

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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IN THE MATTER OF FACT FINDING BETWEEN  
THE TOWN OF NEW CASTLE, NEW YORK

-And

PERB Case No. 2021-092

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, WESTCHESTER LOCAL 860, (NEW CASTLE  
EMPLOYEES UNIT)

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REPRESENTATIVES

a. For the Employer

Jaclyn Goldberg, Town Attorney (Keane & Beane, Inc.)  
Jill Simon Shapiro, Town Administrator  
Robert Deary, Town Comptroller/Deputy Town Administrator  
Tiffany White, Assistant to the Town Administrator

b. For the Union

Maria Diaz, Labor Relations Specialist  
Tom Defde, CSEA Vice President  
Brittany Neider, CSEA Secretary/Treasurer

## **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 collective bargaining process and comes about only after the parties, for whatever reason, have been unsuccessful in the negotiation mediation process. The sole reason for the existence of any of these extensions of the process is to bring the parties 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 and 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 at this late stage of bargaining.

The fact that most of this took place during a worldwide pandemic is not lost on the fact finder.

## **BACKGROUND**

The Town of New Castle (hereinafter, "Town") and the CSEA (hereinafter, "Union") are parties to a collective bargaining agreement (hereinafter, "CBA" or "Agreement") covering the period January 1, 2016 through December 31, 2020, which, notwithstanding its expiration, remains in full force and effect pursuant to Section 209-a(1)(c) of the Taylor Law. In an effort to negotiate a successor agreement, the parties participated in approximately eight (8) negotiation sessions between October 20, 2020 and March 25, 2021, finally coming to an agreement on March 25, 2021. This Memorandum of Agreement (MOA) was signed by both parties and subsequently voted down by the Union. The parties then proceeded to mediation after an impasse was declared to the Public Relations Employment Board (hereinafter, PERB), by the Town, on November 3, 2021. Shortly

thereafter, PERB staff mediator, Lori Matles, was assigned to assist the parties. Three mediation sessions did not produce a settlement and the union filed for fact finding. On November 8, 2022, the undersigned was appointed fact finder. After this appointment, the parties continued to engage in negotiations for a successor agreement. On or about November 18, 2022, the parties appeared to come to a second agreement which was memorialized in a second MOA. On or about December 12, 2022 this second, unsigned MOA, was also rejected by the union membership. Subsequently, a fact finding hearing was held in the Town of New Castle, Chappaqua, New York, on January 5, 2023. The parties presented evidence, supporting documentation and witnesses. Post hearing briefs were accepted by the fact finder on or about February 16, 2023.

#### **TOWN AND BARGAINING UNIT PROFILE**

The Town of New Castle is located in Westchester County New York, approximately 40 miles north of New York City. New Castle sits in the northern center of the county and is a bit over 23 square miles in size with an estimated population of 18,311. Currently, the Town employs a total of 115 employees, 61 of whom are members of the bargaining unit in question. This unit encompasses most town job titles outside of management and confidential employees and police (represented by the PBA).

#### **ISSUES**

- Duration of the Agreement
- MOA #1 & 2

- Duration of the Agreement
- Compensation
- Longevity
- Drug and Alcohol Policy
- Holidays
- Sick Leave
- Working Conditions
- Additional Town Proposals

#### **DURATION OF THE AGREEMENT**

The current CBA commenced on January 1, 2016 and expired on December 31, 2020. We are now over two years post expiration and deeply into the fact finding juncture of the dispute resolution process. Neither of the MOA's offered an increase in duration. The fact finder believes it is now time to visit that option. The current protracted dispute has proceeded despite various in-depth excursions and iterations of bargaining, in addition to the efforts of PERB staff mediator Matles.

Having an agreement that will expire at the end of 2025 leaves the parties little breathing room to develop some "history" under the new CBA. Negotiations for a successor agreement would most likely commence in mid-2025 which is a little more than two years from now. With additional duration, the parties will avoid what might seem like perpetual bargaining. It is with these factors in mind that the fact finder recommends an agreement that expires on December 31, 2027.

## **THE TALE OF TWO MOA'S**

The fact that there are two MOA's exacerbates the confusion in this case. The first MOA was fully executed and signed by both parties and voted down by the Union. The second MOA was not signed, but was, nevertheless, voted down by the Union. I believe neither MOA was voted on by the Town. It is to be noted that the first MOA was negotiated by the parties and the second MOA, also negotiated, came about after the fact finder was appointed. The genesis of this came about when Town Administrator Jill Simon Shapiro approached the union. Discussions ensued and the second MOA was born of these efforts. In its brief (p.10), the Town avers that, "Since the MOA was never fully executed by the parties.....that it should not be considered." The Town goes on to say that the fact finder, "should only recommend the Town pay reasonable increases and provide benefits in an amount less than that found in the unsigned 2022 MOA."

(Ibid)

## **COMPENSATION**

It would be easy to agree with the idea that the second MOA should be distanced from. Nothing was signed and only voted on by the Union. However, if we look at the position of the parties in the MOA as proposals and not end points, everything becomes somewhat clearer. If we use some 20/20 hindsight and look at why the Union voted the MOA's down, we might be able to fashion something acceptable to both sides. With this in mind, I think we should now look at some of the points agreed upon and some of the main sticking points. The objective here is to, in effect, create a third MOA which will be acceptable to both parties. The Union, in its brief, noted that with respect to salary, the first year of the new agreement, 1.2.2021, should include "a salary increase of 2.25% for all employees with

retroactive payment.” This would be added to the subsequent yearly increases bringing the total **increases to 11.25% over the five years of the CBA as compared to a total of 7.00% as provided by the first MOA.** Even eliminating any increase in the first year, the second MOA still provides 9.00% over the five years of **the agreement. It is clear that the Town chose to increase the percentages in the last four years of the** agreement as a tradeoff for offering no increase in year one. Therefore, it is the fact finder’s recommendation that the salary provisions of the second MOA be adopted by the parties. This would include the 1.5% lump sum payment and full retroactivity.

In the last two years of the proposed new agreement, a salary increase of 2.50% is recommended for each year, effective January 1. This would bring the total over seven years to 14%. With this arrangement, any money given up by the Union in year one of the agreement would be made up on the back end.

With respect to the rest of the agreement, the following changes are recommended.

#### **DRUG AND ALCOHOL POLICY**

The “Alcohol, Marijuana and Drug Testing Policy” of the Town has been in effect in the Town rules and regulations for many years but was never made part of the CBA. During the negotiations for the new agreement, changes and clarification were negotiated and included in the policy with an eye toward including it in the CBA. The most significant change was related to disciplinary action to be taken in the event an employee tested positive for alcohol, marijuana or drugs. Previously, there was a “three strike” provision in the policy which provided what was essentially a formula for progressive discipline which

provided increasingly stronger penalties at each step of the process. For the first offense there was a five-day suspension without pay. The second offense earned the guilty party a twenty day suspension, and the third offense provided a Section 75 hearing before a hearing officer appointed by the Town. The fourth offense provided automatic discharge.

In the new policy that was negotiated, the Town was trying to create what was essentially, a “zero tolerance” drug policy with no progressive discipline that brought the matter directly to a disciplinary hearing after the first offense. Due to the make up of the bargaining unit (almost two thirds were highway department workers) there is legitimate concern with respect to operation of equipment and worker safety.

At the fact finding hearing the Union argued that the two main reasons for both MOA's being rejected by the membership were a zero % pay increase in year one and the disciplinary portion of the drug and alcohol policy in question. In its brief, the Union proposed a disciplinary policy which provided for a penalty for the first offence and a hearing for the second. It should be noted at this point that there have been very few unit members disciplined under the current provisions.

It is the fact finder's opinion that a three or four strike progressive disciplinary procedure is a bridge too far if the Town is ever going to achieve a “zero tolerance” drug policy. He also believes that “one and done” is inappropriate in this case because Section 75 does not provide a fair and impartial hearing and/or award because the employer both appoints the hearing officer and has a right to overturn the hearing officer's decision. If the Town and Union were to agree to install binding arbitration for a first offense, the fact finder would heartily agree with a “one and done” provision. In lieu of that, the recommendation is, in this new agreement and drug policy, the first offense would include a penalty of a 20-day suspension, followed by a Section 75 hearing after the second offense.

It was also posited by the Union at the hearing that employees would somehow lose the right to enter an EAP program if this new policy was adopted. When questioned about this, the Town did assure the fact finder that this was, in fact, not the case. With this in mind, the following language, similar to the original language, would be included in the policy:

“For the first offense, the employee will be given a TWENTY WORKING DAY suspension without pay. Such employee shall agree to be referred to the Town Employee Assistance Program. The Town will incur no costs associated with such referral. The employee must arrange a report of participation at EAP to be provided to the Employer on a weekly basis or as arranged appropriate between EAP and the Town.”

“For the second offense, the employee will be subject to discipline, up to and including discharge. The disciplinary action to be taken will be determined at a hearing to be conducted by a hearing officer, which hearing officer shall be appointed by the Town Board. The employee will have an opportunity to be heard at said hearing. Said hearing shall be conducted in accordance with Section 75 of the Civil Service “

#### **LONGEVITY, HOLIDAYS, SICK LEAVE, WORKING CONDITIONS**

The recommendation with respect to these items is that they should be left as they appear in the second MOA.

#### **ADDITIONAL TOWN PROPOSALS**

With respect to the additional Town Proposals concerning the DPW & Park Maintenance Employee hours, Vacation and Promotion it is the fact finder’s recommendation that further negotiations on these matters should be engaged in by the parties and any resulting agreements added to the final MOA.

## CONCLUDING STATEMENT

The fact finder believes this report to be fair and equitable. Two years additional duration were recommended with concomitant pay increases. With one exception, Drug and Alcohol Policy, the second MOA was left mostly intact. It is hoped that the recommendations set forth herein be adopted by both parties and that they form the basis for a 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 to do so as soon as possible.

March 1, 2023

Bellport, New York

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Thomas J. Linden, PERB

