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FACT FINDING REPORT

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

March 20, 2002

SAGINAW COUNTY COMMUNITY
MENTAL HEALTH AUTHORITY
(The Authority)

-and-

Case No. L01 H-3019

SERVICE EMPLOYEES INTERNATIONAL
UNION
LOCAL 517 M
(SEIU)

Saginaw County had a Department of Mental Health for some years. It created a separate Saginaw County Community Mental Health Authority (hereafter, the Authority) in 1997. The Authority is a completely independent public employer no longer associated with the County. It provides mental health services to County residents. More than 120 of its employees are part of a combined office, technical and professional bargaining unit represented by SEIU. That unit includes people with diverse skills - custodians, clerks, occupational therapists, mental health therapists, mental health educators, client service managers, and so on.

The first collective bargaining agreement (CBA) between the parties ran from January 1, 1996 through October 1, 1999. That contract was later extended to October 1, 2000. Negotiations for a successor CBA began in August 2000 and continued until late June 2001 without success. The Authority asked MERC to appoint a fact-finder and MERC did so. SEIU believed the Authority had not bargained in good faith and filed an unfair labor practice charge with MERC. A hearing on that charge was scheduled to begin in early March 2002.

The parties reached tentative agreement on many matters. But there remain a large number of open issues. In order to expedite the handling of this fact-finding case, the parties agreed that there would be no formal hearing. Instead, they provided lengthy submissions containing their arguments and various supporting materials and exhibits. The Authority was represented by Robert A. Kendrick, Attorney (Braun Kendrick & Finkbeiner); SEIU was represented by Marianne Woods, Labor Relations Specialist, Local 517M.

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To begin with, much of SEIU's post-hearing brief dealt with its allegation that the Authority had failed to bargain in good faith. That claim, however, is a proper subject for MERC itself to decide. And indeed a hearing is about to begin, or has already begun, before MERC on this very issue. As a fact-finder, it is not my function to address an unfair labor practice charge. Such cases can be dealt with only through a formal hearing in which the bargaining history is carefully described and evaluated. I shall therefore limit my report to the various issues the parties were unable to resolve in their lengthy bargaining.

Article II - Management Rights

The present "Management Rights" clause states that management has the "sole right to manage its affairs..." subject of course to the terms of the CBA. It lists in general terms certain examples of this "right", for instance, "plan, direct, and control its operations"; "determine the location of its facilities"; "decide the business...hours"; and so on. The Authority proposes a far more detailed list of "rights" including a final statement that management may "exercise its rights...without engaging in any further negotiations..." SEIU accepts much of the Authority's proposed language but objects strongly to some broad descriptions or to the very existence of certain "rights".

It appears the parties are in agreement with respect to Sections 1A, B, C, E, F, I, and J of the Authority's proposal.[1]

The first disagreement relates to Section 1D. The Authority seeks language recognizing a right to "decide the type of work to be performed by classification of employee, including job descriptions...and...establish minimum required qualifications for...classifications". SEIU disapproves of such language. Clearly, the determination of the work content of a given classification is a traditional management function. Once that determination is made, a job description often follows. And changes in work content, along with a statement of reasonable minimum qualifications, are precisely the kind of management actions necessary to the operation of an enterprise. I recommend that this Section 1D be adopted with the addition of the word "reasonable" before "minimum required qualifications".

Another disagreement relates to Section 1G of the Authority proposal. The Authority requests language recognizing a right to "assign bargaining unit work to management, administrative, or supervisor employees when deemed appropriate..." True, management possesses broad rights with respect to the assignment of work. The question of whether, or to what extent, supervision and others outside the bargaining unit may perform unit work is typically dealt with through a separate contract provision. Or, absent such a provision, the matter may be handled through possible implications drawn from the "recognition clause" or the existence of job classifications and job descriptions. Where, as is true here according to the Authority, excluded persons have customarily performed bargaining unit work because of the very nature of the workplace, they are ordinarily free to continue to do so. But all of these comments deal with contract interpretation. The "Management Rights" clause is simply not the appropriate place to resolve the issue of who can appropriately perform bargaining unit work.

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[1] My comparison was between SEIU's proposal of January 4, 2001 and the Authority's final proposal of June 22, 2001.

A minor disagreement exists regarding Section 1H. The Authority proposes language which acknowledges the right to "establish, change...work classifications and to determine reasonable wage rates for any new or changed classification ..." subject to the terms of the CBA. SEIU would remove the word "reasonable" before "wage rates" and add that the "wage rates for any new or changed classification..." be based "upon written agreement..." between the parties.

Obviously, once a new or changed classification is established, a wage rate must be attached to that classification. This subject is dealt with in detail in Article 9, Section 9.2 of the Authority's case. This proposal contains language which in effect has been part of the CBA for some years. That language contemplates the Authority setting the rate initially, SEIU having the opportunity to challenge the rate, the parties (assuming a challenge) negotiating over the rate, and SEIU filing a grievance if the rate cannot be agreed upon. Nothing in the evidence suggests that this arrangement has been unsatisfactory. Negotiation, and possible arbitration, of new rates is provided for. I recommend that any "Management Rights" language on this subject reflect the procedure found in Section 9.2.

A large disagreement exists regarding Section 1K. The Authority proposes language giving management the right to "subcontract any existing or new work" subject only to a 30-day notice requirement. SEIU objects.

This proposal goes well beyond the typical "Management Rights" clause because it deals with a subject which may, by implication, be covered by the terms of the CBA or by the very existence of the CBA. Whether management may subcontract existing work in any and all circumstances is a matter traditionally left to the contract interpretation process. It is the type of substantive matter which should not be inserted in the CBA through a "Management Rights" clause. I recommend that the Authority withdraw this proposal as well as the final paragraph of its proposed dealing with "negotiations with the Union".

Article 3 - Non-Discrimination

Article 3, Section 2a commits management "not [to] discriminate against any employee...because of age, race, sex, gender preference, color, religion..." The Authority proposes the deletion of this provision. It argues that because of a recent Michigan court decision, an arbitrator's ruling denying an employee's Section 2a grievance does not preclude that employee from filing a civil rights lawsuit.[2] It urges that because an arbitrator's ruling would not be "final and binding" in this situation, it is unfair to expose the Authority to the possibility of an employee obtaining "two bites of the apple". SEIU insists that the non-discrimination language be retained.

Nothing in the record suggests that the Authority has experienced this dual exposure - first arbitration and then litigation. There are, moreover, several reasons for employees to choose arbitration of discrimination claims. It is quicker and far cheaper. Employees should not be denied the opportunity to avail themselves of such an expeditious procedure. Had the non-discrimination clause been a substantial burden to the Authority in the past, perhaps an appropriate effort should be made to address the problem. But there is no evidence of such a burden. The fact is that the presence of such a non-discrimination clause is almost universal in CBAs notwithstanding the possibility of an unsuccessful grievant taking his case to the courts. I recommend that the Authority withdraw its proposal.

Article 5 - Seniority

Both sides have proposed large changes in the seniority clause although SEIU says it would be willing to continue in effect the present seniority language. Given the scope of the disagreement, it would be counter-productive to attempt to make recommendations on each and every point in question.

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[2] The court decision emphasized that the arbitrator's award would have precluded a lawsuit had the CBA expressly waived the employee's right to file a lawsuit in these circumstances.

I shall limit myself to what appear to be the principal issues in the hope that once they have been removed from the agenda, the parties will be able to successfully work through the thicket of small language differences.

As to filling vacancies and promotion, the criteria should be "ability" to perform the work of the vacant job as revealed through past "experience" relevant to such work and "education" where pertinent as would be the case regarding various professional, paraprofessional and technical jobs. The "overall work record", however, is an ambiguous concept. To the extent to which it refers to special work accomplishments, it might be helpful. But if the Authority is referring here to informal ratings or rankings by supervision or to past disciplinary action, I do not believe such matters ought to be part of the promotion system.

Where the job applicants are relatively equal from the standpoint of the relevant criteria, the most senior applicant should be awarded the vacancy. The determination of the applicant's qualifications, in applying a "relatively equal" test, is for supervision initially. However, a disappointed applicant should be allowed to protest that determination in the grievance procedure if he (she) believes it was clearly unreasonable. In other words, the Authority's proposal that management has "sole discretion" in these matters should not preclude a legitimate employee protest. Only if there are no qualified applicants should management be permitted to hire someone, "to appoint an external applicant". The fact that the latter person is better qualified should not allow management to overlook a qualified employee applicant.

A probationary period of 10 working days for the successful applicant is reasonable. That period may of course be extended by agreement between the employee and management. Should the employee fail to satisfactorily complete the probationary period, he (she) shall return to his former position without loss of seniority. But here too an employee may successfully challenge a disqualification if management's decision was clearly unreasonable. To this extent, the matter of disqualification cannot fairly be left to the "sole discretion" of management.

Management may transfer employees, within their job classifications, to a different location or program. But, in doing so, management should give due consideration to an employee's wishes consistent with his (her) seniority and ability. For example, a senior employee should be able to decline such a transfer if a junior employee in the same classification is capable of doing the work in the different location or program.

Management shall post vacancies in non-bargaining unit supervisory or administrative positions and should allow unit employees to apply in writing for a vacancy. Management shall consider such requests prior to hiring from outside. However, this selection process rests solely with the Authority and is not subject to any of the terms of the CBA.

Such contract language, in my view, will provide management with a large measure of discretion in filling vacancies and allow employees relief against any abuse of such discretion. Such contract language is consistent with the way vacancies and promotions are dealt with in a great many collective bargaining relationships. I recommend the parties adopt language which embraces these concepts.

As to layoffs, the parties seem to be in agreement. The "programs" should be expressly spelled out so that everyone understands exactly where they fit within the Authority structure. Presumably when the parties speak of layoff being effected by "program" and "job classification", the relevant seniority is length of service within the relevant classification. I recommend such language.

As to bumping rights, the proposals seem to be mirror images of what the parties suggested with respect to filling vacancies. My view would also be essentially the same as what I expressed with respect to layoffs. The criteria - ability, experience, and education - should be treated the same way. Management makes the initial decision regarding an employee's qualifications for th job into which he (she) wishes to bump. But the employee, denied a bump, is free to challenge supervision's determination that he (she) was not qualified. And if such determination was clearly

unreasonable, the employee will prevail. The employee has three working days, following notice of layoff, to claim a job classification of equal or lower pay. And Management has 10 working days to determine if the employee is sufficiently skilled to perform that job. If the employee decides not to stay with the bump job, he (she) shall be laid off. If the employee is removed by supervision, he (she) is entitled to one more bump. And if the employee bumps into a job classification other than his (her) current classification, he must be able to perform the duties of the bump job without additional training. I recommend such language.

As to demotions, the parties are in agreement except for the SEIU proposal that transfers from one job or classification "to fill a temporary vacancy" will be accomplished in such a way as to avoid a substantial increase in the workload of the position vacated by the transferred employee. The short answer to this request is that management determines an employee's workload and any change in the workload of a position vacated by a transferee cannot affect management's right to transfer. Workloads are not frozen. So long as employees are not subjected to an excessive workload, they cannot legitimately complain about occasional increases in workload. I recommend that SEIU withdraw this proposal.

Article 7 - Discipline

Both parties wish to delete the current discipline clause and substitute new language. Their proposals differ on two essential points. First, the parties agree on the steps involved in progressive discipline, namely, verbal warning, written warning, three-day suspension, and discharge. They agree also that these steps need not be strictly followed for a more serious offense calling for a more severe penalty. The Authority urges that in applying progressive discipline, it should be permitted to take into "consideration...any prior Work Rule...violations..." SEIU objects. It is well-established in arbitration that an employee's prior disciplinary record is relevant to the question of whether the penalty imposed by management is reasonable. The Authority's proposed language is consistent with that tradition and I recommend its adoption.

Second, the Authority asks that it be permitted to consider prior discipline within the preceding two-year period. SEIU agrees that the two-year limitation is proper for prior suspensions but urges a one-year limitation on prior warnings. I recommend adoption of the Authority's language.

Article 19 - No Strike/No Lockout

The current CBA has no "no strike/no lockout" clause. The Authority proposes that there be one. SEIU objects.

Such a clause simply tracks law in Michigan. Public employer CBAs often contain a "no strike/no lockout" provision. No persuasive reason for not including such language in the CBA has been given. I recommend its inclusion.

Article 20 - Term of Agreement

Absent any proposal from SEIU, I recommend inclusion of the Authority's proposed language.

Article 9 - Rates of Pay

The Authority has proposed:

- a wage freeze until Oct. 1, 2000
- effective, first full pay period after Oct. 1, 2001, a 1% increase
- effective, first ful pay period after October 1, 2002, a 4% increase

SEIU has proposed, for the same periods, increases of 2%, 2%, and 3%.

SEIU stated in its brief that it entered negotiations knowing that "only modest economic relief would be able to be achieved". That statement was no doubt prompted by the financial difficulties confronting the Authority. Those difficulties stem, in large part, from the much lower than average capitation fees received from Medicaid services.

Notwithstanding this problem, SEIU has been able to secure an average year-to-year wage increase of 2-3% between 1996 and 2000. The evidence does not establish that the wages of those in the SEIU bargaining unit are sub-par in relation to comparably skilled employees in Central Michigan. The one-year freeze sought by the Authority covers a period when cost-of-living increases had moderated dramatically. The 4 percent increase effective early October 2002 should more than make up for the wage restraint in the preceding two years. Given the record before me, I believe the Authority's wage offer was reasonable and I recommend its adoption.

There are other wage issues as well. First, the Authority urges that a contract provision be added to allow management "to develop, change, or delete any incentive plan(s), or to increase any wages, for any employees...and to pay additional monies pursuant to any such incentive plan(s)..." SEIU objects to any such arrangement.

I recommend that the Authority withdraw this proposal. An "incentive plan" would become a fundamental part of the wage structure. As such, it would be wrong to permit unilateral implementation of this wage supplement. Incentive plans can be helpful in encouraging greater employee effort and in rewarding skill and creativity. But given SEIU's understandable concern with wage equity and wage administration, an incentive plan should be initiated only through mutual agreement. There is presently no such mutual agreement.

Second, the Authority urges that it be given the option "not to implement" the 4% increase on October 1, 2002, and to "re-open" the CBA on such wages and benefits "as determined by the Employer". SEIU objects.

I recommend that the Authority withdraw this proposal. It poses a number of difficulties. To begin with, it gives only the Authority - not SEIU - the option to "re-open". Without the 4% increase proposed by the Authority for the final year, the recommended wage package would be inadequate. The package would not, over a three-year period, provide employees with protection of their real,

inflation-adjusted wages. At the very least, their real wages should at the end of the CBA be roughly equal to what such wages were at the start of the CBA.

As to the job classification language of Section 9.2, that matter has already been discussed earlier under Article 2, Section 1H. That discussion need not be repeated here. However, I recommend that the Section 9.2 procedure apply both to new classifications and changed classifications.

Article 11 - Paid Time Off & Holidays

Only one portion of this Article is in dispute, namely, Section 11.12. The Authority accepts the present language. SEIU seeks an additional paid holiday on an employee's birthday for those employees with four or more years of service.

I recommend SEIU withdraw this proposal. Article 11 currently provides for twelve paid holidays and four weeks or more of vacation/sick time through PTO for those with three or more years of continuous service. No further paid holidays seem appropriate at this time.

Article 14 - Healthcare & Insurance

The parties' proposals regarding Article 14 differ in many respects. My recommendations are limited to what would appear to be the principal disagreements.

As to health insurance, the dispute seems narrow indeed. The parties agree that the Authority must pay the premiums, subject to employee co-pays, for the health care program set forth in the Summary Plan Description presently in effect "or provide comparable coverage... The latter quoted words permit management to "shop" its health care coverage to different insurers in an attempt to find a lower cost for "comparable coverage". The parties agree to eliminate the last paragraph in the current Section 14.1. In its place, SEIU proposes the following sentence: "The benefit level of the health care program shall not be decreased for the duration of this [CBA]". The Authority objects.

I recommend that SEIU withdraw this proposal. The suggested "benefit level..." freeze is inconsistent with SEIU's stated willingness to allow management to find "comparable coverage". Such a freeze would prevent the kind of minor adjustments, up and down, which together could provide employees with "comparable coverage". Should SEIU establish that any future change in the health care program does not offer "comparable coverage", it can prevent such changes through the grievance procedure and arbitration.

As to health insurance for retirees, there seem to be two major disagreements. First, the Authority urges that any co-pay changes for employees - either health care premiums or prescription drugs - should apply as well to retirees. SEIU objects. The present CBA calls for retirees to pay a certain percentage of their health care premium depending upon their years of service at the time of retirement. For example, a retiree with 20 or more years of service pays 5% of his (her) premium. Some 87 percent of current employees have the PPO1 plan and also pay 5% of their premium. It is fair, in my opinion, to continue this rough comparability in premium co-pays. Any increase in the employee co-pay should be matched by an increase in the retiree co-pay. I so recommend.

Second, the Authority asks that employees hired after December 31, 2001, no longer be eligible for healthcare coverage upon retirement. SEIU disagrees and proposes that healthcare coverage be available to such retirees at their own expense. Nothing in the record suggests that this latter arrangement would impose any financial obligation upon the Authority. I recommend that the SEIU's proposal be accepted.

As to cost-sharing for employees and retirees, the current CBA provides for employees to pay 5% or 10%, depending on the health plan chosen, of the Authority's premium cost. The Authority proposes to leave that formula in place and to add another formula which would require employees to pay further premium costs in the event that year-to-year increases in such premium costs exceed 15%. For instance, for the health plan year beginning June 1, 2001, any increase in the Authority's premium cost beyond

15% in that year would be borne by employees and retirees. SEIU proposes a different change, limiting the premium increase for employees to 2% for any year in which the Authority's premium cost rose 5% or more. It would also place a cap on the maximum employee contribution.

During the first year of the new CBA, the increase in the Authority's health premium cost was less than 15%. The impact of its proposal in the future is pure speculation. It is true that health care premiums have been rising substantially in recent years. It is true too that employees and retirees presently share the burden of these rising premiums through their co-pays of 5% or more. The problem might become severe but the Authority has not as yet experienced year-to-year increases of more than 15%. Should that happen, should these costs become unduly burdensome, the Authority should have the right to re-open the CBA on this narrow point and attempt to negotiate a solution with SEIU. Should the parties at such time be unable to agree, this limited question should be subject to interest arbitration at the request of the Authority. I recommend no change in the present cost-sharing structure for health care premiums, notwithstanding SEIU's sympathetic stance, but I also recommend some contract language to deal with the contingency described above.

There is still another dispute about the co-pay for prescription drugs. Presently, employees and retirees have no co-pay whatever for drug purchases. The Authority urges a prescription co-pay, applicable to employees and retirees, of $10 for a generic drug and $20 for a brand name drug. SEIU is prepared to agree to a co-pay, applicable only to employees, of $5 for a generic drug and $10 for a brand name drug.

The need for some kind of co-pay for prescription drugs is not in dispute. The only question is the amount of the co-pay. I recommend the $10-$20 Authority proposal. I recommend too that retirees should be subject to co-pays for drugs just as they are for health insurance premiums. But, given the greater need for drugs among retirees, I recommend their co-pay be set at $5-$10.

Article 18 - Retirement Plan

SEIU notes that employees 55 years of age with 20 years of service are currently eligible for full retirement. It proposes that employees 50 years of age with 25 years of service also be eligible for full retirement. The Authority disagrees.

Absent evidence as to the practical and financial impact of this proposal on the Authority, I recommend that SEIU withdraw its proposal and that the parties develop detailed information on this matter and then discuss it further.

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My recommendations are found in the above report. In all other respects, the parties appear to be in agreement or their differences are relatively minor in nature.

Richard Mittenthal
Fact Finder