STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
FACT FINDING

MICHIGAN AFSCME COUNCIL 25

("the Union")

MERC Case No. L01 F-5007

-and-

LUCE-MACKINAC-ALGER-SCHOOLCRAFT
DISTRICT HEALTH DEPARTMENT

("LMAS")

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Report

Thomas L. Gravelle, Fact Finder

January 26, 2005

This fact finding proceeding was heard before me on September 24, 2004 in Newberry, Michigan.

The Union is represented by Roger Smith. Also present for the Union were Carla Wark, Darla Wood, Lisa Johnson and Susan Cameron.

The Employer is represented by Steven J. Cannello. Also present for the Employer were Dr. James Terrian, Joseph P. Van Landschoot and Marvin Henderson.

Because of the large number of unresolved issues, the parties stipulated at the hearing before me that in my report I may forego written findings and reasons as I deem appropriate.

In making my recommendations, I have sought a reasonable balance, taking into account the concerns of the parties in making their first collective bargaining agreement.

FACT FINDING LAW AND RULES

Section 25 of the Labor Mediation Act (LMA) of 1939, 1939 PA 176, as amended, provides for fact finding as follows:

> When in the course of mediation ..., it shall become apparent to the commission that matters in disagreement between the parties might be more readily settled if the facts involved in the disagreement were determined and publicly known, the commission may make written findings with respect to the matters in disagreement. The findings shall not be binding upon the parties but shall be made public.

MERC has explained that "factfinding is an integral part of the bargaining process." County of Wayne, 1985 MERC Lab Op 244; 1984 MERC Lab Op 1142; *aff'd* 152 Mich App 87 (1986). The fact finder's report reinstates the bargaining obligation and should be given serious consideration. City of Dearborn, 1972 MERC Lab Op 749.

BACKGROUND

The Employer is LMAS, a non-profit public health agency. Dr. James Terrian is its Medical Director.

LMAS provides public health services in the Eastern half of Michigan's Upper Peninsula. It maintains four offices in four County seats.

LMAS receives 80% to 85% of its revenues from home health care services which its employees perform. For this reason, it is primarily a pay-for-service provider with a clientele spread over a broad geographical area.

The payors for these services are private insurance, Medicare and Medicaid. A tiny fraction of LMAS's income is from County entitlements.

For 2004, LMAS has budgeted its total revenues (and total expenses) as a bit less than $6,000,000. For 2005, it has projected total revenues (and total expenses) as a bit more than $6,000,000.

LMAS estimated that it has a general fund equity balance of about $300,000. This would be about 5% of its annual revenues (and expenses).

The bargaining unit is composed of about 75 employees, who work in 16 job classifications.

In making my recommendations, I have considered the following:

– the parties' testimony and arguments,

– the LMAS proposed contract,

-- the Union proposed contract,

– the LMAS Personnel Policy Handbook (referred to below as "the Handbook"), and

-- (among the several comparable employers proposed by the Union) primarily the Western Upper Peninsula District Health Department (referred to below as "WEP").

Like LMAS, WEP provides home health care services, is geographically spread out, and has a collective bargaining agreement with the Union. The WEP agreement is clear and succinct; and because of the comparability of the two health departments, the WEP agreement should be of assistance to the parties as they proceed to negotiate in good faith to resolve their numerous disagreements, including some of a radical nature.

DISPUTED ISSUES

To aid the parties in understanding this Report, I will use Article headings contained in LMAS's proposed contract, which has highlighted in yellow the language to which the parties already have agreed. (The Union's proposed contract is similarly headed.)

ARTICLE 5: MANAGEMENT RIGHTS

The parties have agreed on many management rights. Disagreement concerns some additional management rights sought by LMAS which conflict with provisions sought by the Union. For example, LMAS has proposed a management right "[t]o discipline and discharge employees," whereas the Union has proposed that "just cause" apply to discipline and discharge. In addition, some of the proposed rights are redundant or unnecessary by reason of the agreed upon rights and also the Section 5.2 Limitation "that all subjects not specifically listed in this Agreement are retained as Employer rights."

I recommend that the parties put on hold the disputed Article 5 provisions until they have resolved their various disputed issues in other Articles, at which time they can decide whether any additional management rights should be added.

ARTICLE 6: CONTRACTUAL GRIEVANCES

The parties have agreed to much of this Article.

I recommend that Section 6.1 D not be adopted because it could conflict with the definition of a grievance in Section 6.1 A. Also Section 6.1 D is unnecessary because of the Article 26 language the parties have already agreed to.

I recommend that the one hour weekly time limit in Section 6.3(F) be deleted because it is possible that more than one hour in a particular week would be needed "for direct participation in grievance adjustments with management."

I recommend that Section 6.3(H) be deleted because it is redundant by reason of the Article 26 language the parties have already agreed to.

ARTICLE 7: CONTRACTUAL ARBITRATION

I recommend that Section 7.2(B) be adopted.

I recommend that Section 7.3 be modified to provide for the goal that arbitration decisions will be rendered within 30 days after the close of the hearing, i.e., after post-hearing written arguments, if any, are received by the arbitrator.

I note that agreed-upon Sections 7.4 and 7.8 are contradictory. I recommend that Section 7.4 be deleted.

I recommend that the disputed language of Sections 7.5, 7.6, and 7.7 not be adopted.

I recommend that Section 7.9 be modified to authorize reasonable paid-time off for attendance at the arbitration hearing at the request of either party.

ARTICLE 8: NO STRIKES OR LOCKOUTS

In Section 8.1 the parties have agreed to standard language in this area.

I think that the disputed language is unnecessary.

I recommend that the disputed language not be adopted.

ARTICLE 9: STATUTORY DISPUTE ARBITRATION (NON CONTRACTUAL)

Proposed Article 9 is designed to have the Union voluntarily waive the rights of the employees in the bargaining unit to bring statutory discrimination (and all other non-contractual) claims in a court, and likewise to voluntarily waive the right of employees to jury trials for any of these claims.

This type of proposal is typically used by non-union employers in order to avoid the risk of a "run-away" jury in a statutory discrimination case. I am unaware of this type of proposal ever being part of a collective bargaining agreement. Further, it is unclear why a Union would ever agree to this waiver proposal.

I do not recommend that it be adopted.

Having said this, I note that collective bargaining agreements often state that the parties agree to conform to applicable civil rights laws. See, e.g., WUP contract, Art. 7 (short form). See also Handbook Policy No, 1 (long form).

My recommendation is that if the parties want a non-discrimination clause, they can include it in their agreement, and state that if the employee brings any governmental action (either administrative or judicial) for statutory discrimination the employee will have waived the right to arbitrate the claim under the parties' agreement.

ARTICLE 10: DISCIPLINE, DISCHARGE, SUSPENSION, AND RESIGNATION

The second sentence of Employer proposed Section 10.1 makes every employee an "at will" employee. As "at will" employees, they would have no contractual right to challenge their discharge. (Lesser discipline apparently would be grievable, although it is unclear what the standard would be.)

Over 90% of collective bargaining agreements have "cause" or "just cause" as a reason for discharge. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6th Edition (BNA Books 2003) 931 n 36. Those agreements which don't have "cause" for discipline and discharge include the many agreements in the construction industry where a union hiring hall reassigns discharged employees to different construction sites.

Also, the Director's letter in the Handbook states:

> The Department recognizes and asserts that it will neither discharge, nor take other disciplinary action toward, any non-probationary employee, except for just cause.

In addition, Handbook Policy No. 46 requires arbitration of contractual claims for money damages (which would encompass a back pay claim, were an employee to claim that he was discharged without just cause).

For these reasons, I recommend that the parties adopt the "just cause" standard for discipline and discharge.

At the hearing before me, LMAS raised concerns about egregious misconduct for which it did not want its decision to discharge submitted to an arbitrator. For this type of misconduct, the parties may consider adding the following provision;

> For the following reasons for discharge, the only issue before the arbitrator will be whether the employee committed the offense. If the arbitrator finds the employee guilty as charged the arbitrator must deny the grievance and the arbitrator will have no jurisdiction to review the penalty:
>
> (a) Theft:
> (b) Fighting
> (c) etc.

ARTICLE 12: LAYOFF AND RECALL

The parties' proposals involve layoffs, ensuing bumping, and recalls.

As to *bumping* after receiving notice of layoff, both parties have proposed the following language:

> Employees may bump the Employee with the least seniority in the Bargaining Unit, on the applicable Seniority List for which they are fully qualified.

This language would appear to be adopted.

As to *layoffs*, the Union has proposed layoffs on a departmental basis using bargaining unit seniority.

LMAS has proposed layoffs by seniority subject to the "relative ability" standard.

Under a relative ability standard, seniority is controlling provided that there is not a junior employee who is more qualified.

PAUL C. WEILER, GOVERNING THE WORK PLACE (Harvard U. Press 1990) 71 explains the wide acceptance of seniority as the principal for layoffs even where no union is involved: "In practice, the seniority principle is honored in layoffs by nonunion employers on a noncontractual basis nearly as often as by unionized firms governed by collective agreements."

Handbook Policy No. 68 provides that permanent layoffs will be by seniority "provided that the employees who are retained have the demonstrated ability and fitness to perform the available work." This appears to be a "sufficient ability" standard, i.e., "Is the senior applicant able to perform the duties of the position?"

WUP contract, Art. 15, §F states that layoffs will be by seniority "provided that in the option of the appropriate administrator patient care is not thereby adversely affected."

LMAS is very concerned about having some flexibility in this area because of its dependence on productivity in a difficult economic environment, and because of the broad geographical area it covers. Its layoff proposal is like WUP's but with factors spelled out.

For layoffs, I recommend that the Handbook Policy No. 68 standard be adopted.

For *recalls*, LMAS also has proposed that they be by seniority subject to the "relative ability" standard.

WUP contract, Art. 15, §F states that recalls "shall be in reverse order of layoff, except that the District may recall out of order to secure employees with needed skills and/or ability after discussing the matter with a representative of the Union." This is similar to LMAS's "relative ability" proposal.

For recalls, I recommend that either the Handbook Policy No. 68 standard or LMAS's proposed "relative ability" standard be adopted.

***[UNION proposal]*: JOB POSTING AND BIDDING PROCEDURES**

The Union has proposed that bargaining unit vacancies and transfers be decided on the basis of seniority and the "sufficient ability" standard, i.e., "Is the senior applicant able to perform the duties of the position?"

I recommend that the Union's proposed article be adopted subject to the following:

(A) Seniority, subject to the relative abilities of applicants, be the standard.

(B) The arbitrability of an employer decision that a trial period employee is unsatisfactory be limited to an "abuse of discretion" standard.

(C) Language along the lines of the following be made for contracting or subcontracting work:

> The right to contracting or subcontracting is vested with the Employer. This right will not be utilized for the purpose of eroding the bargaining unit. In cases where contracting or subcontracting will displace bargaining unit employees, Employer representatives will hold advance discussions with the Union. During such discussions the Union shall be advised of the scope of contracting or subcontracting that effects its members; including the number and classifications of any employees to be laid off, the duration of the layoff, the purpose of such contracting or subcontracting, type of work being performed, the benefits and/or savings to the Employer and any other pertinent details. Any bargaining unit employee who is displaced by contracting or subcontracting will be permitted to bump in accordance with the provisions of ARTICLE 12.

ARTICLE 13: HOLIDAYS, VACATIONS, AND LEAVES OF ABSENCE

The parties are in agreement as to the holidays to be observed. (I assume these are paid holidays.) They also agree as to jury duty.

For paid vacation or other paid time off, LMAS has proposed that the employees will begin to accrue paid time off beginning with the ratification of the contract (Section 13.2) and that all sick leave accrued or banked prior to ratification shall be forfeited (Section 13.7).

Handbook Policy No. 20 states that "[a]nnual leave may be accumulated up to a maximum of thirty days."

Handbook Policy No. 21 states that "[a]n employee or their designated beneficiary shall be paid fifty percent of the employee's unused sick leave up to a maximum of 60 days upon retirement, separation or death after ten years of service. Payment shall be made at the employee's current rate of pay, along with other compensation due."

I recommend that accrual of vacation, illness and other paid time off be based on each employee's length of service with LMAS, and not on the ratification date of the parties' contract. Forfeiture of accrued benefits is inequitable. Also, keying the forfeiture to ratification of the contract seems punitive.

As to *sick leave*, LMAS's proposal is based on eligibility under the Family Medical Leave Act (FMLA), which LMAS is required to comply with even absent a contract. For leaves not covered by the FMLA, the LMAS proposal states only that employees "will be eligible for leave only with approval of Management, which may be denied." In other words, the LMAS proposal appears to lack any substance (other than its non-contractual obligation to comply with the FMLA).

For sick leave, I recommend that the parties adopt either the Union's proposal or the language contained in the WUP contract.

ARTICLE 14: SENIORITY

Here, the only dispute between the parties here is over Section 14.6 "Rights Defined."

The Employer's list sets forth four areas to which seniority applies.

I recommend that the Section 14.6 be amended to add Vacancies and Transfers (and any additional areas to which seniority applies).

I also recommend that Article 14 be moved ahead of Article 12, which I believe is the more appropriate position for it.

ARTICLE 15: SENIORITY EXCEPTION

I recommend that the following language in Section 15.1 be deleted: "or between the unit and any other position outside the unit."

I also recommend that the balance of Section 15.1 be adopted.

ARTICLE 17: HOURS OF WORK AND PREMIUM PAY

I recommend that either the Union's proposal or the applicable provisions of Article 18 of the WUP contract be adopted.

ARTICLE 18: ON-CALL

I recommend that the parties adopt LMAS's Sections 18.1 and 18.2.

I also recommend that for employees actually called out, pay shall be at least two hours of pay at the rate of time and one-half for each independent call. Here, I am relying on the language of Article 18, Section G of the WUP contract.

ARTICLE 20: DEFINITIONS

I recommend that "Regularly Scheduled" be clarified.

I recommend that "full time" means the typical work day of 7 ½ hours plus ½ hour for lunch.

I recommend that the parties adopt LMAS's definition of "part time."

I also recommend that the parties add the following definition:

Irregular employee – less than half time

ARTICLE 21: INSURANCE AND PENSIONS

The parties have agreed on some of LMAS's language.

As to pensions, I recommend that the current plan be maintained without change.

As to the various types and plans of medical insurance, I do not have enough information to make recommendations in this complex and costly area.

I can say that (barring a waiver by the Union) LMAS would have a duty to bargain concerning changing insurance carriers and terms of coverage.

I also can say that many contracts address this question by authorizing a unilateral change by the employer after consultation with the Union, provided that the benefits under the new plan are on balance equivalent to the old plan.

ARTICLE 23: WORK ASSIGNMENTS AND RULES

As to Section 23.1, I recommend that the second paragraph be adopted.

The first sentence of Section 23.1 and Section 23.2 would make every task of every employee subject to the sufferance of LMAS. For this reason, I recommend that it not be adopted.

I also recommend that the parties consider agreeing to set up a committee to review LMAS's numerous job classifications (and their descriptions), with an eye to simplifying and clarifying this complex area.

ARTICLE 26: INTEGRATION AND PAST PRACTICE

The parties have agreed to Sections 26.1 and 26.4 (Section 26.2 is blank).

Section 26.3 is titled "Requirement of a Writing."

I recommend that Section 26.3 be simplified to state:

> This Agreement can only be amended by a writing signed by the Employer and the Union.

ARTICLE 27: WAGES

I recommend an across the board raise of 3% for the first year of the contract.

I also recommend a 3% wage increase for the second year of the contract. However, as to the second year, I recommend a contract reopener if the wage increase would put LMAS in deficit, with the parties negotiating an adjusted wage increase.

ARTICLE 30: TERMINATION

I recommend that the contract be for two years beginning with the date the contract is executed. This would provide stability of expectations for a reasonable time and also would give the parties sufficient time to determine if any "bugs" need to be worked out. Also this will be sufficient time to reduce any fears LMAS may have about having a collective bargaining relationship with the Union (a fear expressed at the hearing before me, and revealed by some of LMAS's proposals).

Respectfully submitted,

Thomas L. Gravelle
Fact Finder