

In the Matter of the Impasse Between)
)
CITY OF PORTERVILLE,)
)
Public Employer)
)
- and -)
)
OPERATING ENGINEERS LOCAL UNION)
NO. 3)
)
Exclusive Representative)
)

(PERB Case No. SA-IM-111-M)

FACTFINDING REPORT AND
RECOMMENDED TERMS OF
SETTLEMENT

January 31, 2013

COMPOSITION OF THE FACTFINDING PANEL:

- Neutral Chairman:* ROBERT BERGESON, Arbitrator/Factfinder
13351-D Riverside Drive #142
Sherman Oaks, CA 91423
- City Member:* SHELLINE BENNETT, Esq., Liebert Cassidy Whitmore
5250 North Palm Avenue, Suite 310
Fresno, CA 93704
- Union Member:* CLAYTON DIGNAM, Code Enforcement Officer
Porterville Fire Department
40 W. Cleveland Avenue
Porterville, CA 93257

PUBLIC EMPLOYMENT
RELATIONS BOARD
HEADQUARTERS OFFICE
2013 FEB -8 PM 12:42

PRESENTING EVIDENCE/ARGUMENT TO THE PANEL:

- On Behalf of the City:* Patrice Hildreth, Human Resources Manager
- On Behalf of the Union:* Doug Gorman, Business Agent

BACKGROUND AND PROCEDURAL HISTORY

Operating Engineers Local Union No. 3 (Union) is involved with representation of two bargaining units in the City of Porterville (City). The General Unit, which contains about 140 employees, is directly represented by Porterville City Employees Association, which is affiliated with the Union. The Safety Support Unit (Unit), for which the Union is the recognized exclusive representative, includes the classes of animal control officer, code enforcement officer,

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communications dispatcher (Dispatcher), community service officer, public education officer and records clerk.

Dispatchers are required by state law to be certified as competent by the state commission on Peace Officer Standards and Training (POST). At the time of the hearing in this matter, there were 12 rank and file dispatchers and one supervisory Dispatcher.

On May 1, 2012, the City Council passed a resolution approving of the use of a \$100,000 Homeland Security Grant to purchase equipment which would allow the City's police department to provide certain emergency dispatch services to the Tulare County cities of Woodlake and Lindsey. Pursuant to agreements between the City and Woodlake and Lindsey, the latter two entities would pay the City \$60,000 for the provision of such services. Specifically, City Dispatchers would use said new equipment to provide dispatch services after hours and on weekends and holidays.

On a date not entirely clear from the record, the Union requested to meet and confer with the City over the impact of assumption of the additional work on Dispatchers. In response the City opined that it had no legal obligation to bargain with the Union but would do so in an effort to maintain a good working relationship between the parties and avoid the cost of litigation. On or about August 30, 2012, the Union declared the existence of an impasse on the issues involved and the parties proceeded to mediation.

On October 1, 2012, Woodlake terminated its contract with the City after three months of service thereunder. During this same period of time, the city hired two "provisional" Dispatchers. A provisional appointment means that the incumbent holding such position holds it for only a specified period of time, in this case apparently for the term of the contract between the City and Lindsay.

After a resolution to the parties' impasse was unable to be reached through mediation, the matter was moved to factfinding pursuant to the provisions of Government Code § 3505.4(d). From a list of names provided by the state Public Employment Relations Board (PERB), Robert Bergeson was chosen by the parties to be the neutral chairperson of the factfinding panel (Panel). The City and Union thereafter chose Shelline Bennett and Clayton Dignam to be their respective members of the Panel.

The panel is statutorily authorized to meet with representatives of the parties through

investigation and/or hearing and, if an agreement settling all issues cannot be reached, to make factual findings based on the evidence obtained and to recommend terms of settlement. To initiate those quasi-legislative responsibilities a hearing was held at City Hall on November 14, 2012, during which the Union and the City were given full opportunity to present evidence on the outstanding issues. The parties thereafter submitted briefs to the Panel to confirm their positions. Chairman Bergeson then drafted the present report for review by partisan panel members Bennett and Dignam. Following such review, the report was finalized.

RELEVANT FACTORS

Subsection 3505.4(d) of the Government Code provides as follows:

In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

- (1) State and federal laws that are applicable to the employer.
- (2) Local rules, regulations, or ordinances.
- (3) Stipulations of the parties.
- (4) The interests and welfare of the public and the financial ability of the public agency.
- (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
- (6) The consumer price index for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Any criterion which has not been relied upon by the parties has not been relied upon by the parties has not been considered in arriving at the findings and recommendations made herein.

SALARY INCREASE FOR ASSUMPTION OF ADDITIONAL WORK
AND RELATED ISSUES

Union's Position

The Union's position can be summarized as follows.

Although the City's contract with Woodlake has been terminated Dispatchers nevertheless performed some additional duties during that time for which they were not compensated. Although the additional responsibilities are in theory handled by a part-time Dispatcher the City has hired, full-time Dispatchers need to provide assistance when their part time counterpart is overwhelmed with calls from Lindsay or when part timers need to take a restroom break.

The difficulty of the Dispatcher job is exemplified by the fact three of five Police Explorers who have taken the qualifying exam have been unable to successfully pass it. In order to get a sufficient number of part timers, the City has therefore had to lower the minimum age below 18 and to lower the minimum typing words per minute below the previous 40.

"To think that these additional duties from the Lindsay contract will not have an affect on [Dispatchers] is ludicrous at best . . ." . The Union has asked Dispatchers to come forward and provide testimony to the factfinding panel but "Those who wanted to talk clearly indicated that they were afraid of retaliation" by management.

Accordingly, the salary of Dispatchers should be increased by 5% to compensate for this additional work. The City's assertion it lacks the financial wherewithal to fund such an increase is disingenuous. The City ended its 2009-2010 fiscal year with a 65% general fund reserve, "which is huge by today's standard."

The City should also ensure that part timers are not being used to "supplant" full-time Dispatchers.

City's Position

The City argues as follows.

As set forth in a number of PERB decisions, the Union bears the burden of showing impacts on the bargaining union which are direct and not merely speculative. However, the Union has failed to meet that burden. Indeed, a study performed by the City showed the impact on Dispatchers of

assumption of some small amount of work from Lindsay was to the effect there is an average of only two additional calls per hour during the relevant times.

To address that small number of additional calls, the City has been utilizing part-time Dispatchers until a limited-term full-time Dispatcher can be hired for the duration of the contract with Lindsay. In the meantime, the City has paid full-time Dispatchers a 5% bonus during the time they are needed to train part timers. That 5% is double the 2.5% the Union advocated. Thus, there is no justification for any increase in the regular salary of full-time Dispatchers.

The Union's contention the City is flush with money with which to increase the salary of all Dispatchers is also without merit. However solvent the City's budget may once have been, at the end of the 2011-2012 fiscal year, the City had a deficit of \$1,606,912 and as a result, the City has been in concession bargaining with all recognized unions. As a result of such concessions, as of November 1, 2012, the City had obtained over \$225,000 in PERS contribution savings. Therefore, to increase the salary of Dispatchers by the 4.68% (the exact figure) the Union advocates would be to open the City up to the likelihood that most or all other bargaining units would seek a similar increase. In any event, as the City showed, it pays its Dispatchers almost exactly as much as is the case with the city of Tulare and city of Hanford dispatchers earn a little more, City Dispatchers earn considerably more than their counterparts in Delano.

On the issue of problems with finding qualified part-time help, in order to save money the City has endeavored to become POST certified so it may administer its own written examinations rather than having to pay for an outside source to do so. Delay in certification was through no fault of the City but rather a function of state budget problems. Since the parties began meeting and conferring, the City has obtained POST certification and during the last administration of the salient test, 46 of the 64 applicants were able to successfully complete it.

Analysis and Recommendation

It should be said at the outset that it is beyond the authority of the Panel to decide whether the City is obligated to meet and confer with the Union in this matter. The law on that point is within the exclusive jurisdiction of PERB via its unfair employee relations practice procedure. The Panel will therefore refrain from addressing the PERB cases cited by the City.

Nevertheless, the Panel is statutorily charged to make findings of fact on the evidence

presented to it by the parties. In that regard, the City has presented the results of a study that its contract with Lindsay has resulted in simply one additional call per hour to Dispatchers. The Union has attempted to rebut the study by presenting to the Panel what it indicates are emails from full-time Dispatchers as to the impact upon them. The problem with those emails is as follows.

Although administrative proceedings are not held to the same strict procedural standards of civil procedure, basic concepts of fairness must nevertheless be adhered to. The emails presented by the Union are hearsay evidence which, contrary to direct testimony, cannot be cross examined by the City. Moreover, they are particularly problematic since the names of those who addressed them to the Union have been redacted. For the Panel to be persuaded by the substance of those emails would therefore be patently unfair to the City.

Granted, employees should not be intimidated by management in the exercise of their rights to union representation under the Government Code. Although the Panel has no doubt the Union has accurately represented that unit members have advised they are unwilling to appear before the Panel to testify, that does not negate the potential prejudice to the City of the Panel making findings of fact based on such hearsay which is incapable of cross examination or corroboration. The fact is this. A union can only be as strong as its membership. When members are unable or unwilling to stand up for themselves, the union can do little on their behalf. Such is the case here.

To put it another way, even assuming there is some impact on the workload of full-time Dispatchers as a result of the City's contract with Lindsay, the Panel is compelled from the useful evidence presented to conclude that it has been minimal as the City argues. And contrary to impact, the Union does not dispute the City's contentions regarding measures it has taken to mitigate even that minimal impact.

To repeat, the valid evidence produced leads inexorably to the conclusion that, on average, the City's contract with Lindsay has resulted in merely two additional calls per hour. Obviously that is some additional work but the City has hired part-time Dispatchers to neutralize the impact.

The Panel also believes that the City has made a persuasive argument about the ramifications of granting a salary increase to all Dispatchers. First, the City's fiscal situation is not as rosy as the Union argues is the case. But even if it were, the City is no doubt correct that providing a salary increase to Dispatchers would, at a minimum, result in questions from other employee groups as to

why they have not be accorded such consideration. Had the City not taken measures to negate the impact of the small amount of additional work, perhaps inquiring groups could be placated with an explanation that Dispatchers were entitled to additional income based on additional work. However, to repeat, from the record presented to this Panel, that cannot be said.

Similarly, no viable evidence was presented that the City has been using part timers to "supplant" full-time Dispatchers. The City denies that is the case and in the absence of persuasive evidence supporting that Union contention, the Panel cannot recommend anything which would alleviate a problem it cannot find to exist.

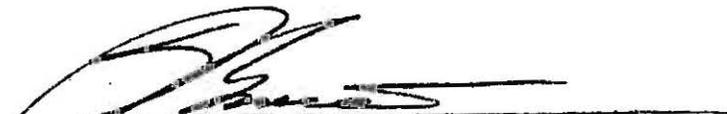
The Panel having so opined, the factfinding process is concluded.

DATED: January 31, 2013

Respectfully submitted,



Robert Bergeson
Impartial Chairman



Shelline Bennett
City Panel Member



Clayton Dignam
Union Panel Member