1028

STATE OF MICHIGAN

DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES

EMPLOYMENT RELATIONS COMMISSION

FACT FINDING

IN THE MATTER OF THE FACT FINDING BETWEEN:

PUBLIC MUSEUM OF GRAND RAPIDS (Employer) (Museum)

-and-

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION (GREIU) (Union)

_____/

MERC Case #L99 H-7019

FINDINGS AND RECOMMENDATIONS

APPEARANCES:

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INTRODUCTION

The parties' negotiating efforts which led to this fact finding were directed at establishing their first Collective Bargaining Agreement.

As of the dates of the hearing the bargaining unit was comprised of 16 employees. There are numerous classifications ranging from Custodian to Carpenter to Financial Assistant to Curators, Office Assistants, etc.

The Petition for Fact Finding is dated May 26, 2000. Pursuant to Public Act 176 of 1939, I was appointed Fact Finder and notified of the appointment by correspondence dated July 12, 2000. Given the participants' schedules, the first day of hearing was conducted on December 19, 2000. At the conclusion the parties were to consider whether the record was complete and, if not, notify me by January 14, 2001 if additional hearing dates were needed. I was notified that an additional hearing date was needed and it was scheduled for and took place on March 14, 2001. Briefs were exchanged through my office on May 1, 2001. These recommendations follow as soon as practicable.

BACKGROUND

The Employer, the Public Museum of Grand Rapids, was initially created in the 1850s and has existed under various titles and at several locations throughout the years. It has been at its current location since November of 1994.

The Museum was one of the first to be accredited by the American Association of Museums and is considered by many to be one of the premier history museums in the country. It has been referenced in several publications, being characterized as a "new world class" museum center.

The Museum is comprised of not only the center located on Pearl Street, but also the Chaffee Planetarium, the Blandford Nature Center, and the Voigt House Victorian Museum. There is also a separate Collections Research Center. According to its records, the Museum enjoyed an attendance of about 430,000 in 1999 and about 377,000 in 2000.

In addition to its large permanent collection and its excellent and extensive furniture collection, along with the exhibit of native American tribes indigenous to Michigan, the Museum also hosts travelling exhibits. It recently hosted the "Mysteries of Egypt" exhibit and is hosting the "Star Trek Federation Science" exhibit.

GOVERNANCE AND FUNDING

Title XIV of the Grand Rapids City Charter provides for a Board of Art and Museum Commissioners. A general statement describing the Board of Art and Museum Commissioners is contained in a document entitled **A Statement of the Privileges & Duties of Citizen Board and Commission Members**. The statement reads as follows:

> **"Board of Art & Museum Commissioners**
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> "This Board is a unique body established by Title XIV of the City Charter to have custody, management and control of the City's Public Museum and of the property and assets belonging to the Museum. The Board is also authorized to operate an art collection or art museum if one is established. The Board is authorized to appoint, employ, supervise and compensate such employees as it deems appropriate. The Board, usually acting through the Museum Director, has direct authority over the employees of the Museum. The Board is the 'department' head of the Museum and has Charter-granted authority not

generally granted to other Boards and Commissions to independently manage the Museum as it sees fit."

The Museum Commissioners are appointed by the Grand Rapids City Commission. The Museum's holdings are titled in the name of the City of Grand Rapids.

Prior to 1/1/94 Museum employees were treated the same as City of Grand Rapids' employees, receiving the same percentage wage increases, benefit packages, pay scales, etc. The evidence also establishes that during this period the City of Grand Rapids provided substantially all of the financial support for the Museum.

Beginning on 1/1/94 circumstances changed. The record establishes that even though the Museum is a component of the current City budget, the Museum became more autonomous as the Museum Commission assumed greater responsibility for its fiscal operations. While it is clear that the Museum's operating budget has grown from approximately $3,878,000 in 1997 to $4,297,000 in 2001, the Museum has had to explore and utilize additional sources of revenue. This is true even though the City of Grand Rapids' appropriation to the Museum has grown from approximately $1,550,000 in 1991 to almost $2,300,000 in 2001. Other sources of revenue include fund-raising campaigns, state grants, fees, beverage services, retail operations, facility use, MDOT reimbursable labor, and numerous other items. It is noted that even prior to 1/1/94 attempts were made to fund the Museum through a City millage, but the 1986 attempt failed.

Beginning on 1/1/94 the wage increases for Museum employees fell behind wage increases granted City employees. It is noted,

however, that Museum employees are still participants in the City's pension plan and in the City's group health insurance programs. Nonetheless, the cost of these programs are charged to the Museum and are not assumed by the City.

COMPARABLES

As in binding interest arbitration the parties have relied upon so-called comparables in order to help support their respective positions. The Employer has suggested that there are four institutions which should be considered comparable to the Public Museum of Grand Rapids for the purpose of this fact finding. They are: Detroit Historical Museum, Kalamazoo Nature Center, Mackinac Island State Museum, and Rochester New York Museum.

The Union suggests that the Michigan State Museum, Abrams Planetarium and the Michigan Historical Center should be considered comparable. In addition, the Union has suggested that there are so-called internal comparables that are parties to bargaining contracts which also should be considered. They are: The City of Grand Rapids and the GREIU, the Library contracts, APA and City contract, and the 61st Judicial District Court contract.

It could be concluded, and the evidence to a degree suggests, that in general there are substantial similarities between Curators, etc., employed by the Museum and Curators, etc, employed by other museum-related entities. Yet, there is real difficulty in attempting to characterize the various employers as comparable to the Museum. Some of the considerations included in this difficult task is the fact that other employers are funded in different

fashions and provide differing services to the public. This analysis does not include the Union's so-called internal comparables.

In examining the so-called internal comparables, one must be cognizant of the reality that funding vehicles are substantially different in the suggested comparables from the funding formula affecting the Museum, and the work being performed is quite dissimilar from the work performed by most members of this bargaining unit.

In relation to funding I have already outlined the general sources available to the Museum. The other suggested external comparables have varied funding sources, with some relying heavily on a political subdivision, such as the Detroit Historical Museum, while others, like the Mackinac Island State Museum, relying on admission fees, concessions, grants, State of Michigan general fund allocations, etc.

Also, the evidence establishes that many of the suggested external comparables have different focuses in relation to the types of exhibits, displays, activities and information offered to the attendees. For instance, no one who has attended the Mackinac Island State Museum and the Employer's facility would contend that they both offer the same experience to attendees. While attendance to each may provide an exciting, provocative and educational experience, what's presented by each entity is quite different. Thus, it seems logical that the work performed by the respective

employees may be similar in a general sense and in a specific sense it may be quite different.

Furthermore, not all of the external comparables are represented by a labor organization. Furthermore, there are differing mixes between full-time and part-time staff.

The above doesn't mean that the information and evidence regarding the suggested external comparables should be ignored. That's not the case at all. What the evidence does establish is there must be a very careful, precise and comprehensive analysis of the information, which in certain areas is quite conflicting and unsettled, before any recommendations are formulated.

After examining the Union's suggested internal comparables, it is quite clear that while there are at least arguable reasons to consider the wages, hours and conditions of employment existing in the various relationships, there are many factors which establish that in conducting such an analysis one should be very cautious. The Union suggests that the internal comparables are critical in assessing its position because the Museum is a City department. If we assume that's correct, it is nevertheless very difficult to equate what personnel in the 61st District Court, as well as in the other so-called internal comparables, provide in the form of work product with the services provided by members of this bargaining unit.

The Employer has suggested that a museum is a cultural luxury which exists solely on the voluntary support of the community which it serves. I suppose that some could subscribe to that analysis,

but nonetheless, a city's cultural environment is defined by a number of factors, several of which revolve around what is available for the cultural nurturing of its population. It is not unreasonable to conclude that a museum in the nature of the Employer's facility is essential to maintaining the status of the community. While I agree that a museum doesn't equate with what is considered basic essential municipal services, such as police, fire, water, sewer, etc., one could reasonably argue that the City has the responsibility of providing more than just the basic needs of its inhabitants.

As I have indicated above, what the record establishes is that all the evidence submitted by the parties, including the external comparables, must be carefully weighed and analyzed. Furthermore, it would be inappropriate to totally ignore the data regarding the suggested internal comparables.

ISSUES

Depending upon the manner in which the issues are counted and combined, there is a potential for over two dozen different issues. I suppose that part of the reason for the number of outstanding issues is the fact that this is the parties' first Collective Bargaining Agreement. Nonetheless, the number of issues displays a very wide-ranging disagreement.

As I have noted above, I have carefully and painstakingly analyzed this record in arriving at the recommendations outlined below. It must be noted that I have not mentioned every argument or item raised by the parties. To do so would be impossible and

probably inappropriate. The parties submitted literally hundreds of pages of documents and extensive testimony from several witnesses. None of the record was ignored, but not all of it will be displayed. It is hoped that the recommendations contained in this report will provide the basis for the terms of a Collective Bargaining Agreement.

DURATION - ARTICLE 42

The parties have not been able to agree on the duration of their Collective Bargaining Agreement. I view this issue as pivotal, for without the framework of the period of time covered by the agreement, it is difficult, if not impossible, to deal with the other issues. Thus, it is the first issue I will address.

The Museum, that is, the Employer, is seeking a one-year Collective Bargaining Agreement which will become effective upon signing and continue through June 30, 2001. The Union seeks a contract effective July 1, 1999 through December 31, 2001.

The Employer argues that a one-year contract is appropriate because it doesn't know from year to year what the amount of its funding will be. It argues that the Union's proposal is primarily retroactive and only extends six months beyond the Museum's proposed termination date. It further goes on to suggest that changing the contract year to a calendar year basis is not warranted and is proposed by the Union merely to place it in agreement with the City of Grand Rapids.

The Union argues that the Employer's argument regarding the instability of its financing is not persuasive, for the evidence

establishes that the City has consistently increased its appropriation to the Museum. It points out that a multi-year contract with a specified pay schedule will make employee compensation a priority and will compel the Museum to expend at least a portion of its increased appropriations from the City and from other sources on its employees. It maintains that a multi-year contract is necessary to adequately meet the needs of the employees.

There are several elements to this issue. First, since this is an initial contract, there is an intensified question as to when it will become effective. Second, there is an issue of whether it should follow the Museum's fiscal year or be changed to a calendar year and, lastly, there is a question of what period the Collective Bargaining Agreement should cover.

After carefully examining the record, my recommendation is that the Collective Bargaining Agreement become effective on 7/1/2000 and remain so until 6/30/2003. In other words, I recommend a three-year contract commencing on 7/1/2000.

There are several reasons why I recommend that the contract become effective on 7/1/2000. I recognize the Employer's concern that if the contract became effective on 7/1/99, as suggested by the Union, a retroactive wage recommendation would place a majority of the cost in periods which have already passed. Furthermore, the evidence suggests that the Union was certified on 7/1/99 and there is no evidence suggesting that it is customary or, for that matter,

the reality in other bargaining units, that the first contract become effective upon the date of recognition.

By the same token, the Employer's proposal, which is that the agreement shall become effective upon the date of signing and continue until June 30, 2001, is untenable. If it were adopted, there would be no contract because the date of these recommendations will be subsequent to June 30, 2001. Even if these recommendations were issued on the exact date that the parties' briefs were exchanged, and of course that's an impossibility, the contract would have had a duration of two months. That's not acceptable.

As a result, and as I have indicated above, I recommend that the commencement day of this Collective Bargaining Agreement be 7/1/2000.

I am not convinced that the termination date of the contract should be created to parallel the dates of the GREIU contract with the City of Grand Rapids. I am not suggesting that it is inappropriate and perhaps down the line the parties will choose to do so. All that I am suggesting is that at this point, and based upon the record I have before me, I don't think there is a basis for recommending that the contract have the same yearly definition as the GREIU and City contract.

While the arguments presented by the parties regarding the length of the contract are interesting and helpful, I am absolutely convinced that a multi-year contract, specifically in this case a three-year Collective Bargaining Agreement, is not only

appropriate, but mandatory. First of all, a multi-year contract provides a level of labor peace. Given the situation the parties are in now, if the recommendation were adopted within the next few months there could be approximately 12 to 18 months of labor peace in the sense that the parties would not need to negotiate a new Collective Bargaining Agreement until shortly before the termination date of 6/30/2003. This period of time also allows the relationship between the parties to mature and they can focus in on real concerns and issues that have arisen through their experiences in the pre-termination contract years.

Additionally, a multi-year contract outlining the benefits and wage scales to be realized during that period of time tends to establish the cost levels, with the exception of course of varying costs, such as health care, and allows expense planning. It provides notice of revenues needed to maintain certain levels of staffing and allows for future planning and adjustments affecting expenses and service levels.

The evidence does establish that the City's contributions have increased over the years and, thus, there is a reasonable basis to conclude that at least the City's contribution will continue to increase. I recognize that this may not be the case, but nonetheless, the parties may very well be motivated into developing alternative sources of revenue. I note that it has been approximately 14 or 15 years since there was an attempt to secure millage to support the Museum, and while perhaps given recent events it may be difficult, there are nonetheless other avenues for

securing revenue, and perhaps millage will be one of them, to insure the continuation of the contributions made to the Museum by the community.

Furthermore, most, if not all, of the Collective Bargaining Agreements contained in this record cover a multi-year period. Clearly the parties to the other contracts have recognized the need for multi-year Collective Bargaining Agreements which is additional motivation for recommending a multi-year contract in this dispute.

Thus, as I have indicated above, in dealing with the issue of duration, I recommend that the parties execute a Collective Bargaining Agreement commencing on 7/1/2000 and terminating on 6/30/2003.

WAGES - ARTICLE 35

The recommendations for the dispute involving wages is that effective on the date of the contract, being 7/1/2000, the employees in this bargaining unit receive a 3.5% increase in salary. Effective 7/1/2001 they shall receive a 3.5% increase in salary, and effective 7/1,2002 they shall receive a 3% increase in salary. To state it in another fashion, the increase in salary over the three years of the Collective Bargaining Agreement shall be 3.5%, 3.5%, and 3%. This of course will require the retroactive payment of salary increases to 7/1/2000 and 7/1/2001.

They are numerous aspects of the record which support this conclusion. First of all, dating from 1/1/85 the evidence establishes that members of this bargaining unit received no salary increase in 1994, none in 1997, none in 1999, and until this

recommendation none in 2000. Certainly this isn't typical of what transpired in the City of Grand Rapids, although, as I said, that data doesn't necessarily come from comparables, but during that period the City employees represented by the GREIU received a raise in every year, and on occasion two raises per year.

It is noted, and keeping in mind the comments regarding City employees covered by the GREIU contract, that in classifications of Carpenter, Custodian, Financial Assistant I, Office Assistant III, and Lead Custodian, the pay rate for members of this bargaining unit are consistently under that of the City bargaining unit. The differences range from 6.5% to 25.3%.

In looking at the data regarding the Michigan Historical Center in Lansing, and of course keeping in mind the considerable concern dealing with the suggested external comparables, it is noted that in the match-ups established by the Union in its exhibit, the salaries received by members of this bargaining unit were substantially lower than those received by employees of the Michigan Historical Center in classifications the Union suggests are comparable. The data is similar for the MSU Museum and Planetarium. The Curator of History at MSU receives $42,532 plus a bonus, while a Curator I in the current bargaining unit receives $42,621. The planetarium program coordinator at MSU receives $45,920 plus bonus, while, again, the Curator I in this bargaining unit receives $42,621.

The data is somewhat different when the salary rates in this bargaining unit are compared with the Rochester Museum, Mackinac

Island, Kalamazoo Nature Center and the Detroit Historical Museum. Using the data available, it shows that in 2000 the average increase for the aforementioned entities was 2.8%, with the same average increase in 2001. Where the data is available, it also shows that the wages paid in those four entities in 1999, 2000 and 2001 were and are substantially lower than what members of the bargaining unit currently receive and what I have recommended. Nonetheless, as I have pointed out, there are some considerations which persuade me that while the external comparables suggested by the Employer and, in fact, suggested by the Union, should be considered, they are not controlling.

It must also be recalled that prior to 1992 the Museum participated in the Pas Job and Wage Classification Study. Apparently the study was not well received and the City made some substantial revisions. The study placed job classifications, which while not representing the same type of work, represented at least the same level of endeavor as outlined in the parameters in the study into several pay ranges. For instance, an Exhibit Preparator II was assessed at pay range 14, which is the same as the Librarian I. An Exhibit Preparator I was assessed as an 11 and placed in the same pay range as a Personnel Assistant, Legal Secretary II and others. A Curator I was placed in pay range 15, while a Curator II was placed in pay range 19. There are, of course, other examples. The point is, however, that members of this bargaining unit who were classified at pay levels which included job

descriptions existing in the City have consistently fallen behind individuals working in those classifications.

While I agree that predicting the future isn't a precise science, the evidence persuades me that given the data regarding CPI, as well as all of the considerations I have listed above and others which were carefully analyzed but not memorialized at this point, I am confident that the recommendation I have issued, i.e., 3.5%, 3.5% and 3%, is eminently reasonable.

AGENCY SHOP/SERVICE FEE/CHECKOFF - ARTICLE 2

The Union's proposal is that as a condition of employment, present and future employees shall either become members in good standing with the Union or pay a service charge equal to union dues. All of this shall take place within 30 days of the signing of the agreement or the beginning of their employment, whichever is later. While the issue contains reference to "checkoff", there is no checkoff language contained in the proposal.

The Employer argues that agency shop/service fee will not help to attract or retain the best available talent.

The Union argues that it is a very common provision and is necessary to establish union security.

The evidence establishes that the agency shop/service fee provision sought by the Union is almost universal. Certainly employees who have joined the Union indicate their willingness to support their exclusive bargaining agent. Further, there is reason to require individuals who do not belong to the Union, but who benefit from bargaining, to pay a service fee.

The evidence persuades me that the Union's proposal regarding agency shop/service fee should be adopted and incorporated in the Collective Bargaining Agreement between the parties. Along with this language there should be the very common provision requiring union indemnification of the Employer for claims arising out of the article provision re agency shop/service fee.

PART-TIME EMPLOYEES/VOLUNTEERS

The Union's proposal would prohibit the use of volunteers to fill a full-time position. Further, it requires that regular full-time staff be maintained at its present level for the life of the agreement. Additionally, the proposal requires management to freeze the number of regular part-time employees and not increase them above the current level. Further, it prohibits non-unit or supervisory personnel from regularly performing bargaining unit work.

The Union argues that the full-time staff has remained stable since 1990, even though programs and exhibits have expanded. It points out that the number of part-time staff, as well as volunteer staff, has grown dramatically. It maintains that the work preservation language is necessary to maintain the Museum's quality.

The Museum argues that it must have the flexibility to utilize part-time and volunteer personnel and the Union's proposed restrictions are simply unworkable and unacceptable given the size, structure, mission and financing of the Museum.

The evidence establishes that the comparables deal with the concerns displayed by the Union in varying fashions. Some have contracted very detailed language, while others have a mix from the types of protections available to the Union and restraints placed upon the Employer.

An analysis of the evidence and arguments leads to the following conclusions. First, there should be no recommendation requiring the Employer to maintain the present level of regular full-time staff. Secondly, it is recommended that even though volunteers shall continue to be used, they shall not be used to displace regular full-time staff. Additionally, the current procedure for utilizing regular part-time employees shall continue. Furthermore, given the nature of the unit, its size and the interaction between supervisory and non-supervisory personnel, the current practice regarding supervisory personnel performing bargaining unit work shall continue, but shall not be expanded.

PENSION - ARTICLE 30

With perhaps two exceptions, the pension proposals offered by the parties are the same. Portions of the Union's proposal appear as follows:

> "Section 1. Employees covered by this contract are provided a pension under the Grand Rapids General City Employees Pension Plan. Such plan came into effect October 1, 1939. The pension plan as amended herein shall be continued for the life of this Agreement.
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> *******
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> "Section 7. Medicare Supplement Fund

"A Medicare Supplement Trust Fund shall be established to be administered by the Pension Board. The Museum will contribute .5% of the bargaining unit payroll to the fund."

Portions of the Employer's proposal appear as follows:

"1. Employees covered by this contract are provided a pension under the Grand Rapids General City Employees Pension Plan, as amended, Participation in the pension plan shall be continued for the life of this Agreement, provided the City continues to permit participation.

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"7. Medicare Supplement Fund

"Employees covered by this contract participate in the City of Grand Rapids Medicare Supplemental Trust Fund. The Museum will contribute .5% of the bargaining unit payroll to the fund."

The differences between the proposals are obvious. In this regard the differences in the Medicare Supplement Fund do not seem to be significant and either is acceptable.

Apparently the real issue concerns the inclusion of the language "provided the City continues to permit participation" in the Employer's proposal.

The evidence establishes that the pension plan in question is identified as the Grand Rapids General City Employees Pension Plan. Individuals in this bargaining unit, who nonetheless are employed by the Public Museum of Grand Rapids, participate in the City's plan. The Employer wishes to have such language in the contract to memorialize what it contends is the City's ability to limit participation. Of course, the Union objects to such language and seeks language establishing that the plan will be continued for the life of the agreement.

Both positions present some fundamental problems. First of all, if indeed the reality is that the current employees are employed by the Public Museum of Grand Rapids and the pension plan is the Grand Rapids General City Employees Pension Plan, then technically, although perhaps not as a practical matter, the City may have the ability to alter bargaining unit members' participation in the plan and the Public Museum of Grand Rapids may not have the ability to guarantee participation. If indeed this is the case, then there is a question regarding the effect of any language by which the Public Museum of Grand Rapids warrants the continuation of the plan for the life of the agreement. It may very well not have the authority to do so. By the same token, there may be issues and theories by which the City could not exclude members of this bargaining unit from participation in the plan.

After carefully considering all of the evidence and the competing interests, it is recommended that in addition to the portions of the provisions not in question, the following be included in the pension language:

> Employees covered by this contract are provided a pension under the Grand Rapids General City Employees Pension Plan, to become effective October 1, 1939, as amended. The parties recognize that currently members of this bargaining unit participate in the above-mentioned plan and it is hereby agreed that the Employer shall take no action to modify any provisions of the plan or to alter bargaining unit members' ability to participate in the pension plan.

The above language does not contractually recognize the City's ability, if any, to eliminate the participation of the bargaining

unit members in the General City Employees Pension Plan. If there is an issue regarding the City's ability to do so, it will have to be resolved in a different forum and there should be no contractual recognition of either its ability or inability to affect members of this bargaining unit.

OVERTIME - ARTICLE 21

According to the record, members of this bargaining unit were not in the past paid overtime based upon the Employer's position that the employees were exempt under the Fair Labor Standards Act. Apparently the Union questioned the Employer who, according to the Union, indicated that it would provide a study examining the classifications with respect to overtime eligibility status. The Union maintains that it never received the study, so it assumed that all employees were eligible to receive overtime. In response, the Employer took the position that it would agree that all members of the bargaining unit were entitled to overtime if the management benefits package outlined in the City of Grand Rapids Management Compensation and Fringe Benefits Handbook were, with the exception of grandfathering certain eligible employees in the vacation schedule, deleted from the employment relationship. Thus, the proposals were developed and presented.

The Employer's proposal provides, inter alia, two hours' call-in time and the following language for overtime distribution:

> "Section 6. When Management determines to make overtime available, it will attempt, where feasible, to award overtime first to those qualified employees within the classification who volunteer. If insufficient volunteers are available, then overtime will be assigned to those qualified employees within

the classification based on the inversed order rotating through the seniority list."

The Union seeks, inter alia, four hours' call-in and a very comprehensive method of assigning overtime, which appears as follows:

"Section 6. ASSIGNMENT OF OVERTIME

a. During each calendar month period, overtime work shall be distributed as equally as practical among employees of the same permanent job classification only, within a given Department or Division, who have expressly volunteered for overtime work for the month. Employees interested in overtime work shall so indicate in writing to their immediate Management Supervisor not later than the last full week prior to the beginning of each month. Employees newly entering the Department or Division shall be afforded the opportunity to volunteer in writing for overtime work within one week of the time entering the Department or Division. The method of equalization shall be by a strict rotation by seniority. The most senior employees who volunteers shall be obligated to work the first overtime of the month and so on down the volunteer list through the month. Those volunteers who are excused from their rotation or who are unavailable shall be charged with a call. (Employees on Vacation or Worker Compensation will not be called. Employees on Sick Leave will be called.) Only employees who have so volunteered for overtime work will be called upon to perform overtime work during the designated month and such employees shall be obligated to perform such work, except that all employees may be required to work overtime for up to one and one-half (1 1/2) hours in situations where such work is necessary to complete a job they started at the end of their shift. In the event that insufficient numbers of employees are available for overtime work assignments, the employees of the classification required with the least amount of seniority will be required and obligated to perform such work.

b. In the assignment of overtime hours Management will, consistent with the needs of the service, give preference to those persons holding permanent appointment. A record of such overtime hours shall be kept and the record shall be posted during the first ten (10) days of each month.

c. Overtime provisions established in a given department/division which may be contrary to these provisions will be controlling provided the provisions are agreed to by the Union and Management."

It is noted that 11 of the 16 members in the bargaining unit are currently receiving the so-called management benefits package. It is also noted that there is not enough evidence in the record to determine who is exempt or not exempt under FLSA.

Given the state of the record, I am not prepared to recommend the Employer's position that everyone be allowed overtime if the management benefits package is deleted. There seems to be two different issues and while certainly such an arrangement could be an interesting exploration at bargaining, it is difficult to conclude that the Employer's proposal should be part of a fact finder's recommendation. To put it in another fashion, I am not convinced that it is appropriate to conclude that management benefits should be eliminated in order for all members of the bargaining unit to receive overtime, which I recommend.

I am convinced that any recommendation should, however, provide for two hours of call-in time rather than the four hours sought by the Union. According to the Union, its proposal mirrors the language in the GREIU contract with the City of Grand Rapids. How long it took GREIU to negotiate that provision is unknown, and I am not persuaded that the fact that the GREIU has a particular benefit means that it should automatically become available to members of this bargaining unit. There is ample time in the future to address these issues.

As far as the exact language, I do agree with the Union that there is more specificity required than what it is outlined in the language presented by the Employer. While I tend to agree that the language submitted by the Union is hyper-specific, especially of a bargaining unit of only 16 members and a number of classifications, some of which are occupied by only one individual, frankly I recommend that the simplified language provided by the Employer be adopted with alterations utilizing portions of the Union's proposal, such as equalization, strict rotation by seniority, charge for time asked by not worked, etc. Given this guidance, the parties should be able to work out such language.

HEALTH INSURANCE BENEFITS - ARTICLE 32

Currently members of the bargaining unit participate in the City's health care plan. This has been the situation for many years. The Employer's proposal reads as follows:

> "Museum proposed language: Section 1. All employees shall be covered by a single insurance plan, currently referred to as the Unified Plan maintained by the City of Grand Rapids.
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> "It is understood by the parties that the employer has the right to name the administrative agent, provided there is no change in the negotiated benefits.
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> *******
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> "Section 2. All employees shall be eligible for a $60,000 death benefit, in accordance with the terms and conditions established in the Museum's Personnel Policy Manual for Full-Time Staff, as revised March 17, 1999."

The Union's proposal is a multi-page, detailed expression dealing with various aspects of applying for benefits, defining

retiree coverage, etc. Notwithstanding, according to the Union, it is "not seeking additional benefits, but is merely requesting that the current health care benefits, as specified in the Unified Health Plan, be continued pursuant to the terms of the Unified Health Care Plan's Memorandum of Understanding."

It is difficult to understand how the Museum could guarantee the continuation of the specific benefits contained in the Unified Health Plan when both parties agree that coverage will continue to be provided under the Unified Plan and by its terms the Unified Plan may improve or change the health care benefits contained therein, and is also subject to change by bargaining or the City's unions. Furthermore, the Union agrees that bargaining unit members are covered by the Death Benefit Payment Plan and the Worker's Compensation Supplemental Payment Plan which are listed in the Management Handbook and Personnel Manual. It wants all the specifics incorporated into the contract.

A careful analysis of the record does not persuade me that it is necessary to recommend that the very detailed memorialization of the specifics of the various topics outlined in the Union's proposal needs to appear in the Collective Bargaining Agreement. The Employer's general recital seems to provide adequate language and effective reference to the source of benefits. If, as the Union states, the members of the bargaining unit currently retain coverage under the Death Benefit Payment Plan and the Worker's Compensation Supplemental Plan, then such coverage should continue. There is no need to get into every specific aspect of the coverage.

VACATIONS - ARTICLE 23

In general terms the Union proposes placing all employees on the so-called management level benefits. That is, after one year of employment an employee will have 12 vacation days. Their vacation time increases by one day per year of service until 16 plus years when it caps out at 27 days. Additionally, the following language is contained in the proposal:

> "Section 2. Vacation Allowance
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> c. On the first day of each calendar year following the completion of the employee's second (2nd) year of employment, an employee may cumulatively accrue one (1) additional day of vacation until a maximum total of twenty-seven (27) work days is reached.
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> *******
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> "Section 4. Use of Vacation
>
> c. Upon termination or death, an employee will be paid in full to the nearest one-half (1/2) day for all unused vacation."

The Employer's position is to grandfather those employees on the management schedule and utilize a different schedule for all others and new hires. The schedule proposed by the Employer would provide 12 days of vacation after one year of service through four years of service. At the end of five years of service an employee would receive 13 days and this would progress on the basis of one day per year until it caps out at 27 days at 19 plus years. Furthermore, the language regarding payout sought by the Employer and the memorialization of the grandfathering provision appears as follows:

"Section 4, c. Cash payments in lieu of unused vacation shall be made only upon termination of employment. Upon termination, the employee shall be paid in full to the nearest one-half (1/2) day for all unused vacation up to a maximum of forty (40) work days. In the event termination is caused by the death of the employee, the full unused balance of vacation accrual will be paid out.

"Any employees on the management vacation schedule as of July 1, 2000, shall continue to progress on that vacation accrual schedule. All bargaining unit employees hired after July 1, 2000, shall accrue vacation in accordance with the schedule in the collective bargaining agreement."

Notwithstanding the Union's claim that it would like to have uniformity within the bargaining unit, there is evidence establishing that other bargaining units, such as the library employees, have varying vacations scheduled in the same bargaining unit.

Furthermore, as pointed out by the Employer, the so-called management level vacation schedule is extremely generous and indeed the non-management vacation accrual schedule is extremely competitive with other bargaining units.

Given the state of the record, I am not persuaded that the provisions, including the payout provision existing in the so-called management level benefits, should be made available to every member of the bargaining unit. Those five or so members who are receiving the other than management level vacation accrual schedule and payout provisions, are receiving very competitive vacation benefits.

I recommend that members of the bargaining unit who are receiving the so-called management level benefits shall continue to

do so, including the payout and other applicable vacation provisions. Those receiving the other level of benefits shall continue to do so utilizing the accumulation schedule proposed by the Employer and the payout schedule referenced in the language.

SICK LEAVE - ARTICLE 25

The Union's sick leave proposal contains the following:

"Section 3. Sick Leave Accumulation

a. An employee accumulates one (1) day of sick leave for each calendar month of service in which he/she is paid twelve (12) or more complete days.

"Section 7. Substantiation

a. An employee will be required to substantiate the use of sick leave by such reasonable means as his/her department or division director may require. Intentional falsification of any sick leave affidavit or fraudulent use of sick leave will be grounds for disciplinary action up to and including discharge.

"Section 9. Unpaid Sick Leave

a. Upon the advice and recommendation of the City's physician, the Museum Director shall grant unpaid sick leave for up to one (1) year upon application for any employee whose paid sick leave is exhausted.

"Section 10. Pay for Unused Sick Leave

a. Unused accumulated sick leave will be paid to employees who resign or retire with ten (10) years or more of continuous service based on a schedule of One Dollar ($1.00) per day times the number of years of continuous service for the first 90 days of sick leave; Two Dollars ($2.00) per day times the number of years of continuous service for the 91st through 180th day; and, Three Dollars ($3.00) per day times the number of years of continuous service for all days over 180. Employees who resign will be paid for unused sick leave based on the same schedule but at one-half the rate."

The Museum's proposal reads as follows:

> "Museum proposal: Section 3, a. An employee accumulates one (1) day of sick leave for each calendar month of service in which he/she works twelve (12) or more complete days.
>
> "Section 7. Substantiation. An employee will be required to substantiate the use of sick leave by such reasonable means as his/her division supervisor or the Director may require. Intentional falsification of any sick leave affidavit will be grounds for discharge.
>
> "Section 9. Unpaid Sick Leave. Upon the advice and recommendation of the City's physician, the Museum Director may, at his discretion, grant unpaid sick leave for up to one (1) year on application by any employee whose paid sick leave is exhausted.
>
> "Section 10. Pay for Unused Sick Leave. Unused accumulated sick leave will be paid to employees who resign or retire with ten (10) years or more of continuous service based on a schedule of One Dollar ($1) times the number of years of continuous service to a maximum of ninety (90) days. Employees who resign will be paid for unused sick leave based on the same schedule but at one-half the rate ($.50 per day)."

Section 3.a. of the Union's proposal provides that individuals receive one day of sick leave for each calendar month of service in which he/she is "paid" twelve or more complete days, while the Museum's proposal requires that an individual "works" twelve or more complete days.

Section 7 of the Union's proposal indicates that intentional falsification of any sick leave affidavit or fraudulent use of sick leave will be grounds for discipline up to and including discharge. The Employer's provision is that intentional falsification of any sick leave affidavit will be grounds for discharge.

Another difference between the two is that in Section 9 of the Museum's proposal the Director may, at his discretion, grant unpaid sick leave for up to one year. In the Union's proposal the Director has no discretion and "shall"...

Further, the payout provision in the Union's proposal is more lucrative than in the Museum's proposal. The Museum's proposal represents the non-management level of payout, while the Union's proposal represents the management's level of payout.

In analyzing the evidence I am persuaded that Section 3.a. should use the term "works" rather than "paid". The word "works" is the same term used in the GREIU and City of Grand Rapids' Collective Bargaining Agreement.

In that regard the language sought by the Union in Section 7 - Substantiation, specifically paragraph a, is the same language which exists in the aforementioned GREIU contract. I recommend that it be adopted. In reality I don't perceive there is much difference between that language and the language proposed by the Museum, i.e., "grounds for discharge" as the parties may perceive.

In Section 9, paragraph a, I recommend that the Employer's language be adopted and that the Museum Director "may" grant unpaid sick leave, etc. This is a rather small unit with only 16 members, and given the need to maintain services, it is not unreasonable to allow the Director the discretion to grant unpaid sick leave.

As far as the language in Section 10 - Pay for Unused Sick Leave, I recommend that the Union's language, which represents the management's level of payout, be continued for those employees who

have historically received management level benefits, while the level of payout outlined by the Employer be utilized for the five bargaining unit members who have not historically received management level benefits. Certainly the parties will have every opportunity in the future to negotiate the elimination, or at least alteration, of the two levels of payout benefits.

SEVERANCE PAY - ARTICLE 29

The Union's proposal for a severance pay package reads as follows:

> "Section 1. In the event of an involuntary layoff, the Museum Director shall upon the employee's request provide a severance package for the employee. An employee's eligibility for a severance package requires relinquishment of claims to all future re-employment rights and claims against the Museum. The value of this package will be 3 months of total compensation including insurance and benefits."

The Museum indicates that it will not agree to a mandatory severance program.

To get directly to the point, the evidence does not support recommending the Union's proposal.

INCOME MAINTENANCE PLAN - ARTICLE 33

The Union's proposal appears as follows:

> "Section 1. The Income Maintenance Plan provides employees with an income allowance equal to 75% of their regularly assigned salary for a period of one (1) full year in the event of an illness or disability which prevents the employee from being at his/her regular Museum employment.
>
> "Section 2. The Income Maintenance Allowance begins for the employee at such time as he/she has exhausted all of his/her accrued sick leave and vacation benefits. Employees shall remain on the Museum payroll and continue to have insurance premiums

and retirement plans funded by the Museum in the manner outlined above.

"Section 3. In the event the employee receives monies as a result of Workers' Compensation Law payments or as a result of payments made pursuant to the provisions of the Michigan No Fault Automobile Insurance Law, the income allowance will be reduced by an amount which will result in the employee receiving not more than one hundred percent (100%) of his/her regularly assigned salary during the period of illness or disability.

"Section 4. All decisions relative to the degree of illness or disability of any employee, and whether or not the employee should or should not be at work will be made by the City's Physician."

The Museum proposes that this benefit be eliminated.

This is also one of those benefits which is available to 11 of 16 bargaining unit employees because those 11 employees were included in the so-called management benefits category. Frankly, the availability of this benefit and others which have been, and will be discussed, to only members of the bargaining unit, suggests that people are not being treated equally. Indeed, that's the case. The difficulty in dealing with this type of situation in a fact finding, however, is that if benefits are made uniform, by eliminating the income maintenance plan, individuals who have had the plan for a number of years will be losing what they consider to be an important benefit. If members of the unit are made equal by making the plan available to the five members of the bargaining unit who did not heretofore have the plan, then I would be recommending a benefit which appears to be non-existent in other employment relationships.

Given the circumstances, it would be appropriate to recommend that the status quo continue, i.e., members of the bargaining unit who have received the income maintenance plan, will continue to receive it, while those who have not received it, will not have the benefit instituted on their behalf. The parties can negotiate and deal with this issue in the future. That's the only recommendation that can be made at this time.

UNION LEAVE - ARTICLE 5

The Union's position regarding union leave appears as follows:

> "Section 2. Management will grant a total of fifteen (15) days of leave of absence with pay per year for members of the Union to attend functions of the Union, provided such leave is requested in advance and the needs of the service will not be adversely affected by such absence. Such days shall be accumulative for the life of this Agreement, and any balance shall be carried over to a successor Agreement."

The Museum's proposal appears as follows:

> "Management will grant a total of five (5) days of unpaid leave of absence per year for the bargaining unit, to allow unit members to attend to union business or training. Such days shall be non-accumulative."

The Union maintains that its language is supported by the language contained in the so-called internal comparable contracts. It maintains the language will allow members of the bargaining team to bargain during working hours without loss of pay.

The Museum points out that both of the organized comparables it has provided do not provide any paid leave for union business. It argues that the Union's request equates to approximately one paid day of union leave for each employee in the unit. It

maintains that given the size of the unit, the nature of the finances, and the fact that this is the first contract, the Museum maintains that its proposal is both fair and reasonable.

The only contract referenced by the parties which parallels the Union's proposal is the GREIU contract. Notwithstanding the Union's claim that the language in the Library contract, the 61st District Court contract, and the APA contract is similar to the language it is now proposing, I find that the language in the referenced contracts is similar only in the sense that it deals with employees' union activities. The language referenced in the above three contracts does not speak of paid leave which is accumulated from year to year. In general, the language speaks of the bargaining committee's ability to bargain without loss of pay when bargaining takes place during regular work hours.

Considering all of the available evidence, I am not persuaded that it is appropriate to recommend the Union's proposal. By the same token, the Museum's proposal provides only for unpaid leave and certainly the evidence suggests that in many units bargaining committee members are paid for bargaining during work hours.

Given the nature of the financial landscape, the size of the unit, and other relevant considerations, I find it appropriate to recommend that management grant a total of seven days of paid leave of absence per year for the bargaining unit to allow unit members to attend to union business or training. Such leave shall be requested in advance and the needs of the service will not be

adversely affected by such absence. Such leave days shall not be cumulative.

UNION STEWARDS AND REPRESENTATIVES - ARTICLE 6

The Union's proposal reads as follows:

> "Section 5. A Museum Steward or designate shall be allowed time at his/her regular rate of pay to investigate a grievance and to attend Museum Board meetings when they are held during normal work hours."

The Museum's proposal reads as follows:

> "Union business will be conducted so as not to interfere with the work assignment of the Stewards or any other employee. The Stewards may, with the written permission of the Director or his/her designee, be released from their assignments to investigate or adjust grievances. Such release shall designate whether it is with pay."

After carefully reviewing the evidence and arguments, I have concluded that neither party's proposal is acceptable in total.

The record does not convince me that stewards or their designee should be allowed to attend board meetings which are held during normal work hours without loss of pay. This aspect of the Union's proposal is not acceptable. In relation to the Museum's proposal, the record clearly supports the proposition that when a steward appropriately investigates or adjusts a grievance during his/her work period, he/she shall do so with pay.

As a result, I recommend the following language:

> Union business will be conducted so as not to interfere with the work assignment of the stewards or any other employee. The stewards may, with the written permission of the Director or his/her designee, be released from their assignments to investigate or adjust grievances. Such permission shall not be unreasonably withheld. When adjusting

or investigating grievances during work hours stewards and/or designee shall be paid.

GRIEVANCE PROCEDURE - ARTICLE 7

The parties have each submitted substantial proposals regarding the grievance procedure. Rather than list the individual proposals it would be more economical to deal with the differences.

The Museum points out that its proposal differs from the Union's in a number of ways. First, the Museum's proposal requires a first step meeting between an individual's immediate supervisor outside of the bargaining unit and the Assistant Director. The Union's proposal does not.

Second, the Museum's proposal requires that the grievance refer to the specific provisions of the agreement alleged to have been violated and be signed and dated by the employee. The Union's proposal contains no such provision.

Third, the Museum's proposal contains language recognizing the ability of the grievance chairperson to file a grievance on behalf of the entire bargaining unit. The provision also contains a ten working day time limit after the bargaining unit first has reason to know the circumstances leading to the grievance. The Union's proposal does not contain such language.

Fourth, the Museum's proposal does not allow a grievance regarding a written disciplinary warning to be taken to arbitration. Additionally, the Museum's proposal does not contain a provision allowing a terminated probationary employee to file a discrimination complaint with the City Labor Relations Department. The Union's proposal does.

Lastly, the Museum's proposal contains a provision establishing that a request for arbitration constitutes an election of remedy and a waiver of any and all rights by the appealing party. The Union's proposal does not.

Given the differences, it must be noted that in its written argument the Union takes issue with only three of the differences. First, it proposes that the first step of the grievance procedure should not include the Assistant Director. Second, it rejects the Museum's proposal which excludes disciplinary written warnings from the arbitration process. Finally, it rejects the Museum's proposal concerning the election of remedy provision.

Keeping the above in mind, the only areas of dispute are the three raised by the Union and those are the only areas which will be analyzed.

Dealing first with Step One, the record seems to establish that the personalities involved at the first step of the grievance procedure reflects the characteristics of the various employers and bargaining units mentioned in the record. While the language which appears in the various Collective Bargaining Agreements establishes the parties' agreement, that doesn't mean the Union has the right to dictate which of the Museum's representatives it should meet with at the first step of the grievance procedure. The Union has speculated that its proposal would more likely result in quicker resolution to grievances that can be settled. That may or may not be true, and that may or may not be appropriate.

Frankly, I am convinced that the Museum should have the right to determine which of its agents should be involved in the grievance procedure and thus has the right to require that the Assistant Director be present at Step One. Thus, I recommend that this aspect of the Museum's proposal be adopted.

In dealing with the second aspect of this dispute, whether a "written warning" can be arbitrated, there must be a careful understanding of what the term "written warning" means. If the term is interpreted to mean that a "written warning" is just that, a warning, and carries no disciplinary impact, I would recommend that the Museum's proposal be accepted. The reason being that if so interpreted, a "written warning" is nothing more than notice. However, if the term "written warning" is considered by the parties to be discipline or if the Museum cannot agree that it isn't discipline, then the written warning should be subject to arbitration. Oftentimes if a step in the progressive disciplinary procedure, such as a "written warning", is not subject to arbitration, arbitrators ignore the written warning based upon the proposition that the recipient did not have the opportunity to arbitrate the matter and thus have it tested in the advocacy procedure which the parties have adopted for other types of disputes.

As a result, my recommendation in this portion of the dispute is that if the parties agree that a "written warning" or counselling is not discipline, then I would recommend that such notices be excluded from arbitration. If the Museum cannot agree

that written warnings or counselling are not discipline, or if the parties agree that those items are discipline, then such disputes should be subject to arbitration.

The final portion of this dispute involves the language proposed by the Museum which establishes an election of remedies provision. An analysis of the record establishes that a number of the Collective Bargaining Agreements offered by the parties for the employment relations they consider comparable contain election of remedy provisions. It is not to say that they are identical, but such provisions are fairly common. For instance, a provision may attempt to preclude the prosecution of any claim in another forum if that claim were arbitrated under the Collective Bargaining Agreement. Another type of provision would prevent utilization of the grievance procedure, and hence arbitration, if the subject matter of an appropriate contractual claim had been prosecuted in an agency, court or in some other fashion.

Frankly, these types of provisions are becoming more and more common.

After carefully studying the record and the arguments, I recommend that an election of remedies provision be adopted. However, the record does not convince me that the Museum's proposal is the one the parties should execute.

I recommend the proposal as follows:

> It is expressly understood and agreed that appealing a grievance through to arbitration and arbitrating the dispute and receiving a decision on the merits, constitutes an election of remedies and a waiver of any and all rights of the appealing party and any person or persons he/she/it represents to litigate

or otherwise contest the appealed subject matter in any court, administrative agency, or other forum. Conversely, if any proceedings involving any matter which is or might be alleged as a grievance, are instituted in any administrative action before a government board or agency, or in any court, whether by an employee or by the Union, then such administrative or judicial proceedings shall be the sole remedy, and the grounds for a grievance under this agreement shall no longer exist.

DISCHARGE AND DISCIPLINE LANGUAGE - ARTICLE 8

As in some of the prior discussions, it is easier to explore this issue by indicating what separates the parties.

The Union's proposal differs from the Museum's in several areas. First, is the Museum's inclusion in its proposal of language establishing that intentional falsification of sick leave "shall be considered just cause for summary discharge." The Union's proposal does not contain this language.

Second, the Union's proposal contains an expungement provision which indicates that management will not take into account any prior infractions which occur more than two years previously, provided that the employee has not been subject to disciplinary action (excluding letters of warning) during the two years prior to the imposition of the current discipline. The Museum's proposal does not contain such a provision.

Third, the Union's proposal contains a very broad provision requiring the Museum to supply an employee with a copy of any and all notices, reports, etc., which may be made the basis for disciplinary action. It also provides that the Employee's Right to Know Act (Act 397 of PA 1978) shall apply. The Museum's

proposal contains no such provision, but does indicate that it will provide copies of all the information which may be a basis for discipline. There is also language in the Museum's proposal providing the union steward or other appropriate representative to meet with an employee who has been discharged or disciplined, even if the employee is required to immediately leave the premises. The Museum must make available a conference room or other suitable area. The Union's proposal does not contain such a provision.

Having stated the above, the Union takes issue with only two of the differences. In its brief the Union argues that the expungement provision contained in its proposal should be adopted. It maintains that such language is contained in several of the Collective Bargaining Agreements submitted by the parties. Further, the Union argues that the inclusion of "intentional falsification of sick leave" in those lists of events which would provide "cause for summary discharge" is not acceptable.

Dealing first with the last proposition, I recommend that the reference to intentional falsification of sick leave be removed from discharge and disciplinary language. I am certainly not doing this because I condone intentional falsification of sick leave, but I do note that such conduct has been dealt with under the sick leave provision. Granted, the language at that point is somewhat different, but rather than create conflict, I recommend that the language in the sick leave provision control such conduct and there be no reference thereto in the language dealing with discharge and discipline.

As previously indicated, the Museum does not agree that an expungement clause should appear in the language, while the Union's proposal is that prior infractions which are more than two years old should not be taken into account, assuming there were no further disciplinary actions, excluding letters of warning, during the intervening two years.

The record does establish that several of the Collective Bargaining Agreements affecting other bargaining units contain so-called expungement or limitation provisions. That type of language certainly isn't unusual.

It is important to understand, or at least for me to articulate, the concept of the language proposed by the Union. First of all, the Union's proposal does not require that prior discipline be removed from an employee's record. It only prevents management from taking into account any prior infractions which were incurred within the time limitation.

Notwithstanding the above, I am sensitive to the Museum's concerns. Also, I do note that some of the limitations contained in the other contracts are longer than the two-year period proposed by the Union in this case.

When all of the evidence is considered and the arguments analyzed, I recommend that the Union's language be adopted with certain alterations. The language should be altered to read that when imposing any discipline on a current charge management will not take into account any prior disciplinary suspensions which occurred more than four years previously, provided the employee has

not been subject to disciplinary actions (excluding letters of warning) during the four years prior to the imposition of the current discipline. Further, in imposing any discipline on a current charge management will not take into account any discipline less than the suspensions referenced above which occurred more than two years previously, provided the employee has not been subject to disciplinary actions (excluding letters of warning) during the two years prior to the imposition of the current discipline.

MAINTENANCE OF STANDARDS - ARTICLE 13

The Union submits the following proposal:

> "Management agrees that all conditions of employment not otherwise provided herein relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at the standards in effect on July 20, 1999, and the conditions of employment shall be improved whenever specific provisions for improvements are made elsewhere in the Agreement."

The Museum's position is that it does not agree to include a maintenance of standards provision in the Collective Bargaining Agreement. The Museum maintains that such language does nothing but create problems and seldom, if ever, provides any substantive direction for the parties. The Museum maintains that it is facing numerous challenges, not only in the nature of its business, which tends to be project or exhibit-oriented, but in the nature of its funding. Thus, it cannot be constrained to the status quo.

The Union maintains that in every internal comparable it has presented the respective Collective Bargaining Agreements contain a maintenance of conditions provision.

Frankly, these types of clauses are very common. Even when worded as the Union has worded its proposal, they do not unduly intrude upon management's rights. The language does not mean, for instance, that the hours of work are frozen. A condition of employment relating to hours of work may have been that management always had the opportunity to alter the hours of work. Of course, the opposite may be true, but the point is that a maintenance of standards clause is not generally as restrictive as the Museum contemplates.

After carefully analyzing the record, I recommend that the proposal offered by the Union be adopted, with the exception that the maintenance of standards language should be altered to relate to those maintenance of standards in effect on the date the contract was executed.

NEW OR CHANGED JOBS - ARTICLE 14

The Union's proposal regarding New or Changed Jobs reads as follows:

> "Section 1. An employee may request a review of his/her position once in any calendar year. Such a review is not to exceed once a year.
>
> "Section 3. All jobs are to be posted within the Museum. Current Museum employees will have two weeks to apply and, if qualified, be hired. If no qualified current Museum employees apply, the job may be posted outside the Museum."

The Museum's proposal reads as follows:

> "Paragraph 1. Position reviews. Not agreed. Not necessary.
>
> "Paragraph 3. Not agreed.

"Section 1. Any permanent vacancies within the bargaining unit will be posted, with a copy of the posting provided to the union. The posting will include the job duties, the required qualification, and the pay scale for the position. Postings will remain open for a minimum of five (5) work days. The Museum may fill the position on a temporary basis, until a permanent appointment is made.

"Section 2. The Museum reserves the right to select the most qualified applicant for the position. Where applicants' qualifications are deemed to be equal, relevant classifications, seniority, and unit seniority will be given consideration."

The Union maintains that employees should be permitted to request a review of their position to determine whether their job duties have changed. It maintains that the language it proposes is similar to that in the APA contract. Further, it believes that since the bargaining unit is comprised of dedicated and hard-working employees, they should have the first opportunity to apply and be considered for openings at the Museum.

The Museum indicates that only openings within the bargaining unit should be posted. Further, it argues that given the size of the unit and the mission of the Museum, it should be allowed the right to select the most qualified applicant for a position.

After carefully analyzing the record, I recommend that the Museum's position regarding an employee's ability to request a review of his/her position be adopted. I agree with the Museum's assertion that this type of review can be adequately explored during the next round of bargaining.

In relation to the remaining portions of the language proposed by the parties, I recommend that, with one alteration, the Museum's language be adopted.

Given the nature of the Museum, its goals and the need for continued professionalism in the staff, the Museum should have the right to select the "most qualified applicant" for the vacant position.

In relation to the vacancies to be posted, I would recommend that while the Museum's language be adopted, a sentence be added to state that for informational purposes all vacancies outside the bargaining unit will be posted, with a copy of the posting provided to the Union. This language will provide the members of the bargaining unit with notice of positions outside of the bargaining unit and they can take the appropriate action, even though the election language contained in the contract would not apply to those positions.

Having stated the above, I do note that the Museum's proposal speaks of a separate article for promotions and job transfers. There is certainly a potential, as will be seen with the analysis of the next issue in this dispute (seniority), for confusion. There is the possibility of overlap and conflict between various portions of the language. The parties are encouraged to keep the recommendations contained herein and those subsequently displayed in mind and work through the apparent or possible conflicts.

SENIORITY - ARTICLE 15

The Union's proposal for the language in Article 15 - Seniority, is three pages long and covers a number of topics, including accrual, loss of seniority, etc. I am not going to display the entire proposal, but will address portions thereof. At the outset it should be recognized that just for the purposes of clarity I would recommend that the issues of promotions, transfers, demotions, etc., be contained in a separate article.

The Museum's proposal is much more succinct than the Union's, but does leave out provisions which utilizes seniority in areas which historically seniority has been a factor.

After painstakingly reviewing the record and arguments, there are a number of recommendations to be offered. I am not going to write the parties' language for them because they may have specific needs or expectations which this record does not make me aware of. Thus, I will make my recommendations in a general form.

The Collective Bargaining Agreements in the record all reference seniority in one fashion or another. In fact, seniority has been recognized as the objective standard which is often utilized to administer other benefits.

First, it seems appropriate to adopt the definition of seniority contained in the Union's proposal, with the caveat that if for some reason classification seniority be considered relevant, it should also be defined in the language.

Second, the provision in the Union's proposal regarding the accrual of seniority seems appropriate.

Third, the Union's provision regarding loss of seniority will be recommended, with the exception of item #6. Item #6 suggests that an individual will not lose his/her seniority if laid off for a continuous period of six months or the length of the employee's seniority, whichever is greater. This standard is common in the Collective Bargaining Agreements contained in the record. However, there should be language placing the responsibility on the employee to keep the Museum apprised of the employee's current address and phone number, at least on an annual basis, indicating to the Museum that the employee still wishes to be recalled.

The language regarding non-bargaining unit personnel can be recommended.

Seniority shall apply, as suggested by the Union, to shift assignments, vacations, layoff and recall, and acting assignments.

I agree with the Museum that questions of promotions, transfers and vacancies shall be in a separate article. While I am not going to write that article for the parties, I do recommend that seniority be utilized as the sole standard in certain transactions, such as transfers within the same classifications. As to the filling of other vacancies, such as promotions, demotions and lateral transfers, I refer the matter back to the parties for their further negotiations without submitting any recommendations which at this point would be essentially speculation.

PROBATIONARY PERIOD

As previously noted, there is probationary language contained in the Union's seniority proposal referenced above. The Museum's

proposal suggests that probationary language be considered in a separate article. The Union's position, as previously indicated, is that it should be contained in the seniority provision.

Frankly, probationary language is often contained in a seniority provision because it generally defines when seniority begins. Nonetheless, if the parties wish to provide a separate article dealing with probation, I would recommend that the language contained in the Union's proposal, which is now memorialized in the seniority provision, be adopted.

The two proposals are not that far apart, but the Museum's proposal does fail to provide certain language which seems more desirable. The Museum's suggestion that the language contained in the probationary provision regarding movement to a position in a classification which is contained in the Union's seniority language is unclear, doesn't seem to be the case. It seems that during the first 30 days any management individual can return the employee to his/her former position, while after 90 days a decision must be made by the Director.

Notwithstanding, if indeed probationary language is contained in a stand-alone section, it should be the same language that was recommended in the prior discussion regarding seniority. That language contains the Museum's responsibility to document any performance deficiency and provide that a permanent employee may utilize the grievance procedure to appeal his/her removal.

JOB SECURITY/SUBCONTRACTING - ARTICLE 16

The Union's proposal reads as follows:

> "Section 1. Management shall have the right to contract and subcontract work when it is not feasible or economical for the Museum employees to perform such work, provided no union members having the skills subcontracted are laid off."

The Museum's proposal states:

> "Section 1. Management shall have the right in contract and subcontract bargaining unit work as it determines necessary in the best interests of the Museum."

A careful examination of the record establishes that several of the Collective Bargaining Agreements contained therein have as a provision language which controls or provides the parameters for subcontracting. In that regard, it seems that the Museum's proposal is out of step with some of the provisions memorialized in other contracts. By the same token, the Union's proposal is not acceptable. For instance, it is easy to envision a circumstance where a bargaining unit member is laid off and, yet, work needs to be subcontracted for a period of a day and a half or two days, which is a period of time that may not warrant recall of a laid-off employee.

After carefully considering the record and arguments, I recommend that language be adopted which establishes that management shall have the right to contract and subcontract work when it is not feasible or economical for the Museum employees to perform such work. Such rights shall not be exercised for the purpose or intent of undermining the Union, nor for the purpose or

intention of discriminating against any bargaining unit member. Such right will be exercised for legitimate business reasons.

SHIFT AND SCHEDULE PREFERENCE - ARTICLE 18

The Union's proposal reads as follows:

> "Section 2. Seniority shall be recognized as the basis of shift assignment and work schedule Assignment.
>
> "Section 3. Bargaining Unit Work
>
> "Supervisory personnel outside of the bargaining unit shall not, except in emergency situations, or for instruction purposes, perform overtime work normally performed by employees covered by this Agreement if they gain thereby any benefit in the form of compensatory time off, administrative leave or overtime pay.
>
> "Section 4. Saturday or Sunday Work
>
> "An employee shall be paid one and one-half (1 1/2) times his/her hourly rate for all hours worked on Saturday, Sunday or holidays."

The Museum's proposal reads as follows:

> "Section 2. Classification seniority shall be recognized as the basis of shift assignment and work schedule assignment within the employee's division.
>
> "Section 3. The Museum does not agree to include this section in the contract.
>
> "Section 4. The Museum does not agree to include this section in the contract."

The Union takes the position that shift and schedule preference should be granted based on seniority principles. It maintains that it has modeled its language after the GREIU Collective Bargaining Agreement. The Museum maintains that while it will recognize seniority, there must be a limitation that it be

exercised within the employee's division. It maintains that it is simply not workable to do it in any other manner.

After carefully analyzing the record, I am persuaded that there is no factual basis for adopting the Union's proposal regarding bargaining unit work and Saturday or Sunday work. The evidence establishes that the Museum is not an 8:00 a.m. to 5:00 p.m. Monday thru Friday operation.

Furthermore, there is little in the record to establish that the Museum's proposal regarding the use of classification seniority within an employee's division is not the appropriate method of dealing with shift and schedule preference. Indeed, it seems to be much more workable than the broad seniority language proposed by the Union.

As a result, I recommend that the Museum's proposal be adopted.

PROFESSIONAL DEVELOPMENT - ARTICLE 28

The Union has proposed an extensive Article 28 entitled Professional Development. It displays educational policy, training and support programs, etc. According to the Union, it is nothing more than the language in the Personnel Manual being incorporated into the contract.

The Museum's position is that no contract language should be adopted. The Museum resists any contract language pointing out that it has been able, without a charge-back by the City, to have its employees participate in the tuition reimbursement and training programs supplied by the City. It maintains, however, that these

programs are not guaranteed by the City and the Museum cannot afford the benefits if the City begins charging them back to the Museum. Thus, the Museum argues that it cannot make contractual commitments which it cannot reasonably expect to fund.

While I do note that the Union's proposal contains the language that the Museum shall participate as long as the City continues to support it, I do recognize the Museum's reluctance to create contract language. There is no indication in the record that the Museum would take steps to eliminate bargaining unit members from participating in the program as long as the City absorbs the costs. However, if the City began charging back the cost of the program, this would present the Museum with difficulties.

As a result, and after carefully analyzing the record, I recommend that the Museum's position be adopted and that no professional development language appear in the Collective Bargaining Agreement.

UNIFORMS - ARTICLE 37

The Union's proposal appears as follows:

> "Section 1. Management will initially issue, at its expense, five (5) sets of uniforms (uniforms to mean one shirt and one pair of trousers). Employees will be issued uniforms within fourteen (14) days following completion of their entrance probationary period. Following the initial issue, uniforms will be replaced on an as-needed, fair wear and tear basis. Employees issued uniforms shall be required to wear the uniform as a continuing condition of employment. Uniforms will not be worn on a day when an employee is off duty.
>
> Employees will be offered a choice of cotton or 'stay pressed.'

"Section 2. Any employee whose duties expose his/her clothing to unusual wear or unusual possibility of damage may choose to be issued protective clothing."

The Museum's proposal reads:

"Section 1. Any employee whose duties expose his/her clothing to unusual wear or to unusual possibility of damage in the opinion of the Director, may choose to be issued and wear a uniform. Each such employee will be initially issued five (5) UNIFORMS. Following the initial issue, uniforms will be replaced on an as-needed, fair wear-and-tear basis. Employees issued uniforms shall be required to wear a uniform as a continuing condition of employment. Uniforms shall not be worn on a day when an employee is off duty. Uniforms must be turned in upon separation from employment."

The Museum suggests, and frankly its conclusion doesn't seem unreasonable, that the Union's proposal would require that every employee be provided a uniform. In its brief the Union seems to dispel this conclusion. Nonetheless, the Museum's proposal is clear, and with one minor exception, will be recommended. The exception is that language should be added indicating that the Director will not unreasonably withhold his decision to provide uniforms. His failure to provide uniforms may be grievable.

SPECIAL CONFERENCE - ARTICLE 39

The Union has offered a proposal, i.e., Article 39 - Special Conference, which formalizes the procedure that either party may utilize to call a special conference. Additionally, its proposal provides that Union representatives attending special conferences will be paid for time spent, but only for straight-time hours they would otherwise have worked on their regular schedule.

The Museum's position is that there is no need to have language in the agreement.

The Union argues that this provision is in the best interest of both parties as it opens the door for communication. The Employer maintains that with a bargaining unit of 16 individuals, it is not necessary to ritualize a process. It argues that meetings can and should be held when both parties agree that there is a mutual need and interest.

While I am certainly convinced that the communication between the parties is healthy, I tend to agree with the Museum that with a 16-member unit there is no need to have a mandatory special conference protocol in the Collective Bargaining Agreement. If the lack of such language ultimately creates a problem, the parties may revisit this issue and negotiate such a provision.

Nonetheless, given the state of the record, I recommend that the Museum's position be adopted, and thus, no special conference language be placed in the contract.

INDEMNIFICATION - ARTICLE 38

The Union's proposal reads as follows:

> "Management shall provide each employee with legal counsel for acts in the course of his/her employment which give rise to a cause of action under any civil or criminal action. The foregoing shall not apply to any cause of action arising out of unauthorized acts, gross negligence or willful misconduct or actions taken while under the influence of intoxicating liquor or controlled substances or worker's compensation claims, grievances or other claims made against the Museum."

The Museum opposes the Union's proposal and its position is that no language of this nature be included in the Collective Bargaining Agreement.

The Union points out that the management handbook contains an indemnification clause. However, an analysis of the record establishes that there is little, if any, support provided by the Collective Bargaining Agreements in the record, and given the nature of the work performed, there is no convincing logic for the existence of such a clause.

I recommend that the Museum's position be adopted and that there be no indemnification language in the Collective Bargaining Agreement.

LAYOFF AND RECALL - ARTICLE 17

The Union's proposal regarding layoff and recall is extensive and detailed. It outlines the order of layoff, demotion or transfer in lieu of layoff, references preferred eligible lists, and deals with recall from layoff.

The Museum's proposal in essence eliminates consideration of seniority from layoff and bases selection of the individuals for layoff on management's determination of which employees within the affected classification best meets the skill requirements or needs of the Museum. It essentially eliminates the length of service as a consideration in a layoff scenario.

The evidence establishes that seniority is a fundamental element used in layoff provisions. Indeed, the organized comparables offered by the Museum all utilize seniority in their

layoff provisions. This is also true in the vast majority of the comparables offered by the Union. As a result, except for the theories espoused by the Museum, there is little, if any, evidence to support its position.

It is certainly true that the Union's proposal is extensive and detailed. It may need to be addressed in subsequent bargaining and areas fine-tuned to eliminate trouble spots.

Nonetheless, with the alterations I will subsequent list, I recommend that the Union's proposal be adopted.

As I indicated above, there are certain provisions in the layoff and recall language which I recommend be changed. There may be others that come to light, but the parties can deal with those. The ones I have listed herein are apparent on the face of the proposal.

First, under Section 2 - Order of Layoff, paragraph d, I would alter the language proposed by the Union which indicates, inter alia, that seasonal or part-time employees may not be hired in any department or division where bargaining unit employees are currently laid off and volunteers part-time or seasonable or contracted employees may not perform the duties of a laid-off bargaining unit employee. That language should be changed to, in general, read that seasonal or part-time employees may not be hired in any department or division where the work those employees are to perform is of a duration and nature that it could be performed by recalled bargaining unit employees who are currently laid off from that department or division. The same tenor should apply to the

second sentence. Volunteers, part-time, seasonal or contracted employees may not perform the duties of a laid-off bargaining unit employee if the work they are to perform is of such a nature and duration that the bargaining unit employee could have been recalled to perform the work. None of the employees or volunteers referenced in this paragraph should be used with the intention or effect of preventing the recall of a laid-off bargaining unit employee.

In moving down to Section 5, paragraph b, I recommend that the language be altered to eliminate any conflict with language contained in the seniority provision.

SUMMARY

These recommendations are being issued with the hope that they will be utilized by the parties to resolve the numerous issues in dispute. Not every item of evidence has been displayed, but all was considered and these recommendations have been formulated only after a complete and thorough analysis of the record.

MARIO CHIESA

Dated: October 26, 2001