

**NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of the Fact Finding Between

ORLEANS NIAGARA BOARD OF COOPERATIVE
EDUCATIONAL SERVICES, Employer

- and -

BOARD OF COOPERATIVE EDUCATIONAL
SERVICES TEACHERS' ASSOCIATION, Union

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**FINDINGS OF FACT AND
RECOMMENDATIONS**

Case No. M2015-069

BEFORE: Lise Gelernter, Fact Finder

APPEARANCES:

For the Employer:

Wayne M. Van Vleet
Director of Labor Relations
Orleans/Niagara Board of Cooperative
Educational Services
4232 Shelby Basin Road
Medina, New York 14103

For the Union:

Elizabeth Vignaux
Labor Relations Specialist
New York State United Teachers
270 Essjay Road
Williamsville, New York 14221

I. INTRODUCTION

The parties. The Orleans Niagara Board of Cooperative Educational Services (BOCES or Employer) “provide[s] educational services and partnership with the local school districts” in Orleans and Niagara Counties. Employer’s brief, p. 4. BOCES cannot levy taxes, but receives most of its revenue from its 13 component school districts, which pay BOCES for services that BOCES renders. *Id.* See also Union brief, pp. 1-2.

The Board of Cooperative Educational Services Teachers’ Association (BOCESTA or Union) represents professional, certified staff, which includes teachers, school counselors, school

social workers, speech therapists and other titles, as well as occupational and physical therapists and therapy assistants. Collective bargaining agreement (CBA), §1.01; Appendix J; BOCES brief, p. 3.

The negotiation, mediation and fact finding processes. The collective bargaining agreement (CBA) between BOCES and BOCESTA expired on June 30, 2013. The parties had started negotiating a new contract in March 2013, but were not able to reach an agreement on all issues, though they managed to resolve many, contingent upon the results of further negotiations or fact finding on the unresolved issues. Union brief, pp. 1-3. After the Union filed a Declaration of Impasse in May 2015, the parties worked with State mediator Frank Ciaccia for three sessions, but did not resolve all the open issues. BOCESTA filed for fact finding on December 16, 2015. *Id.*, p. 1; Fact Finder Appt. Ltr., attachment.

PERB appointed this fact finder on January 29, 2016. In a conference call, the parties agreed to provide written briefs or statements of their positions to the fact finder on March 30, 2016. I submitted written questions concerning those submissions on May 3, 2016 and the parties responded in writing on May 24, 2016. The briefs and reports of the Union and the Employer were comprehensive and explained very well the parties' proposals on the open issues, their reasons for failing to agree with the opposing party's proposals, and the economic and operational circumstances under which they worked.

The parties' eight unresolved issues are:

1. The allocation of health insurance costs
2. Salaries (including raises)
3. Annual accumulation of sick leave and requirement of a doctor's note
4. Conversion of sick leave days for cash or medical payments upon retirement
5. Drug and alcohol testing

6. Issues related to occupational and physical therapy bargaining unit members
7. Permitting the work year to start at the end of August.
8. Length of the contract.

I met with representatives of both parties on June 1, 2016 at BOCES' conference center in Sanborn, New York in a very productive and cooperative meeting during which I was able to learn more about the impact of each party's proposals and the reasons for their positions. It was clear that despite the parties' disagreements over some key issues, BOCES and BOCESTA representatives and staff were committed to reaching a fair agreement. Moreover, both parties' goals included delivering effective teaching and services to the children and families they serve.

In addition to Elizabeth Vignaux, the Union's Labor Relations Specialist, the Union's other representatives at the meeting all work for BOCES, and many of them hold Union offices: BOCESTA's outgoing President, Lynne Hochmuth; the incoming President as of July 1, 2016, Deborah Hillburn; Robert Ihle, who teaches Secondary Vocational Education; Cynthia Neden, a teacher; and Laurie Barney, a Physical Therapist.

For the District, in addition to Wayne M. Van Vleet, BOCES' Director of Labor Relations, the meeting attendees were: Superintendent Clark J. Godshall, Ed.D; Robert Cluckey, Director of Special Education; Patricia Hartigan, Director of Business Services; and Joseph Steinmetz, the Director of Career and Technical Education, Secondary Programs.

Standards and presumptions. Section 209 of the New York Civil Service Law governs the fact finding process in this case, but it does not set forth standards for a fact finder to follow to make an informed recommendation to the parties as required by Section 209.

N.Y. Civ. Serv. L. §209(3)(c). In lieu of statutory standards directly applicable to this case, I have looked for guidance from the principles described in the statute applicable to binding

arbitration of certain contractual disputes. These principles provide that recommended terms for a contract should reflect the terms that the parties would have or should have agreed upon based on:

- a) a comparison with similarly situated employees and employers in similar markets;
- b) the ability of the employer to pay for the terms of the contract and the impact of the contract's terms on the public interest; and
- c) the terms of agreed-upon contracts in the same or comparable regions and for similar or comparable employees and employers.

See N.Y. Civ. Serv. Law § 209(4)(c)(v).

In addition, because the parties previously agreed to the terms of the contract that expired, my presumption is that the terms of the expired contract should continue unless there is a clear reason to change them, such as a change in conditions, a significant concession by one party or a clearly prevailing custom or practice that is applicable to the employer and the employees.

II. BACKGROUND

BOCES' financial status. BOCES' component school districts are, on average, 43% less wealthy than the State average, based on the Combined Wealth Ratio, which is an index based on property and residents' incomes in each school district. BOCES brief, pp. 4-5; Statement of Facts Ex. 3. In addition, the student enrollment between 2011 and 2015 in the component school districts fell about 7.2%. BOCES brief, p. 6; Statement of Facts Ex. 7. Since BOCES depends on the component school districts for most of its funding, much of which is based on pupil services provided, the school districts' relative wealth (or lack of it) and the decline in student enrollment affect BOCES' financial status as well. In addition, the salaries and

benefits provided in the component districts are important indicators of what the districts and therefore BOCES are able to afford.

BOCES had an annual surplus of funds in each of the fiscal years ending in 2013 to 2015. Union brief, p. 29; Attach. 15. However, surplus funds are refunded to the component districts each year, something the districts have come to expect. BOCES Answers,¹ p. 6; 6/1/16 meeting. BOCES also has cash reserves in a fund for Other Post-Employment Benefits (OPEB), which is used for retiree benefits other than pensions. Union brief, Attach. 15. The Union suggested that BOCES could pay any additional costs imposed by a contract that included raises and other items since BOCES has typically used only about half of the OPEB fund in the last few years. Union Answers, p. 5, Union brief, Attach. 15. However, BOCES stated during our June 1, 2016 meeting that BOCES is no longer reserving money for the OPEB fund and that within eight years, the fund balance will go to \$0 as a result of paying for retiree benefits.

III. DETERMINATIONS ON THE UNRESOLVED ISSUES

1. The allocation of health insurance costs.

Current provisions. Under the expired contract, members of the BOCESTA bargaining unit pay 3% of the premium of the point of service plan (POS), which includes prescription coverage with co-payments of \$7 (generic); \$15 (preferred brand name/ \$35 (non-preferred brand name). CBA, § 8.12.²

¹“Answers” are the supplemental information the parties provided in response to my written questions.

²There is also a “traditional indemnity plan,” CBA § 8.11, but since the Orleans/Niagara School Health Plan Consortium decided that it was too expensive and fewer than 7% of health insurance enrollees in the Consortium are enrolled in that plan, the Consortium determined that the plan would no longer be offered as of June 1, 2017. BOCES Answers, p. 3, Health Ins. Ex. 9. BOCESTA has agreed that under those circumstances, BOCES need not continue the indemnity plan.

The parties' proposals. A comparison of the parties' proposals on the employee

share of health insurance appears below:

<u>EMPLOYEE POS PREMIUM SHARE</u>			
BOCESTA		BOCES	
Timing	Employee percentage	Timing	Employee percentage
on ratification	5%	7/1/15	7%
7/1/16	6%	7/1/16	9%
7/1/17	7%	7/1/17	11%
7/1/18	8%	7/1/18	13.5%
7/1/19	10%	N/A	

PRESCRIPTIONS – EMPLOYEE CO-PAYS

BOCESTA:	\$7 (generic); \$15 (preferred brand name/ \$35 (non-preferred brand name) (no change)
BOCES:	\$10 (generic); \$20 (preferred brand name/ \$40 (non-preferred brand name)

Union brief, p. 10; BOCES brief, pp. 16-17

Discussion. BOCES argues that the escalating costs of health insurance justify having employees pay a greater share of the premium and that BOCES has proposed a reasonable series of increases. BOCES brief, pp. 17-18. BOCESTA recognizes that unit members will have to pay more of the insurance premium, contingent upon satisfactory agreements on other issues, including raises. Both parties have taken justifiable positions; the only difference between them is how much of an employee share of the premium is “reasonable.”

In Western New York school districts, teachers pay an average of 10% of the health insurance premium for POS or Preferred Provider plans (PPO). BOCES brief, p. 18, Health Ins.

Ex. 8, p. 2. Looking at BOCES' component school districts, the average teaching staff member is paying about 10% of the insurance premium. BOCES brief, p. 18, Health Ins. Ex. 7, p. 2. In the BOCES component districts, only three have teaching staff paying more than 10% of the premium: Albion, Holley and Lyndonville. BOCES Health Ins. Ex. 8. The remaining districts' employee shares are 10% or less. *Id.* Within BOCES itself, its other unionized employees pay no more than 7% of the premium, except for the Administrators Union, which provides for a contribution of 10% in 2013-14, going up to 13% in 2017-18. BOCES Statement of Facts Ex. 10. Of the four other BOCES districts in Western New York whose contracts end on July 1, 2016 or later (Cattaraugus/Erie/Wyoming; Erie 1; Erie 2; Genesee Valley), three have employees paying 10% of the premium and one (Genesee Valley) has employees paying 0% of the premium for POS, but 15% of the premium for PPO packages. BOCES Health Ins. Ex. 6.

Some of the differences within BOCES on employee contributions can be explained by average salary: the members of the Administrators' Union, who will pay 13% of the premium, have a 2016 average salary of \$92,555.56, which is the highest average negotiated salary in BOCES. BOCES brief, Statement of Facts Ex. 10. BOCESTA members, other than Occupational and Physical Therapists and Aides (OTPT), have an average salary of \$68,372.20. Although this bargaining unit has a 10-month work year as compared with the 12-month work year of the administrators, there is no guarantee that teaching staff receive compensation from other employers over the summer months. However, even if you annualized the teachers' average salaries, they would have an average 12-month salary of \$82,046.64.³ The average 2016

³This calculation was done by dividing \$68,372.20 by 10 for the 10-month year, and arriving at an average salary of \$6,837.22 per month. Then the average monthly salary was multiplied by 2 (for the two additional months required for a 12-month year), yielding \$13,674.44, and then adding that to \$68,372.20, arriving at an average 12-month salary of \$82,046.64.

salaries for each unionized unit are shown below.

AVERAGE BARGAINING UNIT SALARIES as of 3/29/16

Administrators and Supervisors Association	\$92,555.56
BOCESTA Teachers	\$68,372.20
Staff Specialists	\$57,445.50
BOCESTA OT/PT	\$53,615.09
Technical, Maintenance and Custodial	\$35,076.80
Educational Secretaries Unit	\$33,168.88
Teachers Aides Special Education	\$14,847.65

BOCES Statement of Facts Ex. 10.

Given the predominance of an employee contribution of 10% or less in the region, the component districts and within BOCES, BOCESTA's proposal to arrive at a 10% contribution is reasonable because it is consistent with the conditions at BOCES' component school districts and other school districts throughout Western New York. BOCES justified reaching a 13.5% contribution rate by pointing to the higher percentages paid by employees in three component districts, the 13% contribution paid by administrators within BOCES, and the relatively good salaries paid to BOCESTA members compared with some component districts. BOCES Answers, p. 2. However, as discussed in more detail concerning the salary proposals, BOCESTA members' salaries are not out of line with the salaries in the component districts; BOCESTA salaries tend to fall into third, fourth or fifth place among the 13 component districts, depending upon the salary step involved. BOCES brief, Salary Ex. 5. Nonetheless, since a year has passed since the last BOCESTA proposal, and insurance costs are quickly rising, the time line for getting to a 10% contribution should be shorter than BOCESTA proposed.

As for the co-pays on prescriptions, they should remain as they are under the expired contract. There is no distinct trend in the surrounding or component districts that suggests that

BOCES' proposal to raise the co-pays would have been part of a negotiated package.

Recommendation on health care insurance premium share: BOCESTA bargaining unit members should contribute 10% of the POS plan premium as of July 1, 2018, as follows:

Timing	Employee percentage
on ratification	8%
7/1/17	9%
7/1/18	10%
7/1/19	10%

Further, the prescription co-pays should remain at current levels: \$7 (generic); \$15 (preferred brand name) /\$35 (non-preferred brandname) .

2. Salaries.

Current conditions.

Teaching staff. The expired CBA provides a salary schedule for all teaching staff, which includes all members of the bargaining unit except for OT/PT staff. CBA, §§ 8.02, 8.03; BOCES Brief, Statement of Facts Ex. 2, p. 2 (MOA concerning inclusion of OT/PT staff in the unit); CBA, Appendix J, §3, and p. 17. There are approximately 192.2 FTE (full-time equivalent) teachers on the payroll and there are 21 steps in the salary schedule; ordinarily, a teacher will go up one step each year. BOCES brief, p. 8; CBA, § 8.03(2), Appendices a-G.

In the 2012-13 school year (the last year of the contract), a Step 1 salary for a teacher with permanent certification was \$44,837 and a Step 21 salary was \$84,580. CBA, Appendix G. Even with an expired contract, teachers move through the steps, thus realizing an “increment” or

step increase each year until they reach Step 21. The total payroll cost for teaching staff was about \$13,867,331 in 2015. BOCES brief, p. 8.

Under the terms of the expired contract, the cost of the increment for all the steps is shown below:

PERCENTAGE COST OF STEP INCREMENTS	
SCHOOL YEAR	PERCENTAGE COST
2015-16	1.64%
2016-2017	1.60%
2017-2018	1.36%
2018-2019	1.28%

BOCES brief, p. 9.

OT/PT staff. When the parties agreed to add the OT/PT staff to the BOCESTA bargaining unit in 2008, they agreed that although BOCESTA would become the OT/PT staff's bargaining representative, "[t]he terms and conditions of the collective bargaining agreement between the BOCES and BOCESTA shall not . . . become applicable to any employee in the job classification of occupational therapist, physical therapist, physical therapy assistant, or certified occupational therapy assistant." BOCES brief, Statement of Facts Ex. 2, p. 2. The salary schedule for OT/PT staff is included in Appendix J of the CBA and does not have steps. Rather, the OT/PT staff salary schedule provides for raises in each of the school years from 2009-2010 to 2012-13. CBA, Appendix J, p. 17. Because OT/PT staff are not on a step schedule, they have not received any raise since the expiration of the contract on July 1, 2013. Union brief, p. 21.

As of the 2012-2013 school year, OT/PT staff salaries for the most senior personnel were: \$31,415 for a Physical Therapy Assistant, \$34,587 for a Certified Occupational Therapy

Assistant, \$69,787 for an Occupational Therapist, and \$69,872 for a Physical Therapist. CBA, Appendix J, p. 17. There are about 12.87 FTE OT/PT staff and their total payroll in 2015 was \$776,197. BOCES brief, p. 8.

The parties' proposals and positions.

Adding OT/PT staff to the salary step schedule. As a matter of fairness and equity, the Union proposed that OT/PT staff be added to the salary step schedule, as it had always planned to do. Union brief, p. 22; Union Answers, p. 5. Without a new negotiated agreement, OT/PT staff receive no raises, whereas all the other members of the bargaining unit receive, at the least, their step increases. *Id.*

BOCES opposed the Union's proposal to add OT/PT staff to the salary step schedule because BOCES never indicated that it would agree to do so and must compete with private providers of OT/PT services. BOCES brief, p. 29. BOCES' OT/PT services are attractive to the component school district only if they can be provided in a cost-effective way. *Id.*, pp. 29-30.

Proposed raises. BOCES proposed the raises shown on the next page for teaching staff on the step salary schedule, including the increment due to automatic step increases:

BOCES' PROPOSALS FOR TEACHING STAFF

<u>School year</u>	<u>Cost of increment</u>	<u>Percentage increase above step increment</u>	<u>Total percentage salary increase (including increment)</u>
2013-2014	1.68%	0%	1.68%
2014-2015	1.65%	0%	1.65%
2015-2016	1.64%	2.26%	4.0%
2016-2017	1.6%	0.84%	2.5% ⁴
2017-2018	1.36%	1.04%	2.5%
2018-2019	1.28%	0.72%	2.0%

BOCES brief, p. 9, Union brief, p. 26.

For OT/PT staff, BOCES proposed the following percentage raises:

BOCES' PROPOSALS FOR OT/PT STAFF

2013-2014	0%
2014-2015	0%
2015-2016	5%
2016-2017	2%
2017-2018	2%
2018-2019	2%

BOCES pointed out that teachers' salaries cover a ten-month school year. Due to the component school districts' relatively low wealth and the "economic and budgetary climate," BOCES argued that its proposals were "fair and equitable." BOCES brief, p. 10. Moreover, the proposed raises are consistent with those of the other BOCES bargaining units, result in salaries that are above the mean and median of salaries for similar staff in the component school districts

⁴Rounding of the component parts of the increase apparently resulted in some sums that may be slightly different than the actual sum of the non-rounded components shown in the chart.

and would be greater than the salaries at other area BOCES. BOCES brief, pp. 10-11.

The Union proposed the following raises, assuming the addition of OT/PT staff to the step salary schedule:

UNION PROPOSAL FOR ALL BARGAINING UNIT STAFF
(INCLUDING OT/PT STAFF)

<u>School year</u>	<u>Cost of increment</u>	<u>Percentage increase above step increment</u>	<u>Total percentage salary increase (including increment)</u>
2013-2014	1.68%	1.54%	3.22%
2014-2015	1.88%	1.63%	3.51%
2015-2016	1.74%	1.75%	3.49%
2016-2017	1.71%	1.70%	3.41%
2017-2018	1.46%	2.06%	3.52%
2018-2019	1.28%	1.90%	3.18%
2019-2020	2.10%	1.10%	3.2%

At my request, the Union performed similar calculations of their proposals, assuming the OT/PT staff were not added to the step salary schedule:

MODIFIED UNION PROPOSAL FOR TEACHING STAFF
(NOT INCLUDING OT/PT STAFF)

<u>School year</u>	<u>Cost of increment</u>	<u>Percentage increase above step increment</u>	<u>Total percentage salary increase (including increment)</u>
2013-2014	1.68%	1.56%	3.24%
2014-2015	1.65%	1.67%	3.32%
2015-2016	1.64%	1.80%	3.44%
2016-2017	1.6%	1.75%	3.35%
2017-2018	1.36%	1.96%	3.32%
2018-2019	1.28%	1.84%	3.12%
2019-2020	1.13%	2.09%	3.22%

Union Answers, p. 1.

The Union argues that the raises and salaries it proposed are reasonable and consistent with the salaries paid in BOCES' component school districts. Union brief, p. 26. In addition, the raises are "essential to the ability to implement the health insurance premium increases that are part of the BOCESTA proposal," according to the Union. *Id.*

Discussion.

1. Adding OT/PT staff to the salary step schedule. Although adding the OT/PT staff to the step salary schedule of the teaching staff would make the treatment of bargaining unit members more fair and consistent, the automatic raises provided by a step salary schedule would be a significant concession for BOCES to make. My working presumption is that this report should not recommend major changes to the contract without some clear movement from both sides on that issue or a link to other concessions. In this case, although BOCES might agree to this change in the normal course of give and take negotiations, there was no indication that BOCES was willing to move on this issue, or that there were any savings to be gained elsewhere that would make up for the additional costs this proposal would impose on BOCES even under the salary and health insurance regime it had proposed. Therefore, I do not recommend that the OT/PT staff be added to the step salary schedule.

Recommendation on adding OT/PT staff to the salary step schedule. Although the Union proposal makes sense in terms of fairness and equity, unless the parties themselves agree otherwise, I do not recommend that the OT/PT staff be added to the salary step schedule for teaching staff.

2. Raises.

Teaching staff. In terms of comparing the parties' proposals on teaching staff raises with the comparable districts, the component school districts with unexpired contracts have negotiated raises that are between 2.94% and 3.88% including salary step increments over the course of the contract, although it is not clear from the data presented how many years of raises this includes. Union brief, p. 29, Att. 14. Yet, the actual dollar amounts of BOCES' teaching staff salaries, even without the raises proposed by either party, exceed the mean and median of the teaching staff in the component districts at most steps. BOCES brief, p. 11, Salary Ex. 3. Nonetheless neither the proposed raises of BOCES or the Union would appear to place BOCES teaching staff above second or third place for salary at most steps in comparison with all the component school districts. *Compare 2015-16 schedules of BOCES brief, Salary Ex. 3;* Union brief, Att. 13.

Within BOCES, all the other bargaining units have agreed to no more than 2% raises in each of four or five school years, although all of those units, other than the Administrators Union, have agreed to contribute no more than 7% of the cost of the health insurance premium.⁵ BOCES brief, Statement of Facts, Ex. 10.

The Union proposal would cost BOCES quite a bit more than the BOCES' proposal, particularly because of the retroactive raises that would be imposed:

⁵The Teachers Aide Unit of CSEA pays 0% of the health insurance through 2015-16, when the contract expires, whereas the Administrators Union will pay 13% of the premium in 2017-18.

NET COST OF SALARY RAISE PROPOSALS

<u>School year</u>	BOCESTA proposal – cost above increment	BOCES proposal – cost above increment
2013-2014	\$216,305	\$0
2014-2015	\$241,623	\$0
2015-2016	\$272,951	\$338,209 ⁶
2016-2017	\$278,965	\$131,095
2017-2018	\$323,491	\$168,716
2018-2019	\$318,158	\$108,002
2019-2020	\$370,467	N/A

Union Answers, p. 2; *see also* BOCES Answers, Salary Ex. 8.

Although it is difficult to predict exactly what the parties would have agreed on for raises given the variables of health insurance contributions and salaries and percentage raises in comparable school districts, a 3% per year raise, inclusive of increment, for teaching staff, starting with 2015-16 approximates the low end of the prevailing raises in the region. Union brief, p. 29. Although this exceeds the 2% raises within BOCES’ other bargaining units, those other units (except for the Administrators) are paying a smaller contribution towards health insurance than my recommendation for the teaching staff, which tops out at 10%. Moreover, the recommended raises are not retroactive beyond the recently ended school year.

Recommendation for raises for teaching staff: I recommend that the following raises, inclusive of increment, be paid to the teaching staff on the salary step schedule:

⁶The calculations of the Union and BOCES varied slightly on this data, probably due to slightly different assumptions about the number of staff and other factors. I have provided the Union’s calculations in this chart in order to be consistent.

<u>School year</u>	<u>Total percentage salary increase (including increment)</u>
2013-2014	0%
2014-2015	0%
2015-2016	3.00%
2016-2017	3.00%
2017-2018	3.00%
2018-2019	3.00%
2019-2020	3.00%

OT/PT staff. Since I have not recommended that the OT/PT staff be added to the salary step schedule, it means that OT/PT staff have not received a raise since the end of the 2012-13 school year. Therefore, retroactive raises for them are reasonable, as the other members of the bargaining unit on the teaching staff received increments of 1.68% in 2013-2014 and 1.65% in 2014-2015.

The District had proposed an initial 5% raise for the current school year, followed by 2% raises in successive years. The Union had urged that OT/PT staff receive the same raises and salary steps as teaching staff. Given the fact that OT/PT staff salaries are within the range of salaries for similar occupations in both the private sector in the region and the component school districts, CBA, Appendix J, p. 17; BOCES brief, Salary Ex. 7, providing the same 3% raise each year to OT/PT staff provided to teaching staff, from the current school year forward, is equitable and reasonable.

Recommendation for raises OT/PT staff: I recommend that OT/PT staff receive the following retroactive and prospective raises:

2013-2014	1.68%
2014-2015	1.65%
2015-2016	3%
2016-2017	3%
2017-2018	3%
2018-2019	3%
2019-2020	3%

3. Annual accumulation of sick leave and requirement of a doctor's note.

Current conditions. Article 5.01 of the expired CBA provides for 18 paid sick days per year.

The parties' proposals. In order to cut down on absenteeism, BOCES proposed that Article 5.01 be amended to reduce the available sick leave from 18 to 17 paid days and to authorize the Superintendent to require a medical professional's note for any absence of four or more consecutive days, or if the Superintendent suspects the employee is abusing sick leave. BOCES brief, p. 21; BOCES Answers, p .5. BOCES argued that a 17-day allotment was still generous and compared favorably to other school district in the area and BOCES' bargaining units. Moreover, BOCES pointed to the data it provided on sick day utilization, which showed that the average teacher used between nine and 10 sick days per year over the last few years, with a median usage of between five and six days per year. Sick Leave Ex. 1. The data on individual usage in 2014-2015 showed that there were some teachers that used as much as 36, 38, 86 and 186 sick days that year. Sick Leave Ex. 2.

BOCES sought authorization for medical documentation because the contract does not provide anything about medical notes for teachers and some teachers have refused to provide

them when requested. In contrast, the OT/PT staff must provide medical documentation whenever requested, or if they have been out three more consecutive days, or if the Superintendent suspects an abuse of sick leave. CBA, Appendix J, Art. 2.01. Although the Union pointed out that BOCES has some authority to require teachers to submit to a medical evaluation pursuant to NYS Education Law § 913, that power can be used only to “safeguard the health of children . . . to determine the physical or mental capacity of [the employee].” NYS Ed. Law § 913; BOCES brief, p. 23..

The Union opposed any reduction in the number of sick days, pointing out the 18 days was not out of line with surrounding school districts. The Union added up all the sick and personal leave days allotted in the contracts for BOCES’ component school districts and showed that the total number of leave days was between 15 and 19 days. Union Brief, p. 7. Two districts provided for 19 leave days, two (including BOCES) provided for 18 days, four districts provided for 17 days, three for sixteen days, and two for fifteen days. Furthermore, any reduction in sick leave accruals would reduce the amount of extended sick leave available under Section 5.02 of the CBA, which allows for extended leave not exceeding “the number of days of accumulated sick leave credited at the beginning of the current school year” if the employee’s doctor certifies that he or she is “physically unable to return to his/her teaching duties.” CBA §5.02; Union brief, p. 8.

On the requirement of medical notes, the Union was willing to allow the Superintendent to require medical documentation, but only after a teacher uses six consecutive sick days. The Union argued that BOCES’ “suspicion of abuse” standard was too vague and that no teacher should be required to submit medical documentation simply “upon request.” BOCES clarified in

its Answers that it had intended its proposed language to require medical documentation “only in cases of four (4) or more consecutive days of absence or if the employee is suspected of abusing sick leave.” BOCES Answers, p. 5.

Discussion.

Number of sick days. BOCES’ proposal to take away one sick day was not based on a particular problem with teacher absenteeism, although there were 16 teachers who had taken at least 10 days off for sick or family leave in each of the last three years. BOCES Answers, p. 5. Without knowing the reasons for those absences, there is no indication there is any serious general problem with sick leave abuse or absenteeism. Compared to the leave available for similar purposes in the component districts, 18 days is not unreasonable. Since the Union was adamant about opposing it, it is unlikely the parties would have agreed to this change without some other give and take on other issues. Therefore, operating on the principle of not recommending a significant change to the contract without some indication of a change in circumstances or both parties’ willingness to consider the change, I do not recommend a change in the number of sick leave days.

Medical documentation. The Union and BOCES were very close to agreement on allowing the Superintendent to require medical documentation for absences of several consecutive days. BOCES wanted the documentation for a four-day absence; the Union was agreeable to a six-day requirement. Documentation from a medical professional is a reasonable requirement as long as it does not require unnecessary doctor visits. It is unclear whether a person would necessarily go to a doctor for a serious but not complicated illness which can often be treated at home, like the flu, which might require a three-day absence. However, it is much

more likely they would do so for an illness requiring absences of four or more days. Therefore, requiring medical documentation for absences of four or more consecutive working days would appear reasonable. If, however, after two years under this regime members of the bargaining unit find it forces them to see medical professionals unnecessarily, BOCES must be willing to discuss and bargain for a more reasonable consecutive day requirement based on the information the Union provides.

As to requiring medical documentation when the Superintendent has a reasonable suspicion of sick leave abuse, the Union was understandably concerned about the standard for a “suspicion” or a “reasonable suspicion.” Rather than crafting a reasonable suspicion standard, I recommend that this practice be left out of the contract. Instead, BOCES can obtain this documentation as part of its existing disciplinary process. If it suspects sick leave abuse, BOCES can charge the teacher with misconduct. In order to defend the teacher, the Union will often find medical documentation to be helpful.

Recommendation on the number of sick days and medical documentation. I do not recommend reducing the number of sick days available to teachers, nor placing a requirement for medical documentation on suspicion of sick leave abuse into the contract. However, I do recommend requiring supporting documentation from a medical professional for any sick leave absence of four or more consecutive days if a supervisor or the Superintendent requests it. However, after the passage of two school years under this requirement, if the Union has evidence that the four-day requirement is forcing teachers to seek medical assistance unnecessarily, it shall present that evidence to BOCES. BOCES must then meet to discuss and bargain in good faith about increasing the number of

consecutive days required for medical documentation.

4. Conversion of sick leave days for cash or medical payments upon retirement.

Current conditions. Pursuant to Article 8.15(f) of the expired contract and a December 2005 Memorandum of Agreement (2005 MOA) between the parties, upon retirement, teachers can convert unused accrued sick days in excess of 190 days to cash and a medical fund. CBA, Art. 8.15(f), p. 36; BOCES Retirement Ex. 1. Depending upon the teacher's seniority status during the 1999-2000 school year, the conversion is calculated as follows:

1. 1/200th of the teacher's annual salary for each unused sick day in excess of 190 days. However, the "cash payment shall not exceed the employee's total salary in that year;" or
2. the employee can "cash-in" up to 190 days of unused sick days in excess of 190 days for a combination of cash and a medical fund; no more than 100 days can be redeemed in cash based on 1/200th of the teacher's annual salary, and any days not converted to cash can be converted, under the same formula, to a medical fund providing payment for medical benefits until the fund is exhausted.

CBA, Art. 8.15(f)(A) and (B).

The parties' proposals and positions. BOCES proposed changing the conversion formula from 1/200th of the annual salary for each unused sick day to 1/400th of the annual salary, effectively cutting the benefit in half. BOCES brief, pp. 26-27. BOCES pointed out that pursuant to Article 8.14 of the CBA, retiring teachers can receive an independent benefit of health insurance paid for by BOCES, for up to seven years. *Id.*, p. 26; CBA Art. 8.14(2). A teacher with between 10 and 15 years of service receives 12 months of coverage. After that, for every five years starting with year 15, there is an increase in the number of months covered, culminating in 84 months for someone with 25 years of service. *Id.* This already costs BOCES a great deal of money; reducing the sick leave conversion cost by half would significantly improve

BOCES' financial status. BOCES brief, p. 27. BOCES provided the records for seven retired teachers between 2013 and 2015 who received sick leave conversion payments in cash and medical funds of between \$29,000 and \$89,000. BOCES Retirement Ex. 2. Moreover, BOCES noted, the retirement benefits currently provided are "generous in comparison to the retirement benefits received by teachers in our component school districts." BOCES brief, p. 27; BOCES Retirement Ex. 3.

The Union opposes any change in the conversion formula and argues that the conversion program gives employees an incentive to accrue sick days, rather than use them, as well as providing some health care retirement benefit. The Union emphasizes that the independent benefit of retiree health insurance coverage in CBA § 8.14 is limited by an employee's length of service to the district, thus making the sick leave conversion very important for retiring teachers who will be living on fixed incomes. Union brief, pp. 17-18. The Union calculated that a teacher would have to work for BOCES for more than 21 years and never take a sick day (earning 18 sick days per year) in order to maximize this benefit. *Id.*, p. 17.

Discussion. The retirement benefits provided based on seniority in CBA § 8.14, coupled with the sick leave conversion of CBA § 8.15, can result in a very generous benefit for employees with 20 or more years of service with BOCES. However, not all employees retire with more than 20 years of service and most will use some sick days over the course of the years, thus resulting in a reduced benefit for many teachers. There was no evidence presented that the full potential financial exposure of these benefits is routinely realized, although it was clear from the records BOCES provided that some teachers retire with more than \$80,000 extra paid in cash or medical funds. Nonetheless, the specter of the potential cost should not drive a

recommendation for a change in the existing benefit; the actual cost of the benefit is what is important.

As the Union noted, most of the school districts in the region have a retiree sick leave conversion benefit, although the formulas vary. BOCES is the only one that provides a 1/200th formula, whereas Royalton-Hartland has a 1/370th formula and Starpoint has a 1/400th conversion. Union brief, pp. 18-19. However, Royalton-Hartland and Starpoint do not ignore the first 190 accrued days; instead, they impose maximums of 250 days and 230 days for conversion, respectively. *Id.* Moreover, neither Royalton-Hartland nor Starpoint provide employer contributions for health insurance to retirees at all. *Id.* The formulas of the other districts in the region and in the BOCES component districts are calculated in a myriad of different ways, so it is difficult to compare their impact. Union brief, pp.18-19; BOCES Retirement Ex. 3.

Because there was not strong evidence of a prevailing regional trend, nor of BOCES' need to save the money spent on sick leave conversions, or a change in circumstances, under the principles guiding me, I do not recommend a change in the sick leave conversion.

Recommendation on sick leave conversion. There should be no change in the sick leave conversion formulas for teaching staff upon retirement.

5. Drug and alcohol testing.

Current conditions. There is no provision in the expired contract permitting drug or alcohol testing of covered employees. However, all the other BOCES bargaining units have agreed on contractual provisions permitting “reasonable suspicion” drug testing; a similar program is in place for unrepresented employees as well. BOCES brief, pp. 24-25.

The parties' proposals. BOCES proposed adding an Appendix K to the contract to allow for “reasonable suspicion” drug and alcohol testing in a manner “consistent with those under the Federal Highway Administration . . . applicable to safety-sensitive transportation employees.” BOCES brief, p. 24. *See* Union Att. 9 (text of proposal). BOCES wants to be able to test teachers for drug and alcohol use under the same stringent standards it applies to all its other employees in order to protect its students and workers. BOCES brief, pp. 25-26. Within the past five years, two teachers have been counseled in writing when they smelled of alcohol. BOCES Answers, p. 4.

The Union opposes the imposition of drug testing on teachers and points out that no other teacher contract in New York State has drug or alcohol testing requirements. Union brief, p. 24. The Union points out that Section 913 of the State Education Law does allow BOCES to require a teacher to submit to a medical evaluation if there is evidence that the teacher can't perform properly or is endangering student safety. *Id.* The due process safeguards in the law allow BOCES to protect its students while also protecting employee rights. *Id.*

Discussion. BOCES' desire to have teachers treated consistently with its other employees is a rational goal. However, given the lack of drug testing requirements for teachers throughout the State, the Union's vehement opposition and the evidence that the small number of potentially problematic situations have been handled effectively through the counseling and disciplinary process, I will not recommend the imposition of a drug testing regime. I do note that although the Union argued that State Education Law § 913 provided BOCES with the authority to require drug testing under appropriate circumstances, the law is not geared to the type of problem that BOCES' is trying to address: the use of drugs or alcohol while teaching children.

Rather, the law appears to require evidence of poor performance or endangerment of children, which may not always be present when someone is nonetheless under the influence of drugs or alcohol.

Although there is no contractual language on this issue, if BOCES has a reasonable suspicion that a teacher is working while under the influence, it can use the disciplinary process and charge teachers with misconduct for using drugs or alcohol inappropriately.

Recommendation on drug testing. I recommend that there be no change in the contract; there should be no addition of drug and alcohol testing requirements.

6. Issues related to OT/PT bargaining unit members. One of the unresolved issues concerning OT/PT was the Union’s proposal to add OT/PT staff to the teachers’ salary step schedule. As discussed in the section on salary, I recommended against adopting this proposal.

The other OT/PT issues concern: 1) payments for professional dues and dental accounts; and 2) an increase in payments for unused sick leave upon retirement.

Current conditions. BOCES contributes \$400 each year to a “dental and professional dues fund” for OT/PT staff. The funds may be used for dental expenses or professional dues. CBA, Appendix J, §4.02 (p. 10). For sick leave conversion, OT/PT staff are entitled to cash out sick days at \$50 per day if they have at least 20 years of service upon retirement. *Id.*, §4.06 (p. 12).

The parties’ positions. For the dental and professional dues fund, BOCES proposed changing it to an IRS §105h account, which can be used for reimbursement of medical expenses only. By converting the fund to a health reimbursement account, BOCES could “shift the

reimbursement system to the third-party administrator that administers the BOCES' flexible spending account plans. . . and HRAs (under Section 105h of the Internal Revenue Code). Doing so would enhance medical privacy and provide for more efficient administration of benefits.”

BOCES Answers, p. 4. Saving money was not a motivation for this proposal. *Id.*

BOCES proposed increasing the sick leave conversion to \$60 per unused sick day, \$10 more than the current \$50 per day. BOCES brief, p. 29. As part of this proposal, BOCES was willing to revise the OT/PT staff grievance procedure to have binding arbitration as the last step rather than the current advisory arbitration system. *Id.*

The Union opposes BOCES' proposal to convert the dental and professional dues fund to a § 105h account because members would no longer be able to use any of the \$400 provided towards the payment of any professional dues. BOCESTA's survey of members showed that a majority of them used the funds, at least in part, for professional dues, as they are members of professional associations in order to meet their licensing requirements. Union brief, p. 20.

The Union proposed increasing the unused sick leave conversion rate from \$50 to \$75 per unused day. The Union argued that because OT/PT staff do not receive any other health insurance payments or other benefits upon retirement, they should receive more money for their unused sick days. \$60 is simply not enough, according to the Union; \$75 per day is still “only a fraction of what BOCES provides to members of the original BOCESTA bargaining unit.” *Id.*, p. 21.

Discussion. Since BOCES did not suggest the § 105h conversion of the professional dues and dental expenses fund as a cost-savings device, it does not make sense to make a change that the affected personnel oppose. The only small advantage to BOCES is an administrative

one; having a third party entity handle the reimbursement process. Without evidence of a significant administrative burden under the present system, I do not recommend any change to the composition of this fund.

A change in the dollar conversion amount for unused sick days for OT/PT staff is clearly in order – BOCES was willing to increase it by 20%, up to \$60 per day. The Union had wanted a 50% increase. Since it is likely that the parties would have reached a middle ground in their bargaining, I recommend a \$15 per day increase, to \$65.

Recommendation on OT/PT issues. I do not recommend any change in the professional dues and dental expense fund for OT/PT staff. I recommend increasing the conversion rate for unused OT/PT staff sick days upon retirement from \$50 to \$65 per day.

7. Permitting the work year to start at the end of August.

Current conditions. Pursuant to Section 8.09 of the CBA, the regular school year is the period falling between September 1 and June 30 and it cannot exceed 189 days. CBA, § 8.09(1) (p. 26) and § 2.08 (p. 6).

Parties' positions. BOCES proposed adding a provision to Section 2.08 of the CBA to permit up to two of the 189 days of the school year to be scheduled in August in the week immediately preceding Labor Day, but not including the Friday before Labor Day. This would allow BOCES to schedule things like planning and staff development prior to the students' arrival in those years when Labor Day falls very early in the calendar. BOCES brief, p. 28; BOCES Answers, pp. 3-4. In a 2016 Memorandum of Agreement (2016 MOA) BOCES and the Union agreed to a one-time work day on August 31, 2016 as well as a one-day reduction in the work year to 188 days. BOCES stated that being able to schedule one or two work days in August can cut down on the number of Superintendent's conference days, which can conflict

with the client school districts' schedules. BOCES Answers, p. 3. In addition, it can help to avoid problems caused when a client school district begins the school year before BOCES does.

Id.

The Union opposes scheduling work days in August because it interferes with employees' summer plans and activities. Union brief, pp. 5-6. Furthermore, BOCES' 189-day work year is longer than most of the component school districts' work years, which range in length from 185 to 188. *Id.* Only Wilson, which requires 190 work days, exceeds BOCES. *Id.* Because the last day of the school working year realistically cannot occur before the Regents' Rating Day, set by the State Education Department, even if BOCES started earlier, it would still have to end on whatever date the State set, typically the last Friday in June. Union Answers, p. 5.

Discussion. Where Labor Day falls unusually early, it makes sense to try to schedule work days before September 1 so that the same kind of activities that normally take place before students arrive can take place in those early-Labor Day years. The 2016 MOA shows that the parties can reach a meeting of the minds on this issue. Even though it was a one-time agreement, it is a sufficient indication of the workability of the proposal and of the parties' willingness to bargain productively on this issue. I note that while BOCES was able to get the concession to start work on the last day of August, BOCES conceded to the Union by reducing the work year to 188 days. Thus, I recommend the adoption of BOCES' proposal to permit up to two days' of the work year to be scheduled in the week before Labor Day in August, not including the Friday before Labor Day, but that if BOCES uses this option, there also will be a reduction in the number of days in the work year to 188 days, whether one or two work days are scheduled in August.

Recommendation on the work year extension. I recommend the adoption of

BOCES' proposal to amend Section 2.08 of the CBA to permit the scheduling of up to two work days in the week in August immediately preceding Labor Day as long as the school work year is reduced from 189 to 188 days in any year in which work days are scheduled in August. This reduction of one work day should be made whether BOCES schedules either one or two work days in August.

8. Length of the contract. In response to my written questions, BOCES indicated that it was “willing to consider” agreeing to the Union’s proposal to extend the contract term through June 30, 2020. In our meeting on June 1, 2016, BOCES said it had no objection to that proposal.

Recommendation on the length of the contract. Since the parties agreed on this issue, I recommend that the contract term be July 1, 2013 through June 30, 2020.

CONCLUSION

My recommendations were based on the comprehensive information the parties cooperatively provided as well as their justifications for their positions. I was guided by the principles set forth in Section I of this report and believe that the resolutions that I recommended are as close as possible to the agreements the parties would have reached on the open issues. In addition, these recommendations are consistent with BOCES’ ability to pay and the prevailing trends in comparable school districts. My findings will hopefully give the parties a realistic starting point for reaching an agreement, although they may easily find alternative, but mutually agreeable resolutions of their differences.



July 8, 2016
Amherst, New York

Lise Gelernter, Fact Finder