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MICHIGAN EMPLOYMENT RELATIONS COMMISSION
STATUTORY FACT FINDING TRIBUNAL

In the Matter of the Fact Finding between:

CITY OF FENTON,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, STATE, COUNTY AND MUNICIPAL WORKERS LOCAL UNION NO. 214 AFL-CIO

MERC Fact finding
Case No. L 87 J-678
Stanley T. Dobry

Fenton, City of

FACT FINDER'S REPORT AND RECOMMENDATION

I. APPEARANCES

For the Employer:

Grover & Associates
By: Merle W. Grover — Labor Consultants

For the Union:

Anthony F. Marok — Business Representative

II. INTRODUCTION

The petition for fact finding was filed on June 29, 1988, by Teamsters Local 214, which represents bargaining unit employees of the City's Department of Public Works, Water Department and custodial staff. The Union's petition submitted these disputed issues: Premium Pay Overtime, Dental Plan, Sick and Accident, Grader Operator, Wages, Retroactivity, Crew Leader D.P.W., Premium Pay Shift Hours Worked, and Recognize Heavy Equipment for Out of Class Pay.

The Teamsters were not a party to the predecessor agreement, which expired on June 30, 1987.

Stanley T. Dobry was selected as fact finder by the parties. On August 17, 1988, the undersigned was appointed by the Michigan Employment Relations Commission (hereafter "MERC") as its statutory agent. Hearings were conducted on October 13, 1988 at the Fenton City Hall.

At the hearing two issues presented in the Union's petition were withdrawn: Crew Leader, D.P.W.; and Grader Operator. These withdrawals were contingent upon an agreement that the present Grader operator will be paid in this classification for two years.

As a personal note, both parties put together thoughtful presentations. This facilitated understanding of their positions, making coherent the voluminous record created in one very long day of hearing. They filed post hearing briefs, in the form of proposed findings of fact, conclusions and recommendations.

It is my task to find facts and make principled recommendations, with a goal of resolving this dispute.

III. THE MERITS:

1. **WAGES** and
2. **RECOGNITION OF HEAVY EQUIPMENT FOR OUT OF CLASS PAY**

Despite their separation, these two issues are so interwoven in terms of argument and import that they cannot be easily divided.

Positions of the parties:

<u>On wages</u>, the City proposes, effective the date of the Union's recognition and certification by MERC, a three

year agreement with a 4% wage increase for all bargaining unit classification during each of three periods: August 24, 1987 - June 30, 1988; July 1, 1988 - June 30, 1989; July 1, 1989 - June 30, 1990. It is said this offer parallels the wage settlements for all other city bargaining groups covering the same period of time.[1]

The Union seeks to establish and eventually reach a "prevailing area wage rate for the classifications." It requests parity with certain portions of the Annual Salary and Wage Survey reported by the Michigan Municipal League (hereafter "MML"). It wants the parties to adopt a formula that will automatically generate future wage rates.

The Union urges that this unit's rates lag behind those published by the League, should be brought level to the average of those rates, and then increased in lock step as increases are granted elsewhere. The union proposes that the annual formula be recognized as area rates less 10% of

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[1]Merle Grover, the City's Representative, testified that for the more than ten years, the City and its unions have agreed to the same percentage wage increase for all collective bargaining units. There were differences in the way the individual units allocated the money, sometime applying it to benefits, and other times to general salary increases. He maintained that the only time an employee classification was granted more than the general bargaining pattern, was when "substantial evidence" was presented by a union that a particular classification was "out of line" with prevailing rates. He cited as an example police dep[illegible]t dispatchers, who received an "out of form[illegible]" settlement because they were substantially underpaid compared to other employees performing similar duties at the City of Fenton and in surrounding areas.

actual rates for the first year of the contract of 1987 and that the second year of the contract of 1988 be area rates less 5% and that only in the third year, 1989, would the area rates be at the then current rate.

On classifications, the Union demands that all bargaining unit employees classified as Skilled Laborers should be considered "Key Class #10" employees since they operate backhoes and street sweepers which are listed under this MML category.

The City counters that its existing Job Descriptions are viable and properly describe the work performed. The employer requests that use of the MML's survey classifications be rejected.

Discussion:

The City of Fenton is a member of the MML and, as such, participates in the League's compilation of information concerning area rates, which are distributed to league members. These compilations are used by negotiators throughout the state as a tool for collective bargaining.

The Union seeks to treat the document as something created by the city, binding upon it based upon its connection with other municipalities. The Union asserts that such surveys "establish rates."

Plainly, that is not true. The surveys report rates based upon broad general categories. Because municipal job classifications, job structures and job descriptions are not identical, comparisons are imperfect at best.

The Union correctly assumes that work performed in the City of Fenton's Department of Public Works is "comparable" to the wage rates listed in the Michigan Municipal League's Salary and Wage Surveys of 1986 and 1987.

Saying the work is comparable is not tantamount to finding it to be identical. Indeed, the structure of the MML wage survey and its definition of classes differs markedly from some of the duties actually performed in Fenton.

The 1987 MML Salary and Wage Survey, page V warns:

> "Caution should be exercised when using the data for comparative purposes. Each community has some degree of variance in work assignment, duties, and responsibilities for most job titles. **The footnotes indicate major combinations of positions or other factors affecting the compensation,** but it is not possible to report all variations. The data is sorted by population categories for convenience in presentation. **These categories do not indicate comparability for municipalities in the same population group.** [Emphasis added].
>
> "Extensive efforts have been made to insure that data presented in this report are accurate. Nevertheless, large amounts of data were collected, and there may be some inaccuracies in reporting. We would appreciate it if municipal official will call to our attention corrections which should be made in this report.
>
> "Comparative wage data is only one of the variables used to determine pay levels. Other important variables include degree of job responsibility, prior bargaining history and relationships, labor market conditions, and the employer's ability to pay. These other variables should be considered when interpreting and using this data."

The 1979 MML survey cover letter instructions cautions: "Please note that we are not trying to obtain the wages and salaries of every job you have . . . evaluate whether your positions provide a very close match to those described."

The Union asserts there is "no doubt that the equipment used by the City is recognized as Grade Class #10" and that the data supplied to the Michigan Municipal League includes participation by the City of Fenton. The Union adds that Fenton "helps to establish this information but, at the same time, refuses to apply it to its own employees."

It must be recognized that job classification schemes are not neat little boxes. In the real world, there is always overlap between the work performed by various related classes. The issue is always the best placement of a job in a particular classification scheme. **The MML survey classifications are a mere inexact semblance to the city classification scheme. There is a clear contrast between the type of work performed by "Key Class #8"[2] employees and those in "Key Class 10."[3]**

Comparisons of the City of Fenton's Skilled Laborer classification to Key Class #10 contained in the 1987 MML survey is instructive. The MML definition for Key Class #10 includes operating a bulldozer, which Fenton never

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[2]"Key Class #8 - Public Works. Duties include performing manual labor involving the operation of motorized equipment, small vehicles and trucks. This employee works as part of a crew under immediate supervision."

[3]"Key Class #10 - Public Works. Duties include operating the heavier, more complex equipment, such as ldozer, backhoe, crane, sewer cleaner, and s sweeper. This employee works as part of a crew performing manual and semi-skilled work in the public works department."

has had. "Similarly, although MML's Key Class #10 does not include a grader in its listing of equipment, the City of Fenton put its grader operator in this category. According to Dirctor of Public Works Bland, this was done for purposes of completing the survey when there was an actual grader being operated, since this position "fit this category most closely", per Director Bland. Moreover, it seems apparent that the use of a dump truck with an underbody blade to smooth the shoulder of roads is not as complex as driving a grader. While the work is similar at times, the skills required to operate the equipment are not. The fact finder agrees with the city: using dump truck blades is not equivalent to Grader Operator level work. Driving the trucks and blading the gravel does not make an employee a "Heavy Equipment Operator."

Relevant sections of the 1987 issue of this survey are provided as the City's exhibit 115. The reader should become familiar with Key Classifications #7 - #10 as defined on page xi of exhibit 115 as well as the City job descriptions for this bargaining unit as provided on pages 21 - 32 of City exhibit 113. A close comparison reveals that the Fenton Skilled Laborers are more nearly like the MML Key Class #8, and that there is only minimal overlap with Key Class #10.

Based upon the record before the fact finder and particularly their job description, it is apparent that the predominant work of Fenton "Skilled Laborers" is more like

MML Key Class #8 than #10. In summary, Fenton's "Skilled Laborers" are more in line with the MML's Key Class #8, although Grader Operation is analogous to the MML's Key Class #10.

The Union claims that since the City participated in the MML survey, it should adopt their job description and wage rate as its own. However, on the evidence presented, no other municipality uses the MML Key Classes for city job descriptions. Every city has its own job descriptions, even though a majority of the cities participate in the MML survey. Also, the Michigan Municipal League redefines the classifications used in its salary and wage surveys. For example, as recently as 1984 there was no Key Class #10, or any other Key Classes. There is no guarantee that the current classes will exist for any time in the future.

The prior contract governing this bargaining unit, under Rights to Manage, subsection (h), states that the City has the right "to establish, change, combine, discontinue job classifications and prescribe and assign job duties, content and classification. . ." This clause reaffirms a fundamental management right, generally recognized by arbitrators.[4] Any recommendation limiting that contractual recognition is likely to be rejected by management.

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[4]See Hill & Sinicropi, Management Rights, (BNA, 1986) pp. 390-395.

Union Exhibit #26 lists cities used in reporting these rates. These cities are listed by population and distance to the City of Fenton. The Union seeks imposition of a formula, asserting that it "clearly allows the City to recognize wages based on area rates a full year in advance" and "provides for stability with the employees."

Still, it does not inescapably follow that the rates should be identical from one city to the next. The very existence of the survey presumes the existence of disparity. Other factors including the location of community, other employers in a community and their rates, financial condition of a municipality and the community as a whole, and fringe benefits provided have a legitimate impact on the wage rate negotiated.

Those factors were significantly downgraded by the Union in its comparisons. The cities suggested as comparable by the Union come from nine different counties in the State. The City offered comparisons within a 25 mile radius of Fenton. The Union selected cities for comparison from within a 50 mile radius. While either distance could be used for comparison, there are some logical reasons why the 25 mile radius is preferable. A one way half hour to forty minute commute is the maximum commonly accepted. Thus, those municipalities within that distance are more likely to be considered by employees as potential employers, since they probably would not have to move to take jobs with them.

The employer's offer is the identical wage increase granted all other bargaining units in the City of Fenton including the administrative bargaining unit, the clerical and inspection bargaining unit, and both police bargaining units covering sergeants, patrol and dispatch personnel.[5]

Unfortunately, the Union's proposal, to use the MML survey as a basis for bargaining unit wages, makes future costs unpredictable. By definition, use of future editions of the Michigan Municipal League's Salary and Wage Survey, which do not yet exist, means that neither the parties nor the fact finder can determine its total cost.

Based upon the data that does exist, the employer and union proposals differ by approximately $.20 per hour in the first year.

The MML survey data is not a nullity. The survey is a point of reference, which should be used as a basis of comparison. It points up that "Key Class #8" employees are underpaid, even using the cities in the employer's exhibit. The relative position of Fenton has also fluctuated over the years. The surveys point up a need to adjust the bargaining unit's wages, but not to the level requested by the Union.

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[5]As a first orbit of comparison, any honest analysis must [illegible] t raises granted by the city to other employ including administrators. The employer should have some discretion to run its shop and set wage rates at a level necessary to attract and keep required talent.

An important limiting factor is that the City cannot give this unit a preference that is inconsistent with that provided to other unions that have already settled with the city.

Further, we are not establishing an initial wage rate. This bargaining unit was not created yesterday. The employees and the employer (although not this particular union) have voluntarily set the wage structure, dictating the worth of the job at a particular time.

In general, it appears that the bargaining unit employes have been slowly losing ground to other analogous employees in the comparison area in the MML survey.

It is apparent that the City's offer is not competitive with recently settled contracts. This inflexibility in light of increases granted to other employees is unjust. It is equally apparent that the union's monetary demands are excessive, and not supported by the record, since cost and affordability must also be taken into consideration.

The details of the fact finders recommendation on wages and heavy out of class pay will be presented hereafter.

3. RETROACTIVITY

Two basic facts are indisputable: (1) the prior labor agreement ended June 1, 1987; and (2) Teamsters Local 214 was selected as the bargaining agent for these employees

on August 24, 1987, at which time it was certified by the MERC as the bargaining agent.

The Employer asserts that the Union did not represent these employees prior to August 24, 1987, and the effective date of any resulting agreement, and any retroactive pay increase, would be the Union's certification date.

The Union has requested retroactive relief, to the first day following the day of expiration of the former labor agreement, since negotiations began.

Which party should prevail?

Three factors govern this dispute. As the last contract expired, the employer knew the employees were filing a petition for a new bargaining agent. The employees were simply exercising their statutory right to select a new bargaining agent. If the employer prevails, the employees will effectively be penalized for exercising a right given to them by the law. Moreover, the relationship of employer and employee continued uninterrupted, even though the election process occurred and the employees changed unions in the meantime.

In short, the value of the services performed is in no way diminished by the fact that the employees were using their lawful right to change unions. Common sense dictates that the adjustment of wages should abut the end of the last labor agreement.

4. PREMIUM PAY OVERTIME

The Union asserts it "plows no new ground," and demands time and one-half (1 1/2) for all hours worked after an eight (8) hour day. It is noted that this working condition has been an accepted and established for thousands of employees within the State of Michigan. The employer's proposal to not recognize sick days as a counter to time and one-half (1 1/2) over an eight (8) hour day is completely without foundation. Sick days, along with vacation days, holidays, etc., paid time off has always been recognized as time worked.

The Employer desires maintenance of the current City practice and the existing collective bargaining agreement, which provide time and one-half only for hours worked in excess of forty (40) per week. It asserts the language and practice had been consistently applied, so excused sick days have not been counted for computation of the forty (40) hours per week to determine qualification for time and one-half.

Discussion:

At one time, a compromise offer was made by the City to pay time and one half over eight (8) hours in one day or forty (40) in one week on the condition that excused sick time would no longer be used to compute these totals.

The forty hour work week has long been recognized. A portion of the problem here is the employer's proclivity to schedule weekend work, and week day work in excess of

eight hours, after an employee takes a sick or leave day in a week. The gives the employer the benefit of "overtime" from the employee, and creates an extra burden on the employee without a corresponding benefit. Such a practice acts in indirect derogation of the employee's contractual privilege to take time off, for personal leave or due to legitimate illness.

The plain fact, however, is that this inequity has been part of the practice for this employer and these employees for many years. The fact finder notes in passing, however, that the employer's contention on the alleged uniformity of the practice on sick time seems to run contrary to Article XVII, Section 1 (a) of the prior labor agreement, which makes excused absence, including sick time, holiday pay and vacation pay count against 40 hours

Accordingly, the fact finder recommends a change which will redress the most common abuse of this situation, week day overtime in excess of eight hours. While this does not satisfy all of the union's problems, it is an attempt to compromise with the employer's legitimate expectations. Further redress should wait until the next negotiation. Therefore, the fact finder recommends that the employees be paid overtime after eight hours worked in one day and after 40 hours worked in one week. In this context, "worked" means time worked on the job. To that extent the union's request for total recognition of sick days toward overtime is denied.

5. **DENTAL PLAN**

The Union proposes equal treatment in dental coverage. It asserts the employees of this City pay taxes to this City, and ought not to be the victim of discrimination against hourly workers. These workers should be granted the same benefits provided for the privileged administration.

The Employer states that the Dental Plan presently offered to bargaining unit members is substantial and that the difference in coverage between the current plan and the Union's requested upgrade is not significant. The Employer's projected cost for the requested upgrade is some 26%. The city feels there is no justification for a finding that these plans should be identical (See Exhibit 119).

Discussion:

The union's goal of equality with other bargaining units is a reasonable request. Other bargaining units are getting substantially similar plans, but there may be some material differences. If, in fact, this bargaining unit is getting less than the clerical unit, it ought to get the same benefit.

On the other hand, there is no requirement that the employees get exactly the same thing as the supervision.

6. **SICK AND ACCIDENT**

The Union charges that the Sick and Accident Plan follows the same "discriminatory plan" as dental benefits. It alleges that the hourly workers receive a Sick and

Accident program "totally inadequate for our time." For an employee to be out because of an accident is trauma enough without the additional burden of loss of pay. "The City somehow believes that the cost of groceries must be less for hourly employees than for salaried administrators."

The Employer admits that the level of sick leave paid to supervisors and administrators is superior to hourly employees. It denies any invidious intent, since there is a justification for a higher rate of pay for administrators and supervisors, there is a corresponding need for a differential in the amount of sick leave received by sick employees who are on authorized sick leaves.

Discussion:

It would cost the City 18% more to provide the level of coverage requested compared to that currently provided.

More importantly, sickness and accident benefits should not be raised too high relative to the wages being earned by an employee. When the ratio becomes too close, there is a substantial incentive for employees to stay home. Obviously, most employees are well motivated and honest. Nevertheless, the point of incomes and benefits is to pay for work. Sickness is an unavoidable incident of living, which should not be devastating to the employee. However, it should not be more advantageous than working.

The level of coverage, i.e., number of dollars, can legitimately be different between two classifications.

No employee should receive more than 2/3 of their take home, since there should not be too many incentives to take excess time off. On the other hand, 2/3 of take home is a normal benefit paid by insurance companies. The employees should, of course, be able to take their earned sick leave.

The record, however, is unclear as to the exact level of benefits provided by the city to other employee groups. Depending upon that situation, the fact finder's recommendation should be limited to the maximum provided to any other employee group.

7. SAFETY SHOES

The Union notes that rising costs make the current allowance inadequate. Safety shoes are needed and required for these employees. They help prevent costly accidents. However, these shoes must take great abuse, and current costs have risen to above $100 for good shoes. The employees request $90, and increase of $15. The employer's offer of a $5 increase over the span of three (3) years hardly covers the sales tax.

The Employer notes the current practice is to provide up to $75.00 per purchase, and has proposed increasing that amount to $80.00. While the Union has alleged in these proceedings that the shoes desired by many of the employees exceed $90.00 per pair, nowhere did it provide evidence of the actual cost safety shoes. Even if such evidence existed, the Employer believes that the increased level of up to $80.00 per pair more than meets the safety

shoe requirement by substantially paying for most, if not all of the cost.

Discussion:

Nowhere is there a requirement that an employer pick up the cost of shoes for an employee.

That is equally true of such other benefits as "gun allowance" for police and "food allowance" for fire fighters. These are all creations of contracts.

Nevertheless, these employees are accorded the benefit. Their needs for certain shoes are tied to the special demands of the job. It would appear that the costs have risen during the last contract term, and the Union's demand makes economic sense.

8. PREMIUM PAY SHIFT HOURS

The Union states one employee assigned to work at the City Hall with a shift starting at 11:00 a.m., is denied p.m. shift premium because of his starting time. The Union asks that the employee be paid for hours of his shift: afternoon shift premium for only those hours of work between 1:00 p.m. and 12:00 a.m. In this case, the employee would be paid six (6) hours of afternoon premium pay. As he works these hours, along with other employees, he is paid $.20 per hour less than employees who start at 1:00 p.m.

The Employer requests maintenance of the status quo. "To accept the Union's argument that one bargaining unit employee should receive a shift for all hours worked after 1:00 p.m. would be to justify all bargaining unit

employees working for the City to receive the same shift premium for hours worked after 1:00 p.m." The city says that the current contract language on this matter is fair and equitable and that no evidence has been provided by the Union that any change is called for, needed, or justified.

Discussion:

The existing collective bargaining agreement with this bargaining unit provides for premium pay if the regular starting time for an employee falls between 1:00 p.m. and 12:01 a.m. The Union requests a change for an employee who starts work at approximately 11:00 a.m. The fact finder understands that under the current labor agreement, it is the starting time of the employee's shift that controls whether or not an employee receives this form of premium. The affected employee has worked similar hours since his hire some 10 years ago and has never received, or been given reason to expect, any such shift premium pay.

A line must be drawn somewhere. It has been there a long time, and this was the system in place. The burden of proof was on the party seeking the contractual change. The fact finder believes the union failed to demonstrate that a change is warranted. To paraphrase John L. Lewis, 'If it ain't broke, don't fix it.'

III. CONCLUSION AND RECOMMENDATION

Notwithstanding the problems involved in the negotiations, it is apparent that both sides have made a good faith effort to resolve their inconsistent needs.

It appears that many changes have been made from the existing labor agreement by mutual consent. In these Fact-Finding proceedings the fact finder has not had to address the many compromises initialed by both the parties in an effort to reach an agreement. For example, the city was willing to provide an additional holiday, provide additional vacation time, provide two personal leave days, or provide compensation for jury duty.

The following is offered as a recommendation for settlement in its entirety. It is designed to take into consideration each of the parties needs, rather than its wishes. Disruption of the package destroys the balance of needs we are attempting to reconcile.

A. Tentative agreements:

It is recommended that all previously settled issues be incorporated into the Contract and given retroactive effect, except as the settlements specified otherwise.

B. Wages; Key Class #10; Contract Duration and Term:

It must be noted that if a three year contract is to be negotiated, the contract term is more than half over. The natural consequence is that the union and the employer will be back at the bargaining table next year. Constant negotiation and strife is destructive of the bargaining relationship. Accordingly, it is the fact finder's recommendation that the parties consider a four year agreement that reconciles their opposing interests and protects their mutual need for stability in the relationship.

It is recommended that the union's request for heavy equipment pay be denied.

It is recommended that the parties settle on a four year contract, with an increase of 50 cents per hour in the first year, 4% in the second year, 4% in the third year, and 4% in the 4th. The contract will commence at the end of the last collective bargaining agreement.

The fact finder specifically recommends to the parties that they consider dividing the contract into two separate terms, so as to avoid any conflict with provisions of the Public Employee Relations Act, particularly as it relates to contract bar.

C. Premium pay overtime:

The fact finder recommends that the employees be paid over 8 worked in one day and over 40 hours worked in one week. In this context, "worked" means time worked on the job. To that extent the union's request for total recognition of sick days toward overtime is denied.

D. Dental benefits:

If in fact this bargaining unit is getting less than the clerical unit, it ought to get the same benefit. It ought not get the same benefit as supervision.

E. Sickness and accident coverage:

The level of coverage should be increased so employees will take their earned sick leave then should be entitled to receive 2/3 of their regular take home pay.

Given the lack of clarity as to the exact level of benefits provided by the city to other employee groups. Depending upon that situation, the fact finder's recommendation is limited to the maximum provided to any other employee group.

F. Safety shoes:

Safety shoe reimbursement should be increased to $90.00.

G. Premium pay shift hours:

It is recommended that the union's demand be denied.

On the issues presented, reasonable persons could differ as to the outcome. However, there are real needs on both sides that need to be protected. The administration must be able to run the city and its employees deserve financial and job security. The interests of the employer and the union have been balanced herein. They have been weighed with a long term view of the best interests of the community and the bargaining unit.

Obviously, these are recommendations only. The parties can choose to ignore them and resort to economic and legal warfare if they choose. It is gently urged, however, that these are rational and reasonable solutions to the problems which confront them. It is a compromise with reality. It is a basis upon which to work out solutions to their own problems, without winners and losers, and to

restore their relationship upon a new foundation. The public would be well served if this advice was heeded.

STANLEY T. DOBRY, Fact Finder

Dated: February 28, 1989 at the
City of Detroit, Michigan