* * * * * * * * * * * * * * * * * *

In the Matter of Fact-Finding

between

County of Erie

and

Civil Service Employees Association
Local 815

Findings

and

Recommendations

(NYSPERB Case No. M2009-089)

* * * * * * * * * * * * * * * * * *

Having determined that an impasse exists in the negotiations between the County of Erie and CSEA Local 815, the New York State Public Employment Relations Board appointed the undersigned to serve as Fact-Finder, for the purpose of inquiring into the causes and circumstances of the dispute and offering recommendations for its resolution. A hearing in the matter was held on October 17, 2011, at the Union's offices. Representing the County was Christopher M. Putrino, Commissioner of Labor Relations. Representing the Erie County Medical Center Corporation was Carla M. DiCanio-Clarke, Employment Law Specialist. Representing the Union was Dean L. Adams, Labor Relations Specialist. Upon completion of the hearing, the record was closed.

BACKGROUND

The Union represents for collective bargaining purposes some 3,500 professional, technical, and clerical workers employed by the County of Erie and the Erie County Medical Center Corporation (ECMCC). ECMCC was established by the Public Authorities Law to operate the Erie County Medical Center and the Erie County Home. Under the Law, employees of ECMCC are also deemed to be employees of Erie County and are covered by

collective bargaining agreements between the County and its various unions, including the CSEA. About 1,100 members of the bargaining unit are ECMCC employees.

The last negotiated collective bargaining agreement (CBA) between the parties covered the calendar years 2004 to 2006. Negotiations for a successor agreement have progressed off and on since late 2006. Impasse was declared in 2009, and in 2010 Gregory Poland was appointed by PERB to mediate the negotiations. With his assistance a tentative agreement was reached at the bargaining table in June 2010, but the agreement was rejected by the Union's membership. In Fall 2010 the Union asked PERB to appoint a fact-finder, and in January 2011 I was so designated. I met with the parties in March 2011 to discuss fact-finding procedures, and during that meeting the parties expressed an interest in continuing negotiations, inasmuch as certain developments following the contract rejection had removed one of the contentious issues from the picture. Several subsequent meetings were held and a number of proposals exchanged, but the settlement remained elusive, although the differences between the parties were narrowed. In July 2011, the parties agreed to proceed with fact-finding.

At my request, the parties agreed to prepare comprehensive pre-hearing briefs, outlining their positions on the unresolved issues. The hearing on October 17, 2011, allowed me to obtain any needed clarification and make further inquiry, while providing the parties with an opportunity to offer rebuttals to arguments made by the other side. In the report below, each outstanding issues is addressed as follows: the status quo, the positions of the parties, my analysis and findings, and my recommendation. The issues that the parties have agreed to submit to fact-finding are these:

1. Holidays
2. Personal Leave
3. Lunch Breaks
4. Rest Breaks
5. Wages

The first four of these issues involve some form of paid time off that the County seeks to reduce or eliminate. The County sees these changes as reductions from excessive levels of paid time off enjoyed by the bargaining unit, necessary to justify the pay increases that are on offer. The Union sees the reductions as overdone, especially in light of other concessions that it has already agreed to. Most notably, the parties have agreed to impose some employee contributions to health insurance (15 percent of any future increases for current employees; 15 percent of the total premium for new employees) and to eliminate retiree health insurance for new employees. The Union believes that the total package of concessions sought by the County, including those already agreed to, is disproportionate to the pay increases being offered.

FINDINGS AND RECOMMENDATIONS

After careful review of the arguments and exhibits presented by the parties, I believe that several general observations are warranted to inform the discussions and recommendations below.

1. The record does not indicate how Erie County employees compare with other municipal employees with respect to paid time off, so it is difficult to say whether theirs is "excessive," but it is certainly generous for the U. S. workforce as a whole. In addition to the paid days off, employees work for only 6.5 hours per day excluding paid breaks. A settlement that couples more salary dollars with less paid time off therefore strikes me as generally appropriate.

2. To the extent that benefit concessions (including both paid time off and health insurance) are tied to salary increases, it makes sense for the salary increases to apply only during times when the benefit concessions are in effect. Since the benefit concessions have to be prospective, it is appropriate for base salary increases to be prospective as well. Any extra money paid for prior years should be in the form of lump sums, reflecting the fact that the County was continuing to grant the benefits.

3. The record does not contain detailed job-by-job wage comparisons of County employees and their counterparts in other jurisdictions. (The parties agree that such data are not readily available, and in any event are ambiguous because of variations in job titles and duties.) Neither side has attempted to make the case that, even after five years of no pay increases, Erie County employees are either substantially underpaid or overpaid as a group relative to employees of other counties or municipalities. Nor has the argument been made (with certain exceptions at ECMCC, which have been addressed), that pay is an obstacle to the County's ability to recruit or retain employees.

4. Much of the argument offered in this proceeding has focused on historic and comparable changes in pay and benefits over time. I believe this focus on *change* is misplaced. The fact that employees have not received pay increases over a long period of time may have some relevance to a proper resolution of this impasse, but it is certainly not as weighty as the *level* of pay that employees are now receiving, as evaluated according to the statutory criteria. And, as noted, there is no evidence that the current level of pay is dramatically out of line, one way or the other.

HOLIDAYS

Section 14.1 of the CBA provides for 12 paid holidays per year. The County proposes to eliminate two of these holidays, Columbus Day and Election Day. The Union seeks to preserve the *status quo*.

The County notes that reduction of paid leave has been an objective of the current administration from the outset, since the benefits of County employees are excessive. Other unions of County employees have already agreed to the proposed reductions, and the reductions were included in the tentative agreement negotiated with CSEA in 2010. Further, ECMCC points out that CSEA members now work alongside other employees who are required to work on the two holidays at issue, an inequity that causes scheduling difficulties. Even at 10 holidays, the County's hospital employees will still have the highest number of holidays among area hospitals.

For its part, the Union presents data showing that the average number of holidays in Western New York counties is just under twelve, and among towns and villages in Erie County more than thirteen.

It is true that reducing the package of paid holidays to ten will put the County at the low end of area municipalities, but ten holidays over the year is still not ungenerous. It is also not unlikely that, as pressures on public budgets in New York State continue to grow – there is certainly little sign of near-term relief – reductions in paid time off in exchange for other considerations in the compensation package will spread. Furthermore, the Election-Day holiday itself is clearly an anachronism, and Columbus Day as a work holiday is not found in most workplaces. As concessions go, this one should be less painful than most.

Recommendation: Adopt County proposal.

PERSONAL LEAVE

Section 18.1 of the CBA provides for four personal-leave days per year. The County proposes to reduce the personal days to two per year – immediately for new hires, and one each in 2013 and 2014 for continuing employees. The Union is willing to agree to the reduction for new employees, but not for continuing employees.

The County argues that this reduction is justified by the excessive benefits now enjoyed by County employees, and is a reasonable *quid pro quo* for a wage increase. ECMCC notes that with paid time off generally very high, it is difficult to schedule all these personal days. The benefit is also very expensive, as overtime is often necessitated.

The Union argues that the existing benefit falls within with the range of comparable counties and similar towns and villages in Western New York. It presents data showing that the average number of personal days among both groups of jurisdictions is just under four.

The considerations here are much like those for the paid holidays. Further, if the two remaining personal days are sufficient for new employees, they should also serve the needs of continuing employees, especially if the reductions are phased in. The only change I would make in the County's proposal is to phase them in a bit more gradually.

Recommendation: Reduce personal days to three in 2013 and to two in 2015.

LUNCH BREAKS

Union members currently receive a paid lunch period of 60 minutes. County proposes to reduce the paid lunch period to 30 minutes. The Union seeks to preserve the *status quo*.

The County notes that the proposed change would not reduce employees' pay or increase the length of their work day. It would, however, provide increased productivity.

The wage increases offered by the County contemplated this increased productivity in order to maintain the Administration's fiscal accountability to taxpayers. ECMCC points out that its nurses receive a lunch break of 30 minutes, as do most AFSCME employees of the Corporation. Here again, the different benefits enjoyed by various employee groups adversely affects scheduling, reduces productive hours, and creates additional expense.

The Union notes that the current one-hour lunch has been in effect for more than 30 years. It allows employees to access area restaurants. Further, the County does not provide adequate facilities for in-house lunches.

The real issue here is not so much how long a lunch break should be but how much on-duty time there should be in a work day. As noted earlier, employees now receive 1.5 hours of paid break time in an 8-hour day. The remaining 6.5 hours is surely on the light side for most workplaces. As long as the parties choose not to extend the boundaries of the work day beyond eight hours, it seems to me appropriate to limit the paid break time more than it is in current practice. Raising the on-duty work day to seven hours should not be seen as onerous to County employees.

Recommendation: Adopt County proposal (*but*, see below). Also, add language assuring that employees will be provided adequate facilities on site where employees can eat their lunches.

REST BREAKS

Union members currently receive two 15-minute paid breaks. The County proposes to eliminate one of these. The Union seeks to preserve the *status quo.*

The County argues that the reduction of one paid break is a reasonable trade of a benefit for money. The County has sought to identify benefits that could be reduced in

exchange for pay increases. Initially, it was the Union that proposed the elimination of one paid break in order to preserve the paid lunch. Eliminating the break would allow the County to agree to a larger pay increase than it otherwise could. ECMCC points out that CSEA employees work only 6.5 hours a day, which puts the Hospital at a competitive disadvantage with area hospitals and forces the use of additional staff and overtime.

The Union argues that the majority of area counties, towns and villages provide two 15-minute breaks to their employees.

Providing employees with some break time within each half-day of work strikes me as reasonable. Given the earlier recommendation to reduce the lunch period, asking employees to forgo a rest break as well is excessive. However, the main point here is to increase on-duty time to seven hours. Depending on operations in specific departments, the parties should be free to negotiate the reduction of either or both rest breaks in exchange for a 45-minute or 60-minute lunch break.

Recommendation: No change in status quo, or negotiated reductions in rest breaks to compensate for extra time on lunch breaks.

WAGES

The parties' wage proposals are shown in the table on the following page.

The **Union** contends that with the long delay in executing a new Agreement, the significant concessions in health-insurance benefits already agreed to by the parties, the elimination of summer hours already agreed to, recent average pay increases in comparable municipalities, and the fact that employees will receive no wage increase over a 4½-year period, its proposal cannot be characterized as anything but extremely modest. The health-care concessions are particularly important to keep in mind. Current employees will pay 15

Year	County	Union
2007	Lump-sum payment of 2 percent of gross wages	No payment
2008	2 percent lump sum	No payment
2009	2 percent lump sum	No payment
2010	2 percent lump sum	No payment
2011	2 percent lump sum	5 percent across-the-board wage increase upon ratification
2012	3 percent across the board	3 percent across the board
2013	3 percent across the board	3 percent across the board
2014	2 percent across the board	3 percent across the board
2015	2 percent across the board	3 percent across the board
2016	2 percent across the board	3 percent across the board

percent of future increases, and new employees will pay 15 percent of their total premium. Further, new employees, on retirement, will no longer receive paid health-insurance benefits. In addition, employees will now have an incentive to subscribe to a "value plan, "thus saving the County even more money.

The Union also points out that pay increases in other WNY counties averaged about 2¾ percent per year from 2007 through 2011, and increases in town and village governments averaged about 2.8 percent per year from 2007 through 2013. Thus the Union's proposal, which amounts to less than two percent per year since 2007 and contains more than four years with no wage increases at all, falls significantly short of prevailing patterns in the area. Moreover, the real cost of the proposal to the County is much less than the nominal cost, since a significant part of the County's payroll costs are

reimbursable by either the state or federal government. In fact, nearly one-third of the proposed increase would not have to be borne by County taxpayers.

The Union argues, in addition, that the County has the ability to pay the proposed increases. Its financial condition has steadily improved in recent years, and the health-care concessions will improve it further. A recent review of the County's audited financial statements found that, while times were indeed lean in 2007, the County has since then built an unreserved fund balance that meets the accepted standard for fiscal soundness. The outlook for the future is also positive, as evidenced by the County Executive's "State of the County" address in March 2011, and by the four-year financial plan issued in June 2011, which projected a $10 million surplus for 2011. And in May 2011, the County Comptroller reported a significant and unbudgeted increase in sales-tax revenues, which are driven by the continuing weakness of the U.S. dollar. In sum, the County's current financial health and forecasts of future gains demonstrate that it has the ability to fund the Union's modest wage proposal.

The **County** argues, in general, that the region has become older and poorer in recent years, with a significant reduction in private-sector jobs and stagnant wages and benefits there. The result is a significant dichotomy between private- and public-sector employees in terms of job security, wages and benefits. Moreover, Erie County employees are fairly compensated relative to other public employees. Thus as a matter of fairness to the taxpayers who are funding public-sector compensation, the County is seeking some relief from the burdens of that compensation, including compensation in the form of health insurance. In this context, there is no justification for wage increases greater than those proposed by the County. There is no reason, in particular, for County taxpayers to support

increases for well-paid public employees who already earn more than the taxpayers themselves. In 2007, for example, the median earnings of bargaining-unit members were almost identical to the average *household* income in Erie County. Differences in benefits make the gap even larger.

By way of background, the County notes that its population has declined over the past decade, unlike other urban counties in Upstate New York. Its taxable valuation has increased by less than in other counties. Its sales-tax revenues grew by less than those of Monroe and Onondaga from 2000 to 2008. Its per-capita income is lower than those of the other counties. In 2010, total County revenues were still lower than they had been in 2000. And since the CSEA is the County's largest bargaining unit, the impact of a wage increase is a significant budgetary matter, especially in the context of the non-mandated portion of the budget, which is all that the County can control. While the County has managed to generate modest surpluses in recent years, it faces anticipated budgetary challenges over the next three years. It must therefore be vigilant about how to use its limited resources.

The County points out that its proposal includes lump-sum payments for 2007-2011 and wage increases for 2012-2016. The reason for the lump-sum payments in the earlier years is that employees have already enjoyed the full benefit package for those years. Since there are no retroactive benefit concessions until 2012, there should be no retroactive wage increases. The base-rate increases proposed for 2012 through 2016 sum to 12 percent, and more when compounded. The total exceeds the value of the concessions that the County is seeking. By contrast, the increases sought by the Union are excessive given the region's weak economy and the lower average pay of taxpayers.

ECMCC proposes the same payments and increases as the County, except for certain employees who were upgraded pursuant to a separate agreement covering 2007 through 2011. It notes that it has agreed to somewhat higher increases for its other bargaining units, NYSNA and AFSCME, but these unions also accepted major concessions in health insurance coverage for retirees, including existing employees, which allowed the Corporations to afford those raises.

ECMCC notes that it is not a government and cannot generate revenue through taxes. Its current model of employees with very high benefits that outpace the Corporation's local competitors is unsustainable. Moreover, the 2006 pay rates of bargaining-unit employees are competitive even with more recent scales paid by private area hospitals. In this context, the current efforts of New York State to close the gap in its own finances include major reductions in Medicaid payments, a significant source of revenue for the Hospital (25-30 percent of patients). These moves by the State will constrain the Corporation's ability to absorb wage increases. Moreover, the State recently executed a contract with its own CSEA bargaining unit that provided for significant concessions, several years of pay freeze, and furloughs.

In sum, argues ECMCC, its financial projections anticipate multi-million-dollar shortfalls for the next three years, due to flat patient volumes, cuts to Medicaid, rising expenses, and increases in the cost of employee benefits. Because of its status, it cannot be compared directly to county governments. Accordingly, it urges that its wage proposal be recommended by the Fact-Finder.

Discussion. At the outset, I am persuaded that the basic approach put forth by the County is the better one, namely, lump-sum payments for past years and base-pay

increases for the future. The lump-sum payments will provide employees with some compensation for the years of forgone pay increases while providing the County with relief from any ongoing burden based on those payments. The County's approach also comports with the reasonable notion that permanent pay increases should be adopted at the same time as permanent benefit concessions.

The arguments offered by the parties in support of their positions, while relevant, are not dispositive. The Union's underscoring of the agreed-to health-care changes is understandable, but it tends to exaggerate the impact of the concession, at least in the short term. While the County will certainly benefit from employee cost-sharing, the bulk of the cost-sharing will be borne by *new* employees, who will pay 15 percent of their premiums. The cost-sharing by continuing employees – 15 percent of the premium *increases* – will provide much less relief to the County, as it will still have to pay 85 percent of increases that continue to very much outpace inflation. Until there is considerable turnover in the bargaining unit, therefore, it will be some time before the health-insurance changes actually produce material changes for the County, although they will certainly be felt by employees. If these changes go into effect for 2012, the County will still be paying appreciably more for employee health insurance in 2012 than it did in 2011. The change in retiree health insurance (for new employees only) will obviously provide no relief for many years.

The fact that the County is in better financial shape in 2011 than it was in 2007 is a good sign and may serve as justification for pay increases, but the County has not denied that. In part, its more stable resources should allow it to make the lump-sum payments referred to earlier, and also to grant base-pay increases for future years. The question, of

course, is how large these increases should be. The fact that sales-tax revenues are up, largely as a result of Canadian shoppers, is obviously not a factor that can be counted on indefinitely, as currency exchange rates are notoriously volatile.

As for the County's point about the relative income of County employees and the average taxpayer, it is certainly true that lower-paid taxpayers should not be asked to underwrite excessive pay scales for County employees, but as noted earlier there is no evidence that County pay scales are currently excessive. The fact that average household income in the County is lower than the average income of employees doubtless speaks more to household composition and differences in job responsibilities and human capital than it does to differences in direct pay for equivalent work. I do not see in this argument a basis for concluding that the County's position in this proceeding is stronger than the Union's.

The only difference between ECMCC's position and that of the County is that certain employees whose positions were upgraded should not receive the lump-sum payments that other employees receive. I do not find the argument persuasive. As explained at the hearing, the upgrades were instituted, largely at the *Corporation's* initiative, because the Corporation was finding it difficult to hire at the current rates. The upgrades, therefore, stemmed from a judgment that these employees were *underpaid*, and without a correction the Corporation would not be competitive in the market for these positions. The rationale for the lump-sum payments is entirely different, and it is difficult to see why employees should be denied these payments solely because their salaries were adjusted upward to levels they should have been at in the first place.

Recommendation. Having weighed the foregoing considerations and the data provided by the parties, I conclude that the parties should adopt and implement the following pay adjustments for all members of the bargaining unit, including those employed by ECMCC:

2007	Lump-sum payment of 2.0 percent of gross wages
2008	2.0 percent lump sum
2009	2.0 percent lump sum
2010	2.0 percent lump sum
2011	2.0 percent base-pay increase across the board, effective July 1, 2011
2012	2.0 percent across the board, effective 7/1/12
2013	2.5 percent across the board, effective 1/1/13
2014	2.5 percent across the board, effective 1/1/14
2015	2.5 percent across the board, effective 1/1/15
2016	2.5 percent across the board, effective 1/1/16

I wish the parties well in their efforts to bring these protracted negotiations to a successful conclusion.

11/7/11
(dated)

Howard G. Foster
Howard G. Foster
Fact-Finder