

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

IN THE MATTER OF FACT-FINDING BETWEEN

EASTERN SUFFOLK BOCES

-And

PERB Case No. M2011-335

**UNITED PUBLIC SERVICE EMPLOYEES UNION
CIVIL SERVICE UNIT**

REPRESENTATIVES

a. For the Employer

Denise Barton Ward, Esquire

b. For the Union

Kevin Boyle

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 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.

BACKGROUND

The Board of Cooperative Educational Services First Supervisory District of Suffolk County (hereinafter, "District" or "ESBOCES") 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 July 1, 2006 to June 30, 2011, which, notwithstanding its expiration, remains in full force and effect pursuant to Section 209-a(1)(e) of the Taylor Law. In an effort to negotiate a successor agreement, the parties participated in eight bargaining sessions with the last being held on December 14, 2011. After these negotiations failed to generate a new agreement, the Union filed a Declaration of Impasse with the Public Employment Relations Board (hereinafter, "PERB") on February 10, 2012. Shortly thereafter, PERB staff mediator Karen Kenney was appointed to assist the parties and held three mediation sessions with the last one being on December 15, 2012. Despite these efforts, no agreement was reached and accordingly, by letter of January 3, 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. A formal hearing was held on July 2, 2013 and after another mediation attempt failed, the fact finder requested that the parties narrow the issues and submit supporting data and briefs. These were submitted on August 29, 2013 and the record was closed.

**BOARDS OF COOPERATIVE EDUCATIONAL SERVICES (BOCES)/
BARGAINING UNIT PROFILE**

The latest edition of “School Law” gives us the following in Section 7.1,

“A *board of cooperative educational services* (hereinafter, “BOCES”) is a voluntary, cooperative association of school districts in a geographic area that share planning, services, and programs to provide educational and support activities more economically, efficiently, and equitably than could be provided by an individual district.

BOCES are organized under section 1950 of the Education Law. BOCES services are focused on education for students with disabilities, career education, academic and alternative programs, summer schools, staff development, computer services (managerial and instructional), educational communication, and burgeoning cooperative purchasing.”

School Law goes on to say that BOCES component districts are obligated to pay annually a proportionate share of the BOCES administrative and capital expenses whether or not it participates in any BOCES program or service. Additionally, component districts contribute only toward the costs of programs in which they actually participate. A component district’s contribution to BOCES expenditures is derived from state aid and its local tax levy. Finally, there is no process by which a school district can terminate its status as a BOCES component.

The bargaining unit is comprised of a broad range of classifications including clerical, custodial, buildings and grounds, data processing, registered nurses, occupational and physical therapists, institutional, and security positions. There are approximately 465 employees in the unit including competitive, non-competitive and labor class. The title which has the most employees is Clerk Typist. With minor exceptions, the programs to which these bargaining unit employees are assigned are funded by the school districts that subscribe to the various programs. The school districts pay for the services, and the BOCES sets the rates it charges those districts for the services and programs provided. Component districts are subject to the 2% tax levy cap, but BOCES is not.

THE ISSUES

- Duration of the CBA
- Wages/Longevity Payments/Promotional Increases/Retroactivity
- Health Insurance Contribution Rate
- Disciplinary Rights of Labor and Non-Competitive Class Employees
- Leave
- Case Load, OT/PT
- Overtime
- Work Day Definition
- Security Cards/Time Keeping

Duration of the CBA

District and Union Position on Duration of CBA

The District and the Union agreed that the CBA should run from July 1, 2011 until June 30, 2014. The Union proposed at the July 2nd meeting that they would also be amenable to an expiration date of June 30, 2015.

Fact Finder Discussion/Recommendation on Duration of the CBA

The parties seem close to agreement on this issue and it is the fact finder's recommendation that the parties enter into a four year agreement commencing on July 1, 2011 and expiring on June 30, 2015. These negotiations have been protracted even though the parties made a sincere and honest effort to move the process along and reach agreement. If the expiration date were June 30, 2014, the parties would have to begin bargaining a few months after this report is issued (assuming agreement is finally reached shortly thereafter). I strongly believe the parties would benefit from a cooling off period and it makes sense to extend the CBA the extra year.

Wages/Longevity Payments/Promotional Increases/Retroactivity

District Position on Wages/ Longevity Payments/Promotional Increases/Retroactivity

The District has, from the beginning of bargaining, argued that any increase in compensation should be tied to an increase in employee health insurance premium contribution rate. The District offered pay increases as follows:

7/1/2011	0% increase
7/1/2012	2% increase

7/1/2013	1% increase
7/1/2014	1% increase

This would add up to a 4% total increase over the four years of the agreement as proposed by the District. These payments would be retroactive. The District is also proposing that increased contributions to health insurance premium rates be made retroactively by subtracting the contribution from the retroactive wage increase. With respect to longevity and promotional increases, the District proposes the *status quo*.

The District contends that component districts are under increased financial pressure due to the 2011 implementation of 2% tax cap. The District argues that this constricts school districts because the largest source of their funding is from property taxes. Their ability to pay ESBOCES for services is hindered by this cap. Districts are allowed to “pierce” the cap, but few attempted that in the last school year. The District also points to enrollment reductions in its special education and career and technical programs of 19% and 31% respectively, since the 2006-2007 school year. Decreased enrollment equals decreased payments for services. With budgets getting tighter, in order to save money, districts have either decided to send fewer students, run the programs themselves, or discontinue non-required programs altogether.

Although the District did not argue inability to pay, it did contend very strongly, that the current arrangement will be unsustainable in the future.

Union Position on Wages/Longevity Payments/Promotional Increases/ Retroactivity

The Union contends that unit members are deserving of pay increases and points to other comparable units in other school districts arguing that members of this unit are

lagging quite far behind. The Union also believes that increased longevity payments should be made. Each longevity payment should be increased by the amount of that years pay increase as listed below. The Union also asserts that promotional increases should be increased by \$500 in each category.

In its brief the Union proposed the following pay increases:

7/1/2011	2.5%
7/1/2012	2.6%
7/1/2013	2.7%
7/1/2014	2.8%

The Union also proposes that seventy-five percent of the increases above be applied to the minimums set forth in Appendix A of the current CBA. This would be a continuation of Article 4 of the current CBA.

Fact Finder Discussion/Recommendation on Wages/Longevity Payments/Promotional Increases/Retroactivity

My hope is that the recommendation in this section of the report will be an important factor in bringing the parties to an agreement. I have examined all the justifications and data presented to me, both in the briefs and at the meeting of July 2, 2013, and I have come to the conclusion that I must make a recommendation that recognizes economic realities and, at the same time, does not penalize ESBOCES for its obvious showing of fiscal responsibility. The brief exposition of the arguments and data

of the parties indicate that, using relatively similar sources of data, the parties were able by selection and interpretation to come to different conclusions concerning a proper economic package. I believe that the totality of circumstances supports a modest pay increase in each year of the new agreement. I recommend that the following increases be retroactive to July 1, 2011.

7/1/2011	1.75%
7/1/2012	1.75%
7/1/2013	2.00%
7/1/2014	2.00%

These pay increases will take effect as soon as the parties ratify the agreement. Longevity payments will be increased by \$100 for each milestone reached, namely 5, 10, 14, 19 and 25 years of service. The longevity payments shall also be increased, after the addition of the \$100, by the amount of the yearly pay increase above. As stipulated in the longevity provision of the current CBA, longevity increments are non-cumulative.

With respect to promotional increases, I recommend that individuals promoted shall receive the following increases in salary, or the starting salary, whichever is greater:

From I to II	\$1,400
From II to III	\$2,900
From III to IV	\$3,200
From IV to V	\$5,200

From V to VI \$5,200

Health Insurance Contribution Rate

District Position on Health Insurance Contribution Rates

The District asserts that in the years since the CBA expired (6/30/2011), health insurance premiums have increased by 26.7%. The District notes that current employees contribute 5% of the individual or family premium. The District contends that this is simply not enough and proposes that employees start paying 15% upon ratification of the new CBA. In addition, the District notes that the Union has offered that new employees shall pay 15% of the premium. Because no date was given for this by either party, I assume this would take effect after the ratification of the agreement.

The District also notes the astronomical increase of retiree costs as compared to other costs over the years. It is the District's proposal that in the future, starting on 7/1/2014, retirees begin to pay the same contribution rate into retirement as they paid while working. This assumes, I believe, that there will be no prospective irrevocability applied. According to the District, "allowing employees to continue a free ride that is on a trajectory to break the agency's ability to provide the services for which it was created in the first place, would be irresponsible."

With respect to the option to wave health insurance coverage, or "buyout" as memorialized in Article 5, A., 1. b. of the CBA, the District has proposed a reduction in the amount paid out from 60% to 40%. This would be another cost saving measure.

While most employees are enrolled in the New York State Health Insurance Plan, there are some enrolled in two higher end plans, namely Vytra and Blue Choice. The District has offered, in its brief, to pay only the percentage it pays for the NYSHIP plan for these more costly plans and that employees shall contribute the balance. The District believes this proposal would allow employees to continue coverage without the interruption that would happen if these plans were discontinued as options.

Union Position on Health Insurance Contribution Rates

The Union recognizes that something has to be done in the area of health insurance contribution and is willing to begin absorbing an increased portion of never ending spiraling health costs. The Union is proposing that employees increase their contribution rate for health insurance to the following levels:

Effective upon contract ratification		6%
Effective	July 1, 2014	7%
Effective	January 1, 2015	8%
Effective	June 30, 2015	9%

These percentages amount to a 1% increase on each date. Also, under the Union's proposal, new employees would begin paying 15% of the individual or family premium upon hire. With respect to retirement, the Union proposes that retirees not covered by

irrevocability pay 5% into retirement. The Union also has proposed that new employees receive a 40% “buyout” payment in lieu of the amount paid currently of 60%.

With respect to the higher end Vytra and Blue Choice Plans, the Union has proposed eliminating the option for participation in these plans. This, they believe, would help cut costs.

Fact Finder Discussion/Recommendation on Health Insurance Contribution Rates

There is no question that health care costs have increased dramatically in the recent past. The vexing conclusion we must reach if we examine health care costs going back many years is that, in fact, they have never trended downward. In recent years, increases have far exceeded previous projections and actuarial assumptions, and employee contribution rates have been trending upward. There is also no question that with respect to employee contribution to health premium costs, dominoes have begun to fall. Recently, various police units, including the Suffolk County PBA Unit, have begun to participate in health plan payments. This is also the trend in school districts on Long Island, although payment for health insurance premiums in these units predates payments made in police units. All in all, the tide is turning as we all come to grips with health costs spiraling upward.

After noting these changes in the climate, the undersigned is recommending the following dates, with corresponding percentages, of increased employee contribution to health insurance premiums:

Effective upon ratification

7%

Effective July 1, 2014	8%
Effective January 1, 2015	9%
Effective June 30, 2015	10%

The 2% increase at the ratification date will be mitigated by retroactive monies received in the wage package. The suggestion that employees pay these increases retroactively does not have credibility. I have never seen such a proviso in any collective bargaining agreement.

Going forward, new employees will contribute 15% of individual or family premiums.

I am also recommending the District's proposal concerning Vytra and Blue Choice. This proposal will allow employees enrolled in these plans to continue coverage without interruption.

With respect to retiree health insurance benefits, I am recommending that when employees retire, they pay the same percentage amount that they paid while employed. Irrevocable coverage is not recommended.

I am also recommending that the buyout for current employees remain at 60%. New employees, after ratification, will receive the option for only a 40% buyout. All provisions of the CBA regarding eligibility will be continued.

In addition, the undersigned is recommending that as soon as practicable after the ratification of the new CBA, the parties begin discussions concerning how to deal with these ever escalating health insurance costs. We see now in the health insurance provisions of many agreements, the tiered system I am recommending. These tiered

systems provide employers with some relief against rising costs. We are also seeing groups instituting effective cost saving measures within a plan, such as increasing employee co-pay amounts. Other options could also be looked at, including the possibility of utilizing plans that provide current benefit levels at a lower cost. Taking advantage of an IRS Code 125 “cafeteria plan,” could prove to be a most effective way for unit members to cut costs of health insurance by paying pre-tax dollars for premium costs. Looking at these options doesn’t cost anything, and working together to find win-win solutions will no doubt add to the healing process between the District and the Union.

Disciplinary Rights of Labor and Non-Competitive Class Employees

District Position on Disciplinary Rights of Labor and Non-Competitive Class Employees

The District states that it follows the law in determining classes of employees who are entitled to Section 75 rights and that the current contract provision provides enough protection for unit employees who do not fall under the umbrella of Section 75. The CBA provides: “Non-competitive and labor class employees who have been employed by the BOCES for at least two consecutive years on a full-time basis and who are discharged shall be entitled to a hearing before the Executive Officer or designee. The determination of the Executive Officer shall be final and binding.”

In addition, the District argues that there are financial implications and costs to providing Section 75 coverage. These costs include hearing officer and attorney fees. In its brief the District does not address issues of just cause or due process.

Union Position on Disciplinary Rights of Labor and Non-Competitive Class Employees

The Union believes that the current CBA provision as quoted above is inadequate for the needs of Section 75 ineligible unit members and does not provide just cause or due process. The decision of the Executive Officer is not reviewable and no provision exists in the CBA for anyone to represent the disciplined employee. The Union argues that the Executive Officer is not an impartial hearing officer “given his employment as an agency official.” The Union believes that “if the agency finds it has the records to support a discipline, suspension or termination of a labor class or non-competitive employee, they should have to prove such facts before an independent hearing officer.”

Fact Finder Discussion and Recommendation on Disciplinary Rights of Labor and Non-Competitive Employees

The current CBA does not provide even a minimum threshold of protection for employees not eligible for Section 75 coverage. Currently, the District has the unfettered right to discipline and discharge these employees.

Disciplinary procedure is a mandatory subject of bargaining under the Taylor Law. That being said, it should be noted that a collective bargaining agreement may not extend disciplinary and termination protections to those not otherwise entitled to the protection of section 75. What can be bargained could be referred to as a contractual correlative, or something that mirrors section 75 procedures, something that, for instance, provides just cause and due process provisions for eligible employees.

Therefore, it is my recommendation that a disciplinary procedure be incorporated in the CBA which provides the same protection for labor class and non-competitive class employees that would be provided if they were eligible for Section 75 coverage. This includes, but is not limited to, provisions for an impartial hearing officer and representation by the Union at an impartial hearing. I believe the cost of this is not prohibitive and would give at least a minimum amount of protection to employees not currently covered. This protection would take place after two years of service.

Leave

District Position on Leave

Currently, Article 6(A)(@) provides that employees absent because of an on-the-job injury or illness entitling them to Worker's Compensation benefits are deducted one sick day for each of two days absence.

The District proposes retaining the *status quo*.

Union Position on Leave

The Union contends that there should be no deduction of sick leave while an employee is out due to workers' compensation leave. Currently, employees on workers' compensation receive one day for each two days of workers' compensation to a maximum of ninety days.

The Union proposes two separate provisions, both of which provide for no loss of accrued leave. For injuries not related to the actions of a student, parent or guardian, the union proposes a ninety work day maximum with no loss of accrued leave. For workers'

compensation injuries sustained from a student, parent or guardian, the union proposes a one year maximum payout with no loss of accrued leave.

Fact Finder Discussion and Recommendation on Leave

The fact finder believes that this provision of the CBA should be continued as is. I believe the Union's proposal would be better suited to a unit that has much more student contact than the current unit. Therefore, the recommendation is to agree with the District and continue the *status quo*.

Case Load, OT/PT

District Position on Case Load, OT/PT

The District argues that student treatment sessions should not be limited to a certain number per week. The Union wants a limit of 40, contending that the number of therapy sessions assigned should not be arbitrarily limited. ESBOCES is bound to comply with each student's Individual Education Plan (IEP) which dictates the needs of the student and the number of times the student must receive therapy each week and in what type of setting, individual or group. Moreover, therapy sessions last for only thirty minutes, so that forty therapy sessions would comprise only twenty hours a week. Thus, this still leaves plenty of preparation time for therapy and the preparation of notes regarding each therapy session.

Union Position on Case Load, OT/PT

The Union contends that OT's and PT's in the department carry caseloads of 25 to 35 students that they see every week, some individually and some in groups. Approximately 90% of the day is taken up with direct treatment services, including individual and group treatment sessions, classroom consultation and travel between programs where necessary. The remaining 10% of the day is filled with such things as Medicaid session notes, annual and quarterly reviews of every student, parent communication, preparation time for therapy sessions and classroom carryover time, equipment needs, staff meetings, Behavior Intervention Plan (BIP) data collection and monitoring, ordering building supplies and cleaning equipment. The Union asserts that in order to complete the aforementioned tasks within the time remaining, staff are coming in early and staying late. The Union argues that current caseloads need to be capped at 40 students.

Fact Finder Discussion and Recommendation on Case Load OT/PT

Based on the justifications, arguments and detailed job specifications submitted by the Union, which amounted to what I would call a kind of desk audit, I am recommending that the number of students be capped at 40 for all OT/PT employees. It seems reasonable that with the current 25-35 students filing the workday as described that a cap of 40 is justified.

Overtime

Fact Finder Recommendation on Overtime

My recommendation on this item is that the status quo be maintained. The parties should defer this to another time for resolution. Because this is not a contract item, it would be better suited for another venue.

Work Day Definition

Fact Finder Discussion/Recommendation on Work Day Definition

This is a problem that should have been addressed many years ago but wasn't, for whatever reason. After listening to arguments at the July 2 meeting and reading all the data submitted on this item, I will recommend that the four employees involved be asked to decide on a work schedule that gives the District five day coverage for the week. If this cannot be done voluntarily, then District seniority should be the determining factor. I believe the District should, in this case, exercise its management rights.

I am also recommending that in the event the above solution is not viable, that as each of these employees leaves District service, their replacement shall be required to work a schedule more suitable to the District.

Security Cards/Time Keeping

Fact Finder Discussion and Recommendation on Security Cards/Time Keeping

This is an item that should be discussed with all bargaining unit representatives so that a uniform policy can be implemented. While I certainly understand the District needs to know who is in the buildings for security purposes, I cannot recommend that the security cards be used for time keeping purposes.

I recommend that a District wide labor management committee be established to discuss this issue as soon as feasible.

Fact Finder's Recommendation Recap

Duration of the CBA

- From July 1, 2011 until June 30, 2015, (four years)

Wages/Longevity Payments/ Promotional Increases/Retroactivity

Wage Increases as follows:

- 7/1/2011 1.75%
- 7/1/2012 1.75%
- 7/1/2013 2.00%
- 7/1/2014 2.00%

All above are retroactive, paid within 30 days of ratification.

Longevity increased by \$100 for each anniversary of 5, 10, 14, 19 and 25 years.

Promotional Increases:

- From I to II \$ 1,400
- From II to III \$ 2,900
- From III to IV \$ 3,200
- From IV to V \$ 5,200

- From V to VI \$ 5,200

Health Insurance Contribution Rates

Employee contribution rate increased as follows:

- Upon ratification 7%
- 7/1/2014 8%
- 1/1/2015 9%
- 6/30/2015 10%

New employees will pay 15% of premium

New employees, buyout 40%

Current employees, buyout stays at 60%

Disciplinary Rights of Labor and Non-Competitive Class Employees

Provide the same protection as enjoyed by employees covered by Section 75.

Leave

Status Quo

Case Load OT/PT

Cap case load at 40 students.

Overtime

Status Quo

Work Day Definition

See “Fact Finder Discussion/Recommendation”

Security Cards/Time Keeping

Labor management committee

Concluding Statement

The fact finder hopes 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 to do so as soon as practicable.

September 11, 2013

Thomas J. Linden, Fact Finder

