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Wayne-Finger Lakes Board of Cooperative Educational Services and Wayne-Finger Lakes BOCES Educators' Association

Abstract
In the Matter of the Fact-Finding between Wayne-Finger Lakes Board of Cooperative Educational Services and Wayne-Finger Lakes BOCES Educators' Association. Case Number M2008-309. Adam Kaufman, Esq., Fact Finder.

Keywords
New York State, PERB, fact finding

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State of New York
Public Employment Relations Board

In the Matter of the Fact-Finding

Between

Wayne-Finger Lakes Board of Cooperative
Educational Services

And

Wayne-Finger Lakes BOCES Educators'
Association

At the request of the Wayne-Finger Lakes BOCES and the BOCES Educators' Association the undersigned was appointed Fact Finder by the New York State Public Employment Relations Board (PERB) on November 18, 2009. Prior to that appointment I was appointed by PERB and served as mediator in this impasse having met with the parties on June 16, August 20, and October 22, 2009.[1]

In preparation for fact-finding, representatives of the BOCES and the Association met on January 5, and 19, 2010 to exchange and review information prior to the submission of their pre-hearing briefs. On or before March 1, 2010, the parties filed their pre-hearing briefs together with supporting materials and documents. A fact-finding hearing was held on April 14, 2010 to review that submission and to explore and reassess the parties' positions.

As Fact Finder it is my duty to inquire into the causes and circumstances of the dispute and to transmit my findings of fact and recommendations for resolution of the dispute to the Chief Executive Officer [District Superintendent] of the Board of Cooperative Educational Services (BOCES) and to the BOCES Educators'

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[1] I was also assigned to and mediated the impasse between the BOCES and the NYSUT collective bargaining representing its support staff on April 28, 2009.

Association and within five (5) days of such transmission make public such findings and recommendations.

Should either the BOCES or the Association not accept in whole or in part the recommendation contained herein, the District Superintendent shall within ten (10) days after receipt of these findings of fact and recommendations submit to the BOCES Board of Education a copy of these findings and recommendations together with his recommendation for settling the dispute.

BACKROUND

The Wayne-Finger Lakes Educators' Association and The Executive Officer Of the Board of Cooperative Educational Services of Ontario, Seneca, Yates, Cayuga & Wayne Counties (Wayne-Finger Lakes BOCES) are parties to a contractual agreement for the period July 1, 2003 through June 30, 2008. The BOCES directly supports twenty-five (25) component school districts providing program offerings and services in administration, technical and career education, special education, direct instruction, instructional and non-instructional support.

The BOCES Educators' Association represents 312 pedagogical employees with a total payroll as of January 15, 2010 of $15,500,728. The cost of step increments on the salary schedule each year for 2008-2009 and 2009-2010 are estimated to be less than 2% of salary.

Health insurance is provided to 291 members of the unit. The collective bargaining agreement provides for an indemnity plan (Blue Million/the Wayne–Finger Lakes Plan) with an enrollment of 50 members and a point of service plan (Blue Point 2) with an enrollment of 241 at a current cost of $2,798,649. The BOCES pays 90% of the premium of the indemnity plan and applies an amount equal to that share to the point of service plan which fully pays for that insurance. The BOCES provides 307 unit members with a payment for an Internal Revenue Code Section 105 medical

reimbursement plan in the amount of $690. The collective bargaining agreement provides for a health insurance "buyout" option of $1,200 once the number of eligible unit members who decline participation in the health insurance plans reaches 24% or more and ceases if that percentage falls below 18%.

The collective bargaining agreement provides a retirement benefit calculated as follows: $7,500 for ten (10) years of service; a sum equal to each year after ten (10) years multiplied by an increment of $300; and after five (5) years of service, $50 multiplied by the number of accumulated sick days to a maximum of 220 days. That money is to be applied toward the purchase of health care insurance at the full rate of the annual premium until exhausted or, upon proof of other health insurance at the time of retirement, provided as a non-elective contribution to a tax sheltered annuity in accordance with section 403 (b) of the Internal Revenue Code.

The BOCES periodically offers a retirement incentive to bargaining unit members who elect to retire in a given year. An incentive of $10,000 has been offered each year for the last four (4) years.

The collective bargaining agreement provides for redress of disputes as to discipline and dismissal of bargaining unit members solely by arbitration in accordance with the rules and procedures of the American Arbitration Association in lieu of Section 3020-a of the New York State Education Law.

The parties have agreed that this fact-finding report and its recommendations need only address three issues that are central to the impasse: salary and compensation including compensation at the time of retirement, health insurance and the medical reimbursement plan, and discipline and dismissal procedures.

There is no dispute between the parties as to the effect of New York State's current fiscal crisis on the prospect for State education aid to the BOCES component districts. The BOCES is dependent on participation by its component districts to sustain its programs. Those component districts, which are below average wealth, are not only facing increased costs, reduced or limited revenue in the form of State education aid but also, in many cases, declining enrollment.

The potential for reduced participation and use of services by these districts and resultant programmatic cuts and staff reductions at the Wayne–Finger Lakes BOCES is recognized as real, if not certain.

In light of the funding and budget issues that are facing school districts, the New York State Legislature passed and the Governor has signed, the so-called 55/25 retirement legislation effective June 1, 2010 for NYSUT bargaining unit members which is projected to be beneficial in reducing, at least in the short term, district employee costs by providing an incentive to employees at the top of salary schedules to retire. Further, as this is written, the Governor has proposed a two-pronged retirement incentive plan for New York State employees and a reiteration of teacher retirement incentive legislation that has been offered in past years.

Both parties recognize that the Consumer Price Index increase has remained moderate over the last twelve months. As reported on April 14, 2010, on a seasonally adjusted basis, the Consumer Price Index for all Urban Consumers (CPI-U) increased 0.1 % in March. Over the twelve month period the index increased 2.3% before seasonal adjustment.[2]

The parties have been negotiating for a successor collective bargaining agreement with a four (4) year duration, retroactive to July 1, 2008 through June 30, 2012. Recognizing that two years have already passed without agreement, I will be recommending a five (5) year contract through the 2012-2013 school year so that certain changes and modifications to the agreement may be phased in.

[2] The Consumer Price Index for April 2010 is scheduled for release on May 19, 2010.

COMPENSATION and SEPARATION PAYMENTS

The BOCES last salary offer, which contained the caveat that it would "expire" on November 13, 2009, but is now referenced as its "current" proposal, is to provide a four (4) year salary and wage increase, inclusive of step increase and not applied to graduate credits or the Masters Degree schedules of 3.9% for the 2008-2009 school year and 3.5% each year for 2009-2010, 2010-2011, and 2011-2012.

The Association's position with respect to salary is interrelated with its position with regard to compensation at retirement which will be addressed below. The Educators' Association has proposed salary increases of 2.0% for 2008-2009, 2.0% for 2009-2010, 4.0% for 2010-2011 and 4.25% for 2011-2012.

The salary analyses and comparisons jointly submitted by the parties show that for the past ten (10) years salary increases have averaged 4.06% in the Wayne-Finger Lakes BOCES component school districts. For the six (6) year period 2002-2008 the average was 3.82%.

By reducing from prior bargaining positions its salary proposal in the first two years of a projected four year agreement the Association has attempted to structure sufficient cost savings to fund its separation payment and compensation at retirement requests. Each 1% of salary reduced from the BOCES proposed salary increase is calculated to save $155,000 each year and each year into the future together with attendant future percentage payments on those amounts as well as payments for FICA and to the Teachers' and Employees' Retirement Systems. The Association's 2% proposal for each of the first two (2) years "saves" an arithmetic 3.4% compared to the BOCES current offer and reduces that offer by $527,000 without further calculating the structural savings each year thereafter of not having that sum incorporated in the salary schedule.

The Educators' Association's restructured salary proposal, it suggests, permits it to address the related issues of separation payments at retirement as follows: The Association proposes that the

base benefit be established as $45,000 (plus an inflation increase of 2% in subsequent years) and in addition increasing the existing base benefit for ten years of service to $8000 plus a payment of $300 for each year of service thereafter and increasing the unused sick day payout to $75.

The BOCES has proposed to modify the retirement benefits currently incorporated in the agreement in Article 10 H by increasing the base amount of $7,500 to $11,250 commencing with the 2009-2010 school year and increasing the additional payment rates for additional years of service from $300 to $450 and payment for unused sick days from $50 to $75 each effective with the 2009-2010 school year.

The parties agree that the current average cost of separation payments at retirement inclusive of all factors is currently $22,000 for an average of eight (8) qualifying employees each year. This amount does not include the existing retirement incentive of $10,000 that has been periodically offered by the BOCES.

HEALTH INSURANCE AND RELATED ISSUES

The BOCES proposal of October 22, 2009 establishes a three tier health insurance matrix:

The Wayne-Finger Lakes Plan (traditional indemnity plan/Blue Million) with the employee paying 10% of the plan for 2008-2009 and 2009-2010 and 15% of the annual premium in the 2010-2011 school year and 17% of the annual premium in 2011-2012.

The Blue Point 2 Plan with a $5/$15/$30 prescription rider with the bargaining unit member being able to apply the dollar amount equivalent of the BOCES contribution to the indemnity plan for 2008-2009 and 2009-2010; and a BOCES contribution of 96% of premium in 2010-2011, and 94% in 2011-2012.

The Blue Point 2 $20 Plan with a $10/$25/$40 prescription rider with the bargaining unit member being able to apply the BOCES contribution to the indemnity plan in 2008-2009 and 2009-2010; and a BOCES contribution of 96% of premium in 2010-2011, and 94% in 2011-2012.

The Association's proposal is a variation on the BOCES theme.

The Association proposal removes the Wayne-Finger Lakes traditional indemnity plan/Blue Million as the base plan. Bargaining unit members would pay a pre-determined percentage of the cost of each health insurance plan: 10% of the premium of the Wayne-Finger Lakes Plan; 5% of the Blue Point 2 Plan, and 2% of the Blue Point 2 $20 Plan. It proposes an increase in the BOCES's annual contribution to the Section 105 account from $690 each year to $800 and reconfigures the health insurance "buyout" at $750 per year with no required threshold of bargaining unit participation.

The BOCES has not proposed changes in or increases to its contribution to the Section 105 provision or to the "buyout" formula. During mediation the parties did engage in discussions that included modification of the BOCES proposal, eliminating the percentage contribution to the Blue Point 2 plans with decreases in the BOCES contribution to the indemnity premium to the 85% and 83% levels in concert with proposed modifications in Association bargaining positions.

BOCES states that it is not requesting nor does it intend "drastic changes" in health insurance. BOCES suggests it is "seeking gradual relief from the high cost of providing the Blue Million plan and would like to see migration to less expensive plans where the cost is less both to the BOCES and its employees."

The current annual premium for the Blue Million traditional indemnity family plan is $12,592.68. At the 90% level the BOCES contribution would equate to $11,333.41, at the 85% level the contribution would equal $10,703.78 and at 83% $10,451.92.
The current annual premium for a Blue Point 2 Plan family plan is $10,775.64 and for the proposed Blue Point 2 $20 Co-pay family plan

with a $10/25/40 prescription rider the annual premium is $9,829.56.

DISCIPLINE PROCEDURES

Section 3020-a of the Education Law, as amended by Chapter 691 of the Laws of 1994, provides that a tenured school district employee who has been charged with incompetence or misconduct may elect to have a hearing officer review the charges and make findings of fact and recommendations as to penalty or punishment, if warranted, which the board of education must implement within 15 days of the receipt of the recommendations. In cases which involve charges of pedagogical misconduct or issues of pedagogical judgment, the employee may elect to have a three member panel perform this function.

Section 3020 of the Education Law, as of the above Chapter amendment, provides that any alternative disciplinary procedure contained in a collective bargaining agreement that becomes effective on or after September 1, 1994 must provide for the written election by the tenured school district employee of either the procedures specified in Section 3020-a or the alternative procedures contained in the collective bargaining agreement and must result in a disposition of the disciplinary charge within the amount of time allowed therefore under Section 3020-a.

The Association proposes adding language to allow for an election by a tenured employee of the statutory procedure.

The BOCES suggests that its reading of the statute allows for continuation of negotiated alternative disciplinary procedure provisions in collective bargaining agreements “until a new agreement is negotiated” and permits existing language to continue until such language is mutually changed through bargaining. The BOCES also points to decisions of the Court of Appeals recognizing the right of parties to a collective bargaining agreement to negotiate alternative procedures.

RECOMMENDATIONS

Since bargaining for a successor agreement began in February, 2008 the State's economic condition has turned bleak. Any salutary effect on the State's finances of what now appears to be the beginning of a period of recovery is some twelve (12) to eighteen (18) months in the future. Clearly, the impact of that recovery may not be apparent at least until next spring's State budget deliberations and projections of tax revenue. What the State's fiscal circumstances and budget condition will be next year and the resultant effect on aid to education at that time is unknowable.

Controlling the increase in personnel costs for the next two school years beginning July 1, 2010 would seem rational and prudent. I believe that an agreement that moderates these expenditures can be achieved. The representatives of the parties, however, understand and acknowledge that there must be a balancing of interests and that each side has a constituency that by a majority must support any agreement reached at the table.

Through mediation and at the fact-finding hearing, the Association's bargaining team has insisted that it is willing to relinquish the salary increases offered by BOCES and make other adjustments to provide for what it deems to be reasonable separation payments at retirement so as to provide its members the capacity to bridge the gap between retirement and Medicare and social security. Whether viewed as meeting the very real needs and wants of its membership and/or as a harmonic on the theme of retirement incentives now being played in Albany, it has been made clear that if there is to be mutual agreement this issue must be addressed.[3]

Patently, there is nothing contained in the Association's proposal that is philosophically repugnant or inconsistent in principle given

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[3] The Association's proposal is not truly an incentive since it is proposed as continuing contract language, but it does provide the ability for an employee to leave sooner than later after becoming eligible for retirement.

the current contractual understandings between the parties. The Association's proposals seek modification of existing contract provisions. The BOCES has proposed increases in each current category of Article 10 H: the base amount; rates for years of service beyond ten (10); and in the payment for unused sick days. Retirement incentives have been unilaterally offered by the BOCES and one is currently available in this school year for the fourth year in a row.

The parties fundamentally agree that they must find a mutually acceptable solution to address the rising costs of health insurance coverage. The Association has agreed in its proposal to cost shifting and employee contribution based on a percentage of premiums in all plans. Clearly, the shift to lower cost health insurance plans and ultimately employee share in the cost is an issue that is critical to the BOCES.

In an effort to provide a framework for settlement, as fact finder I propose the following:

DURATION

July 1, 2008 – June 30, 2013

HEALTH INSURANCE

Effective immediately after an "open enrollment period" for the school years 2010-2011 and 2011-2012, the rate of employee contribution to Wayne Finger Lakes Plan and the existing Blue Point 2 Plan with a $5/$15/$30 prescription rider shall be 10% of the respective premium. There will be no employee contribution for participation in the Blue Point 2 $20 Plan with a $10/$25/$40 prescription rider for the period 2010-2011 and 2011-2012. Depending on enrollment outcomes, whether by "migration" to the lower cost plan or through employee contribution, the BOCES should achieve an 8%-10% reduction in projected health insurance costs for 2010-2011 a sum, based on current year calculations, in excess of $260,000.

Effective July 1, 2012, the rate of employee contribution shall be 12% for the Wayne Finger Lakes Plan and for the Blue Point 2 Plan with a $5/$15/$30 prescription rider. The employee contribution for the Blue Point 2 $20 Plan with a $10/$25/$40 prescription rider shall be 5%.

Effective July 1, 2010 the BOCES annual contribution to the employee's Section 105 account shall be increased from $690 to $800.

Effective July 1, 2010 the health insurance "buyout" is to be $750 per year with no required threshold of bargaining unit participation.

COMPENSATION and SEPARATION PAYMENT

SALARY

July 1, 2008 - June 30, 2009 2%

July 1, 2009 – June 30, 2010 2%

July 1, 2010 – June 30, 2011 3%

In addition to the 3% above, any residual money from the 2% each year that has not be applied to the salary schedule in 2008-2009 and 2009-2010 shall be added to this amount. Since a number of employees did not receive step increment increases in 2008-2009 and 2009-2010, the salary schedule shall be "frozen" with no step increment advancement. The parties should mutually agree on distribution. It should be noted that this reduces the BOCES current salary offer by an additional $77, 500 above the $527,000 salary "savings" or offset in 2008-2009 and 2009-2010.

July 1, 2011 – June 30, 2012 3.5%

July 1, 2012 – June 30, 2013 Cost of Living [Consumer Price Index for all Urban Consumers (CPI-U)] plus 1% not to exceed 4%.

This formula increase will provide the parties an equitable basis for the determination of a salary adjustment for 2012-2013 in this changing and uncertain economic climate.

The percentage salary increases above are inclusive of step increment and are not applied to graduate hours or to the Masters Degree schedule.

SEPARATION PAYMENT AT RETIREMENT

Effective July 1, 2010 for a unit member who has been employed and actually worked for the BOCES who has ten (10) years of service and is eligible for retirement pursuant to the New York State Teachers' Retirement System or the New York State Employees' Retirement System who gives minimum advance notice of ninety (90) calendar days before leaving the BOCES the following benefit shall apply:

SEPARATION PAYMENT: $32,000

SERVICE CREDIT: $11,250 and a sum equal to each year after ten (10) years multiplied by an increment of $450.

ACCUMULATED SICK DAYS:

For an employee who is eligible to retire after five (5) years of service $ 75 multiplied by the number of sick days to a maximum of 220 days.

The money generated by the above is to be paid consistent with the current provisions of Article 10 H.

It is acknowledged that there are a number of variables applicable in determining the costs associated with this compensation and separation proposal but given the structural cost savings in salary each year, continued in future years, as well as the savings in FICA and payments to New York State's Retirement Systems, it appears to be within the ambit of the total compensation package already authorized by the BOCES Board of Education. Even if eight

employees, the average number who retire each year, each served thirty (30) years and accumulated the full complement of sick days the total cost to the BOCES would be $550,000 per year. The total cost to the BOCES of its current salary and retirement offer each year projected over the life of this and future agreements exceeds the estimated cost of the total salary, compensation and separation package recommended herein.

Those calculations and assumptions do not factor in any savings in the reduced projected costs of health insurance and do not speculate as to whether the BOCES Board of Education will, in its discretion, offer a separate $10,000 "retirement incentive" and continue to assume that cost. Nor do those calculations consider the potential effect of these contract provisions when viewed, in the short term, as a retirement incentive enabling those at the top of the salary schedule to retire mitigating the effect of potential reductions in the work force.

DISCIPLINE PROCEDURES

A reading of the 1994 amendments to Sections 3020 and 3020-a of the New York State Education Law would cause one to believe that the Legislature and those who may have had influence in the restructuring of those provisions intended that collective bargaining agreements negotiated subsequent to that date would allow for an election between locally negotiated alternative resolution mechanisms and the revised statute. Section 3020-a has become cumbersome and expensive, however litigation as to the effect of the 1994 amendment would exacerbate the problem.

Effective upon ratification Article 5 E should be amended to provide for the statutory option.

Respectfully submitted,

Adam Kaufman, Esq.
Fact Finder May 13, 2010