

M

STATE EMPLOYMENT  
RELATIONS BOARD

AUG 26 10 26 AM '97

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD  
FACT FINDING PANEL

FACT FINDER'S REPORT AND RECOMMENDATIONS

TALAWANDA CLASSIFIED STAFF ASSOCIATION

AND

TALAWANDA CITY SCHOOLS

CASE NUMBER 97-MED-01-0025

MICHAEL MARMO

FACT FINDER

AUGUST 25, 1997

## HEARING

The Factfinder's meeting with the parties took place on August 11, 1997 at the Talawanda Middle School, and lasted from 8:45 a.m. until 4:30 p.m.. Representing the School Board were Beth Sholl, the Treasurer; Assistant Superintendents, Jim Robinson and Phil Cagwin; and the principal spokesperson for the Board, William Ennis. Representing the Staff Association were its principal representative, Diana Herbe, an Ohio Education Association Labor Relations Consultant; David Hayes, the Local President; Clifford Littor, the Vice-President; and Fritzi Warren, the secretarial/clerical representative.

## ISSUES REMAINING AT IMPASSE

At the time the Factfinder entered the dispute, the following issues remained at impasse:

Article 4	Collection of Dues
Article 5	Grievance Procedure
Article 7	Holiday Pay
Section 12.01	Work Assignments
Section 12.02	Overtime Payment
Section 12.03	Temporary Cafeteria Vacancies and Cafeteria Overtime Opportunities
Section 12.10	Dispensing Medication and Performing Medical Procedures
Section 12.11	Minimum Staffing Requirements
Article 13	Job Openings/ Seniority
Article 14	Layoff and Recall Procedures
Section 15.01	Reference to Salary Schedules in the Appendix
Section 15.03	Hourly Wage Rate for Head Custodians and Food Service Managers
Section 15.04	Hourly Rate for Head Secretaries at Talawanda High School and Talawanda Middle School
Section 15.05	Library Educational Assistant's Supplemental Contract
Section 15.06	Work Days for Talawanda High School Head Secretary
Section 15.07	Enrollment Definitions and Service Period for Elementary Secretaries
Section 17.01	Sick Leave
Section 17.02	Assault Leave
Section 17.05	Personal Leave
Article 18	Insurances
Article 22	Subcontracting
Article 23	Contract Precedence
Past Art 22	Complete Agreement
Past Art 23	Duration
Appendix	Salary

## MEDIATION

Mediation was attempted, and was successful in resolving the following issues:

Article 7	Holiday Pay
Section 12.02	Overtime Payment
Section 12.10	Dispensing Medication and Performing Medical Procedures
Article 14	Layoff and Recall Procedures
Section 15.01	Reference to Salary Schedules in the Appendix
Section 15.03	Hourly Wage Rate for Head Custodians and Food Service Managers
Section 15.04	Hourly Rate for head Secretaries at Talawanda High School and Talawanda Middle School
Section 15.05	Library Educational Assistant's Supplemental Contract
Section 15.06	Work Days for Talawanda High School Head Secretary
Section 15.07	Enrollment Definitions and Service Period for Elementary Secretaries
Section 17.02	Assault Leave
Section 17.05	Personal Leave

#### CRITERIA FOR DECISION

As provided by the procedures of the State Employment Relations Board, the Factfinder based his recommendations on the following:

- past collectively bargained contracts between the parties;
- a comparison of 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;
- the interest and welfare of the public, and the ability of the public employer to finance the issues proposed, and the effect of the adjustments on the normal standard of public service;
- the lawful authority of the public employer;
- Any stipulations of the parties; and
- 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.

#### UNRESOLVED ISSUES

#### ARTICLE 4, COLLECTION OF DUES

#### POSITIONS OF THE PARTIES

The sole matter in dispute on this issue is whether a fair share fee should be implemented.

The Association contends that because they have the legal obligation to represent all employees in the bargaining unit it is appropriate that all contribute monetary support for

that representation. They point out that of the eighteen contracts currently in effect for public school employees in Butler County, fourteen contain fair share provisions. The Union further argues that there is a minimal cost to the Board in providing this request.

The Board argued that it is inappropriate to grant a fair share arrangement when only 41% of eligible bargaining unit members have authorized a dues deduction. Employees should provide financial support to the Association voluntarily, the Board contends, not as the result of a fair share requirement.

#### **FINDING OF FACT**

Certainly, the Association is correct when it argues that the "comparables" dictate that a fair share arrangement be implemented. However, the Factfinder is not willing to recommend a fair share provision when only 41% of the bargaining unit have chosen to financially contribute to their bargaining agent. There is considerable validity to the argument that one or two percent of bargaining unit members should not be allowed to be "free riders", while virtually all other employees pay for the representation that all receive. It is a very different matter, however, when a majority of employees in the unit are "free riders".

#### **RECOMMENDATION**

For the reasons cited, the Factfinder recommends that Article 4 read as follows:

4.01 Employees may at any time sign and deliver to the Treasurer of the Board a payroll deduction authorization requesting deduction of membership dues and assessments of the Talawanda Classified Staff Association/OEA/NEA. Such authorization shall continue in effect through the last payroll period of September of each year and may, at the employee's option, continue in effect until such time that said employee gives written notice to the Treasurer of the Board to discontinue such deductions or employment with the Board terminates.

4.02 The total amount of deductions shall be prorated in equal portions over the remaining payroll periods through the last payroll period in September. All money so deducted shall be remitted to the Treasurer of the Association monthly, accompanied by a list of employees from whom the deductions are made and the for each said employee.

4.03 If an employee gives written notice to the Treasurer of the Board to discontinue such deductions, the Treasurer shall provide the Treasurer of the Association within ten (10) days of such action, the names of said employees making such request.

#### **ARTICLE 5, GRIEVANCE PROCEDURE**

#### **POSITIONS OF THE PARTIES**

The only dispute between the parties on this section concerns the final step in the grievance procedure. The Association proposes that binding arbitration be employed, while the Board argues for advisory arbitration with potential appeal to the court system.

The Association's arguments are partly philosophical; if a contract is between two parties, they argue, a final decision on how to interpret that agreement should not rest with one of the interested parties. The Union also contends that the "comparables" support its position. Of the eighteen contracts with school boards in Butler County, this is the only agreement that does not contain a provision requiring binding arbitration. The Association also contends that the Board proposal is more costly since it would involve both the expense of arbitration(advisory) and those incurred in the courts.

The Board, in turn, argues that binding arbitration is incompatible with the operation of a school system. It may be appropriate in a manufacturing environment, the Board says, but not in an educational setting. In addition, the Board claims that its proposal is cheaper because the parties can skip the advisory arbitration stage and proceed directly to the courts.

Finally, the parties disagree with regard to who is more adept at interpreting collective bargaining agreements. The Union contends that this is what arbitrator's specialize in, the Board believes that arbitrators have a "strong propensity" to go beyond their authority in fashioning decisions.

#### **FINDING OF FACT**

Based on the statutory criteria that govern the Factfinder, he is required to base his decision on how particular issues are dealt with in comparable jurisdictions in both the public and private sectors. For more than fifty years binding arbitration has been the almost universal way of resolving grievances in the private sector. And, while not quite so common in the public sector, it is also the norm among government employees. As the Association pointed out, this is the only unit in the County that does not provide for the binding arbitration of grievances. Finally, it is extremely difficult for the Factfinder to accept the Board's argument that binding arbitration is inappropriate in an educational setting, when its own contract with its certificated personnel employs such a procedure.

#### **RECOMMENDATION**

For the reasons cited, the Factfinder recommends that Section 5.04 Level II read:

Within fifteen(15) days of the receipt of the written grievance by the Superintendent or his/her designee, the Superintendent(or his/her designee) shall meet with the grievant to discuss the stated grievance. The aggrieved party and/or the Superintendent may have representation at this meeting. Within fifteen (15) days of said meeting , the Superintendent or his/her designee shall provide a written response to the aggrieved. The Association and the principal shall be provided copies of the disposition of the grievance by the Superintendent or his/her designee. If the aggrieved is not satisfied with the written response, or if no disposition of the grievance has been made within the time limits set forth in Level II, the Association may submit the grievance to the American Arbitration

Association in accordance with its voluntary rules and regulations . Notice of such appeal shall be filed with the American Arbitration Association and the Superintendent within fifteen(15) days of the receipt of the Level II response or the date by which the response was due.

In addition, Level III and Level IV should be deleted, and replaced with the following:

#### ARBITRATION

The opinion and award of the arbitrator shall be final and binding upon all parties. The arbitrator shall have no power to alter, add to, or subtract from the terms of this Agreement.

The cost of arbitration, including all costs assessed by the arbitrator, meeting room expenses, and court reporter if utilized by the parties, shall be divided equally by the Board and the Association.

#### ARTICLE 12.01, WORK ASSIGNMENT

#### POSITIONS OF THE PARTIES

Both parties agree that this is not an independent provision, but is dependent on what is included in Article 12.11. The Board offered concessions in Article 12.01 based on their assumption that no changes would be made in Article 12.11. The Association, in turn, believed that such concessions by the Board in Article 12.01 were unnecessary, if they received the changes they sought in Article 12.11.

#### FINDING OF FACT

Because the Factfinder will make recommendations concerning changes in Article 12.11, he believes that it is appropriate to include the Association's version of this section of the contract.

#### RECOMMENDATION

For the reasons cited, Article 12.01 should read:

All employees shall have a regular assignment unless a shorter work week is so designated in their contract. The Superintendent shall designate the work schedule for each employee.

#### ARTICLE 12.11, MINIMUM STAFFING REQUIREMENTS

#### POSITIONS OF THE PARTIES

This proposal by the Association attempted to do two things; establish minimum staffing levels for cafeteria workers and educational assistants, and provide some measure of job security for educational assistants.

With respect to its request for a contractual guarantee of minimum staffing levels, the Association argued that it is fearful the Board may attempt to convert full time positions to part time, in order to save on benefit costs.

The Board in turn, argued that there are too many variables present to contractually guarantee staffing levels. Based on changed student tastes in the cafeteria, for example, it may be prudent to alter the mix of workers who provide food service. The Board contended that they should be free to respond to such changes, rather than being locked in by requirements in a collective bargaining agreement.

The Association argued that educational assistants currently enjoy no job security. Despite doing a good job, the Union says, such workers do not find out until the July meeting of the Board whether they will have a job the next school year. As a result of this practice, the Union says, such employees are in a constant state of limbo, never knowing whether or not they will have a job.

The Board contended that because of potential changes in enrollment or reorganization of District schools, they must maintain the flexibility to annually assign staff in a responsible manner.

#### **FINDING OF FACT**

The Factfinder does not believe that it is appropriate to contractually guarantee staffing levels. The Board must be free to respond to changes in demand for workers. It is not the norm in collective bargaining contracts to protect a certain number of jobs.

The Factfinder does not believe that the Board's treatment of educational assistants is acceptable. Despite the fact that almost all are highly competent employees (as evidenced by the fact that they are virtually all rehired each year), they are accorded no job security. While it is not appropriate to guarantee a certain number of jobs for such employees, the Board should be expected to demonstrate some measure of loyalty to workers who have performed well for an extended period of time.

#### **RECOMMENDATION**

For the reasons cited, Article 12.11 should read:

Educational Assistants holding limited contracts with the Board shall not be routinely non-renewed on a yearly basis. All Educational Assistants shall be renewed unless his/her evaluation demonstrates unacceptable performance for the previous school year.

#### **ARTICLE 12.03, TEMPORARY CAFETERIA VACANCIES AND CAFETERIA OVERTIME OPPORTUNITIES**

The Association's proposal attempts to do two things; contractually protect the current practice of paying cafeteria employees at their regular rate of pay for working on

banquets and extra curricular activities beyond their normal work day, and adding additional staff to prepare for the senior citizens banquets. The Union argued that the workload of cafeteria employees doubles on days when they must additionally serve senior citizens. The cost of this proposal, the Union argued, is minimal.

The Board agreed that the workload for cafeteria employees is greater on days when they must also serve senior citizens, but argued that it is not double the normal effort. Most significantly, the Board argued, that the right to assign workload and determine the number of employees necessary to perform a particular task should remain a management prerogative.

#### **FINDING OF FACT**

The Factfinder believes that the ability to determine how many employees are needed to perform jobs in the cafeteria should remain a management determination because too many variable impact this determination. For a situation that only occurs twice a year, the inclusion of contractual language appears unnecessary.

#### **RECOMMENDATION**

For the reasons cited, the Factfinder recommends that no changes be made in this provision.

#### **ARTICLE 13, JOB OPENINGS/SENIORITY**

##### **POSITIONS OF THE PARTIES**

The Association argued that the language of the previous contract allowed the Employer to manipulate the promotional process and to fail to promote workers with the most seniority who were qualified to perform the job. The Union contended that loyalty to the District is ignored in making such decisions and that outspoken workers are not promoted even if they have the ability to perform a job and are the most senior bidder for the opening. The Association proposed that a civil service qualifying test be employed to determine an applicant's ability to perform a job. Of those employees who pass this test, the Union proposed, the most senior person should be awarded the position.

The Board proposed that the language in the previous agreement be retained, and that a statement be added providing; "Determination of qualifications shall be exclusively determined by the Superintendent in his/her sole discretion." The Board argued that numerous skills, responsibilities, and duties exist for employees in the various job classifications and that management should not be restricted by the contract in its ability to select the most qualified person.

#### **FINDING OF FACT**

The Association concedes that only two districts in the County award transfers and promotions solely on the basis of seniority. It also recognizes that employees should not be granted a promotion or transfer if they are not qualified, simply because they have the most seniority.

In both the public and private sectors, collective bargaining agreements typically deal with the issues of promotions and transfers in either of two ways. In some contracts, a judgement must initially be made to determine which employees are qualified to perform the job. Such determinations may be based on passing a qualifying test, or meeting certain stipulated criteria. Of those employees possessing these required qualifications, the most senior employee is awarded the promotion or transfer. The employee selected under such a system must be qualified, but not necessarily the most qualified to perform the job.

Other contracts provide that promotions be given to the most qualified applicant, with seniority used only when several applicants are of relatively equal ability.

Inherent in each of these approaches, however, is the requirement that some objective method be used to determine whether an applicant is qualified to perform the job. In this regard, the current procedures to determine promotions and transfers are deficient in two respects; they do not contain a procedure to evaluate a candidate's qualifications, nor do they employ any stated criteria that are used to make such judgements. Although it is possible to stipulate such procedures and criteria in the collective bargaining agreement, this is not an absolute requirement. What is critical, however, is that a written procedure be established, and written criteria be developed so that applicants and their bargaining agent have some basis of evaluating whether such decisions are made fairly. As an initial step, the Factfinder believes it is appropriate to grant the Board the right to establish such procedures and criteria, and not to include them in the collective bargaining agreement.

## **RECOMMENDATION**

For the reasons cited , Article 13 should read:

### **ARTICLE 13, VACANCIES, TRANSFERS, AND SENIORITY**

13.01 The TCSA understands the duty of management to fill vacant positions with the best qualified personnel and to manage the district in the most efficient possible way. Management values the service of faithful employees and believes that longevity of service should be rewarded. To accommodate these views, vacant positions shall be filled through the following procedures:

A. A vacancy shall be defined as any new or existing position which the Board intends to fill which is open as a result of transfer, resignation, retirement, death or creation of a new position, but excluding seasonal positions. A transfer shall be defined as any change in assignment.

B. All vacancies shall be posted within fifteen(15) days of the condition giving rise to a vacancy and shall be posted in all school buildings and job sites in the district for ten(10)

days. When school is not in session, the notice shall be posted and sent to the TCSA President.

C. A vacant position will be advertised so that all interested employees may file an application. All postings shall contain the following:

1. Posting date and internal application deadline
2. Job title and copy of the job description
3. Location of work
4. Hours to be worked
5. Approximate starting date

D. The Board shall develop a written policy that stipulates:

1. The criteria upon which applicants will be judged to determine if they are qualified to perform the job
2. The individual or individuals who are authorized to decide which job applicants meet these criteria

Decisions regarding who is qualified to perform a job will be made by the individual/s designated in D.2, based on the criteria established in D.1.

E. Of those applicants determined by the Board designee/s to be qualified, the most senior applicant shall be selected from within the affected classification. For this purpose the following classifications are recognized: Maintenance Employees; Custodial Employees; Food Service Employees; Educational Assistants; and Secretarial-Clerical Employees. Should no employee from the affected classification apply, the vacancy shall be filled by the most senior qualified applicant from other classifications.

F. All vacancies shall be filled within twenty five(25) days of the end of the posting period.

G. In the event of transfer from one classification to another, the employee shall be provided a trial period of thirty (30) workdays in which to demonstrate his/her ability to perform on the new job. During this time the Board shall reasonably assist the employee in performing the new job. If the employee is unable to fill the position satisfactorily, or at the option of the affected employee, the employee shall be returned to his/her previous assignment.

H. When an employee transfers to another position within a classification, he/she retains his/her same step placement. When a current employee transfers to another classification which carries a higher compensation level, he/she shall be placed on the first step of the appropriate salary schedule for the new position which would result in an increase in hourly wage. If the employee transfers to another classification which carries a lower compensation level, he/she shall be placed at the wage step on the appropriate salary schedule for the new position which would result in the least decrease in hourly wage.

I. An employee may be involuntarily transferred for just cause.

13.02 Classification seniority shall be defined as the length of all service within the district in a given classification

District seniority shall be defined as the length of continuous service within the district which shall be determined by the following:

- A. date of Board approval of initial contract
- B. years of continuous employment by the Talawanda City School District
- C. date of application
- D. toss of coin with the employees and the Association President present at the toss.

#### ARTICLE 17.01, SICK LEAVE

#### POSITIONS OF THE PARTIES

The Board argued that the number of sick days taken by bargaining unit members is excessive. To remedy this situation the Board suggested that a physician's excuse be required beginning with the fourth incidence of absence during any given year and that a physician be required to certify the necessity of the employee's presence to maintain the health status of family members (only for family living in the same household).

The Association suggested some minor editorial changes in this provision and asked that the incentive benefit for those unit members who do not take sick leave in a given year be extended from custodians to all other employees.

#### FINDING OF FACT

Both the Board and the Association have legitimate concerns on the sick leave issue. The Board is justifiably concerned with reducing excessive usage of sick days, while the Association does not want to establish procedures that are unduly burdensome on those employees who do not abuse this benefit. The Factfinder believes that this is an area in which positive benefits should be provided to those employees who do not take any sick days, and sanctions imposed on those who abuse the system. Although the Board argued that very few janitors qualified for the bonus given for not using sick days, he does not believe this is sufficient reason not to extend the benefit to others in the bargaining unit. If the Board is correct in its belief that few additional employees will qualify for this bonus, then the Employer will not incur any significant expense for providing this incentive.

Although the Factfinder believes it is acceptable to require employees who take off a large number of sick days to have a physician certify their need, he does not believe that this requirement should begin with the fourth incidence in a year. As with most new provisions in collective bargaining agreements, changes should be implemented in a gradual fashion.

Finally, both sides are correct in recognizing that excessive absenteeism impacts both in a negative way. For the Board, it is an added expense; for the employees, it often means that they must work harder if their operation is understaffed. For this reason, it makes sense for both sides to jointly work to ameliorate the problem.

## RECOMMENDATION

For the reasons cited, the following changes in Article 17 should be made:

Section I, Sick Leave Incentive should read:

Any twelve (12) month employee who used zero sick days during the contract year shall receive a \$200.00 sick leave incentive payment on the first pay of the following contract year. Any ten/eleven (10/11) month employee (contracted for 220 or 230 days) who used zero sick days during the contract year shall receive a \$150.00 sick leave incentive payment on the first pay of the following contract year. Any nine (9) month employee who used zero sick days during the contract year shall receive a \$100.00 sick leave incentive on the first pay of the following contract year.

A Section should be added that reads:

Any incident of absence due to illness beyond the fifth (5th) incident in any given school year shall require a written physician's statement that the employee was unable to work due to illness or that the employee's presence was necessary to maintain the relative's health status.

A Section should be added that reads:

A Joint Board/Association Committee on Absenteeism shall be established. It shall be comprised of two representatives named by the Board and two representatives named by the Association. The Committee is charged with making recommendations on how to reduce the rate of absenteeism among bargaining unit members, but such recommendations shall not be binding.

## ARTICLE 18, INSURANCES

Differences exist on four separate issues in the insurance area: the relative percentages of health care premiums that the Board and employees are responsible for paying; the amount of life insurance that will be provided; how extra costs for "premium" health insurance options will be apportioned; and the number of hours employees must work each week to be eligible for insurance benefits.

The Association believes that the Board should continue paying ninety percent (90%) of the premiums for both single and family health care coverage. It indicated that such a sharing of costs is typical of both other school jurisdictions in Butler County and the

contract that was recently agreed to with certificated personnel in the Talawanda School District. Although the Union recognizes that the traditional indemnity plan will be five percent more expensive than either of the PPO options that are available, it contends that the Board should pay ninety percent of the traditional indemnity plan costs. With respect to life insurance, the Association pointed out that only two contracts (other than Talawanda) in Butler County school districts provide only \$20,000 worth of life insurance. Finally, the Association believes that unit employees should receive full insurance benefits if they work twenty hours a week, rather than the current requirement of thirty hours.

The Board proposed that the "basic" health insurance option be the two PPO plans offered by the Butler County Health Plan. Although a traditional indemnity plan would be available, the Board argued that employees should pay all of the added cost of this plan over the cost of the basic PPO plans. The Board argued that because PPO's are effective in reducing health care costs, financial incentives should be present to encourage employees to select such options. Further, the Board argued that because of escalating health care costs it is appropriate that unit members contribute twenty-five(25%) of the premiums for the basic plan. Similarly, the Employer said it would impose an undue financial burden on them to pay full insurance benefits to employees who were working as few as twenty hours per week. In some situations, the Board said, paying full benefits to employees working twenty hours would result in greater expenditures for such employees benefits than would be spent on their salaries. Finally, the Board contended that \$20,000 is an appropriate amount of life insurance.

#### FINDING OF FACT

In these days of rapidly escalating health care costs, the Factfinder believes that it is appropriate to create an economic incentive to encourage employees to select the more cost effective PPO plans, rather than traditional indemnity plans. Basing the Board's health care contribution on the cost of the PPO options will serve to encourage employees to select such options.

With regard to the relative percentage of this PPO cost that the Board and the employees are responsible for paying, it is clear that for employees of school boards in Butler County, it is typical for the employer to pay ninety percent of the total. Perhaps even more compelling as a "comparable", is that the Talawanda Board recently agreed to pay ninety percent of the health care premiums for certificated personnel.

On the issue of life insurance, the Association is correct when it argues that \$20,000 is not typical of school boards in Butler County. Because life insurance is relatively cheap to provide compared with other forms of insurance, the Factfinder believes that a modest increase to \$30,000 worth of coverage is appropriate.

Finally, the Union is correct when it argues that most school districts in Butler County pay full insurance benefits to employees who work a minimum of twenty hours per week. However, because of the expense involved, and because the parties(albeit with a different union) relatively recently increased the eligibility requirement for full benefits, the Factfinder does not believe a change is warranted at this time.

## **RECOMMENDATION**

The Factfinder recommends that Article 18 remain unchanged, with the following exceptions:

Section 18.04 A, should read:

### **Hospitalization, Surgical, Major Medical Insurance**

The Board shall purchase from an insurance carrier licensed by the State of Ohio basic hospital-surgical and major medical insurance coverage for each non-certificated employee now or hereafter employed during the term of this negotiated agreement and his/her family which meets or exceeds specifications listed below. The Board shall pay ninety percent(90%) of the premiums for the single coverage and ninety percent(90%) of the premiums for the family coverage during the life of this negotiated agreement. Employees shall be responsible for paying ten percent(10%) of the premiums due for such hospitalization-surgical coverage.

In Sections 18.04 D, and 18.05 the figure \$20,000 should be changed to \$30,000.

## **PAST ARTICLE 22, COMPLETE AGREEMENT**

### **POSITIONS OF THE PARTIES**

The Association proposed that this provision in the previous contract, negotiated by OAPSE, not be included in the new agreement. The Union contends that such provisions have outlived their usefulness, and that the Union should not be precluded from negotiating over meaningful concerns of their members.

The Board contends that such clauses are typical in collective bargaining agreements and should therefore be part of this agreement. In addition, the Board argued that they are legally required to negotiate over wages, hours, and conditions of employment and that the presence of a zipper clause does not remove this obligation.

### **FINDING OF FACT**

The Board argued, and the Association concedes, that "zipper" clauses are the norm in collective bargaining agreements for school employees. Because they are the norm, and because the previous agreement contains such a provision, the Factfinder believes that the zipper clause should remain in the contract.

## **RECOMMENDATION**

The Factfinder recommends that Article 22 in the previous agreement, be included in the current contract.

## **BOARD PROPOSED NEW ARTICLE 22, SUBCONTRACTING**

## POSITIONS OF THE PARTIES

The Board proposed that it be allowed to subcontract any services currently being provided by members of the bargaining unit. Such a move they said, is consistent with the recommendations of the Talawanda Citizens Commission on school funding which said that the Board should investigate subcontracting transportation services, food services and janitorial services. Subcontracting transportation services was accomplished after the 1993 negotiations with OAPSE permitted this action be taken. Although the Board says they are not necessarily contemplating subcontracting additional unit work, this must become a viable option to properly manage the District's financial resources.

The Association argued against the inclusion of a subcontracting clause in the agreement. The Employer, they said, is better able to maintain control over how services are provided, if they are performed by District employees. In addition, the Union argued that employees in the bargaining unit often go "above and beyond the call of duty" because of their allegiance to the Board and students in the District. Finally, the Association argued that subcontracting has been used by the Board to rid itself of particularly vocal union supporters.

## FINDING OF FACT

The issue of subcontracting is perhaps the most significant clause that can be included in a collective bargaining agreement, because it potentially threatens the loss of all employees jobs as well as the dissolution of the labor organization. The Factfinder is unwilling to recommend such a dramatic change in the collective bargaining contract without a quid pro quo agreement. In some contracts, for example, the employee representative has agreed to grant management the ability to subcontract work in return for very significant wage increases. In other instances, unions have granted the employer the right to subcontract certain jobs in order to protect others. Since no significant concession has been offered by the Employer to achieve the right to subcontract, the Factfinder does not believe such a clause should be included in the new contract.

The Factfinder gave no weight to the Union's contention that subcontracting has been used as a subterfuge for getting rid of union activists. If such an allegation is true, a remedy already exists under State law to remedy this situation.

## RECOMMENDATION

For the reasons cited, the Factfinder believes the agreement should not contain a subcontracting clause.

## ARTICLE 23, CONTRACT PRECEDENCE

## POSITIONS OF THE PARTIES

The Board proposed that language be included in the contract to make it clear that the provisions of the contract are intended to prevail whenever they are in conflict with provisions in either state or local law. The Employer argued that in light of a 1994 ruling by the Ohio Supreme Court, such a provision is required .

The Association, on the other hand, argued that the inclusion of such a provision in the contract is unnecessary. The Ohio Revised Code 4117.10, the Union states, specifically holds that the contract supersedes state law. It is an overreaction, the Association argues, to include such a provision in the contract in view of only one court decision. Finally, the Union pointed out that the Hamilton Classroom Teachers Association contract is the only agreement in Butler County that contains such a provision.

#### **FINDING OF FACT**

The Board may indeed be correct in arguing that the inclusion of such a provision in the contract would remove any ambiguity, any clearly demonstrate that the parties intend for their contract to supersede local and state law. However, the Factfinder is constrained to make his recommendations on the basis of certain statutory criteria, one of the most important being what is done in comparable jurisdictions. In this instance, despite the Ohio Supreme Court decision in this matter in April, 1994, only one contract in the County contains such a provision.

#### **RECOMMENDATION**

For the reasons cited, the Factfinder recommends the contract not contain a contract precedence clause.

#### **PAST ARTICLE 23, DURATION/ APPENDICES, SALARY**

#### **POSITIONS OF THE PARTIES**

The Board argued in favor of a three year agreement, beginning with ratification and remaining in effect through June 30, 2000. They offered a three percent salary increase for the first year, with negotiations reopened only on salaries during the second year of the agreement. The Employer said that two areas of uncertainty required that no salary commitments be made beyond one year; the recent Supreme Court ruling declaring Ohio's school funding mechanism to be unconstitutional, and the lack of assurance that the District would continue to receive additional State aid because of the large amount of untaxed property in the District.

The Association also supported a three year agreement, if annual salary increases of five percent are provided. Such increases are justified, said the Association, because unit members went one year without salary increases as the Talawanda Classified Staff Association assumed bargaining rights. The Union also pointed out that certified personnel in the District have recently settled for an increase of three and a quarter percent.

## FINDING OF FACT

To be perfectly honest, the Factfinder did not find the financial projections of either the Board or the Association to be particularly enlightening. With so many variables present, and with tremendous uncertainty regarding two major sources of revenue, it is virtually impossible to project the Board's revenues two or three year's into the future.

The Factfinder believes it is significant that unit members went a year without a salary increase, and that certificated personnel received a three and a quarter percent offer from the Board. He is also mindful of the fact that he recommended very significant improvements for the Union in the areas of binding arbitration, and seniority, and that these must be weighed against any salary recommendations.

## RECOMMENDATION

The Duration clause should read:

The provisions of this Agreement shall be effective upon execution by the parties and shall remain in full force and effect until 11:59 p.m. on June 30, 2000. If either party desires to modify the salary schedules in this Agreement, it shall give written notice of such intent before April 1, 1998. Only salary schedules shall be subject to negotiations at this time, and any changes in such salary schedules shall take effect no earlier than July 1, 1998.

The Salaries of all unit members listed in the appendices should be increased by three and one-quarter percent (3 1/4%).

This concludes the Factfinder's recommendations.



Michael Marmo  
Factfinder

Cincinnati, Ohio  
August 25, 1997

## PROOF OF SERVICE

This is to certify proof of service by certified U.S. Mail, overnight delivery, return receipt requested to Diana Herbe, Ohio Education Association, 1643 S. Briel Boulevard, Middletown, Ohio 45044 and William Ennis, Ennis, Roberts, and Fischer, 121 West Ninth Street, Cincinnati, Ohio 45202-1904; and by certified U.S. Mail return receipt requested

to G. Thomas Worley, State Employment Relations Board, 65 East State Street,  
Columbus, Ohio 43215-4213.

*Michael Marmo*

Michael Marmo  
Factfinder

August 25, 1997