
)	SERB Case No.
)	12-MED-04-0442
vs.)	
)	
Michael DeWine: Ohio Attorney General)	
)	
)	

APPEARANCES

For the Union:

Paul Cox, FOP/OLC General Counsel
Brenda Goheen: FOP/OLC Bargaining Representative

For the Attorney General:

Kathleen Madden, Director of Human Resources for the Attorney General's Office
Gary Johnson: Attorney for the Attorney General

Fact Finder: Dennis M. Byrne

Background

The fact-finding involves the approximately one hundred and sixty-five (165) members of the Fraternal Order of Police/Ohio Labor Council (FOP/OLC) Unit 46 (Union) and the Ohio Attorney General, Michael DeWine (Employer). Prior to the Fact Finding Hearing, the parties engaged in a number of negotiating sessions; but they were unable to come to an agreement, and four issues remain on the table: 1) an increase in the base wage rate for the prospective contract; 2) “Me Too” language with respect to other similarly situated employees in the Attorney General’s Office; 3) the number of vacation hours that can be converted to cash; and 4) the clothing allowance.

Because of the impasse, a Mediation/Fact Finding Hearing was held on November 7, 2012 at the Rhodes Office Tower in Columbus. The hearing commenced at 10:00 A.M. and ended at approximately 3:00 P. M.

The Ohio Public Employee Bargaining Statute sets forth the criteria the Fact Finder is to consider in making recommendations in Rule 4117-9-05. The criteria are:

- (1) Past collectively bargained agreements, if any.
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved.
- (3) The interest and welfare of the public, and the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standards 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 issues submitted to mutually agreed-upon dispute settlement procedures in the public service or private employment.

Introduction:

This negotiation presents a somewhat unusual situation because the parties reached a tentative agreement on a new contract, but that agreement was overwhelmingly rejected by Unit 46's membership. The Union believes that the State's financial condition has improved over the past years, and that the State can afford to increase the wages and benefits paid to the membership. The Employer agrees that the State's financial condition has improved, but argues that it has not fully recovered from the recession that affected all State and Local governments. The State contends that it must continue its cost containment strategy for the duration of this agreement. Therefore, the Employer argues that it cannot meet the Union's financial demands.

This difference in outlook about the State's financial condition is at the heart of the dispute. However, the fact that the parties reached a tentative agreement that was rejected by the membership complicates the attempt to reach a new agreement. The Union stated that its membership had made numerous concessions in prior contracts, and that its membership had not received a general wage increase in six (6) years. The Union argued that its membership deserved wage and benefit improvements over the life of the proposed contract. Consequently, the Union stated that the membership's rejection of the tentative agreement was justified by 1) the financial reality in Ohio, and 2) the State's positions on many issues.

The Employer stated that it had bargained in good faith and worked toward an agreement that was similar to the agreements signed by other state employees. That is, the Employer believes that the agreement that was negotiated is reasonable and that the

terms of the prospective agreement should be similar to the terms of the rejected tentative agreement.

Contract rejection is a fact of life in industrial relations. However, depending on the underlying reasons for the rejection, it can cause problems for the parties when they try to finalize a new contract. Assuming that there was no bad faith or strategic behavior during the negotiations that led up to the rejected agreement, there is no reason to expect that subsequent negotiations will lead to a markedly different result. That is, the underlying reality of collective bargaining is that each side negotiates in a way that will maximize their gain. At certain times, either the Union or the Employer will have more bargaining power and negotiate a contract that is beneficial to its principals, i.e., it wins the negotiation. However, the underlying reality of negotiations is that each side does as well as it can to advance its goals given the external environment which determines relative bargaining power.

If the parties have bargained properly, then each side has compromised on its positions in the attempt to find a workable agreement. However, if one side or the other rejects the tentative agreement, that rejection forces the parties to return to negotiations. If the parties bargained fully and fairly, there is little reason to expect that any new agreement will be significantly different than the rejected agreement.

There is also a practical problem involved with contract rejection. If an Employer returns to the table and makes significant changes (concessions) to a tentative agreement, that “teaches” the Union that it can get better contract terms by rejecting tentative agreements. This “trains” the Union to reject tentative agreements, and this makes the bargaining process more costly and less efficient. Therefore, the only time that a contract

rejection should lead to a significantly different result is when the rejection fundamentally changes the bargaining power relationship between the parties. In that case, the new contract *may* (emphasis added) lead to changes the terms of the prospective agreement.

What this means is that if bargaining committees that fully and fairly represent the demands of their constituencies when they negotiate a contract, a revised agreement will usually closely resemble the rejected agreement. That seems to be the situation present in these negotiations. Both sides attempted to craft an agreement that was as beneficial as possible for their constituents. The Union membership rejected the agreement, but that rejection does not change the underlying facts of the situation.

The forgoing paragraphs discuss the theoretical and practical implications of one side or the other rejecting a tentative agreement. With that as a background, the issues at impasse will be discussed.

Issue: Article 45: Wages

Union Position: The Union demand is for a one (1.0%) percent increase in each year of the prospective agreement.

Employer Position: The Employer rejects the Union's demand and countered with a wage freeze for the life of the agreement.

Discussion: Unit 46 is the last bargaining unit to sign an agreement with the Employer. In all other settlements, the parties agreed to a wage freeze for the life of the agreement. One of the criteria that ORC4117 requires a Fact Finder to consider is internal comparability. In this instance internal comparability is a major factor in the Fact

Finder's decision. Because all other bargaining units have agreed to a wage freeze, a pattern breaking agreement between the Employer and Unit 46 would have repercussions far beyond the confines of the present contract. In addition, all other bargaining units facing the same situation as Unit 46 agreed to the Employer's position. The Fact Finder did not receive any evidence that convinced him that Unit 46's position was so unique that it deserved a base wage increase when all other bargaining units agreed to a wage freeze.

The Union was aware of the other settlements and in its discussion of this issue made the point that it had gone a number of years with no wage increase. In addition, the step increases found in the contract had also been frozen. The Union negotiating team argued strenuously that the membership deserved some monetary increase in the contract. The Union understood that other bargaining units had accepted a wage freeze, but it believed that even if wages were frozen, that its membership deserved some monetary increase(s) during the life of the contract. In this context the Union stressed that the State's fiscal condition was continuing to improve.

Finding of Fact: A wage freeze is the norm for State bargaining units.

Suggested Language: Current Contract Language

Issue: Article 45 - Wages

Union Position: The Union demands that "Me Too" language be inserted into the contract with regard to wage changes.

Employer Position: The Employer rejects the Union's demand.

Discussion: The Union believes that there is a non-trivial possibility that some members of the Attorney General's exempt staff will receive a wage increase after negotiations are completed. The Union also believes that some other individuals will be reclassified as a way to skirt the contract's wage freeze language. The Employer went on record and claimed that there were no plans to raise wages within the Attorney General's Office.

This is a somewhat complex matter. The Attorney General's labor force is drawn from many different occupations. Unit 46 consists of member of the Bureau of Criminal Investigation (BCI). However, there are secretarial and clerical staff, maintenance staff, Administrative personnel, and profession staff including attorneys. A "Me Too" clause usually relates to other organized employees. That is, in a multiunit jurisdiction there is often an agreement that the wages negotiated by one unit will apply to all units. In addition, certain benefits are subject to either an implicit or explicit "Me Too" clause. Health insurance is an example. Usually an employer has a single medical plan and any negotiated changes in the plan are meant to apply to the entire workforce.

In this situation the Union is convinced that either some individuals will be reclassified or that raises will be given to members of the BCI who are not covered by the contract. The Union believes that its members should receive the same raises that are given to any other employee. The Fact Finder agrees with that argument. However, the devil is in the details. First, there are entire classifications of employees who are not covered by a contract and who work in Attorney General's Office. For example, the legal staff is in an entirely different classification than the members of the BCI. There is a legal labor market and the Attorney General's Office must pay competitive salaries within that market.

Therefore, the coverage of a “Me Too” clause must be restricted to similarly situated employees. That is, individuals who work in the same or similar labor markets to the BCI. That means that the “Me Too” language would apply to other unionized employees and nonunionized members of the BCI. Consequently, the Fact Finder is recommending the inclusion of “Me Too” language into the contract for other similarly situated employees.

Finding of Fact: The contract should include a “Me Too” clause with respect to similarly situated employees.

Suggested Language: Article 45.1

The Language that was agreed to in the previous T.A.

Issue: Article 33 – Vacation Leave Conversion

Union Position: The Union demand is for the right to convert up to one hundred (100) hours of accrued sick leave hours into cash.

Employer Position: The Employer’s position is that an employee can convert up to eighty (80) hours of accrued sick leave into cash.

Discussion: This issue is one of the more contentious issues dividing the parties.

Vacation leave accrual conversion was cut from eighty (80) hours to forty (40) hours as a cost saving measure during the term of the previous contract. In negotiations for the prospective contract, the Employer’s representative offered to increase the vacation conversion to one hundred (100) hours. When the Union membership rejected the tentative agreement, the Employer changed its position. The Employer contends that cost and internal parity considerations necessitated the change. The Union believes that the

Employer's action is unreasonable and that the original agreement should be included in the contract.

The Employer pointed out that when the Union membership voted to reject the tentative contract that they specifically voted down all of the tentative agreements. The Employer was willing to live with its original agreement, but when the tentative contract was rejected, it was able to change its position on this issue.

With some understanding of the background of the issue, it will now be discussed. The Union negotiating committee was adamant that the tentative language should remain in the contract. However, there was some disagreement on the importance of the issue and its effect on the membership. That is, some members use the benefit ever year and convert as many accrued vacation hours to cash as the contract allows. Other members maintain their accrual and cash out their unused vacation time at the time of separation from service with the Attorney General. There was no consensus on the number of individuals that fall into each category.

The Union also pointed out that the Employer's position simply returned the membership to the preexisting standard. That is, before the fiscal crisis of the last few years, the membership could convert eighty (80) hours of vacation leave to cash, and the Employer's position was for a return to the status quo. The Union believes that it deserves an increase in some (all) of the economic provisions of the contract because of the State's brightening financial outlook. Consequently, the Union believes that the Employer's position is a return of a benefit that was already in the contract, and does not improve on the existing benefit. The Union does not see this as a real gain for its members.

This is a situation of equal and competing interests. There is no doubt that the State's financial condition is improving. Both parties agree on that fact. At the same time, it is also apparent that the State's finances do not allow for a general across the board increase in wages and benefits for its employees. The State's contention that internal parity dictates its stance on this issue is compelling, especially in light of the discussion that not all members of the bargaining unit convert unused accrued vacation time. Therefore, the Fact Finder is recommending the State's position on this issue.

Finding of Fact: The number of accrued vacation hours that can be converted to cash should return to eighty (80) hours.

Suggested Language: Section 33.6 Annual Vacation Leave Conversion.

In the pay period including December 1, 2012, 2013, and 2014, each employee who has used less than forty (40) hours of sick leave in the previous twenty-six pay periods will be offered the opportunity to convert to cash any of the employee's accrued, unused vacation leave to a maximum of eighty (80) hours at the current rate of pay.

Issue: Article 46 – Pay Supplements – Clothing Allowance

Union Position: The Union made no initial demand in this article.

Employer Position: The Employer in an attempt to reach a settlement offered to increase the Clothing Allowance.

Discussion: An increase in the clothing allowance is usually demanded by the Union. In this instance, the Employer offered some concession in an attempt to demonstrate that it was trying to find a way to reach an agreement. There was little discussion of this issue. The Fact Finder recommends an increase of \$150.00 to the allowance.

Finding of Fact: The clothing allowance shall be increased by \$150.00.

Suggested Language: Section 46.2 Clothing Allowance

Employees shall receive a clothing allowance of \$650.00 payable in the first pay period of January 2013, 2014, and 2015.

Signed this 21st day of November 2012, at Munroe Falls, Ohio.

Dennis Byrne /s/

Dennis M. Byrne, Fact Finder