BEFORE THE

STATE EMPLOYMENT RELATIONS BOARD

STATE EMPLOYMENT RELATIONS BOARD
SEP 22 10 52 AM '95

* * * *

In Re:

THE CITY OF CLEVELAND *

* CASE NO. 95-MED-01-0024

And

* FACT FINDERS AWARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 47 *

* * * *

I. HEARING

PARTIES: City of Cleveland and Service Employees International Union Local 47

FACT FINDER: I. Bernard Trombetta, Esq.

Date: August 30, 1995

Location: At the Offices of Devin, Cahn & Hutton,
1301 East 9th Street, 20th Floor
Cleveland, Ohio 44114
By Agreement of the Parties

II. APPEARANCES:
EMPLOYEE REPRESENTATIVES:

Eben O. McNair, Esq.
Timothy Gallagher, Esq.
Schwartzwald & Rock, Attorneys at Law
1300 East 9th Street - Suite 616
Cleveland, Ohio 44114-1503

Michael P. Murphy, President, SEIU Local 47
Mark R. Davis, Vice President, SEIU Local 47
Doris Murray, Steward, SEIU Local 47
Jeff Caldwell, Steward, SEIU Local 47
Rochelle D. Edwards, Steward, SEIU Local 47

Willie Howard, Business Representative, SEIU Local 47
1735 East 23rd Street
Cleveland, Ohio

EMPLOYER REPRESENTATIVES:

Martin List, Labor Counsel
Craig Brown, Labor Counsel
Frank W. Buck, Labor Counsel
Duvin, Cahn & Hutton, Attorneys at Law
1301 East 9th Street - 20th Floor
Cleveland, Ohio 44114
Joseph A. Nolan, Director of Personnel &
Human Resources
Jeffrey Patterson, Labor Relations Manager
Corrine Katz, Assistant Director of Law
Vernon H. Robinson, Commissioner of Property Management
Trudy Hutchinson, Labor Relations Officer
Raleigh Clemmons, III, Labor Relations Officer
City of Cleveland
601 Lakeside Avenue
Cleveland, Ohio 44114

III. PRESENT CONTRACT:

The present collective bargaining agreement expired March 31, 1995. It was extended by mutual consent to September 30, 1995.

IV. DATE OF MAILING:

The Award was released on September 20, 1995 by agreement of parties.

V. HISTORY OF UNIT:

The bargaining unit consists of approximately 150 full-time and 75 casual custodial workers and 5 window washers who are employed in 29 buildings of the City of Cleveland

(hereinafter referred to as ``City''). The custodial workers maintain the exterior and interior of the buildings as well as adjacent grounds and perform general cleaning and maintenance work. The window washers wash and clean all windows and perform related duties as required.

The Unit representative is the Service Employees International Union, Local 47 (hereinafter referred to as either the ``Union'' or ``Local 47''). The Unit has been represented for about 30 years. This is a contract renewal, the present contract having expired on March 31, 1995 but extended by agreement through September 30th. The parties bargained on at least 14 occasions before the Fact-Finding hearing. These sessions resulted in the resolution of most of the issues between the parties. There are, however, two unresolved issues which are the subject of this hearing.

VI. ISSUES:

ISSUE NO. 1. COMPETITIVE INITIATIVES:

This issue, named by the City, is a euphemism for the issues of management rights, subcontracting and privatization. The Union, on the other hand, chose to view this issue as job protection and work force efficiency. Both parties proposed modifications to the current Management Rights Clause (and side letter defining procedure thereunder). The issue for want of a better term will be referred to as ``Competitive Initiative'' in this report.

ISSUE NO. 2. WAGES:

The City proposed a wage increase of 2% (retroactive to April 1, 1995), 3% commencing April 1, 1996 and 3% commencing April 1, 1997.

On the other hand, the Union offered to forego a raise in 1995 if its proposal on competitive initiatives was adopted and agreed to a 3% increase in 1996 and a 3% increase in 1997.

VII. MEDIATION

Due to the nature of the issues and the previous number of bargaining sessions engaged in, the parties agreed that mediation by the Fact-Finder had little chance of succeeding. The parties therefore agreed to proceed immediately with the evidentiary hearing.

VIII. FACT-FINDING HEARING

ISSUE NO. 1: COMPETITIVE INITIATIVES

A) Background

The recently expired Labor Agreement contains a Management Rights Clause (Article III) in which the City retained the right to determine matters of inherent managerial policy, direction, supervision and evaluation of employees, maintaining and improving the efficiency and effectiveness of the operations, suspend, discipline, transfer, assign, promote or retain employees, determine the

adequacy of the work force, determine job classifications and standards and promulgate and enforce work rules policies and procedures.

In subsection (L) the City reserved the right to privatize or sub-contract services provided that the parties confer to discuss the issue. The Union also has the right to make an alternative offer. The contract provided that if the Union's alternative offer yields financial savings, improved operating efficiency and/or better quality of service generally equivalent to or greater than those that the City can achieve through either privatization or sub-contracting, the City will accept the Union's offer.

The contract also contained a ``Zipper Clause'' in which the parties agreed that the City had no obligation to bargain collectively with respect to the exercise of any rights reserved to it pursuant to R.C. 4117.08 (C) or as contained in Article III.

In addition to the Management Rights Clause of the Agreement, the parties agreed upon a ``Letter Of Understanding'' regarding management rights and privatization as follows:

> The City agrees that if there is a disagreement over the true value of the Union's competitive alternative, based upon financial savings, improved efficiency or quality of service, the Union shall have the right to submit the issue of whether or not the Union's alternative ``genuinely'' meets or exceeds with City's objectives, to final and binding arbitration before the City implements its privatization decision.

B) Union's Proposal

The Union sought to amend Article III Subparagraph L and the Letter of Understanding as follows:

a. Statement of Principle. The City and the Union agree and acknowledge that they should work together to promote the efficiency and quality of City services, while simultaneously maintaining economic terms and conditions of employment.

b. Labor-Management Committee. If the City believes that employees in the bargaining unit can operate more efficiently and/or provide better quality of service, it shall so notify the Union. The parties shall then establish a Labor-Management Committee (``LMC'') and for the next forty-five (45) days, meet weekly to establish reasonable work rules and reasonable work standards, consistent with those standards generally applicable in the industry. The LMC shall not consider reducing economic terms and conditions of employment, i.e. wages, fringe benefits.

c. Exchange of Information. The City and the Union shall, during this forty-five (45) day period, exchange information to assist in establishing and implementing such reasonable work rules and standards.

d. Resolution. If, at the conclusion of the forty-five (45) day period, the parties reach agreement as to establishing and implementing new work rules and standards, the City shall not invoke arbitration or the bidding procedure set forth below.

e. Arbitration of Union's Best Efforts. If, after the conclusion of the forty-five day period, the parties do not agree, the City may invoke expedited arbitration under the rules of the American Arbitration Association and seek a determination as to whether or not the Union used its best efforts to agree to reasonable work rules and standards.

(i) If the arbitrator determines that the Union did use its best efforts, then the City shall have no recourse other

than to implement the work rules and standards to which the Union agreed.

(ii) If the arbitrator determines that the Union did not use its best efforts, then the arbitrator shall determine what the reasonable work rules and standards shall be.

f. Implementation of Work Rules and Standards.

After the work rules and standards have been established, either by agreement, or pursuant to an arbitrator's determination, then:

(i) Any individual who does not meet those rules and standards shall be placed on notice and given six (6) months to bring his/her performance level up to the rules or standards, or may be terminated or demoted, such discipline being subject to the grievance and arbitration provisions of this agreement.

(ii) Any site which does not meet those rules and standards shall be placed on notice and given eighteen (18) months to bring its performance up to the rules or standards, or such work may be bid out, as set forth below. Such determination that the site is the grievance and arbitration provisions of this agreement. However, individuals at the affected sites who are meeting the rules and standards shall be retained and transferred to another work location.

g. Bidding.

(i) Any competitive bids which the City solicits must include the following:

- the specific wages and benefits which the vendor/bidder intends to pay its employees; and

- the number and job classification the vendor/bidder intends to use to staff the work.

(ii) Union's response to Bid.

The City and the Union through the LMC

will continue to work cooperatively and meet weekly from the time the City solicits bids until the day the City provides to the Union the lowest bid. The Union shall then have thirty (30) days to make a counter-proposal, during which time the City shall meet and provide such documents and information as the Union reasonably requests. If the Union's alternative yields financial savings, improved operating efficiency, and/or better quality of service genuinely equivalent to or greater than what the City can achieve through privatization or subcontracting, the City will accept the Union's alternative.

In determining the lowest bid from an external bidder/vendor, the City shall include all costs reasonably attributable to the choice of privatization or subcontracting, including, but not limited to:

(1) The costs of preparing and administering requests for proposals and private contracts;

(2) administrative costs involved in contract compliance and monitoring; and

(3) conversion costs, including any lost payroll tax, unemployment, severance, accrued leave payments, lease terminations, or retraining costs the City incurs as a result of bargaining unit job loss.

h. Affected City Workers. Should the City privatize a segment of its workforce, the City will make a good faith effort to assign displaced employees to vacant positions for which they are qualified or can be trained to become qualified within a reasonable period of time.

i. Arbitration of Proposal. The City agrees that if there is disagreement regarding sub-paragraphs (f) or (g), *supra*, including over the true value of the Union's competitive alternative (financial savings, improved efficiency, quality of service), the Union will have the right

> to submit the issue of whether or not the Union's alternative ``genuinely'' meets or exceeds the City's objective, to final and binding arbitration before the City implements its privatization decision.

C) City's Proposal

On the other hand, the City sought to maintain current contract language on management rights and to substitute the following ``side letter'' on the issue of privatization in the place of the letter of understanding cited above:

> The City shall have the right to institute competitive initiatives or subcontract services where the City's primary objective is to achieve financial economy, improved operating efficiency, and/or better quality of service. Forty-five (45) days prior to initiation of any bid procedure, the City shall conduct Labor Management Committee (LMC) Meetings on a weekly basis to determine if there are methods of improving operating efficiency and reducing the cost of providing City services. Prior to the LMC Meeting, the City shall provide the Union with information sufficient to allow LMC meetings to proceed in a productive fashion, including the cost of the work being performed and the problems with efficiency or productivity which the City would like to address.
>
> At the conclusion of the LMC Meetings, the City and the Union shall calculate the cost and evaluate the methods of providing services. Upon review by the City, if the alternative yields significant financial savings and improved operating efficiency, the City shall accept the Union's alternative instead of utilizing an outside bidder/vendor, although to insure meaningful substantive evaluation, the City will be permitted to prepare bid documents during the initial 45 day LMC meeting period set forth above and to utilize the bid procedure immediately upon completing the 45 day LMC meeting period.
>
> If the City informs the Union that the alternative does not sufficiently meet the City's objective as stated in paragraph 1 above, then the City and the LMC will continue

> to work cooperatively for not less than twenty (20) days after the conclusion of the bidding process (which ends on the day the City shares the lowest bid for and initiative with the LMC and affected union (s)), after which the City may exercise its contractual rights to implement the proposed initiative.
>
> Should the City decide to implement a competitive initiative, the City will make a good faith effort to assign displaced employees to vacant positions for which they are qualified or can be trained to become qualified within a reasonable period of time.
>
> The City and the Unions agree that if there is a disagreement regarding the above, including over the true value of the Union's competitive alternative (financial savings, improved efficiency, quality of service - including the payment of a living wage), the Union will have the right to submit the issue of whether or not the Union's alternative ``genuinely'' meets or exceeds the City's objective to final and binding arbitration before the City implements its competitive initiative.

D) Review of Proposals

The City did not request a modification to the existing Management Rights Clause. It did, however, seek a modification to the ``letter of understanding'' and the procedure governing the parties conduct in the event competitive initiatives were commenced. On the other hand, the Union sought to amend section L as well as the current ``Letter Of Understanding.'' The parties, therefore, agreed that the Union would have the burden of going forward on Issue No. 1.

The parties bargained long and hard to resolve their differences, and, indeed, resolved them except for the two issues presented herein.

Most of the bargaining sessions were conducted between the City and a group of Unions known as the Public Unions Council of which Local 47 was a member until it decided to bargain alone. The City reached tentative agreements with The Fraternal Order of Police, Lodge 8, Municipal Foremen & Laborers Union, Local 1099, Teamsters, Local 244 and The Sign Display Workers, Local 639 and apparently has some form of an understanding with the remaining unions of the PUC, with the exception of Local 47. The agreements with Locals 1099, 244 and 639, contain the same language as that proposed by the City in this instance.

As proof of the earnestness of its position, Local 47 offered to swap the 1995 wage increase in return for the adoption of its proposal. The Union argued against the City's proposal claiming it granted unlimited discretion to the employer. It also questioned the use of the term ``significant savings'' as the benchmark in determining the acceptability of its alternative offer. The word ``significant'' is not contained in the letter of understanding.

The City's proposal retains the right to challenge the cost savings data through binding arbitration prior to the adoption of privatization or subcontracting, as well as providing reasonable job retraining and worker replacement if the arbitrator adopts the City's proposal on privatization or subcontracting. The Union, on the other

hand, modified the existing arbitration procedure to a determination of ``best efforts''.

E) STATUTORY RECOGNITION

Pursuant to the provisions of R.C. 4117.14 (G)(7) the Fact-Finder took into consideration the following: past collectively bargained agreements; comparison of the present issues as compared to those issues related to other public employees by the same employer; the interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed and the lawful authority of the employer, and other relevant factors.

F) DISCUSSION AND RECOMMENDATION

i) Issue No. 1

In addressing the first issue, the authority of the City to privatize or sub-contract out work is recognized, under the statutes as well as by case law. The employer's right to privatize was recognized by the Ohio Supreme Court in Local 4501, CWA v. Ohio State University [24 Ohio St. 3d 191, 494 N.E.2nd 1082,1087(1986)] in which it held: ``it can generally be stated, therefore, that in the absence of proof the public employer was motivated by political considerations or a desire to set up a spoils system, the public employer `may lawfully contract to have an independent contractor perform services which might also be

performed by civil service employees'... so long as such practice is not violative of either the affected employees collective bargaining agreement or R.C. Chapter 4117.'' [See also; State ex rel Sigall, v. Aetna 45 Ohio St. 2nd 308, 345 N.E. 2nd 61 (1976)].

In a later decision involving the Lorain City School District, the Supreme Court again reiterated its support for the management rights of the employer and permitted the school district to subcontract out work that had been previously performed by members of the bargaining unit with the condition that such subcontracting was a matter of mandatory collective bargaining pursuant to R.C. 4117.08 (A) and (C). [City School District v. SERB, 40 Ohio St. 3d 257, 533 N.E. 2d 264 (1988)]. [However, see dissent of C.J. Moyer which appears to uphold the right of the employer to subcontract work without regard to bargaining over the issue. He also noted that his interpretation of the majority opinion required the employer to first bargain with the Union over any of the matters raised in R.C. 4117.08 (C) 1,3,4,5,6 and 8 before it intended to perform any of the responsibilities thereunder though neither the statute nor bargaining agreement imposed such a constraint.].

In a later case, the State Employment Relations Board appears to have addressed Chief Justice Moyer's concerns in permitting the implementation of a no-smoking policy as a permissive subject of bargaining but, at the same time, stating that the implementation of such a policy, as it

affects wages, hours or terms of other conditions of employment, is a mandatory subject of bargaining.[(In Re: State Employment Relations Board v. Ohio Department of Transportation, SERB 93-005 (April 29, 1993)]. See also Eaton City School District, v. State Employment Relations Board, 71 Ohio App. 3rd, 783, 595 N.E. 2nd, 432 (Preble Co. 1991) which held that there was substantial evidence to support SERB's conclusion that the employer committed an unfair labor practice in refusing to bargain collectively over the issue of non-replacement of two retiring teachers on the grounds that the additional responsibilities including a greater number of students to teach as well as additional class periods affected the terms and conditions of employment and was therefore a subject of mandatory bargaining, though the decision not to replace the retiring teachers may have been a management prerogative.

Local 47 supported its position regarding management rights by citing previous arbitration awards and Fact Finder recommendations. This Fact Finder is not persuaded by any of them and in particular finds that Case Nos. 91-MED-12-1330 and 1338 are significantly different than the instant matter. In those cases, the city requested the Fact Finder to include the City's right to privatize and subcontract into the new collective bargaining agreement. The Fact Finder refused. In the instant matter, management rights including privatization and subcontracting are contained in the recently expired agreement, and Local 47 now desires to

reverse course and modify language which it had previously agreed to three years ago.

The parties, recognizing the importance and volatility of the issue provided a rather elaborate process in order to implement such a course.

Local 47's proposal appears unduly restrictive to the City's ability to manage its workforce. The Union seeks guarantees of economic terms and while that goal is mandatory as far as its members are concerned, the City's obligation to deliver cost effective services must be balanced against it. The procedures outlined in the present letter of understanding proved workable with the same representative in the past and there is no reason to recommend a wholesale desertion of them in favor of an untried and restrictive program.

Local 47's proposal also addresses the adoption of work rules and standards as they relate to worker efficiency. A worker not meeting standards is to be given 6 months to bring his performance level up to standard, and a work site not meeting such standards is to be given 18 months to bring its performance to standard. These appear to be in addition to ``Competitive Initiatives.'' The Union also proposed that any outside bidder or subcontractor include specific wages and benefits which the bidder intends to pay and the number and job classifications with which he intends to use on the job. Privatization certainly can result in fewer workers and/or lower wages. It is possible that the

exercise of such rights can lead to a dismantling of the unit, but to date we have no such evidence before us. To the contrary, the parties appear to have really tried to adjust their difference to deliver more services at an economical rate in accordance with the procedures now in effect. The adoption of the Union's proposal would hamstring the City in its ability to do so.

Under both the current and proposed modifications, the Union has the right to make a competitive alternative offer and if that alternative yields financial savings, improved operating efficiency and/or better quality of service genuinely equivalent to or greater than those the City can achieve through privatization or subcontracting, the City will accept the Union's alternative.

The Union raised question concerning introduction of the word ``significant'' in determining whether the Unions alternative proposal results in financial savings or meets the City's expectations. That term is not employed in the current agreement and might be interpreted as requiring a higher standard from the Union than that of the private bidder. Though the City countered that use of the term ``significant'' in the proposal was actually for the benefit of the Union, the Fact-Finder has difficulty in accepting that interpretation.

Lastly, City submits that its proposed modifications be contained in a ``side letter'' rather than in the body of

the contract, but again, the Fact-Finder disagrees that such provisions would be better incorporated into the Agreement.

RECOMMENDATION

The Fact-Finder recommends that Article III Section L be amended as follows:

> ``The City shall have the right to institute competitive initiatives or subcontract services where the City's primary objective is to achieve financial economy, improved operating efficiency, and/or better quality of service.''

In the event the City institutes competitive initiatives, or desires to sub-contract services, it shall follow the following procedures:

> Forty-Five (45) days prior to initiation of any bid procedure, the City shall conduct Labor Management committee (LMC) Meetings on a weekly basis to determine if there are methods of improving operating efficiency and reducing the cost of providing City service. Prior to the LMC Meetings, the City shall provide the Union with information sufficient to allow LMC meetings to proceed in a productive fashion, including the cost of the work being performed and the problems with efficiency or productivity which the City would like to address.
>
> At the conclusion of the LMC Meetings, the City and the Union shall calculate the cost and evaluate the methods of providing services. Upon review by the City, if the alternative yields financial savings and improved operating efficiency, the City shall accept the Union's alternative instead of utilizing an outside bidder/vendor, although to insure meaningful substantive evaluation, the City will be permitted to prepare bid documents during the initial 45 day LMC meeting period set forth above and to utilize the bid procedure immediately upon completing the 45 day LMC meeting period.
>
> If the City informs the Union that the alternative does not sufficiently meet the City's objective as stated in paragraph 1 above, then the City and the LMC will continue to work cooperatively for not less than twenty (20) days

after the conclusion of the bidding process (which ends on the day the City shares the lowest bid for and initiative with the LMC and affected union (s)), after which the City may exercise its contractual rights to implement the proposed initiative.

Should the City decide to implement a competitive initiative, the City will make a good faith effort to assign displaced employees to vacant positions for which they are qualified or can be trained to become qualified within a reasonable period of time.

The City and the Unions agree that if there is a disagreement regarding the above, including over the true value of the Union's competitive alternative (financial savings, improved efficiency, quality of service - including the payment of a living wage), the Union will have the right to submit the issue of whether or not the Union's alternative ``genuinely'' meets or exceeds the City's objective to final and binding arbitration before the City implements its competitive initiative.

ii) ISSUE 2 - WAGES

The City offered the following wage proposal:

I. Effective April 1, 1995, 2% increase;

II. Effective April 1, 1996, 2% increase;

III. Effective April 1, 1997, 3% increase.

The Union countered with the following proposal:

I. Effective April 1, 1995, 0% increase;

II. Effective April 1, 1996, 3% increase;

III. Effective April 1, 1997, 3% increase.

The Union's offer was conditioned upon the adoption of its proposals regarding Article 3 and the side letter.

The Union's proposal as to management rights is intertwined with its proposal to forego a raise during the first year of the contract. It also contemplated the establishment of work rules and standards. The City, on the other hand, offered the Union, a standard 2,3,3, raise which was accepted by other Unions the (Fraternal Order of Police, Lodge No. 8, Municipal Foreman and Laborers Union Local 1099 and The Sign Display and Allied Trade Local No. 639) and is the same increase offered to the Locals remaining in the PUC. The City's offer, therefore, fully satisfies the issues of parity, which has long been the goal of Unions involved with a multi-union employer.

Neither party introduced any evidence regarding the ability of the City to afford a larger increase, the amount saved if Union's offer of foregoing an increase in the first year or any other relevant wage information.

The Fact Finder therefore concludes that the offer of the City is the same offer as accepted by at least three other Unions, and the same offer made to other Unions within the PUC of which the Union was a member until mid-July.

RECOMMENDATION:

It is the recommendation of the fact finder that the proposal of the City, to wit:

1. A 2% wage increase effective April 1, 1995;
2. A 3% wage increase effective April 1, 1996;
3. A 3% wage increase effective April 1, 1997

be incorporated into the new Collective Bargaining Agreement between the parties.

Respectfully submitted,

I. Bernard Trombetta
Fact Finder
33595 Bainbridge Road, #201
Solon, Ohio 44139
(216) 349-3700

SERVICE

The foregoing Report and Recommendation was served upon the following by courier service on the 20th day of September, 1995: Martin List, Attorney at Law, 1301 East 9th Street, 20th Floor, Cleveland, Ohio 44114 and Eben O. McNair, Attorney at Law, 1300 East 9th Street - Suite 616, Cleveland, Ohio 44114-1503 and by ordinary U.S. mail upon the Bureau of Mediation, State Employment Relations Board, 65 East State Street, Columbus, Ohio 43215-4213.

I. Bernard Trombetta
Fact-Finder