

PERB MEDIATOR/FACT FINDER

2 WOODLAND PARK ROAD
BELLPORT, NEW YORK 11713

NYS PUBLIC EMPLOYMENT RELATIONS BOARD

RECEIVED

JUL 10 2013

Kevin E. Boyle, President
United Public Service Employees Union
3555 Veterans Highway, Suite H
Ronkonkoma, New York 11779

CONCILIATION

Re: PERB Case No. M2012-108

Dear Mr. Boyle,

Enclosed is my fact finding report on the above captioned matter. It was a pleasure working with you and your team.

I hope this report helps the parties reach resolution in this matter. If I can be of any further assistance please let me know.

Sincerely,

Tom Linden

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THOMAS J. LINDEN

PERB MEDIATOR/FACT FINDER

2 WOODLAND PARK ROAD
BELLPORT, NEW YORK 11713

Denise Barton Ward
Littler, Mendelson
290 Broadhollow Road
Suite 305
Melville, New York 11747

Re: PERB Case No. M2012-108

Dear Ms. Barton Ward,

Enclosed is my fact finding report on the above captioned matter. It was a pleasure working with you and your team.

I hope this report helps the parties reach resolution in this matter. If I can be of any further assistance please let me know.

Sincerely,

Tom Linden

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

**IN THE MATTER OF FACT-FINDING BETWEEN
EASTERN SUFFOLK BOCES**

-And

**PERB Case No. M2012-108
Before: Thomas Linden
Fact Finder**

UNITED PUBLIC SERVICE EMPLOYEES UNION

REPRESENTATIVES

a. For the Employer:

Denise Barton Ward, Esq.

b. For the Union:

Kevin E. Boyle

BACKGROUND

The Board of Cooperative Educational Services First Supervisory District of Suffolk County (hereinafter, "ESBOCES" or "Eastern Suffolk BOCES") and the United Public Service Employees Union (hereinafter, the "Union" or "UPSEU") are parties to a collective bargaining agreement (hereinafter, the "CBA" or "agreement") covering the

period of July 1, 2007 through June 30, 2010. In an effort to negotiate a successor agreement, seven bargaining sessions were conducted between the parties, with the last being held on June 5, 2012. After the negotiations failed to generate a new agreement, the Union declared an Impasse with the Public Employment Relations Board (hereinafter, "PERB") on June 9, 2012. Shortly thereafter, mediator Karen Kenney was appointed to assist the parties and subsequently conducted three mediation sessions. Despite these efforts, no agreement was reached and accordingly, by letter of January 9, 2013 to PERB, the Union requested the appointment of a fact finder.

Thereafter, the undersigned was appointed as fact-finder, via correspondence, dated January 29, 2013. In lieu of a formal hearing, the parties agreed to engage in a fact finding/mediation session on April 23, 2013. After a lengthy mediation session failed to generate a new agreement, the parties agreed to submit respective briefs and proofs to the undersigned by May 31, 2013. The date was later extended to June 7 at which time briefs were received by the fact finder and the record was closed.

PRELIMINARY STATEMENT

Fact Finding is part of the statutorily mandated process of alternate dispute resolution found in the Taylor Law. It is, by its nature, an extension of the bargaining process and comes about only after the parties, for whatever reason, have been unsuccessful in the negotiation and mediation process. The sole reason for the existence of any of these extensions of the process is to bring the parties, sometimes kicking and

screaming, to an agreement. Often, in the short term, the parties to the process lose sight of the long term perspective, the big picture. It is the fact finder's responsibility to help the parties overcome this shortsightedness and to pay a visit to the other side's perspective, even if they don't fully agree with it. It is obvious that the parties to this agreement had ambitious goals; it is now time to take stock of what can reasonably be attained in bargaining.

As stated by fact finder John Trela, in PERB M2009-278, p. 12:

"Parties at the fact finding stage of the impasse procedure have often staked out intractable positions. Nevertheless, sooner or later the parties begin to view their respective positions a bit differently, and when they do, there is a foundation upon which agreement can be reached.....the role of a fact finder is to provide an objective view of the causes of a dispute and recommend a course of action that will lead to agreement".

BARGAINING UNIT PROFILE

This bargaining unit is one of several within ESBOCES and is comprised solely of part time employees. The unit is comprised of adult literacy instructors, certified and uncertified, and adult vocational advisors. All of the unit members work 30 or fewer hours per week. There are a total of 57 employees in the unit and the work hour breakdown is as follows:

Adult Literacy Instructors,

25 employees work 6 hours per week (+ 2 hrs. required paperwork)

24 employees work 20-26 hours per week (+ 7 hrs. required paperwork)

Vocational Advisors

4 employees work 8-12 hours per week

4 employees work 30 hours per week

The objective of the adult literacy program is to prepare students to enter the workforce. This program is recognized by the NYS Department of Labor as an educational program which prepares individuals for job readiness. Among the components are GED and ESL programs. Adult literacy instructors engage in teaching, and vocational advisors administer intake and placement. While this, on its face, may seem simple, there are complexities with this program in understanding its funding and revenue stream.

FUNDING

Funding for the Adult Literacy Program (instructors) comes from three sources, with the largest amount coming from the State Education Department's Employment Preparation Education fund (hereinafter, "EPE"). Funding for the Vocational Advisors is derived mainly from tuition paid directly by enrolled students.

With respect to instructors, each year, the State Education Department informs ESBOCES of the number of EPE hours it will provide the program, and the rate it will provide for each of those contact hours. An EPE contact hour represents one hour of service for one student. EPE funds are paid after the services are provided. Once all EPE

contact hours are used, the State no longer provides EPE funding for that year. The vagaries of the funding stream seem to be contributing mightily to the problems of negotiating an agreement with additional compensation for this unit. The Summary of Literacy Expenditures presented at the hearing by ESBOCES in its Exhibit 3 shows the inherent quixotic nature of the EPE funding stream. It is indeed chaotic and fluid, a moving target so to speak. While the rate paid per student per hour through EPE has increased since 2006-2007, the contact hours have decreased.

The funding issue here is something that the fact finder believes should be taken up at the state legislative level. The whole system seems a bit dysfunctional and needs to be addressed by ESBOCES and the legislature, possibly with some help from the Union.

THE ISSUES

- Duration of the CBA
- Wages
- Longevity
- Leave
- Health Insurance

Duration of the CBA

ESBOCES and Union Position on Duration

The previous CBA began on July 1, 2007 and expired on June 30, 2010. The date of June 30, 2013 marked the third year without a successor to the agreement now in place. ESBOCES contends in its brief, as it did at the hearing, that the new CBA duration

should not go past June 30, 2013 and that the fact finder has "no authority to make a finding for a longer term." The Union, on the other hand, stated it's willingness to extend the agreement past June 30, 2013.

Fact Finder Discussion/Recommendation on Duration

While the ESBOCES believes the parties should be held to this three year term, it is the conviction of the undersigned, that a new agreement with a longer term would best fit the needs of the parties. One of the responsibilities of the fact-finder is to look at the overall picture in this matter, and accordingly is recommending that the CBA continue through June 30, 2015.

It makes little sense to recommend an agreement with a term that has already expired. The parties need to take a breather after these three years of protracted dispute. To start negotiations now or in the near future would only prolong what has sadly become an unproductive relationship. A five year agreement seems to be the appropriate solution for both sides to take a step back and have a two year cooling off period. Many of the concerns ESBOCES has voiced throughout this process were centered on uncertainty. The undersigned believes a contract with an expiration date of June 30, 2013, would only exacerbate the uncertainty. There would be no time for reflection and no time to let the relationship heal, even for a short period. Also, to start off on day one of bargaining focusing immediately on retroactivity, seems counter productive.

Wages

ESBOCES Proposal on Wages

ESBOCES has proposed a 1% salary pay out for hours worked in the 2010-2011 school year and a 1% salary pay out for hours worked in the 2011-2012 school year. These increases would not be added to the base hourly rates. This would be, in effect, a lump sum payment of hours worked multiplied by approximately .30-.34 cents, depending on one's title. ESBOCES is silent on any increase for 2012-2013, so the undersigned can only assume the employer is proposing no increase. ESBOCES notes that money has been put aside to pay for "unsettled contracts" retroactively.

Union Proposal on Wages

The Union has proposed a four year agreement with a 2.5% pay raise for each of the first three years, retroactive and added to the hourly rate of pay. If there were to be a four year agreement, the union would accept either a re-opener clause or another year at a 2.5% increase with the fact finder's recommendation. The Union believes that ESBOCES has unrestricted funds to pay for retroactivity and prospectively for future increases.

Fact Finder Discussion / Recommendation, Wages

At hearing the parties attempted, albeit unsuccessfully, to make some small adjustments in their respective positions in an effort to reach agreement. In other words, they were making progress which is why we continued the hearing. Regrettably the outcome was disappointing, although it did appear that we were close at one juncture.

One of the difficulties in making a recommendation in this case is the fact that there are really few, if any, comparables that we can look to for guidance. This is, as ESBOCES so strongly points out, a program like no other, either within or without of

ESBOCES. That being said, the program and employees of the program do not exist in a vacuum. The employer and the employees both face financial and economic pressure. The Adult Literacy Program seems to be a management nightmare as evidenced by much of the data and arguments of ESBOCES. It is not within the fact-finders purview to make recommendations vis-à-vis the management of the program, the undersigned believes that something needs to be done to bring some stability to the situation. There needs to be a way to bring at least a modicum of predictability to the year-to-year financial plan.

This bargaining unit is indeed unique for many reasons but I think the most important thing that sets it apart from other bargaining units within ESBOCES is that all employees in the unit are part time and that the funding sources differ. Some are closer to full time (30 hour employees) and the remainder are something less than full time, namely 20 hour to 6 hour employees. However, no matter how many hours employees work, the entire state is feeling the pressure of the current state of the economy. Even though one might not be the so called "bread winner" and even though you might be single, with or without the responsibility of a family, one is still subject to rising health care costs, health insurance premiums, mortgage interest increases and inflation. In the bargaining unit's part time paradigm none but 30 hour employees receive much in the way of leave benefits. Therefore, in almost all situations, employees working fewer than 30 hours per week will be paying for benefits not provided here, the most costly being health insurance. For these reasons, I am recommending the following pay increases:

July 1, 2010	1.0 %
July 1, 2011	1.5%

July 1, 2012	1.5%
July 1, 2013	1.5%
July 1, 2014	2.0%

All percentage increases **will be added to the base hourly rate** and payments will be made **retroactively** for hours worked.

Longevity

ESBOCES Position on Longevity

According to the current CBA, employees who have worked at least seven years in a position, and who are appointed for twenty hours or more per week, enjoy \$400 per year in longevity payments. After twelve years they become eligible for an additional \$400 per year for a total of \$800 per year. This figure increases to \$500 and \$1,000 for 30 hour employees after the 7th and 12th year respectively. ESBOCES takes the position that the increase of longevity would have a negative effect on their fiscal situation and could, among other things, cause the early closing of the program.

Union Position on Longevity

The Union is asking for an increase in longevity payments of \$100 in years 3 and 4 of the agreement. The Union believes "its longevity proposal is fair and would only represent a modest cost increase" as this provision is in effect for those teachers and

advisors who work 20 hours or more per week. They argue that the number of employees eligible is approximately 50% of the unit of which only 50% are currently entitled to the benefit, thus lowering the cost "significantly."

Fact Finder Discussion / Recommendation, Longevity

ESBOCES argues that an increase in longevity payments would have an impact on the fiscal soundness of the program. An increase in wages without a corresponding increase in EPE rates or a reduction in overhead costs simply creates a deficit which is "untenable over time." In reality, EPE rates have gone up steadily. Rates have increased from \$6.21 per hour in 2006-2007 to a proposed rate of \$8.11 per hour for 2012-2013. On the other hand, funding has been cut. It is indeed a vexing problem.

It is also possible that by virtue of retirements and resignations, there may also be a decrease in the number of those receiving these longevity payments. Thus, for the purpose of this recommendation, calculations of the cost of these payments may not be exact. I do not believe that the cost of increasing longevity payments is prohibitive and some enhancement of longevity payments is appropriate. In that regard, I am recommending that all longevity payments be increased by \$100 each, in the third and fourth year of the agreement.

Fact Finder Discussion / Recommendation, Leave

The Union seeks to extend leave benefits to all employees, regardless of number of hours worked. In some cases, I believe, suggesting that part time employees (including 6 hour employees) be awarded bereavement and holiday leave pay the same as thirty hour

ESBOCES

UPSEU

Bereavement, Status Quo,

All employees receive one day

Bereavement

Increase to 3 days for immediate family,
2 days for others

Sick Leave, Status Quo

30 hr. emp. ½ day per month, 6 per year

Sick Leave

20 hr. employees, 4 days per year
> 20 hr. employees, 2 days per year

Holidays, Status Quo,

No holiday pay

Holidays

All employees, 3 days (regardless of hours)

Vacation Days, Status Quo,

30 hr. employees receive 12 days

Vacation Days

30 hr. employees, 2 more days to a total of
14

employees is difficult for ESBOCES to swallow, and for good reason. It would seem to be more palatable for ESBOCES to award 20 hour employees some sick time. The Union argues that because of the uncertainty of leave usage that, that would somehow limit the cost. I find this argument a bit of a stretch. That being said, I believe the negotiation of increased leave time would be better suited to future negotiations and, therefore, I am recommending no change in leave provisions.

Health Insurance

Fact Finder Discussion, Parties Positions / Recommendation, Health Insurance (including waiver payment).

According to the CBA, eligible unit members are those whose regular workweek is 30 hours or more. The CBA states: "Effective July 1, 2009, all eligible unit members shall contribute 10% towards individual or family health insurance coverage. Effective June 30, 2010, all eligible unit members shall contribute 15% towards individual or family health insurance coverage." In addition, unit members who are eligible for coverage and who have not lost their eligibility, may elect to withdraw from the agency's plan in exchange for 60% of the premium in effect January 1 of the year in which coverage is waived. This type of "buyout" is almost always a "win-win" situation and the fact finder believes that is the case here. I do not see the need to reduce the buyout amount. In fact, this type of reduction could be a disincentive in the future for unit members contemplating a buyout. Therefore, with respect to the ESBOCES proposal to reduce by 20% the buyout amount, I am recommending the amount remain at 60%.

I also find that the current rate of contribution is comparable to other jurisdictions, both school district and local municipalities. Therefore, I am recommending that health insurance contribution rates remain the same in the new agreement.

Fact Finder's Recommendation Recap

Duration of the CBA

- From July 1, 2010 until June 30, 2015

Wages

- July 1, 2010 1%
- July 1, 2011 1.5%
- July 1, 2012 1.5%
- July 1, 2013 1.5%
- July 1, 2014 2.0%

All percentage increases will be added to the base hourly rate, and payments will be made retroactively for hours worked.

Longevity

All longevity payments are increased by \$100 each in the third and fourth year of the agreement.

Leave

No change in leave provisions.

Health Insurance

Health insurance contribution rates to remain the same. Buyout to remain the same.

Concluding Statement

It is hoped by the Fact Finder that this report provides a roadmap to settlement. It is also hoped that the recommendations set forth herein be adopted and embraced by both parties and that they form the basis for the new CBA. The parties may not see these recommendations as a perfect resolution to this impasse. However, they do represent a reasonable solution to resolving these negotiations. The parties are encouraged to adopt them as written and as soon as practicable. However, that action is in the hands of the parties themselves.

Thomas J. Linden, Fact Finder

July 5, 2013

State of New York

County of Suffolk

I, Thomas J. Linden, do hereby affirm my oath as a fact finder that I am the individual described herein and who executed this instrument which is my recommendation.

Thomas J. Linden