

**STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION**

IN THE MATTER OF IMPASSE BETWEEN

UNIVERSITY OF SOUTH FLORIDA

AND

CASE # SM-2009-032

AFSCME, FLORIDA COUNCIL 79

REPORT AND RECOMMENDATIONS OF SPECIAL MAGISTRATE

Thomas W. Young, III

January 22, 2010

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PRELIMINARY MATTERS

Pursuant to Section 447.403, Florida Statutes, and Florida Administrative Code Rule 60CC-3.004, the undersigned was appointed Special Magistrate in the above captioned proceedings by letter dated August 12, 2009, from Stephanie Williams Ray, Chair of the Florida Public Employees Relations Commission. The parties were advised of the appointment by letter from the undersigned dated August 20, 2009.

On October 2, 2009, University of South Florida (USF) and the AFSCME, Florida Council 79 advised the undersigned by email of their agreement to schedule the evidentiary hearing in this matter for Monday, November 9, 2009. The request of the parties was granted and, on October 5, 2009, an order issued scheduling the hearing for November 9.

On November 5, AFSCME requested that the hearing be continued due to the illness of its representative. AFSCME's request was granted and the hearing was rescheduled for December 17, 2009.

The hearing commenced on December 17, 2009, at 9:00 a.m. EST, in Room MSC 3707 of the Marshall Center at the University of South Florida. The parties presented witnesses, documents and argument. At the conclusion of the hearing, the parties agreed to file their briefs electronically with the Special Magistrate by January 15, 2010, and also agreed that the hearing would be closed at that time.

After consideration of the 300 page transcript, the exhibits, and the post hearing briefs, the undersigned makes the following Report and Recommendations.

References to the official transcript of these proceedings will be indicated parenthetically by "T.", followed by the appropriate page number of the transcript. Both parties submitted an indexed compilation of exhibits. References to the exhibits will be indicated parenthetically as USF at Tab # __, p. __, or AFSCME at Tab # __, p. __, as appropriate. References to the briefs of the parties will be indicated parenthetically as (USF Br. at p. __), or (AFSCME Br. at p. __).

BACKGROUND

Florida Public Employees Council 79, American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) represents approximately 1,633 full and part-time employees of the University of South Florida (USF). These employees are employed in various classifications including operational services, human services, administrative and clerical operations. A complete listing of the classifications and positions included in the bargaining unit is provided in Appendix A to the parties' collective bargaining agreement (CBA). The current CBA covers the period from September, 2008, to June 30, 2011. (USF Tab 2, page 30). Article 27 – Duration, provides that in a reopener year, such as 2009/2010, the parties may open wages and up to three (3) additional articles for negotiation. Pursuant to Article 27, the parties commenced negotiations in May, 2009, over certain articles chosen by the parties. After two bargaining sessions, AFSCME declared impasse on July 15, 2009. The parties continued to negotiate after declaration of the impasse, but were unable to reach agreement on all issues. On September 2, 2009, USF made a package proposal in an attempt to resolve the remaining issues. AFSCME rejected portions of the package, and the package offer was withdrawn. (AFSCME Tab 2).

ARTICLES AT IMPASSE

After a review of the record and the briefs of the parties, it is determined that the following contract provisions were unresolved at impasse:

Section 15.2B – Overtime

Section 15.3D – Shift Change

Section 17.1 – Leaves

Section 17.2 – Leave to Supplement to Workers' Compensation Coverage

Section 21.1 – Bonuses

DISCUSSION AND RECOMMENDATIONS

Section 447.405 specifies that the following factors, among others, shall be given weight by the special magistrate in arriving at a recommended decision:

- Comparability of Annual Income

Section 447.405 provides that the special magistrate shall consider the factor of comparability which is defined as either:

1) Comparison of the annual income of employment of the public employees in question with the annual income of employment maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.

(2) Comparison of the annual income of employment of the public employees in question with the annual income of employment of public employees in similar public employee governmental bodies of comparable size within the state.

- Comparability of Peculiarities of Employment with Regard to Other trades or Professions

- Interest and Welfare of the Public

- Availability of Funds

With regard to the discussion and recommendations regarding the unresolved issues at impasse in this proceeding, it is noted at the outset that the presumption of this special magistrate is in favor of existing contract language. Recommendations to change existing contract language will not be made absent a compelling and persuasive argument to do so. In the absence of such argument, the special magistrate is reluctant to substitute his judgment for that of the parties to the contract who live this language on a day to day basis. Changes in contract language are better left to the bargaining process than to special magistrates.

Article 15.2B – Overtime; Article 17.1 – Leaves; Article 17.2 – Leave to Supplement to Workers’ Compensation Coverage

Initially, Articles 15.2B, 17.1 and 17.2 may be discussed together in that all three involve the same basic question – i.e., whether the references to the SUS Rules should be deleted and replaced with language proposed by USF. Imbedded in this question is whether changing to the language proposed by USF would alter the status quo. AFSCME asserts that the change in language proposed by USF alters the status quo. USF maintains that it does not.

In order to address this issue, some background is required. The testimony of Olga Joanow for the USF and Bill McClelland for AFSCME was consistent regarding the history of the “devolution.” From 1985 to 2001, the universities in the State were grouped into a State University System (SUS) and were governed by a Board of Regents (BOR) as the public employer. On July 1, 2001, pursuant to legislative action, the Board of Regents was abolished as the public employer for all employees in the SUS, and the Board of Education became the employer for purposes of collective bargaining. In 2003, a Board of Governors (“BOG”) was statutorily created, supplanting the Board of Education as the employer and assuming jurisdiction over the SUS. Each state university was placed under the BOG. In turn, the BOG designated each board of trustees of the universities to be the sole public employer for the purposes of collective bargaining.

While the SUS existed, SUS rules governed all state universities. However, when the BOG designated each board of trustees to be the public employer of each separate university, USF maintains that the SUS rules became inapplicable and universities, including USF, were charged with drafting their own regulations. (T. 239, 240). AFSCME maintains that, although the SUS Rules were no longer in effect, they established the status quo for the employees of each successor employer, including USF. (T. 92).

USF’s regulations were finalized and enacted in 2003. Since that time, USF has been following these regulations. (T. 239-246). These regulations include provisions that enhance employee benefits over those provided pursuant to the old SUS Rules. Specifically, USF Regulation 10.203 provides four (4) more hours of holiday pay than provided under the old SUS rule. This

USF regulation also provides for twice as many days for bereavement leave than the old SUS rule. (T. 250-252). During his testimony, AFSCME witness McClelland admitted that differences between the SUS rules and USF Regulation 10.203 have been beneficial to AFSCME members, and AFSCME wants to maintain what it deems to be the favorable provisions of the regulation. (T. 127-129). In addition, McClelland provided no example of a bargaining unit employee who has been negatively impacted by application of USF Regulation 10.203. (T. 130-134).

Article 15.2B – Overtime

USF proposes to the following change:

Work beyond the normal workweek shall be recognized in accordance with the ~~SUS Employment Rules~~ and provisions of the Fair Labor Standards Act.

AFSCME proposes that the language remain unchanged.

USF Position –

USF argues that its proposal maintains the status quo. USF notes that the old SUS rules did not conflict with the FLSA, nor is there any indication that the SUS rules provided employees with benefits that exceeded those provided for by the FLSA. (T. 256). As indicated previously, there is no evidence, since the USF Regs were adopted, that there has been any change in the benefits provided for under this section.

AFSCME Position –

AFSCME argues that the change in language changes the status quo. The language of SUS Rule 6C-5.920 (4) (a) 1 provides in pertinent part as follows:

Overtime shall be paid no later than the end of the following pay period unless accrued as overtime compensatory leave.

USF Regulation 10.203 provides in pertinent part as follows:

(5)(a)1. Overtime will normally be paid no later than the end of the following pay period, unless accrued as overtime compensatory leave.

(AFSCME Exhibit at Tab 3, 4; *Emphasis added*). AFSCME witness McClelland testified that experience has led him to be concerned when he sees the word “normally” in a CBA. (T. 130, 132). AFSCME argues that the language proposed by USF would result in eliminating the “guarantee” of overtime payment no later than the end of the pay period following the pay period in which the hours were accrued. (AFSCME Br. at p. 5).

Discussion

AFSCME does not assert that there has ever been an issue raised regarding the timing of overtime payment. In fact, McClelland concedes that he knows of no instance where an employee was adversely affected by the language in question. (T. 135). Unrebutted USF testimony indicates that the addition of the word “normally” reflects current practice. (T. 253). The word “normally” has been in the Regulation for six years. AFSCME witness McClelland testified on cross examination that he could not recall a specific example of an employee being adversely affected by the application of this provision. (T. 132).

While it is conceded that the addition of the word “normally” gives USF more latitude in the timing of the payment for overtime, there is no indication that USF has used this latitude to an employee’s detriment. Furthermore, there is no flexibility regarding whether the overtime will be paid.

The argument by USF that this language reflects current practice, and the concession by AFSCME that the language has not adversely affected unit members for the past six years supports the USF position.

Recommendation – Article 15.2B – Overtime

It is recommended that the language changes proposed by USF be adopted.

Article 17.1 – Leaves

USF proposes changing Article 17.1 as follows:

17.1 Leaves. Employees may be granted leaves of absence as provided in ~~SUS Employment Rule 6C-5.920~~ University Regulation 10.203.

AFSCME proposes that the language remain unchanged.

USF Position -

It is USF's position that this change maintains the status quo. USF's maintains that its only intent in proposing the reference changes is to remove references to rules that no longer apply and that should have been removed years ago.

AFSCME Position –

It is AFSCME's position that the current language should remain unchanged. AFSCME argues that the change in language changes the status quo. The language of SUS Rule 6C-5.920 contains numerous provisions regarding employee leave. AFSCME points out that USF Regulation 10.203 differs considerably from Rule 6C-5.920, and notes five specific changes that AFSCME argues would deny AFSCME unit members the certain protections they currently enjoy. These changes are as follows:

1) A new provision is added regarding payment of accrued leave. Specifically, USF Regulation 10.203(11) provides as follows:

The USF system will withhold any payment due to an employee upon separation from employment for accrued sick leave or accrued annual leave unless and until all property of the USF system in the custody or control of the employee is returned or properly accounted for.

AFSCME is concerned that the effect of this new language would be to deny an employee due process rights to challenge the withholding of payment for accrued leave. (T. 88).

2) USF Regulation 10.203(12)(b) adds the following underlined language to the language of 6C-5.920(9)(b):

With appropriate approval, accrued sick leave is authorized for the following purposes:

AFSCME is concerned that the new language would permit “arbitrary and capricious” withholding of approval for leave. (T.89).

3) USF Regulation 10.203(13)(a) provides as follows:

Annual leave must be accrued prior to use. In extraordinary circumstances, annual leave may be advanced to meet employment needs of the USF system.

Rule 6C-5.920(10)(a) provides as follows:

Annual leave shall be accrued prior to use unless annual leave is advanced by the Chief Administrative Officer.

AFSCME is concerned that “extraordinary circumstances” and “employment needs of the USF system” are not defined. Further, AFSCME is concerned that the USF Reg does not identify an individual with the responsibility of making the decision to advance annual leave. (T 90).

4) The USF Regulation changes the number of days of reemployment required for restoration of annual leave. USF Regulation 10 203(13)(c), provides as follows:

Upon reemployment by the USF system within 30 days or upon recall from layoff by the USF system within one year, all annual leave paid at the time of separation may be restored upon repayment by the employee.

Rule 6C-590(10)(e), provides as follows:

Upon reemployment by the SUS within 100 days or upon recall by the University within one year, all unpaid leave shall be restored and any annual leave paid at the time of separation shall be restored upon repayment.

AFSCME argues that this change is clearly substantive, as opposed to clean up language. (T. 90).

5) USF Regulation 10.203(17)(f)3, addresses employee rights regarding voting in elections. The USF Regulation states as follows:

Up to two hours for voting in public elections when the employee lives at such a distance that he/she cannot vote during the hours when the polls are open or when the employee's regularly scheduled hours are equal to or exceed the hours that the polls are open.

Rule 6C-590(14)(h), provides as follows:

The Chief Administrative Officer may provide administrative leave up to two hours for voting in public elections.

AFSCME is concerned that the addition of “qualifiers” to this section may be used to impede employees’ opportunity to vote. (T. 91).

Discussion

Unlike the change reflected in USF Regulation 10.203(5)(a)1, discussed above, the changes proposed by USF to Article 17.1 appear substantive. The parties disagree as to whether or not these changes reflect a change in the status quo. USF was able to demonstrate on cross examination of McClelland that AFSCME could not identify any instance where bargaining unit members were adversely affected by the language in question. Notwithstanding this fact, it is clear that USF’s proposed changes to Article 17.1 appear to have at least a potential impact on the working conditions of bargaining unit members.

USF’s argument that these changes merely reflect the status quo is not compelling. As AFSCME argues, the language changes could be used to support or justify changes in current practice. (AFSCME Br. at p. 6). Furthermore, USF’s argument that their proposed changes reflect current practice suggests that failing to adopt the changes proposed would not cause USF’s current practice in these areas to be altered. As indicated at the very outset of this discussion, it is appropriate to make such changes through the bargaining process, where questions such as those raised by AFSCME may be addressed and resolved.

Recommendation – Article 17.1 - Leaves

It is recommended that the current language in Article 17.1 remain unchanged.

Article 17.2 – Leave to Supplement to Workers’ Compensation Coverage

USF proposes to change Article 17.2 - Workers’ Compensation Benefits, as follows:

An employee is eligible to use paid leave to supplement Workers’ Compensation benefits in accordance with ~~SUS Employment Rule 6C-5.920(16)~~ University Regulation 10.203.

USF Position –

USF maintains that the change in language will not result in a change in the status quo. USF’s intent is to delete references to rules that it maintains no longer apply.

AFSCME Position –

Other than its blanket rejection of all proposed USF changes, and its reiteration of current contract language, AFSCME does not specifically address this section in its brief.

Discussion

A review of the SUS Rule and the USF Regulation reveals that the two provisions are virtually identical, with one exception. Rule 6C-5.920(16)(d), provides as follows:

An employee who was injured in the workplace may be returned to alternate duty consistent with established University policies and procedures.

USF Regulation 10.203(19)(d), provides as follows:

When it is determined to be in the best interest of the USF system, an employee who is injured in the workplace will be returned to alternate duty when full recovery is anticipated in a reasonable period of time consistent with these Regulations.

(Emphasis added). These two provisions are clearly different. While it is possible that the proposed USF Reg is consistent with current practice, it would not be appropriate in these proceedings for the special magistrate to assume that this is so. There was insufficient testimony and argument from either party regarding the intent of this language, and regarding the current

practice. As indicated above, it is suggested that such changes and their implications be addressed at the bargaining table. Consequently, the proposed changes by USF will not be recommended.

Recommendation - Article 17.2 – Leave to Supplement to Workers’ Compensation Coverage

It is recommended that the current language in Section 17.2 remain unchanged.

Article 15.3D – Shift Change

AFSCME proposes that Article 15 be amended to include a new section as follows:

15.3 D - Shift change assignment shall first be offered to qualified employees in order of seniority. If no employee elects to accept the shift change assignment, it shall be assigned on a mandatory basis to employees in reverse order of seniority.

USF has not proposed any changes to this section.

AFSCME Position –

This change is proposed because shift changes profoundly affect AFSCME unit members. AFSCME witness Susie Shannon testified that, upon being advised that they were being reassigned to a different shift, some unit members were compelled to resign because of health insurance issues, transportation issues, and family care issues. Some unit members are working two or three jobs and the shift change impacted their ability to continue their outside work. (T. 190, 191).

AFSCME proposes that USF relinquish its right to re-assign qualified employees at will, and, in at least one instance, at random (by shuffling a stack of business cards), as admitted by two USF witnesses. (T. 70, 283-284).

AFSCME argues that it did not intend for its proposal to impede USF's ability to determine whether an employee is qualified for a shift change assignment. Rather, AFSCME intends that its proposal would grant preference to the most senior of all qualified employees when offering and assigning shift changes.

USF Position –

USF argues that, in order to operate effectively, it is critical that it retain flexibility in the way it assigns and/or reassigns employees to various shifts. As USF witness Sandy Lovins testified, the job functions that bargaining unit employees perform are not interchangeable and it is important that shift assignments match qualified employees with USF's needs. It was her position that the AFSCME proposal restricts management authority in this regard. (T. 40, 41).

Marc Dube, Manager of Building Services for the Physical Plant, testified that he had serious concerns about the Union's proposed language and explained that, if adopted, this language could require USF to place an employee in a position for which the employee is unqualified. He stated that seniority has never controlled shift changes. (T. 269, 275, 276).

Discussion

In an on-the-record discussion with the special magistrate, Mr. Temple indicated that the second sentence of AFSCME's proposal "implies" that only qualified employees would be reassigned to a different shift. Specifically, Mr. Temple stated the intent of the language is that ". . . the shift change assignment shall be assigned to the basic – to the employee in reverse order of seniority from the list of qualified employees." (T. 281.282). (Emphasis added).

In its brief at pages 8 and 9, AFSCME notes that, "[I]t was apparent at hearing that USF believes that the language is troublesome. Thus, if the Special Magistrate determines that the language proposed by the Union is ambiguous to those ends, the Union respectfully requests that the Special Magistrate recommend language that would allow USF to retain its ability to determine qualified employees, while making seniority the determining factor when selecting which qualified employee to re-assign."

It is respectfully suggested that the parties do not appear to be in disagreement on this issue. It does not appear from testimony or argument that USF opposes the use of seniority in shift changes, so long as the employees from which it must choose are qualified to do the work on the changed shift. AFSCME agrees.

Shift changes occur rarely. (T. 41). Nevertheless, it seems appropriate, given the unquestioned significance of the impact of a shift change on the lives of the AFSCME bargaining unit members, to attempt to resolve this issue with a recommendation that both provides some benefit to the more senior employees, while at the same time preserving USF's right to transfer only qualified employees to work assignments in the shift change. Furthermore, although it may be implicit that USF determines who among its employees are qualified to perform the work to be assigned with the shift change, in order to avoid any misunderstanding, USF's right in that regard should be explicit.

Recommendation – Article 15.3D – Shift Change

It is recommended that the AFSCME proposed language in Article 15.3D be changed and adopted as follows:

15.3 D - Shift change assignment shall first be offered to qualified employees in order of seniority. If no employee elects to accept the shift change assignment, it shall be assigned on a mandatory basis to qualified employees in reverse order of seniority. USF reserves the right to determine which employees are qualified to perform the work to be assigned as the result of the shift change.

Article 21 – Wages

Each wage proposal provides for a one-time lump sum bonus, rather than an across the board increase. However, the amounts and method of apportionment of the parties' wage proposals differ substantially.

USF Proposal –

USF's wage proposal provides employees with a one-time lump sum bonus, the amount of which differs depending upon employee's performance evaluation rating. USF proposes that Article 21 – Wages, be revised to read as follows:

21.1 Pay for Performance Program – 2009/2010

A. The University will provide cash funding for a lump sum bonus payable to each eligible employee in accordance with the following schedule:

1. Employees with an overall performance rating of “Exemplary” on their evaluation of record as of July 1, 2009, shall be awarded a one-time lump sum bonus equivalent to \$1,000 (less applicable taxes).

2. Employees with an overall performance rating of “Commendable” on their evaluation of record as of July 1, 2009, shall be awarded a one-time lump sum bonus equivalent to \$750.00 (less applicable taxes).

3. Employees with an overall performance rating of “Satisfactory” on their evaluation of record as of July 1, 2009, shall be awarded a one-time lump sum bonus equivalent to \$500 (less applicable taxes).

B. Eligibility: Eligible employees are defined as:

1. All employees other than those who have a current “Substantial” or “Not Meeting Performance Standard/Expectations” evaluation on file, and;

2. The employee must have been employed at USF in an established position on or before January 2, 2009, and continuously employed at the time of payment.

C. Payment

1. The bonuses will be issued within 60 days of ratification by the University of this agreement.

2. Any employee with less than a 1.0 FTE will receive a prorated amount based on their FTE.

AFSCME Proposal –

AFSCME’s proposal provides for a bonus based on employees’ salary level. AFSCME proposes that Section 21.1 be amended as follows:

21.1 Lump Sum Bonuses

A. The University will provide cash funding for a lump sum bonus payable to each eligible employee.

B. The bonus payment will be in accordance with the following schedule:

1. Employees whose annual base salary is \$45,000 or less shall receive a lump sum payment equivalent to \$2,000 (less applicable taxes).

2. Employees whose annual base salary is greater than \$45,000 shall receive a lump sum payment equivalent to \$1,500 (less applicable taxes).

C. Eligibility.

1. Must have been employed at USF in an established position on or before January 21, 2009, and continually employed at the time of payment.

2. Must have performance of at least “satisfactory,” as indicated by the official HR records.

3. Any employee with less than 1.0 FTE will receive a prorated amount based on their FTE.

D. Payment.

The bonus will be issued within 60 days of ratification by the University of this Agreement.

E. All bonuses paid under this Article shall be paid independent of any additional increases or bonuses provided by the Legislature in the fiscal year 2009/2010.

USF Position – Fiscal Implications

USF argues that its proposal is particularly reasonable in light of USF's financial constraints. Wages and salaries in the State of Florida have declined by about 3.5% since 2008. The State's population, a significant indicator of its economic health, declined by as many as 58,000 residents in 2009 alone. (USF Bonuses Tab, p. 187-305). Personal income growth, which is also a measure of the State's economic health, declined in 2009 and the State was ranked 43rd in the country in personal income growth in 2009. (USF Bonuses Tab, p. 216). Similarly, Florida's job growth and unemployment rate are both worse than the national average. (USF Bonuses Tab, p. 217). In large part because of these changes, the amount of funds appropriated to USF by the State Legislature has decreased dramatically.

Trudie Frecker, Associate Vice President of Business and Finance, testified that since 2007, USF has lost approximately \$96 million in state appropriated revenue. This represents a 32% decline in state appropriations in just three (3) years. (USF Bonuses Tab, p. 306; T. 207). The largest reduction in state appropriations was felt by USF during the most recent 2009/2010 budget year. In this year alone, USF suffered a \$44.5 million reduction. (USF Bonuses Tab, p. 306; T. 208, 209). USF presented evidence that these budgetary constraints are not expected to improve in the immediate future. Currently, the State's projected general revenue growth is insufficient to support anticipated spending and minimal reserve requirements. (USF Bonuses Tab, p. 199).

USF has taken various actions in an effort to lessen the impact of the severe budget reductions on its employees. According to Frecker, the University has taken simple measures such as cutting back on its use of air conditioning and heating, encouraging individuals to turn off lights when not in use, and leaving open vacant positions. (T. 211, 212). Throughout its budget reductions, USF maintains that its employees were of the utmost concern. Still, the University has had to implement layoffs. Frecker testified that since 2006, the University has reduced its FTE by about 20%. A 20% reduction in FTE represents both full and part time positions that have been

lost, whether through position elimination, attrition, or layoffs. (USF Bonuses Tab, p. 307; T. 213, 214). Because of budget reductions in 2007/2008 and 2008/2009, USF eliminated approximately 459 positions, laid off approximately 59 employees, and held open approximately 376 positions. (USF Bonuses Tab, p. 320-321; T. 215).

In response to AFSCME's argument that USF's unreserved fund balance demonstrates a "significant degree of flexibility" that could be used to fund the Union's proposed increases, Frecker testified that this fund balance has been purposely increased over the past few years in an effort to reduce the impact of state budget cuts on the University. Frecker explained that because of the fund balance, the University was able to provide more notice to employees who were laid off due to budget cuts. (T. 223, 224). In addition, Frecker noted that a large portion of the unreserved fund balance is committed. (T. 224, 225).

With regard to future projections, Frecker testified that the State is now providing non-recurring funds instead of increasing the base budget. Federal stimulus dollars, now being used to keep the University functioning, are also non-recurring. It is Frecker's opinion that the University's financial situation will not improve until FY 2012-2013. (T. 226-228).

It is USF's position that, in view of the critical financial challenges facing USF, the fact that it has proposed any pay increase is significant.

USF estimates that the total cost of the University's proposal is \$1,239,535.00. (USF Bonuses Tab, p. 173). USF estimates that the cost of the Union's proposal is \$3,195,115.00. (USF Bonuses Tab, p. 174). According to USF witness John Henderson, USF's proposal results in an average increase for bargaining unit members of 2.57%, while the Union's proposal results in an average increase of 6.9%. (USF Bonuses Tab, p. 173; T. 287, 288). USF points out that the increase that USF proposes is comparable to past increases that employees have received when the economic conditions were not nearly as bleak as those with which USF is currently faced. (USF Bonuses Tab, p. 153). USF also presented evidence to establish that the proposed increase is also higher than the annual change in the consumer price index, with an emphasis on the fact that the consumer price index decreased over the last year. (USF Bonuses Tab, p.308)

In its brief at page 18, USF argues that AFSCME's attempt to establish the reasonableness of its proposal with comparative data was unsuccessful. USF points out that there is no evidence that the salary survey introduced by AFSCME (AFSCME Tab 8) takes into account individuals with similar rankings, qualifications, and responsibilities as the individuals in the AFSCME bargaining unit. USF also notes that there is no evidence that the survey takes into account employees of public institutions or state universities. Further, according to USF, AFSCME's witness McClelland admitted that he has no evidence about what types of benefits, such as health insurance, employees encompassed by the survey received. (T. 121, 122). McClelland also testified that he was only able to extrapolate data from the survey for a little over one half of the individuals covered by the bargaining unit and there is no information about how the remaining positions compare. (T. 97). Moreover, the survey shows that in ten of twenty-five positions, USF salaries actually exceed local market salaries.

USF Position – Pay for Performance

USF has long sought agreement from AFSCME regarding a merit based bonus system. USF witness Sandy Lovins testified that a pay for performance system "has been a fundamental core concept" that USF has introduced repeatedly. (T. 51). The parties negotiated general performance evaluation standards and procedures, which are embodied in Article 14 of the collective bargaining agreement. (USF CBA Tab, p. 20). The staff evaluation form was vetted by individuals from a variety of areas including academic affairs, physical plant, budget, legal, various colleges and departments, and bargaining units. (T. 49). The form lists a range of ratings including, from best to worse, "Exemplary," "Commendable," "Satisfactory," "Needs Improvement," and "Unsatisfactory." (USF Bonuses Tab, p. 154-166). No grievances or unfair labor practice charges have ever been filed concerning the use of the performance evaluation form, which has been in use since 2006. (T. 73).

USF maintains that its evaluation process is fair and reasonable. (T. 52). Lovins testified that supervisors are held accountable for the way in which they evaluate their employees. Supervisors are evaluated on how well they perform in the area of "people development." Thus, although there is no "line item" on supervisors' evaluations that states "completion of

performance evaluations in a timely manner,” Lovins testified that this is a component of the “people development” category. (T. 59). USF also provides various training for supervisors responsible for evaluating employees. Performance evaluation training includes web based training and one-on-one, face-to-face, training sessions. (USF Bonuses Tab, p. 166; T. 49, 50).

USF argues that, perhaps the most significant endorsement of USF’s merit based pay proposal is the number of people who fall within the “Exemplary” category. Over the last year, more employees received “exemplary” ratings than any other level of rating, followed next by “commendable,” and then by “satisfactory.” Less than 1% of employees received a below satisfactory rating – only 3 of 1,633. (USF Bonuses Tab, p. 170; T. 290).

With regard to AFSCME’s argument that employees do not receive timely evaluations, Henderson testified that for the past year, only about 1% of employees (twenty-one (21) employees out of 1,633) had no current rating on file. According to Henderson, many of these twenty-one (21) individuals were not even due a rating at the time that Henderson reviewed the data in December, 2009. (USF Bonuses Tab, p. 171-172; T. 289 - 291). Lovins pointed out that, in the rare situation in which an employee does not have a rating on file (which could occur when an employee has not been in his or her position long enough to receive a rating), a default rating of “satisfactory” is used. Similarly, if an employee has a rating on file, but it is from more than one year ago, the most recent rating is used. In other words, if an employee received an “exemplary” rating two (2) years ago and he or she did not have a new rating on file for this year, the employee would maintain the “exemplary” rating under USF’s wage proposal, even if his or her performance had slipped. (T. 54 - 56).

USF emphasized through the testimony of Lovins and Frecker that employees who either do not receive evaluations or have questions concerning their evaluations can report this to their immediate supervisors, anyone within their chain of command, or to human resources. Despite the undisputed availability of these complaint mechanisms, USF maintains that there is absolutely no evidence of any reports to this effect. (T. 56). AFSCME witness Bill McClelland admitted that the Union has never filed a grievance over the evaluation form or the way it is

implemented “because there hasn’t been substantial interest brought to [the Union’s] attention about that.” (T. 119, 120).

USF notes that the very evaluation form that the AFSCME questions is the same form that would be used if the AFSCME’s proposal were implemented because the AFSCME’s proposal requires a minimum rating of “satisfactory.”

Finally, USF notes that, out-of-unit administrators and staff have received a tiered bonus based upon their performance rankings, and the Police Benevolent Association agreed to the same performance based bonus that was part of USF’s package proposal, the proposal that AFSCME rejected. (T. 221).

AFSCME Position – Level of Wages

AFSCME’s position with regard to wages is couched in terms of the statutory factors to be considered by the special magistrate. AFSCME provided a salary survey that admittedly only discloses the salaries of about half of the Union bargaining unit employees. (AFSCME Tab 8). According to AFSCME, the survey and other studies provided demonstrate that a majority of AFSCME bargaining unit members earn a significantly lower salary than that of similarly situated employees throughout the Tampa area. 747 out of 1017 Union bargaining unit employees surveyed work in classifications in which the average salary is lower than that of other similarly employed Tampa area workers. AFSCME points out that the differences in salary are not insignificant, as the average salaries of the most populated job classifications range are, in the majority of instances, well over \$1,000 lower.

AFSCME argues that, as the fourth largest employer in the Tampa area, USF should be setting the salary standards within the community, and its employees should be compensated at a level that reflects USF’s stature in the Tampa area.

With regard to comparison of wages to those of employees of other governmental bodies, AFSCME presented evidence concerning the wages of similar employee groups employed by New College of Florida. Until 2006, New College was a part of the University of South Florida

System and its employees were on the USF payroll and received USF benefits packages. Thus, according to AFSCME, the pay level of New College employees would have been the same as USF employees prior to the split in 2006. This year alone, New College has offered its AFSCME employees several wage proposals, including: a 1.5% base pay increase and a \$1,000 one-time bonus; and a 2.0% base pay increase and a \$500 one-time bonus. (T. 197 – 200). It is AFSCME’s position that, even if New College AFSCME employee salaries had remained identical to those of Union employees from 2006-2009, the current wage proposals by New College would provide those AFSCME employees with higher wages than those of USF bargaining unit members.

With regard to the interest and welfare of the public, AFSCME argues that, as the 4th largest employer in the Tampa area, the financial well-being of its employees has an undeniable impact on the community at large. AFSCME offered anecdotal evidence that “the living conditions of many union employees remain well below an adequate standard of living, and in some cases, spreads poverty, hunger, and poor health throughout the community.” (T. 181-188). In a Union survey of its bargaining unit employees, it found that employees do not see the “bonus” payment as allowing them discretionary funds. Rather, 9.5 out of 10 employees said that this would allow them to pay bills that they cannot afford with their current wages. (T. 187).

With regard to USF’s ability to fund AFSCME’s wage proposal, AFSCME points out that, earlier in negotiations, USF proposed a lump-sum bonus payment at a cost of \$2,581,000, an amount that is twice their current proposal. AFSCME asserts that USF has not presented any evidence to suggest that financial circumstances changed since that offer was made on September 2, 2009. (AFSCME Tab 2, p. 6; Tab 18). AFSCME argues that the Union proposal would cost a total of \$3,336,000, and the difference between its proposal and the USF September 2 proposal is \$755,000, which, according to AFSCME, would have amounted to less than 1% of the USF unreserved fund balance in 2007 and 2008. (AFSCME Tabs 10, 18).

AFSCME Position – Pay for Performance

AFSCME notes that there are numerous problems with the pay for performance wage scale proposed by USF. First, AFSCME asserts that the actual performance evaluation system is inherently flawed. Supervisors are not held accountable for the timely completion of their performance evaluations or for the content of those evaluations. (T. 60). The performance review documents hold groundskeepers and maintenance workers to the same standards as administrators and faculty by requiring that they make formal presentations. (AFSCME Tab 14). AFSCME points out that, although USF states that its supervisors need not evaluate employees on all standards contained on the form, USF does not require performance evaluation training for its supervisors, nor does it admonish supervisors for inadequate performance review. (T. 52, 65). Furthermore, AFSCME points out that the performance evaluation standards to which employees are held are not required to be in writing, nor are ratings at the “Satisfactory” level or above grievable under the Agreement. (T. 113).

AFSCME asserts that the oversight of the performance evaluation system is lacking as well. Supervisors are not required to complete a detailed performance evaluation form each year. (T. 62; AFSCME Tab 15). Under the current USF system, supervisors may use a “short-form” performance evaluation, which would ultimately default an employee to the same performance rating as the previous year. According to AFSCME, this is troublesome because the short form itself recognizes improvement or regression in an employee’s performance. (AFSCME Tab 15).

In addition, AFSCME refers to the fact that USF admits at least twenty-six (26) Union employees do not have performance evaluations on file with USF, because they have not completed their probationary period or because their supervisor has not submitted a performance evaluation. USF admits that 1% of employees receiving a default rating is typical. (T. 288-292).

In regard to employees actually receiving performance evaluations, AFSCME maintains that the results are also troublesome. For instance, in regard to Physical Plant and Parking Services employees, while 79% of USF Administrators and 55% of Supervisors received the highest rating, only 12% of Union bargaining unit members were rated “Exemplary.” No custodial worker, groundskeeper, cashier, mail clerk, or maintenance & repair workers received the

highest rating, and only one (1) out of twenty-two (22) bus drivers were rated “Exemplary.” AFSCME asserts that “it is unfathomable that only one of all of the aforementioned employees performs his or her job at that level,” and suggests that the performance review system, as designed, does not adequately evaluate this particular group of Union employees.

Lastly AFSCME argues that, while USF has indicated a commitment to basing wages on a tiered performance-based scale, their actions suggest the opposite. In May 2009, USF authorized a 2% base increase for all Out-of-Unit Faculty rated “Satisfactory” or higher, the same criteria proposed by the Union. Thus, the USF proposal suggests that while basing its lowest-paid employee salaries on a tiered performance scale is necessary, it does not hold its administrative, out-of-unit faculty to the same standards.

AFSCME also notes that bonuses paid to New College AFSCME employees are not tiered in the manner proposed by USF, except for withholding bonuses from employees rated marginal or unsatisfactory, similar to the Union proposal.

Discussion

As in virtually every special magistrate proceeding, there is no agreement regarding the availability of funds to meet the demands of the union. Are there financial resources available to fund the UFF economic proposals? Yes. However, funding recurring costs (wages) from non-recurring fund sources (fund balance) is not fiscally prudent policy.

USF has made a compelling argument concerning its financial position. The facts are clear and irrefutable. Florida’s financial position is poor and is likely to get worse. The loss of population makes that almost inevitable, absent some willingness on the part of state government to find new revenue sources (taxes), a potential that is sure to go unrealized.

Trudie Frecker’s testimony that, since 2007, USF has lost approximately \$96 million in state appropriated revenue, is unrebutted. According to Frecker, this represents a 32% decline in state appropriations in just three (3) years. Significantly, Frecker points out that the largest reduction

in state appropriations was felt by USF during the most recent 2009/2010 budget year. Her testimony in this regard casts some doubt on AFSME's assertion that, since the USF wage offer on September 2, there have been no changes in USF's financial condition. According to Frecker, in this year alone, USF suffered a \$44.5 million reduction. (T. 208, 209). USF presented persuasive evidence that these budgetary constraints are not expected to improve in the immediate future. (USF Bonuses Tab, p. 199).

It is important to note that USF has taken various actions in an effort to lessen the impact of the severe budget reductions on its employees. Because of budget reductions in 2007/2008 and 2008/2009, the evidence establishes that USF eliminated approximately 459 positions, laid off approximately 59 employees, and held open approximately 376 positions. It is reasonable to assume that USF would not have taken these very serious steps unless such action was compelled by its financial situation.

USF estimates the cost of its proposal to be \$1,239,535.00; AFSCME estimates it to be \$1,290,500. AFSCME estimates the cost of the USF wage proposal on September 2, 2009, to be \$2,581,000. USF estimates the cost of AFSCME's proposal to be \$3,195,115.00; AFSCME estimates the cost to be \$3,336,000. The percentage impact of the wage increase on the bargaining unit is apparently not a matter of disagreement. USF's proposal results in an average increase for bargaining unit members of 2.57%, while the Union's proposal results in an average increase per employee of 6.9%. (T. 292).

A review of the evidence presented concerning the statutory factors to be considered by the special magistrate, other than regarding availability of funds, is not particularly helpful. The evidence presented by AFSCME concerning comparability does not contain information regarding benefit packages, work hours/work years, vacation, sick leave, health insurance cost to employees, out-of-pocket costs for insurance deductibles and copays, etc.. These benefits could easily involve an amount of money that would equal or exceed the wage differences noted by AFSCME. Consequently, it would not be appropriate to conclude, based upon the information presented, that the USF employees' pay and benefits are below those of similarly situated employees of other public employers.

The evidence presented through the testimony of AFSCME witness Susie Shannon concerning the financial plight of bargaining unit members is not disputed. (T. 182-188). However, because the evidence is anecdotal and hearsay, it is not appropriate to make a finding of fact in this regard. Similarly, the evidence presented by AFSCME concerning the analysis of USF's financial situation by AFSCME staff, who were not present for cross examination concerning their conclusions, will not be considered as determinative of the points for which it was offered.

The evidence offered by AFSCME regarding New College of Florida is somewhat more compelling. AFSCME notes that, until 2006, New College was a part of the University of South Florida System and its employees were on the USF payroll and received USF benefits packages. Thus, according to AFSCME, the pay level of New College employees would have been the same as USF employees prior to the split in 2006. AFSCME presented evidence that, this year alone, New College has offered its AFSCME employees several wage proposals, including: a 1.5% base pay increase and a \$1,000 one-time bonus; and a 2.0% base pay increase and a \$500 one-time bonus. (T. 197 – 200). It is AFSCME's position that, even if New College AFSCME employee salaries had remained identical to those of Union employees from 2006-2009, the current wage proposals by New College would provide those AFSCME employees with higher wages than those of USF bargaining unit members. However, AFSCME's argument in this regard falls short on several points. There is no information of record regarding whether the employee benefit package has changed since 2006, and more importantly, there is no evidence on this record concerning New College's ability to pay as compared to that of USF.

AFSCME offered testimony concerning the interest of the public in support of its wage proposal. AFSCME argues that the impact of failing to provide the wage increase proposed by AFSCME would negatively impact the area because of USF's position as the 4th largest employer in the area. This argument is purely conjectural. The relatively small number of employees involved, and the relatively small difference in the wage proposals would not compel the conclusion advanced by AFSCME. However, if the funding of a wage increase would have the effect of laying off additional USF employees or eliminating additional positions, the public interest

would be more significantly impacted, given the current state of the job market and the safety net for unemployed workers.

USF offered little evidence concerning the statutory factors to be considered by the special magistrate, other than the factor concerning availability of funds.

Conclusion – Availability of Funds

The state of the economy in general, and the USF financial situation in particular, justify an increase along the lines proposed by USF. The CPI supports this conclusion. AFSCME's argument concerning the USF wage offer of September 2, 2009, is significant, but it was diminished by the unrebutted testimony that FY 2009-2010 saw the most severe reductions in funding yet for USF. This fact, coupled with the significant steps already taken by USF to address the financial situation, including the elimination of positions and the layoff of employees, further supports this level of increase. There is nothing in this record that supports the 6.9% increase proposed by AFSCME.

There remains the method of distribution of the wage increase.

Discussion – Pay for Performance

There was considerable testimony and evidence from both parties concerning pay for performance. There is no question that this issue is extremely important and significant to both parties. USF's interest in tying pay to performance is completely understandable. AFSCME's concerns over using the current instrument and process are equally understandable.

That having been said, the single most significant factor concerning the use of the current evaluation process to determine the amount of wage increases is the fact that it was not negotiated with the intent of impacting employees' pay. It was negotiated to capture employee performance. (T. 58). There is a difference. The difference can be seen in many of the objections that AFSCME has to the current process. The fact that, at any given time, 1% of unit members have no evaluation on file, and would thus default to "satisfactory" may not be so important when the evaluation has no bearing on an employee's wage increase. However, when

one's wage increase is determined by the performance level, it becomes very important – and those 1% deserve the opportunity to receive the wage increase to which they are entitled.

Similarly, the fact that supervisors are not required to evaluate employees each year, but instead may use a “short form” that indicates no change in the performance rating, could affect the amount of an employee's wage increase. The fact that supervisors are not required to have training in the performance appraisal process is perhaps not as problematic when performance is the only thing being measured. However, when that measure affects salary, it becomes very important that all supervisors receive the same training and that they are held accountable for their performance in that regard. Finally, and perhaps most significantly, the performance standards by which employees are judged are apparently not in writing. Again, if performance ratings themselves are the only issue, this fact is not as critical as it would be if the amount of an employee's wage increase depends on it (although it could certainly be argued that any performance system should have the performance standards in writing to assure a uniform application of the evaluation process).

As noted above, USF emphasized through the testimony of Lovins and Frecker that employees who either do not receive evaluations or have questions concerning their evaluations can report this to their immediate supervisors, anyone within their chain of command, or to human resources. USF pointed out that, despite the undisputed availability of these complaint mechanisms, there is absolutely no evidence of any reports to this effect. (T. 56). USF referred to AFSCME witness Bill McClelland, who admitted that the Union has never filed a grievance over the evaluation form or the way it is implemented “because there hasn't been substantial interest brought to [the Union's] attention about that.” (T. 119, 120). It is respectfully suggested that the reason no reports were made, and the reason no grievances were filed is that the evaluations did not deal with the amount of wage increase an employee would receive.

Conclusion – Pay for Performance

For the reasons stated above, it is concluded that the current evaluation process should not be used to determine the amount of wage increase an employee will receive.

Recommendation – Wage Increase

It is recommended that the distribution proposed by AFSCME be used, and that AFSCME’s proposal be modified and adopted as follows:

21.1 Lump Sum Bonuses

B. The bonus payment will be in accordance with the following schedule:

1. Employees whose annual base salary is \$45,000 or less shall receive a lump sum payment equivalent to \$1,000 (less applicable taxes).

2. Employees whose annual base salary is greater than \$45,000 shall receive a lump sum payment equivalent to \$750 (less applicable taxes).

In all other respects, it is recommended that the AFSCME wage proposal, Section 21.1, be adopted as it was last proposed, there being no substantive differences with those sections proposed by USF. (USF agreed to a similar arrangement in the 2008/2009 negotiations.)

NOTE: The amount of the bonus was calculated so that it would closely approximate the cost of the USF proposal of \$1,290,500, and still be an amount that is easily identified. Using the USF calculations presented at hearing as the basis for determining the cost of the recommendation, the cost is estimated to be \$1,597,557. This amount represents one half of the USF estimate of the cost of the final AFSCME proposal, and represents an average increase per employee of approximately 3.45%.

Respectfully Submitted,

Thomas W. Young, III
Special Magistrate

Date