

STATE EMPLOYMENT RELATIONS BOARD
STATE OF OHIO

In The Matter of Fact Finding Between		**Received after business hours on 11/18/14 Processed next business day**
Municipal Foremen & Laborers	}	
Local 1099	}	Case No. (s): 2012-MED-12-1390 & 94
Employee Organization	}	
	}	
AND	}	
	}	
The City of Cleveland	}	Fact Finding Report
Ohio Public Employer	}	Michael King, Fact Finder
	}	

This matter was heard on October 29, 2014, in the City of Cleveland, Ohio.

APPEARANCES:

For The Union:

Basil W. Mangano
2245 Warrensville Center Road, Suite 213
Cleveland, Ohio 44118

Vincent Callahan, Business Manager
Lillian Ponder, Recording Secretary
Bruce Jackson, Executive Board
Julio Castro, Executive Board

For The Employer:

Jon M. Dileno
Zashin & Rich Co. L.P.A.
950 Main Avenue, 4th Floor
Cleveland, Ohio 44113

Hernando Harge, Labor Relations Manager, Public Utilities
Nycole D. West, City's Labor Relations Manager
Phil Haddad, Labor Relations
John Laird, Labor Relations

I. Introduction and Background

The undersigned, Michael King, was appointed Fact Finder by the State Employment Relations Board (SERB) on August 7, 2014. As Fact Finder the undersigned was tasked to conduct a hearing and issue a report with recommendations on each of the unresolved issues between the parties in their negotiations for a successor Collective Bargaining Agreement (CBA).

This matter involves two (2) bargaining units. One unit covers approximately 375 to 460 fulltime and seasonal laborers and other hands-on labor-related classifications. The second unit consists of approximately 100 to 150 supervisory employees. The Union is affiliated with the Laborers' International Union of North America.

The collective bargaining agreement expired on March 31, 2013. Prior to and after expiration of that agreement the parties met and negotiated on numerous occasions, but were unable to conclude a new agreement. Negotiations included approximately fifteen (15) meetings over a fourteen (14) month period.

In June 2014, the parties reached a tentative agreement. That tentative agreement provided that the Union would accept the City's pattern offer on wages, insurance and the no-fault attendance policy. At that time the parties also agreed to other contract modifications designed to deal with an absenteeism problem within the unit.

In July 2014, Union membership rejected the tentative agreement, and the parties requested fact finding. As of the date of hearing, three (3) issues remained unresolved: wages, no-fault attendance, and task system. The unresolved issues correspond to the non-supervisory collective bargaining agreement. However, the parties desire and intend that resolution of these matters will apply to contracts for both bargaining units.

Prior to the hearing the parties timely submitted pre-hearing statements pursuant to SERB Rules. Those statements were reviewed prior to the hearing, and discussed fully at the hearing. Each party was presented a full opportunity to present documents, exhibits and testimony as that party deemed appropriate.

II. Fact-Finder's Report

In reviewing the issues at impasse, and arriving at recommendations, I considered the parties written submissions and exhibits, oral presentations and testimony and the following factors as required by law:

- 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 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] 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 in private employment.

In preparing this report I have attempted to make recommendations that are reasonable based on the evidence presented, and that balance the legitimate economic interests of both parties.

The fact-finding hearing in this matter occurred on October 29, 2014, and the record was closed immediately thereafter.

III. **Issues At Impasse**

Issue # 1 Wages

Employer's Position:

Initially, the City of Cleveland offered and tentatively agreed to, the exact wage package that the Union now seeks. That initial offer was consistent with the pattern Cleveland sought to achieve across its multiple collective bargaining units.

Now, however, Cleveland argues that a lesser wage increase is appropriate. Specifically, the City would provide for a wage freeze during the first year of the contract. Then it would offer a two percent (2%) wage increase during the second year of the contract. The wage increase in the second year of the contract would be prospective only. Finally, an additional two percent (2%) wage increase would be effective at the beginning of year three of the collective bargaining agreement.

According to the City, downward variance from the pattern wage increase is appropriate because of the Union's delay in finally accepting a new collective bargaining agreement. The initial wage offer was part of an overall intertwined package that included -- among other things -- modifications to the health insurance package. Those insurance modifications included some cost shifting to the employees and would have resulted in some financial relief for Cleveland. When the Union rejected the previously negotiated tentative agreement, it deprived Cleveland of immediate access to the financial relief that would have come from changes to the health insurance costs for members of these two bargaining units.

Cleveland argued and presented evidence that its finances aren't robust. Although there has been much improvement since the great recession, city finances continue to face significant challenges. City finances have improved primarily because of substantial cost cutting. For example, in the 2012 fiscal year spending was \$37 million less than in 2008. Revenues in 2012 totaled approximately \$518 million, down \$6 million from 2008. Cost cutting has allowed Cleveland to maintain meaningful year-to-year cash carryover, although below what the City would consider optimum amounts. In 2012 that carryover was approximately 10% of revenues. Public sector finance experts recommend a carryover of approximately 15%.

To maintain some meaningful carryover Cleveland has deferred numerous maintenance and repair projects. It submitted evidence of numerous open work orders for carpentry, electrical, engineering, plaster, painting, roofing and other projects. Some of those work orders remain open after two or more years.

Union's Position:

The Union seeks wage increases as follows:

- 1% Retroactive to April 1, 2013
- 2% Retroactive to April 1, 2014
- 2% Effective April 1, 2015

The proposed wage increases are a part of the pattern Cleveland sought to establish across its unionized workforce. As suggested by the pattern, this is an amount the City deemed it had an ability to pay. Any delay in acceptance of a new contract wasn't done in bad faith, and wasn't so deleterious as to compromise the City's ability to pay the requested wage increase.

The delay is nothing more than the normal give and take of the collective bargaining process. Acceptance or imposition of the revised City wage offer would punish employees for doing nothing more than engaging in the collective bargaining process, and exercising their statutory right to fact finding, according to the Union.

The Union also argues that Cleveland representatives have been overly pessimistic in describing city finances. City finances continue to improve, and there is genuine momentum for economic growth in the region. This momentum is referenced in Mayor Frank Jackson's 2013 State of the City presentation:

Positive momentum in 2012 was measured with multi-billion dollars of public-private investment, including the opening of the Horseshoe Casino; job creation, and significant public infrastructure improvements. The downtown office vacancy rate declined from 22.9% to 18.6%. Total downtown housing units increased 4,193 to 4,636 and maintained a 97% occupancy rate.

2013 will bring the opening of the \$465 million Global Center for Health Innovations and Convention Center and the \$272 million Flats East Bank mixed use development. This summer, Cleveland will host 14,000 athletes for the National Senior Games; and next year, we will host the 2014 International Gay Games, with more than 13,000 artists and athletes from around the world.

Also, the return of athlete LeBron James to Cleveland already is leading to more downtown economic activity. The forthcoming Republican National Convention should provide an even more substantial economic boost for the City.

Finally, the Union argues that the requested wage increase is appropriate based on comparables. Because the City engaged in pattern bargaining, the Union believes that the appropriate comparables are the other public sector bargaining units that have or will negotiate with Cleveland. Those units are offered the exact wage package that these units seek.

Finding And Recommendation

I find that there has been and continues to be some drag on Cleveland's finances including policies of other governmental units that have or will reduce or eliminate certain revenue streams. Such depleted revenue streams include estate tax income and worker's compensation refunds. The City will also be without revenues from traffic cameras as a result of a recent voter decision.

Despite those negatives, I find that City finances are strong and that ongoing economic development will continue to have a positive impact on those finances. As a result, I find that Cleveland has an ability to pay the wage increase requested by the Union:

- 1% Retroactive to April 1, 2013
- 2% Retroactive to April 1, 2014
- 2% Effective April 1, 2015

I concur with the Union, and find that members of these two bargaining units are appropriately compared to other public sector unions bargaining with Cleveland.

I find that the delay in approval of a new agreement by these bargaining units is not inconsistent with delays by other Ohio public sector bargaining units.

Based on all of the above, and on the testimony and exhibits that the parties provided, I recommend adoption of the Union's wage increase proposal, which is the same as the City has offered to other units with whom it has engaged in pattern bargaining.

Issue # 2 No Fault Attendance

Employer's Position

Article 22 of the recently expired CBA covers Sick Leave With Pay. The City of Cleveland proposes to modify that article by adding the following language:

The City reserves the right to implement a no-fault attendance policy. The City will notify the Union prior to implementing such a policy and will negotiate with the Union regarding the policy wherein the City may implement a policy if an impasse is reached in those negotiations. The Union reserves the right to file a grievance regarding the reasonableness of a newly-implemented policy.

The City faces a serious absenteeism problem that is depressing productivity, and causing the City's overtime budget to balloon. Although there are some physical hazards associated with waste collection, the attendance problems seem at least partly unrelated to actual health or illness issues. In fact, there are sick leave spikes at curious and predictable times. For example, on Mondays following Cleveland Browns football games there is a large increase in sick leave call offs.

The City is attempting to address this problem by going to a no fault attendance policy. That would eliminate the need to scrutinize calls, or to request physicians' notes after an absence. This is an issue being addressed across the more than thirty (30) unions who represent city employees.

Even these bargaining units recognize that absenteeism is a problem. Union Business Manager Vincent Callahan addressed that issue in a letter to members October 15, 2014:

We all have families to support and bills to pay, therefore it is imperative that you report to work each and every day. As you may know there are some very serious issues in the Division (old faulty equipment, lack of staffing, health issues ...), but the current absentee rate cannot continue. The City of Cleveland will find solutions which may well disregard your welfare; it is as simple as that! Mandatory overtime caused by unjustified absences only leads to a vicious circle of health issues for those members left to complete the daily routes and a financial burden to the City, which will not be tolerated much longer.

Union leadership is trying very hard to find solutions to these difficult issues but sees unexcused absences as a part of the problem. There are no easy answers, but coming to work is a start to ending a broken cycle.

The City notes that its proposed policy wouldn't have any impact on absences associated with FMLA leave, or with workers' compensation issues.

Union's Position

As noted in Business Manager Callahan's letter, the Union acknowledges there is a serious problem with unexcused absenteeism. However, it claims that the City's proposed contract language on this issue is ambiguous. It proposes the following language:

The City reserves the right to implement a no-fault attendance policy pursuant to the following procedure. The City will first notify the Union no less than thirty (30) days prior to implementing such a policy and negotiate in good faith with the Union regarding the policy. If the parties are unable to reach agreement, the Union reserves the right to file for arbitration with FMCS within fourteen (14) days of a written declaration of impasse. Each party shall present a proposal before the arbitrator, with the arbitrator selecting one or the other proposal based on his/her assessment of which proposal is the most reasonable. The arbitrator's decision must be rendered within thirty (30) days of the hearing date(s) and within sixty (60) days of his/her appointment, unless mutually agreed

otherwise. If the Union does not timely file for arbitration following a declaration of impasse, the City may implement its last-proposed policy. The City will not implement any policy until the Arbitrator renders a decision and will implement the policy selected by the Arbitrator. The City may modify the policy after one (1) year following implementation. If the City desires to modify the policy it must first provide the Union with no less than thirty (30) days' notice and negotiate in good faith with the Union regarding its intended modifications. In the absence of an agreement, the City may not modify the policy unless it establishes a demonstrable operational need.

The Union notes that it is agreeable to bargaining over ways to decrease employee absenteeism. However, it insists that the parties be mindful of the inherent hazards associated with waste collection work. Injuries can sometimes result from dog bites, overweight trash containers, cuts from glass dumped in the trash, as well as injuries from feces or hazardous liquids sometimes splashed from trash containers. Despite some automation in the department the number of injury days continues to rise. In 2012, there were 90 injuries resulting in 570 missed days. In 2013, the days off from injuries rose to more than 1,000. Thus far in 2014, missed days from injury already have topped 1,000.

For this provision the Union urged that the cities of Columbus, Cincinnati and Toledo be viewed as comparables. Those are the state's other major cities and have generally similar population bases and demographics. According to the Union none of those cities has a no-fault attendance policy.

Finding and Recommendation

I find that the Union clearly understands the gravity of the absenteeism problem, and is willing to cooperate in working toward a solution. Moreover, the Union produced evidence that it has worked with other Ohio employer's to mitigate absenteeism.

I find that the Union's proposal is substantially similar to that offered by the employer, but offers greater assurance of a union role throughout the process. The Union's proposal also provides a roadmap to a new attendance policy.

I find that either proposal likely would contribute to a reduction in absenteeism. However, it appears that the proposal offered by the Union may have a more enduring impact because the interest of employees are more clearly protected during the period when the policy is being developed.

For the reasons set forth herein, I recommend adoption of the Union's proposal on development of a no-fault attendance policy.

Issue # 3 Task System

Article 27 of the current recently expired collective bargaining agreement covers the issue of overtime. Paragraph 93 of the CBA provides as follows:

A Waste Collector assigned to work on a residential waste collection route on task system shall receive premium pay at the time-and-one-half rate for all hours worked if after the completion of his task that employee is assigned work at another waste collection station.

Employer's Position

The City of Cleveland proposes to modify that section by adding the following language to Paragraph 93:

The "task system" benefit will be suspended for any day in which the number of employees absent due to paid or unpaid sick leave or unexcused absences (excluding FMLA and workers' compensation leaves) meets or exceeds five and one-half percent (5.5%) of the total bargaining unit members assigned to the Division of Waste Collection (excluding MSLs, Transfer Station Attendants, and Radio Operators who will not be included in any part of the calculation).

The task system allows workers to earn overtime during normal workday, or to go home early once they have completed their task. This system is inconsistent with the City's current posture of attempting to do more with fewer resources.

The current task system language is a contract heirloom that the City believes isn't useful. It would prefer elimination of the task system altogether. However, the City offers the compromise of continuing the task system, but tying its applicability to absentee rates.

Union's Position

The Union proposes maintaining the status quo, with no changes to this section. It believes that the focus should be on those employees who abuse the attendance policy,

rather than on punishing employees who come to work and work diligently to handle the tasks assigned. The task system is an incentive for hard work, and shouldn't be changed.

Finding and Recommendation

I find that no evidence was presented that Cities considered comparables by the Union (Cincinnati, Columbus and Toledo) have any similar system in place. I find that unchecked absenteeism will have a significant negative impact on city finances and city services. Under such circumstances, the task system in its present form will only exacerbate the problem. Finally, I find that the method used to improve city finances (more impact using fewer resources) requires some modification to the task system.

For the reasons set forth herein I recommend adoption of the proposal on task system offered by the City of Cleveland. If absenteeism improves then the proposed task system change will have little or no impact on bargaining unit members. If absenteeism doesn't improve, the modified task system will allow the City to have some counter to the added overtime costs often incurred to cover unscheduled absences.

Additional Finding and Recommendation

As noted above, I find that the parties reached tentative agreement on all other provisions of the collective bargaining agreement. I recommend that all those tentative agreements be approved, and incorporated into a successor collective bargaining agreement of three years duration.

Michael King
Appointed Fact Finder

Date: November 18, 2014
Beachwood, Ohio