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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION

In the Matter of Fact Finding Between:

MICHIGAN EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION,

Union,

and

JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT,

Employer,

Jerold Lax /

Case No. L85 A-9

Fact Finder: Jerold Lax

Michigan State University
LABOR AND INDUSTRIAL
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Appearances:

For the Union: Larry L. Fischer, Uniserv Director

For the Employer: Robert Grover, Esq.

REPORT OF FACT FINDER

Background

The Employer in the present case provides special education services and vocational training to 12 constituent school districts in Jackson County.

In July, 1983 the Union filed a petition seeking a representation election in a unit consisting of the following classifications:

> All secretarial/clerical/ data processing, food service, custodial/maintenance, van driver, technical and media personnel.

The parties ultimately signed an agreement for a consent election in the indicated unit. The election took place on October 12, 1983, and produced a vote of 26 yes, 26 no, and 1 challenged ballot. The Michigan Employment Relations

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Jackson County Intermediate School District

Commission concluded on October 10, 1984, that the challenged ballot could properly be voted. As that ballot had been cast in favor of the Union, the Union was certified as bargaining representative of the defined unit.

Bargaining for the first contract between the parties commenced in February, 1985. No agreement was reached, and, after two mediation sessions had been held, the Union petitioned for fact finding on September 24, 1985. The undersigned fact finder was appointed by the Michigan Employment Relations Commission on December 18, 1985, and a fact finding hearing was held in Jackson, Michigan on January 28, 1986.

Issues

The fact finding petition listed the following nine issues as appropriate for recommendation by the fact finder:

(1) Grievance Procedure. The Union proposed that the contract contain a grievance procedure ending in binding arbitration, while the Employer rejected binding arbitration and suggested instead that the grievance process end in mediation.

(2) Agency Shop. The Union requested an agency shop provision with no "grandperson" clause, while the Employer requested that any agency shop provision not apply to employees who were not members of the labor organization prior to July 1, 1985.

(3) No Strike Clause. The Union suggested a no strike clause reading as follows:

> The Union agrees that it will not, during the period of this agreement, engage in any strike as defined by the Public Employment Relations Act. The Employer agrees that it will not lock out any bargaining unit member during the term of this agreement.

The Employer suggested the following no strike clause:

> The Union agrees that neither the Union, its agents nor its members will authorize, instigate, aid or engage in a work stoppage, slow down, strike (including a sympathy strike), or any other concerted activity which interferes with the operation of the Board. The Board agrees that during the life of this agreement there will be no lockouts.

(4) Subcontracting. The Union requested a provision restricting the ability of the Employer to subcontract work unless the necessary skills were unavailable within the bargaining unit. The Employer desired no restrictions on subcontracting.

(5) Holidays. The Union desired no change in the Employer's current practice of providing 14 paid holidays per year. The Employer wished to reduce the number of paid holidays to 8.

(6) Classification study. The Union proposed that a job classification study be performed covering all work in the unit and that the contract specifically set forth those positions which were less than 52-week positions. The Employer wished to conduct a job classification study covering only secretarial positions. The Employer was willing to specify those positions which were less than 52-week positions, but there was disagree-

ment as to the number of weeks to be allotted to certain of those positions. The Employer also desired to retain the authority to reduce the number of weeks worked by employees in those positions.

(7) Wages. The Union requested a one percent (1%) increase effective July 1, 1983, a six percent (6%) increase effective July 1, 1984, and a six percent (6%) increase effective July 1, 1985. No specific proposal was made for 1985-86. Further, the Union requested a longevity bonus of one percent (1%) for those employees in the twelfth to fifteenth year of employment, a longevity bonus of three percent (3%) for those employees in the fifteenth to twentieth year, a longeivity bonus of five percent (5%) for those employees in the twentieth to twenty-fifth year, and a longevity bonus of six percent (6%) for those employees in the twenty-fifth year and beyond. The Employer offered a one percent (1%) wage increase as of July 1, 1983, no increase to take effect July 1, 1984, a five percent (5%) increase to take effect July 1, 1985, and a five percent (5%) increase to take effect July 1, 1986. The Employer further proposed, with regard to longevity bonus, that its present practice of awarding an annual bonus of $200 for employees with greater than fifteen years of employment be continued.

(8) Fringe Benefits. The proposals of the Union and of the Employer differed with regard to medical, life, dental, and vision insurance, and with regard to the amount which an employee might have contributed to a tax sheltered annuity in

the event that the employee did not desire insurance benefits. The Employer also desired to retain the ability to change insurance carriers during the term of the collective bargaining agreement.

(9) Expiration Date. The Union proposed that the collective bargaining agreement terminate on August 16, 1987 while the Employer proposed that it terminate on June 30, 1987.

Prior to the fact finding hearing, this list of issues was narrowed somewhat. Concerning issue (3), the Union was willing to agree with the position of the Employer. Concerning issue (8), disputes concerning dental, life, and vision insurance were resolved, thus leaving only the issues of medical insurance and annuity to be addressed by the fact finder. Further, the parties agreed at the hearing that the question of the length of the proposed collective bargaining agreement would not require comment by the fact finder. The following findings and recommendations will deal with the remaining issues in the order listed above.

Findings and Recommendations

Grievance Procedure

In support of its position that the grievance procedure in the proposed collective bargaining agreement should end in binding arbitration, the Union relies principally on the contention that all but one of the collective bargaining agreements in Jackson County applicable to educational support personnel

in the school districts served by the Employer contain provisions for binding arbitration and, moreover, that the collective bargaining agreements applicable to all of the instructional units in the county represented by the Union, including two such instructional units of the present Employer, contain provisions for binding arbitration. While the Employer notes that the Union's tabulation of binding arbitration clauses in the named support and instructional units does not specify any of the limitations placed upon arbitration in those agreements, the Employer does not appear seriously to question either the relevance of the comparable units cited by the Union or the fact that the bargaining agreements applicable to those units do contain a grievance procedure terminating in binding arbitration. The Employer's principal argument in opposition to the Union's position, and in support of the Employer's position that the grievance procedure should end in mediation rather than binding arbitration, is that the Employer is being asked by the Union to relinquish an important managerial prerogative, the ability to make final decisions in regard to grievances. The Employer notes that its most recent policy handbook designates the Board of Education as the final decision maker in cases of disagreements between an employee and management, and the Employer argues that it should continue to be the final decision maker under any collective bargaining agreement which becomes applicable to the parties.

I find under these circumstances that binding arbitration is a feature of the collective bargaining agreements in virtually all of the units which have been proposed by the Union (without serious disagreement by the Employer) as comparable to the unit involved in this case. Further, I find that binding arbitration has been regarded as a useful feature of collective bargaining agreements in many other contexts for a considerable period of time. Based upon these findings, I recommend that the collective bargaining agreement between these parties include a grievance procedure which terminates in binding arbitration. The Union has indicated a willingness to place limitations upon any such binding arbitration clause comparable to the limits found in other contracts relating to bargaining units of the present employer, such as the clause contained in the contract between the Employer and the Jackson Intermediate Education Association. The clause in question is attached to this report as Appendix 1, and contains such traditional limitations as a restriction on the power of the arbitrator to add to, subtract from, or modify any terms of the agreement. It would be entirely appropriate to include comparable limitations in the collective bargaining agreement which will apply to the present unit.

Agency Shop

While both the Union and the Employer appear willing to include a provision in the collective bargaining agreement for agency shop, it is the desire of the Employer that such a provision apply only to employees who have become employed

since July 1, 1985, which appears to be the approximate date on which the Union first advanced a proposal for agency shop. In support of its position that no "grandperson" clause be included, the Union notes that all of the collective bargaining contracts applicable to educational support personnel in the districts served by the Employercontain agency shop provisions with no grandperson clauses, and that all but one of the contracts applicable to educators represented by the Union in Jackson County contain agency shop provisions with no such clauses. The Union further notes that of the some fifty employees in the instant collective bargaining unit, only six were hired on or after July 1, 1985. The Employer argues in support of its position that this is the first collective bargaining unit between these parties, and that, moreover, the election was extremely close.

I find that agency shop clauses with either no provision for grandfathering or with grandfathering provisions that exclude only a small number of employees in a unit from agency shop requirements are a feature of the collective bargaining agreeements in units comparable to the present unit. While it is true that this is the first collective bargaining agreement for the present unit, and that the election in the unit was extremely close, I do not find that either of these facts provide a persuasive justification for depriving an agency shop provision of its principal purpose, namely, requiring some

financial support from individuals who at least arguably benefit from the collective bargaining process. Hence, it would be my recommendation that the collective bargaining agreement reflect the position of the Union regarding this issue.

Subcontracting

In support of its position that the Employer should be prohibited from subcontracting work unless skills needed to perform the work are unavailable within the bargaining unit, the Union states that such protection is contained in eleven collective bargaining agreements applicable to support personnel in the districts served by the Employer. While the Union's summary does not spell out in detail the language contained in each of the relevant comparable clauses, the Union does provide examples from four different districts in which the ability of the Employer to subcontract work is limited in various ways. These four provisions are appended to this report as Appendix 2. The Union indicates a willingness to accept limitations of the sort found in these four examples. The Union, at one point in the bargaining process, apparently also expressed a willingness to forego a specific limitation on the ability of the Employer to subcontract and to rely instead on the recognition of the collective bargaining agreement as a protection for bargaining unit work. The Employer, however, has consistently maintained that the recognition clause does not function to preserve bargaining unit work but merely to

guarantee that if bargaining unit employees are used to fill the positions specified in the recognition clause, then the Employer has a duty to bargain concerning the working conditions of those employees. The Employer desires to retain subcontracting authority.

Because I find that some limitation on the ability of an employer to subcontract is prevalent in comparable collective bargaining agreements, and because the Employer has not provided any persuasive justification for declining to include such a provision in the contract between the instant parties, I recommend that such a provision be included in the agreement. The Concord provision, as contained in Appendix 2, has been specifically cited by the Union as an appropriate provision. While the parties are of course encouraged to develop a provision in the course of collective bargaining which is carefully tailored to the instant employment situation, any of the provisions in Appendix 2 might serve as an appropriate model.

Holidays

Prior to the certification of a collective bargaining unit in this matter, the Employer had instituted a practice whereby the relevant employees received 14 paid holidays per year. These included Labor Day, Thanksgiving, the day after Thanksgiving, 3 days at Christmas, 3 days at New Years, 3 days during the school spring break, Memorial Day, and the Fourth of

July. An earlier superintendent had apparently created the tradition of a 3 day break during the winter school vacation and a 3 day break during the spring school vacation by announcing additional days off shortly before the commencement of the regular school vacation periods at these times of year, and this practice was then regularized in the Employer's policy handbook. The Employer retained the discretion to determine which specific days an employee would have off during the winter and spring vacation periods, but the total number of days off per year in relation to holidays or holiday periods has remained 14 for a substantial length of time. The Union desires to continue this practice, while the Employer wishes to reduce the number of days which have been granted during the winter and spring breaks.

The Union appears to acknowledge that if the additional days which have traditionally been allowed during winter and spring school breaks are regarded as holidays, the past practice in the Jackson Intermediate School District would produce a number of paid holidays in excess of those allowed by the collective bargaining agreements which have been negotiated with other educational support units in school districts served by the Intermediate School District. The Union argues, however, that these additional days during the winter and spring breaks should be regarded not as paid holidays but as paid vacation, and that, when so construed, the total number of paid vacation days which would be allowed to support employees

of the Intermediate School District would not exceed the average number of paid vacation days received by other support personnel in related districts, particularly if viewed over a twenty year period. The Employer argues that the data supplied by the Union in relation to total vacation days for support personnel in the area is both incomplete and misleading in that a number of employees not covered by collective bargaining agreements are omitted from the data, and that if the additional winter and spring days are added to the vacation days proposed for the collective bargaining agreement, the support personnel of the Intermediate School District would indeed receive more paid vacation days over a twenty year period than would be received by employees in comparable units.

I find, based upon the information provided by the parties, that the Employer's past practice of providing additional paid leave days during the winter and spring breaks has produced a situation where, if these days are construed as "holidays," the employees in this unit receive a number of paid holidays in excess of those received by employees in comparable bargaining units, and if these days are construed as "vacation," the employees may receive a disproportionately high number of paid vacation days during the early part of their tenure as employees. It would not, of course, be inappropriate to consider increasing the number of vacation days awarded to employees who have been employed by the district for more extended periods of time. Hence, it is my recommendation that

the Employer's position concerning paid holidays be adopted, but that the parties consider during the course of collective bargaining whether the number of vacation days awarded to more senior employees should be greater than that originally suggested by the Employer. No specific recommendation is being made with regard to the precise number of vacation days which should be awarded to employees in the bargaining unit.

Classification Study

The Union argues that the Employer had intended to conduct a classification study relating to all employees in the bargaining unit prior to the time that the unit was certified, but that, after certification, the Board determined to restrict its study solely to secretarial positions. The Employer acknowledges that at one point it considered the possibility of all classifications within the unit but argues that it should retain the discretion that it should limit such studies if it so desires. While a classification study might provide useful information to both parties, I do not find that the Union has advanced arguments which would justify compelling the Employer to conduct such a study. Hence, it is my recommendation that the Employer's position regarding this issue be adopted.

A subsidiary issue relates to the possible inclusion in the contract of those positions which are to be regarded as less than 52 week positions. Both parties agree that inclusion of such a provision would be appropriate, but there is some disagreement concerning the number of weeks to be allocated to

certain of these positions. The four positions are all secretarial positions, and the disagreements are as follows. For the job placement secretary, the Employer contends that this is a 44-week position and not a 47-week position. For the attendance secretary, the Employer contends that this is a 44-week position and not a 46-week position. For the special education secretary, the Employer contends that this is a 43-week position and not a 42-week position. For the student personnel secretary, the Employer contends that this is a 44-week position and not a 48-week position. From the testimony presented at the hearing, I find that the Employer's position accurately reflects the number of weeks allocated to these secretarial positions when viewed from the standpoint of the specific understanding of the parties as to the minimum number of weeks allocated to these positions, whereas the Union's position more accurately reflects the number of weeks which have typically been worked by these secretaries in the recent past. Hence, it would appear to be the Employer's position that the contract reflect the agreed upon minimums, with the Employer retaining the discretion to extend or reduce these periods if conditions so required. The Union, on the other hand, would appear to desire that the contract reflect the maximum periods which these secretaries have worked during the recent past, and that while expansion of these periods by the Employer should be permitted, reduction should be prohibited. Concerning this issue, I would recommend that if

specific time periods are to be set forth in the collective bargaining agreement, the minimum time periods be included and be designated as such. If minimums are included, the Employer should not be permitted unilaterally to reduce these periods.

Wages

While the parties have agreed that a one percent wage increase be included in the collective bargaining agreement retroactive to July 1, 1983, the parties diverge principally with regard to what increase, if any, should be included in the contract for the period July 1, 1984 to ~~July~~ 1, 1985. The Union's position during bargaining was that a six percent increase should apply for the period in question, while it was the position of the Employer that no increase be included for the period. The Employer did offer an increase of five percent effective July 1, 1985, and of an additional five percent effective July 1, 1986. The Union sought six percent effective July 1, 1985, and made no specific demand for the period commencing July 1, 1986. It appeared clear at the hearing that the Union would find five percent increases for the 1985-86 and 1986-87 periods acceptable, despite the initial demand for six percent in 1985-86.

The Employer does not base its position concerning 1984-85 on any alleged inability to pay the requested increase for the period, but rather on its contention that the compensation of the bargaining unit employees, even without such an increase, would compare favorably with employees in comparable units.

The Union, for its part, does not base its request for an increase applicable to 1984-85 on the proposition that its wages, in absolute terms, are inadequate, but rather on the proposition that the Employer granted wage increases of five percent for the period in question to employees in two of the other units with which it bargains and to its unorganized employees, and that it would therefore be inequitable to provide no increase for the employees in the present bargaining unit.

A number of factors are typically regarded as relevant to the question of a wage increase, including ability of the Employer to pay, wages in comparable bargaining units, increases granted to employees in comparable bargaining units, and increases in cost of living for the period in question. As already suggested, certain of these factors have either been minimized by one or another of the parties in this case, or have been omitted from consideration altogether. I find that although the employees in the bargaining unit might, without an increase for the 1984-85 period, compare favorably in wages with personnel in some comparable units, the granting by the Employer of five percent wage increases for the period in question to employees in two of its other bargaining units and to its unorganized employees suggests both that the Employer would be capable of granting a comparable increase to the employees in the present unit and that the economic conditions specifically applicable to the employees of this Employer might

justify such an increase. It is my recommendation that a five percent wage increase be awarded to employees in the bargaining unit for the 1984-85 period, and that similar five percent increases be awarded for the 1985-86 period and the 1986-87 period.

A related issue is the request by the Union that modified longevity bonuses be included in the collective bargaining agreement. It is the Union's position that the Employer has traditionally provided a longevity bonus of $200 only after an employee has worked for 15 years, and that employees in a number of comparable bargaining units receive longevity bonuses at points earlier than 15 years of service. While I do find that there are comparable units in which longevity bonuses are awarded at earlier times than would be the case under the Employer's proposal in the instant situation, there also appear to be four comparable units in which no longevity bonuses of any sort are awarded. Particularly in light of my foregoing recommendation concerning wage increases, I recommend that the Employer's position concerning longevity bonuses be adopted by the parties in this case.

Fringe Benefits

As indicated earlier, while the parties had originally differed over a number of health-related fringe benefits, the issues remaining now relate only to the form of medical insurance to be provided and to the monthly amount which the Employer would contribute toward a tax sheltered annuity for those employees willing to accept reduced medical benefits.

The Union wishes to be covered by MESSA Super Med II with a MESSA care rider, while the Employer proposes that the health insurance be MESSA Super Med I with a MESSA care rider. Further, the Employer desires the ability to change carriers or administrators of the health plan so long as "comparable benefits" may be obtained for the employees. With regard to amounts contributed towards tax sheltered annuities, the Union proposes $30 per month while the Employer proposes $20 per month. It would appear from the evidence presented at the hearing that the Employer provides its other organized employees with MESSA Super Med II, and with a $30 per month annunity contribution. Testimony suggests that while the Employer has reserved the right to change carriers for its other units, it has agreed not to exercise this right during the terms of the existing collective bargaining agreements. Both parties would appear to acknowledge that either health coverage proposal would produce a savings over the health care provisions now in effect for employees within the bargaining unit. The Employer's principal argument in favor of MESSA Super Med I would appear to be that employees in its other bargaining units have been covered by that policy in advance of being awarded coverage under MESSA Super Med II. With regard to its proposal that the monthly contribution toward tax sheltered annuity be $20 rather than $30,the Employer suggests that the employees in its other bargaining untis may have higher average compensation, and that a higher comtribution towards annuities may therefore be justified.

I do not find that the fact that other employees of the Employer may have earlier been covered by MESSA Super Med I provides persuasive justification for insisting that such coverage be accepted by the present bargaining unit. It would be my recommendation that the Union's position be adopted both with regard to medical coverage and with regard to employer contribution to annuities. With regard to the question of the ability of the Employer to change carriers or administrators during the term of the contract, I recommend that such authority not be provided. The evidence indicates that it is provided in very few comparable units, and the question of modification of coverage should more appropriately be left to subsequent collective bargaining between the parties.

Date: 2/28/86

Jerold Lax, Fact Finder

Appendix 1

ARBITRATION CLAUSE CONTAINED IN JACKSON INTERMEDIATE EDUCATION ASSOCIATION CONTRACT - JCISD

Level IV (Arbitration). If the alleged grievance is not settled at Level III, the matter may be referred to arbitration by either party, provided that notice to refer is given within twenty (20) school days from the Board's written decision at Level III. If within five (5) days the Board and the Association cannot agree upon a mutually acceptable arbitrator, the arbitrator shall then be selected according to the Rules of the American Arbitration Association.

In the event that a grievance arises which requires a speedy resolution, the parties may mutually elect, at Level III of this procedure, to appeal the grievance to arbitration under the American Arbitration Association rules for expedited arbitration.

The arbitrator shall hear the grievance and render the decision within thirty (30) days from the close of the hearing, setting forth in writing the findings and conclusions with respect to the issues submitted to arbitration. The arbitrator's decision shall be final and binding upon the Board, the Association, and the employee(s) involved.

The arbitrator shall have the power and authority as set forth herein:

1. It is expressly agreed that the power and authority of the arbitrator shall be limited in each case to the resolution of the question submitted. It is further specifically agreed that the arbitrator shall have no power to add to, subtract from, or modify, any of the terms of this Agreement; nor shall the arbitrator substitute his/her discretion for that of the Board or the Association where such discretion has been retained by the Board or the Association; nor shall the arbitrator exercise any responsibility of function of the Board or of the Association. The decision of the arbitrator shall be final and binding on both parties and the employee or employees involved.

2. No more than one grievance may be considered by the arbitrator in the same hearing, except upon expressed written mutual consent and then only if they are similar in nature.

3. The fees and expenses of the arbitrator shall be shared equally by the Board and the Association. All other expenses shall be borne by the party incurring them, and neither party shall be responsible for the expense of witnesses called by the other.

4. No decision in any one case shall require a retroactive adjustment in any other case.

5. The arbitrator shall have no power to rule on any of the exclusions listed in B of this article nor any claim or complaint for which there is another remedial procedure or form established by law or by regulation having the force of law, including any matter subject to the procedures specified in the Teacher's Tenure Act (Act IV, Public Acts, Extra Session, of 1937 of Michigan, as amended).

E. If any individual employee has a personal complaint and desires to discuss the complaint with his/her immediate supervisor, the employee is free to do so without pursuing this grievance procedure.

F. An individual employee who wishes to drop a grievance may do so without interference from the Association.

EXAMPLES OF SUBCONTRACTING PROVISIONS CONTAINED IN SUPPORT PERSONNEL CONTRACTS IN JACKSON COUNTY

COLUMBIA - The right to contract or subcontract is vested in the Board. The right to contract or subcontract shall not be used to reduce the work force, or their normal work hours.

CONCORD - Nothing in this Agreement shall be construed to restrict the right of the Employer to have work normally performed by bargaining unit members performed by others, including supervisors, substitutes, and independent contractors, except work normally performed by bargaining unit members may not be contracted out or done by others if:

(a) the employer has the equipment and the bargaining unit members have the skills to perform such work; and

(b) bargaining unit members will be laid off as a result of the subcontracting or supplemental work.

HANOVER-HORTON - Subcontracting. The Employer shall have the right to subcontract work normally performed by bargaining unit employees when it determines it does not have the available or sufficient manpower, proper equipment, capacity and ability to perform such work within the required amount of time during emergencies or when such work cannot be performed by bargaining unit employees on an efficient and/or more economical basis. The Employer agrees not to lay off or dismiss employees as a result of subcontracting.

WCMFS - Supervisory employees shall not be permitted to perform work within the bargaining unit, except in cases of an emergency arising out of an unforeseen circumstance which calls for immediate attention and the instruction or training of employees; including demonstrating the proper method to accomplish an assigned task.

Additionally, the Employer agrees that it will not subcontract work in which it has the proper manpower, equipment capacity and ability to perform in an economic manner with regular employees.

Source: Local Collective Bargaining Agreement