2453

STATE OF MICHIGAN

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of Fact Finding

between

The Lowell Board of Light and Power

and

IBEW Local 876

Case Number: L12 B-0165

Fact Finder: Lane Hotchkiss

Date: September 11, 2013

Appearances, Hearing, Exhibits, and Number of Issues

Appearances

For the union: Ted Iorio, attorney and Ralph Brecken, Jon Francis, and Hank Matulewicz

For management: John McGlinchey, attorney and Greg Pierce, General Manager

Hearing

The Fact Finding hearing was conducted on June 27, 2013 in Lowell, Michigan. A second day was scheduled but the parties opted to file post-hearing briefs instead of presenting at a second hearing day. It was agreed that any additional exhibits and any modification of bargaining position were to be submitted within 15 calendar days of the hearing; and post-hearing briefs were to be submitted within 30 calendar days thereafter.

Documents, Late Responses and Late Exhibits by the Parties

The parties submitted 22 exhibits at the hearing and 14 plus nine after the hearing for a total of 45 exhibits. The Employer submitted a 30 page post-hearing brief and the Union submitted a 57 page post-hearing brief. Both briefs were excellent and very helpful to the Fact Finder.

The Employer responded late (after the 15 days) on a change in their bargaining position concerning an issue, which they withdrew; and the Union responded late with eight additional exhibits attached to their Post Hearing brief and one in their correspondence of August 11, 2013.

Since the late Employer change in position, wherein it dropped an issue, is what the Union sought, there is no harm done to the Union by the Employer's late submission.

The Employer objected to the Union submission of eight Union exhibits as Appendices to its post-hearing brief. These exhibits have been marked received but not admissible as they are 30 days beyond the deadline for submission of exhibits.

The Exhibit submitted by the Union on the date of this award is obviously tardy but provides nothing new to the Employer as the Employer knew what wage increases it gave its non-union employees; nor is the data in the Exhibit generally new to the Fact Finder, as non-union wage increases were covered at the hearing and in the Union's Post-Hearing brief. It is being marked as received but not admissible.

Background and Number of Issues

The bargaining unit is new and is negotiating its first contract. The parties negotiated on 14 occasions during 2012 and 2013, six of which were with Mediator Fred Vocino.

The union filed for Fact Finding on March 22 and it was received by MERC on March 26, 2013. Lane Hotchkiss was appointed the Fact Finder on May 3, 2013.

At the Fact Finding hearing, the parties presented their positions on all the outstanding issues. The Union asked the Fact Finder to rule on all of them. There are 40 Articles and two Attachments in the proposed contract, 15 are settled, leaving 25 Articles and two Attachments for the Fact Finder.

This is not the norm in Fact Finding. Usually a Fact Finder deals with half a dozen issues or so. Preparing the award usually takes two to four days of study and writing – which is all that is normally provided by the state to a Fact Finder.

Given this situation, the Fact Finder asked the parties to address the most important issues in their post-hearing briefs. But this did not happen, and both parties addressed almost all of the many unresolved issues.

With this many issues unresolved, it is impossible for the Fact Finder to provide a full recitation of the positions of the parties on all of the issues or a full discussion of these positions. Given the four days provided by the state to this Fact Finder, the Fact Finder is compelled to present a briefer award.

In this award, the Fact Finder will make recommendation on the issues but without full recitation of the positions of the parties and without full discussion and analysis of all issues; and the Fact Finder will provide rationale for only some of the recommendations due to time limitations.

Since this is a Fact Finding report and not a Act 312 Arbitration report, the Fact Finder is not required to make a decision between the positions of the two parties. The Fact

Finder may make recommendations that are combinations of the parties' proposals, ones adapted from other contracts, or create new recommendations. This Fact Finder has done all three of these in his recommendations.

The Unresolved Issues

Article 2 – Employer Rights

The Fact Finder recommends the following:

Section 1: Language as the Employer proposed, but add a sentence at the end:

These rights must be exercised in a reasonable way.

Section 2: As the Employer proposed – Section 2 is not in dispute by the parties.

Section 3: This Agreement embodies all the obligations between the parties evolving from the collective bargaining process and supersedes all prior relationships and/or practices except as set forth in Attachment B (union proposal), which is incorporated into this agreement.

Section 4: Section 4 should not to go into the contract as it is redundant of Section 1 and adds some confusion to the contract in that ample management rights are spelled out in Section 1.

Discussion

As to past practice, binding past practices arise under a contract and there has been no prior contract. So it is not reasonable to argue that past practices are binding on the parties. Furthermore, the Union has had ample opportunity to propose language covering what it felt were desirable past practices and to negotiate to get language

formalizing said practices into the contract. It also should be noted that in some situations the Union may demand to bargain on an issue during the life of the contract. This would depend on the history, circumstances and legal situation of the issue.

It is also reasonable for management to not know what it is agreeing to and not be confronted with alleged practices that are unwritten and unidentified in the contract. This could lead to endless debate over practices, which is not beneficial to stable labor relations.

As to reasonable management decisions, adding a sentence setting forth that management rights must be reasonable seems appropriate. Arbitrators will generally follow a rule of reasonableness in interpreting contracts, in that actions of management cannot be arbitrary or capricious and must bear some logical or necessary relationship to the needs of management.

Article 3 – Union Security

The positions of the parties are quite far apart on the window period issue and neither brief provided any current state ruling on the matter since Act 348 went into effect. There may not be any yet – at least none presented by either party.

The Union argues NLRB and MERC decisions prior to the passage of The Right To Work legislation. The Employer simply argues that its proposal is in accordance with the new law, PA 348 of 2012.

Neither briefs shed much light on the meaning of Section 17 (1) (a) of the act or any part of the act. Section 17 (1) (a) prohibits requiring or forcing an employee to become or remain a member of a labor organization or otherwise affiliate with or financially support

a labor organization. It does not provide a procedure for revocation. Since MERC has ruled that annual revocation periods are legal, such would seem to be okay unless and until MERC or a court determines otherwise.

The Union proposed form is too contorted to comply with the intent of the new law, which is for simple revocation; and management has not proposed a check-off form, simply that there be one.

The Fact Finder recommends the Union proposed language on Union Security, with two caveats:

First, an annual 30 day window period shall be provided wherein members my revoke their membership; and second, the parties will need to develop a simple check-off and revocation form as Attachment A. Other Employers or local unions may have a simple form than can be adapted.

Article 5 – Grievance Procedure

The Fact Finder recommends the following:

Omit the management language in Section 2 wherein the Employer proposed "Bargaining unit employees are employed at-will for discipline and discharge."

Add the 10 day language in Step 2 and Step 3 proposed by the Union to clarify timelines.

In Step 4, create a Grievance Committee consisting of one member of the Board, one member selected by the Union, and an arbitrator selected through the American Arbitration Association.

Discussion: Michigan law enables employees to organize and negotiate contracts to provide job security. For example, just cause for discipline and dismissal is fairly standard in Michigan labor contracts and at-will employment is very rare. It should not be in this labor contract as at-will employment negates the job security labor contracts are to provide.

As to arbitration, any panel should be balanced and include a member appointed by both the Employer and Union along with the neutral arbitrator selected through the AAA. This is a pretty common structure in labor contracts that provide a panel.

Article 6 – Seniority

The Fact Finder recommends the following:

Section 1: Part-time employees shall receive full seniority if they are working more than half-time and half seniority if they are working less than half-time. They shall be on the same seniority list as full-time employees.

Section F and I: Two years as the Union proposed.

Section G: Delete "…and accepted at the sole discretion of the Employer" and substitute the following: "There are not many circumstances that would prevent an employee from notifying the Employer in a timely manner. Consequently, there is a very high burden of proof on the employee in these circumstances."

Discussion: The Union has proposed full dues for part-time employees but that part-time employees be laid-off after full-time employees even if their collective hours with the Employer is greater. This would not seem to be equitable, hence the recommendation for splitting part-time employee's seniority based on their hours of employment. This

concept also applies to lay-off of part-time and full-time employees which is covered later in this report in Article7.

As to the Employer proposed four months or Union two years in both Article 5 and 6, two years does not seem unreasonable in that all the current employees have many years of faithful service to the Employer.

Article 7 – Layoff and Recall

The Fact Finder recommends the following:

Section 3: Two years, which the Union proposed for recall.

Article 8 – Hours of Work

Discussion: At the Fact Finding hearing, there was very little discussion on hours of work or why the Employer changed them. This leaves the Fact Finder with very little understanding of why the hours were changed by the Employer or why the Union finds a PTO system, per se, unacceptable.

The Union, however, indicated in its brief that the earlier work hours are beneficial to the employees because it allows working less hours during the heat of the day during the summer when most outages occur. Given that the Employer gave no rationale or necessity for the change in hours to the Fact Finder, either at the hearing or in the post-hearing brief, there seems to be no reason to support the Employer position.

It might also make sense to have different hours for different times of the year, as some employers have. But this should be left to the parties to discuss.

The Fact Finder recommends the following:

Section 1: "Monday through Friday shall be considered a regular work week with starting time at 7:00 am and the day finishing at 3:30 pm. The normal work week shall be 40 hours. Hours may be changed on an infrequent basis to meet the needs of the Employer. The work schedule shall be posted five (5) calendar days in advance."

Section 2: The Union proposal should be adopted per 30 minute lunch period.

Section 4: The Union proposal should be adopted but without the double time provision.

Section 5: The Employer proposal but with two hours pay minimum.

Section 6: The first sentence of the Employer proposal was agreed to at the Fact Finding hearing. The second sentence of the first paragraph and A and B should be deleted.

Article 11 – Policies – The Fact Finder recommends the following:

Section 2: In the last paragraph, the first sentence regarding arbitration should be deleted from the contract. The second sentence of the last paragraph would remain.

Article 13 – Pyramiding of Premium Pay – The Fact Finder recommends the following:

The Employer proposal should be adopted as it is my understanding that this has been the practice in effect – unless the Employer can accept the July 12 amended proposal from the Union.

Article 16 – Non-Bargaining Unit Personnel – The Fact Finder recommends the following:

Section 1: Modify the Employer proposal as follows:

Temporary Personnel. The Employer reserves the right to hire persons to perform bargaining unit work on a temporary basis, not to exceed twelve (12) months, unless a bargaining unit member is on a leave of absence, in which case the temporary employee may fill that vacancy for the duration of the leave. Temporary employees will not be in the bargaining unit unless they are filling the vacancy of an employee on a leave of absence for longer than 30 calendar days.

Section 2: The Employer proposal should be adopted which reads:

Supervisors: Supervisors and other Board employees may perform bargaining unit work at any time.

Section 3: Modify the Employer proposal as follows:

Part-Time Personnel: The Employer reserves the right to hire part-time employees, both irregular and regular, to perform bargaining unit work. After 30 calendar days, part-time employees shall: be in the bargaining unit, begin to receive the rate of pay for the classification they work in, begin receiving pro rata benefits, and receive pro rata seniority.

Section 4: Section 1, 2 and 3 shall be implemented in such a way so as not to reduce the regular hours of full-time employees, lay-off employees, eliminate significant over-time work, circumvent the recall of employees to either part-time or full-time positions, or to demote them.

Section 5: The word significant in Section 4 shall be defined as eight hours in any three month period.

Rationale: The intent of the wording recommended in Sections 1-5 is to strike a balance between Employer flexibility and Union security. Whether eight hours in Section 5 is the right formula is hard for the Fact Finder to determine, absent data on over-time, and may need to be adjusted by the parties.

Article 18 – Subcontracting

The Fact Finder recommends the following:

Section 1: Adopt the Employer's proposal as Section 1 and add Section 2 as follows:

Section 2: Section 1 shall be implemented in such a way so as not to reduce the regular hours of full-time employees, lay-off employees, eliminate significant over-time work, circumvent the recall of employees to either part-time or full-time positions, or to demote them. Significant in Sections 2 shall be defined as eight hours in any three month period.

Article 19 – Health, Safety, Injuries and Accidents

The Fact Finder recommends the following: Adopt the Employer language.

Article 20 – Duration

The Fact Finder recommends the following: Both the Employer and the Union had two articles dealing with duration in their proposals: Article 20, and Article 39 for the Union and 40 for the Employer. These articles should be combined into one article. Duration traditionally and logically goes at the end of the contract. The Duration article should be only Article 39 and Article 20 should be eliminated and the Articles renumbered accordingly.

Article 23 – Holidays

The Fact Finder recommends the following: Adopt the Employer language.

Article 26 – Health Insurance

The Fact Finder recommends the following:

Adopt the Employer proposals in all of these Articles but see a new proposed Article covering Articles 26, 27, 28, 29, 30, 31 and 32 regarding changes in these insurance policies.

Rationale: The Union can accept the Employer proposals in all these articles except the unilateral right to make changes in plans and/or carriers at its discretion. This knotty problem will be dealt with in one proposed new Article instead of in each Article.

New Article 33 – Change in Insurance Coverage (Probably Article 32 with 20 cut)

The Fact Finder recommends the following language for a new article:

While the Employer has the discretion to change insurance plans and/or policies as set forth in Articles 26, 27, 28, 29, 30, 31 and 32, it shall do so only after careful research and analysis.

The Union will be provided a minimum of 60 days written notice prior to any change in insurance plans and/or policies to provide the union a chance to study the changes and to meet and discuss the proposed changes with the Employer. The notice shall include the proposed changes, a cost analysis, and the proposed plan and/or proposed policy. Any change in benefits must be substantially equivalent to the current benefits and

involve no cost increase to the employees. Any of the provisions in this Article can be varied by mutual agreement.

Article 33 – Standby

The Fact Finder recommends the following:

The Union amended proposal of July 12 which accepts the Employer proposal but adds to the Employer proposal a guarantee of a minimum of 2 hours at 1 ½.

Article 34 – Paid Time Off (PTO)

The Fact Finder recommends the following: The Employer proposal should be adopted, but with the following changes:

35 PTO days total after 12 years

Section 2: 10 days for illness

Section 3 and 4: 10 purchase days instead of 5 and four weeks instead of two.

Add a sentence at the end of the article to read: The provisions of this Article may be varied by mutual agreement of the parties for a particular situation(s).

Rationale: The PTO system seems to be a well-designed leave system and should be kept; but additional days should be added, more illness and purchase days should be provided, and there should be more potential for flexibility. In combination with the short term disability system, it provides a very good benefit to the employees. The Employer did not provide any cost data as to the need to reduce the number of days provided to the employees.

Article 35– Absence from Work

The Fact Finder recommends the following:

Adopt the Employer proposal but in Section 2, change five PTO days to 10 and change after the seventh calendar day to after the twelfth calendar day.

Article 36– Travel and Business Expenses

The Fact Finder recommends the following: The Employer proposal should be adopted.

Discussion: The Union and Employer proposals are miles apart but both indicate in their briefs that their proposals maintain the status quo – hardly a possibility. This leaves the Fact Finder not knowing what the actual situation has been.

The Employer cites Dowagiac to support its position, a summary of other Local 876 contracts on premium pay, and the Union does not provide any comparables. Very little documentation was cited in either brief.

It appears to the Fact Finder that the Employer proposal is reasonable.

Article 38– Wages

The Fact Finder recommends the following:

The following wage increase should be adopted for all the bargaining unit employees:

Upon ratification until July 1, 2014 – a 6% pay increase

Beginning July 1, 2014 through June 30, 2015 – a 2% pay increase but not less than the average given non-union employees (the first eight employees on Union Exhibit 11a).

Rationale: The Employer has not argued inability to pay or financial hardship. While these recommended increases would result in pay at the high end of most of the comparables in the Exhibits by both parties, the bargaining unit employees have previously been at the high end. Consequently, these recommendations would not change their relative standing significantly, e.g. the Employer cited Hillsdale and the Union cited Norway.

Wage increases given to other employees and supervisors have been greater. For example, Lead Lineman Mark Droog, for example, received a 5% increase in pay on July 1, 2012 and General Manager Greg Pierce received 12.5% on July 1, 2012. The average percentage increase for the first eight employees in Union Exhibit 11a was 7.575%. The employees in this bargaining unit received zero increase that year – they have received no wage increase since July 1, 2011.

Article 39– Duration

The Fact Finder recommends the following:

The contract should be from the date of ratification through June 30, 2015.

Unless otherwise specified, all articles of this Agreement shall be in force and effect upon ratification by the parties.

Not later than ninety (90) days prior to the expiration of this contract, either party may request that the other commence negotiations and such negotiations shall commence no later than sixty (60) days prior to the expiration of this Agreement. Upon receipt of such notice, the parties shall select mutually agreeable dates and times to negotiate.

However, upon mutual consent of the parties, negotiations may commence at an earlier or later date.

Rationale: It is time to reach agreement and let the contract settle in without returning to the bargaining table within a few months of ratification. The parties need some experience with their first contract before they begin bargaining their next contract. By mutual consent, at any time during the duration of the contract they can sit down and work out any contract problems together. They should do this as a part of good labor relations so problems don't fester and build up so much prior to the next round of negotiations.

Discussion of Comparables

Determining what employers to compare to is always difficult. It is typical that each side selects either the employer that is most favorable or the sections of contracts that are most favorable. A Fact Finder cannot sort through every contract submitted (about 15 in this case) on every issue. So the Fact Finder is left to sift through the exhibits and contracts submitted and to depend on what the advocates cite in their oral arguments and briefs. This is not unusual, what is unusual is the number of exhibits and their length.

It would be desirable in the future if the parties can agree on what are comparable that have some meaning to them prior to bargaining and especially in they should go to mediation or Fact Finding again.

It seems to the Fact Finder that the comparables that were most relevant to this case were other employees of the Employer, employees of the City, and Employers most often cited by the Union and Employer in their briefs.

Discussion of Relationships and Arbitration

It is worth spending some time discussing what a contract should be about in terms of the relationship of the parties and what role an arbitrator should play in the appeal process. It is worth spending time because the Fact Finder is recommending essentially the Union proposed structure, which is fairly typical in labor contracts; and this structure is over the strong objections of the Employer that feels its rights will be unduly curtailed.

The parties need to work towards being able to sit down and work out their problems on their own – hopefully sometimes without outside assistance, though that can be valuable. It is not that attorneys, outside union representatives, and arbitrators cannot provide invaluable assistance; it is that the best relationship exists when local people sit down and jointly work out their relationships and problems. Arbitration is very necessary as a last resort, there being no good alternative, but it is better avoided when possible through the resolution of problems locally.

That said, the Fact Finder hopes the parties will work towards resolving their problems in a problem solving fashion and not readily resort to arbitration instead of local resolution.

The FMCS can provide invaluable assistance with problem solving training and such training should be considered. The MERC can mediate grievance if both parties are willing and this often works very well.

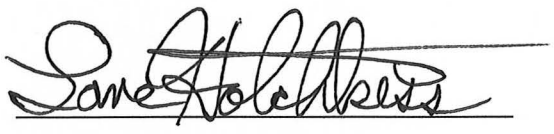
Conclusions

This Fact Finding report is in line with generally accepted labor practices and the exhibits and contracts submitted by the parties. The Fact Finder hopes the parties will find the recommendations in this Fact Finding report helpful in reaching a settlement in the near future. It has been a pleasure working with both attorneys and best of luck in reaching agreement. The directions the Fact Finder has been given to transmit to the parties follow in the next section.

Directions from the Fact Finder to the Parties

According to the instructions from MERC to the Fact Finder, the parties are directed to commence negotiations as soon as possible and use the Fact Finding report as a basis for settlement.

The resumption of mediation could also be very helpful and the parties are directed to contact the mediator if they cannot quickly reach agreement on their first contract.



Lane Hotchkiss, MERC Fact Finder

Dated: September 11, 2013