



STAFF REPORT INFORMATION ONLY

REPORT ON COUNCIL MOTION MM46.4 – Establishment of a Framework Agreement with the City of Toronto Administrative Professional Supervisory Association (COTAPSA)

Date:	May 4, 2010
To:	Employee and Labour Relations Committee
From:	City Manager Executive Director, Human Resources
Wards:	All
Reference Number:	

SUMMARY

The purpose of this report is to provide information regarding the establishment of a framework agreement with the City of Toronto Administrative Professional Supervisory Association (COTAPSA) as directed by City Council at its February 22 and 23, 2010 meeting.

FINANCIAL IMPACT

There are no immediate financial implications in relation to this report.

ISSUE BACKGROUND

At its meeting of February 22 and 23, 2010, City Council referred to the City Manager and the Executive Director of Human Resources a motion that directed the City Manager and appropriate staff to “begin discussions with COTAPSA with the goal of establishing a framework agreement regarding all terms and conditions of employment with the City of Toronto’s non-unionized employees”. The adopted motion by City Council directed the City Manager and the Executive Director of Human Resources to report on this matter and related issues at the next meeting of the Employee and Labour Relations Committee.

COMMENTS

In order to provide a general background on the issue of a framework agreement, the report on this matter and related issues is provided in open session to the Employee and Labour Relations Committee; however, for any discussion of these matters and related issues it is *strongly recommended* that the Committee hold its deliberations in-camera as they deal with confidential employee and labour relations issues.

The proposed Motion MM46.4 directed staff to “begin discussions” with a certain goal in mind. The goal provided for in the motion is twofold: (1) a “framework agreement” is to be established and (2) this framework agreement is to be in regard to “all terms and conditions of employment” for the City of Toronto’s non-unionized employees. For the purposes of this Report it is assumed that City of Toronto's non-unionized employees are those employees commonly referred to or known as non-union employees within the Toronto Public Service and do not include other non-unionized employees in the broader City of Toronto structure (e.g., ABCCs).

In regard to the first stated goal of the motion, the concept of a “framework agreement” is problematic in so far as it is vague and not a term commonly used in employee and labour relations matters nor is it a term defined in labour relations legislation or jurisprudence. The motion does not define the nature of or the expected parameters or content of any such framework agreement.

COTAPSA Inc. is not a trade union as defined in the Ontario Labour Relations Act. For the purposes of this Report it is understood that such a framework agreement would not be a “collective agreement” as provided for, and governed by, that Act. Such a framework agreement that is referenced in the motion could be similar, although not necessarily, to the document in place between the former City of Toronto and COTAPSA.

The Former Agreement between COTAPSA and the Former City of Toronto

The document agreed to by the former City of Toronto and COTAPSA was a “Consolidated Memorandum of Understanding” (MOU). The MOU itself was a 19 page document. The MOU was “consolidated” because it consolidated a number of policies related to the terms and conditions of employment in respect of the non-unionized staff that were “represented” by COTAPSA at the former City of Toronto. Attached to it were 15 appendices which included, in the first appendix, a list of positions covered by the MOU. The remaining appendices contained a number of the City’s policies that applied to the non-union staff that were members of COTAPSA. Although these City policies were included with the MOU for the sake of providing them in one place for employees, the City policies did not form part of the MOU and were not limited in their application to employees represented by COTAPSA.

The MOU covered a number of subjects traditionally found within a terms and conditions document, including terms and conditions that might be found in a collective agreement with a union. The matters in the MOU included, but were not limited to, the following subjects:

- definition of employees covered [which positions were included and which non-union employees were excluded as members of COTAPSA; plus a provision that allowed employees in positions covered by the MOU to opt out of membership in COTAPSA];
- COTAPSA dues deduction;
- wages and salaries article, including alternate rate provisions;
- premium pay provisions (e.g., call back pay; shift premiums);
- notice of change of shift provisions;
- designated holidays;
- vacation entitlements;

- sick pay [now it would be the Short-term Disability Plan]/ sick pay gratuity;
- benefit coverage (including pensions/retirement; provisions for benefits in respect of temporary employees; WSIB-related provisions; etc.);
- leaves of absence (bereavement leave; pregnancy/parental leave; etc.);
- limited provisions re. layoffs and re. requests for transfers;
- payment of legal expenses;
- access to personnel files: and
- mileage and meal allowance provisions.

The MOU contained three other provisions but in a format much different than those commonly found in documents such as collective agreements.

- There was a brief article regarding discipline that provided an employee reporting for a disciplinary discussion with two or more supervisory personnel was entitled to have a COTAPSA representative present. However, it did not provide for grievance processes or the referral of any disciplinary disputes to a third party [e.g., arbitration].
- There was an article in the MOU providing for the establishment of a City/COTAPSA Staff Relations Committee with three representatives of each party [similar to the current City (Human Resources)/COTAPSA Committee which meets monthly, although smaller in size]. The MOU indicated that differences arising between the parties relating to employee relations could be referred to this Committee, which was empowered to “make recommendations” to the parties. The Committee could not make recommendations on matters “that may be the subject of negotiations between the parties”.
- There were two articles in the MOU dealing with the term (period of operation) of these working conditions and dealing with changes or alterations to the MOU. The working conditions were for the term provided in the MOU and thereafter until amended with the approval of City Council. In the event either party wanted changes or alterations to the MOU, they were to give the other party notice as provided for in the MOU and the MOU obligated both parties to “thereupon negotiate in good faith in respect of the matters” proposed to be changed or altered. The MOU contained no provision that would permit the referral of matters which could not be agreed upon to a third party [to arbitration]. As the employees were not unionized, there was no provision for strikes.

Status of the Current Relationship between COTAPSA and the City of Toronto

City Council at its meeting in June 1998 terminated the Memorandum and repealed the by-laws of the former City of Toronto confirming the Memorandum. This decision by City Council was subsequently upheld in the courts after a challenge from COTAPSA. Essentially, there became no contract between the new City of Toronto and COTAPSA regarding terms and conditions of employment for its members and no obligation to negotiate such terms and condition of employment. At that same time, the members of the former COTAPSA and the former management associations of the former municipalities amalgamated and reconstituted into a new organization (using the same name COTAPSA) for the new City of Toronto. To be clear, COTAPSA was no longer recognized by the City of Toronto as the agent for its members. Notwithstanding the above, the City has not been opposed to non-

union/management employees belonging to a voluntary association; however, since 1998 the City of Toronto has never agreed to negotiate terms and conditions of employment with this newly amalgamated association and instead has continued with a common law relationship between the employer and the employee. Since amalgamation, the City administrators have developed a meaningful consultation, dialogue and input process with COTAPSA on various employment policy issues.

The Scope of the Proposed New Framework Agreement with COTAPSA

The second stated goal of the motion was that the agreement was to be in regard to “all” terms and conditions of employment for the City of Toronto’s non-unionized staff. In this way the motion appears to contemplate an agreement with a broad scope in that it would presumably apply to all non-union staff and set out all of the terms and conditions of their employment.

However, for the purpose of this Report, it should be understood that any such document should not apply to all non-unionized employees. Certain non-unionized staff including, but not limited to, Senior Management, Human Resources Division staff, plus other staff with access to confidential information (e.g., Finance, Legal Services, CMO/DCM, City Clerk/Councillor/Mayor staff) relating to employee and labour relations and possibly other matters would have to be excluded from any agreement. Generally, this form of exclusion was the case in relation to the MOU between the former City of Toronto and COTAPSA.

In addition, it is highly unlikely that it would be possible or desirable to seek to create an agreement that would include “all” terms and conditions of employment for the non-unionized employees it covers. As noted previously, the MOU included a number of City policies as appendices but these policies were outside the MOU itself. In addition, there would have been other terms and conditions of employment outside both the MOU and the policies appended thereto. In fact, even most collective agreements are not inclusive of all terms and conditions of employment for the employees covered by those agreements.

As a result, the reference to “all” in the motion is not feasible and the document should not apply to the non-unionized staff as a whole, but only to those staff as is determined appropriate by the City.

Implications of Organizing Efforts of The Society of Energy Professionals, IFPTE Local 160

When Councillor Stintz's motion became known through the document release process for the February 2010 City Council meeting, the motion prompted correspondence from The Society of Energy Professionals (“the Society”) which has been recently engaged in efforts to organize certain non-union staff employed by the City. In that correspondence, legal counsel for the Society asserted that the motion would violate the Ontario Labour Relations Act. They referred to sections 70 and 72 of the Act in that regard.

Section 70 of the Act makes it an unfair labour practice for an employer to "... participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union..." At the

same time, the Act provides, specifically, that "... nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence".

Section 72 of the Act prohibits an employer from:

- refusing to employ or to continue to employ a person, or discriminating against a person in regard to employment or any term or condition of employment;
- imposing any condition in a contract of employment or proposing the imposition of any condition in a contract of employment; or
- seeking by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means;

in order to compel an employee to cease to exercise any rights under the Act.

CONCLUSION

There is a wide range of approaches to employer-employee relations with non-union employees at other large employers. These approaches range from (1) no agreement and no representation for non-union employees, to (2) the current City status quo (i.e., no formal agreement but some representation understanding i.e., COTAPSA) with an association-consultation model, to (3) a formal agreement and representation for non-union employees similar to a union-collective bargaining model. However, the association-consultation and union-collective bargaining models cannot be viewed as an "either-or" choice. There arguably is a continuum with associations-consultation at one end and unions-collective bargaining at the other end. Where the motion proposed "framework agreement" fits within that continuum will largely determine how any individual would view the motion and any such document. Also, that view is often influenced by an individual's beliefs about union representation and the collective bargaining process.

It could be argued that, from the perspective of good employee relations, diverse operationally complex employers who have a large group of non-union employees should have more formal means for employees to communicate their common interests and have them engaged in a dialogue with their employer regarding any employment concerns. However, many employers have no such process and have good employee relations environments.

In addition, non-union employee dispute resolution processes (e.g., grievance and appeal procedures) or alternative dispute resolution processes (e.g., mediation) are more common than they were a number of years ago and such procedures are seen by some employers as providing a more effective way of dealing with employee concerns than taking individual concerns to specialized, and generally more expensive, public tribunals or the courts.

Also, central to progressive human resource policies is an effective internal communications system. Employees want to be informed about the overall situation in the organization and how

they fit into it. A “framework agreement” or MOU with a more formalized non-union representative group is one method that provides a way to achieve that objective.

Notwithstanding the above, a terms and conditions of employment document for non-union employees, regardless of its title, must be flexible enough and allow for sufficient management discretion to allow the City to continue to effectively manage its operations. If direction to staff to develop such an agreement was approved, the provisions within such a document cannot, and should not, be in regard of “all” terms and conditions of employment and it should only be applicable to those non-union employees as is deemed appropriate by the City. In this regard, discussing a "framework agreement" with COTAPSA would involve a potential balancing of the City's interest in retaining flexibility in the management and control of its operations and finances versus the employees' interest in establishing rigidity and certainty in the terms and conditions of their employment, as set out in the City's employment policies and in City Council's decision-making. Finally, while the negotiation of such a framework agreement may be the goal of such direction to staff, staff should be afforded the flexibility, through any such direction, to ultimately walk away from those negotiations if it is determined that they will not result in an agreement that is beneficial to the City.

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