REPORT AND RECOMMENDATIONS

STATE OF MICHIGAN
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the matter of Fact-Finding Involving

GENESEE COUNTY ROAD COMMISSION

and

MICHIGAN AFSCME #496-04
MERC CASE NO. L93-4008

Fact-Finder: Jack Stieber

For the Employer: Michael Kluck, Esq.

For the Union: Diane Rigotti

Genesee County Road Commission

Background

The undersigned was appointed by the Michigan Employment Relations Commission on April 25, 1994, to serve as Fact-Finder and to prepare a Report and Recommendations with respect to matters in disagreement between the parties. A pre-hearing conference was held on May 31, 1994, and hearings were held on August 10 and 11, 1994. The Employer arranged for a transcript to be taken of the hearings and a copy was furnished to the Fact-Finder.

Enclosed is a draft of my report and recommendations. I am available to meet with the parties to discuss the recommendations or to assist them to reach agreement if they wish to do so.

If I do not hear from the parties by October 21, 1994, the enclosed will be submitted as my final report and recommendations.*

Both parties submitted exhibits and supporting documents in support of their respective positions. The transcript comprised 324 pages. The following issues, in whole or in part, were stipulated as being in dispute when the hearings were convened.

Article	Title
III	Management Rights
VI	Grievance Procedure
VII	Arbitration
VIII	Disciplinary Procedures
IX	Seniority
X	Layoff and Recall
XI	Vacancies, Promotions and Transfers
XV	Wages and Rates
XVII	Holiday Pay
XIX	Hospitalization Insurance
XXI	General
XXII	Retirement
New	Subcontracting
	Wages and Contract Duration

*The parties did not respond as of October 31, 1994.

ARTICLE III - MANAGEMENT RIGHTS

Section 1 (d);

Employer Proposes: Eliminate the words "for just cause" from provision which allows Employer to discipline employees "for just cause."

Union Response: No objection provided that the "just cause" standard appears in Article VIII - DISCIPLINARY PROCEDURES (Tr. I-15).**

Recommendation: The parties may wish to consider the following language in Section 1:

> " . . . Specifically, the Employer retains the inherent right to (d) discipline employees, including suspension from work and discharge for just cause, except that probationary employees may be disciplined at the sole discretion of management without recourse to the grievance procedure."

By using this or similar language, the parties would avoid the use of repetitive language in Article VIII - DISCIPLINARY PROCEDURES to make it clear that the "just cause" standard does not apply to probationary employees.

**Tr. I refers to Transcript of August 10, 1994 Hearing.
Tr. II refers to Transcript of August 11, 1994 Hearing.

ARTICLE VI - GRIEVANCE PROCEDURE

Section 5, Step 2:

Union Proposes: Change the requirement that grievances not settled in Step 1 shall be reduced to writing "within two (2) working days" to "within five (5) working days." Increase the Division Head's required answer from two (2) to five (5) working days.

The Union justification for this proposal is that, because employees work in different buildings and in the field, it is often difficult to reduce grievances to writing within 2 working days. The Employer also sometimes has had difficulty in responding within 2 working days, according to the Union (Tr. I-20-21).

Employer Response: Retain current language.

Recommendation: Grant the Union proposal.

Of the four County Road Commission Agreements included in Employer Exhibit 7, three provide for five or more work days for submission of a grievance in writing. Macomb County allows 15 working days; Oakland County allows 5 working days; Saginaw County allows 6 working days; Kent County allows 48 hours.

ARTICLE VI - GRIEVANCE PROCEDURE

Section 5, Step 3:

Union Proposes: Substitute "not less than five (5) working days prior to said meeting" for "within five (5) working days of said meeting."

The Union justification for this proposal is that the current language would permit management to give notice to the Union of a meeting between the Union Committee and the Employer's Appeal Committee the day before the meeting is to take place. This was not the intention of the parties.

Employer Response: Retain current language.

In practice meetings have always been scheduled by mutual agreement.

Recommendation: Discussion of this provision revealed several problems. (1) It is not clear whether the words "arrange a meeting" means to start discussing the scheduling of a meeting or actually setting a meeting date. (2) The current provision appears to allow the Personnel Director to schedule a meeting without consulting the Union, although this was not intended by the parties and does not occur in practice. (3) It is not clear who the Personnel Director will contact in order to schedule a meeting. (4) The existing language allows the

Union to be notified of a meeting in less than 5 working days (Tr. I-34-71).

It is suggested that the parties revise Step 3 along the following lines:

> "An appeal may be taken from a decision of a Division Head to the Employer's Appeal Committee within five (5) working days of the answer given as a result of Step 2. Such appeal shall be in writing signed by the Chapter Chairperson and shall be delivered to the Personnel Director. The Personnel Director and the Union Chapter Chairperson shall meet within ten (10) working days to schedule a meeting to be held between the Union Committee and the Employer's Appeal Committee at a mutually acceptable date. The Appeal Committee shall render its decision in writing within five (5) working days after the meeting."

ARTICLE VII - ARBITRATION

Section 5:

Employer Proposal: Modify to provide that the loser pay the fees and expenses of the arbitrator rather than dividing such payments equally between the parties.

The Employer argues that, since the Union is almost always the moving party in arbitration, it should bear the cost if it does not prevail. Similarly, if the Union prevails the Employer should be required to pay the cost of arbitration.

Union Response: Retain the current provision.

The Union notes that other parties in the county do not have a loser pay provision in their contracts. Also, arbitration sometimes results in a split decision making it difficult to decide which party is the loser and which the winner.

Recommendation: Retain the current provision.

Sharing of arbitration costs is the overwhelming arrangement in collective bargaining agreements in the United States.

ARTICLE VII - ARBITRATION

Section 7:

Employer Proposal: Modify the "sixty (60) calendar days" of retroactivity on awards involving wages to "ten (10) scheduled work days prior to the date the grievance was submitted in writing."

The Employer argues that this change would be consistent with the requirement that a grievance must be submitted "within ten (10) scheduled working days of when the occurrence became known or should have become known to the employee."

Union Response: Retain current language.

As an example of a situation in which more than 10 days retroactivity on wages would be justified, the Union submits the case in which an employee who was transferred or promoted and "for one reason or another was not given the correct salary rate in the new position." (Tr. I-79) The employee may not be aware that he or she was being paid at the incorrect rate.

Recommendation: Retain current provision.

In cases where there has been a "continuing violation" involving wages, which an employee did not discover through no fault of his or her own until more than ten (10) days after

the violation has occurred, retroactivity beyond the ten (10) day period may be justified. (See Elkouri and Elkouri, How Arbitration Works, 4th edition, p. 197.) The parties have placed a limit on such retroactivity of sixty (60) days.

ARTICLE VIII - DISCIPLINARY PROCEDURES

Employer Proposes: That it be made clear that this Article applies only to employees with seniority. This would be done by adding the words "employee with seniority" in each section of the Article.

Union Response: No objection to the Employer proposal.

Recommendation: In order to avoid repeating the words "employee with seniority" in each Section, the parties might consider adding an introductory Section which would say that this Article applies only to employees with seniority. Taken together with the Recommendation on Article III - MANAGEMENT RIGHTS, this would avoid the repetition in the various sections of Article VIII in the Employer Proposal.

Section 2:

Employer Proposes: That the current prohibition on counting any penalty more than one (1) year old in determining the penalty for the next offense be modified as follows:

> "Oral counseling and written reprimands over one (1) year old will not be used in assessing a penalty for a current offense. Discipline involving loss of pay may be considered in assessing discipline on a current charge for up to

forty-eight (48) months from the date such discipline was imposed."

Union Response: Retain current language.

Recommendation: Retain the 12 month limit for oral counseling. Provide that a 24 month limit be applied in cases of disciplinary suspension involving loss of pay of one day or more.

There is merit in distinguishing between oral counseling and suspensions involving loss of pay. But 48 months is much too long a period to consider in assessing the penalty for a current charge. None of the agreements with other bargaining units in the Genesee County Road Commission allows consideration of any penalty beyond 12 months. According to Employer Exhibit 9, other County Road Commissions are divided on this issue. Ingham County allows going back more than 12 months but does not indicate how far back; Kent County has a 12 month limit provided the employee has no prior infractions; Macomb County allows consideration of up to 24 months prior to a current penalty. Oakland, Saginaw and Washtenaw counties appear not to have any provision on this issue.

The Bullard-Plewicki statute, cited by the Employer, which applies a 48 month standard for sharing personnel records with third parties deals with an entirely different subject and is not relevant to this issue.

ARTICLE VIII - DISCIPLINARY PROCEDURES

Sections 4 and 5:

Employer Proposes: Eliminate current time limit of 3 working days for Employer to inform an employee of an alleged infraction and 5 working days after meeting with the employee to assess discipline.

The Employer argues that it may need more time to investigate a possible infraction and therefore it should not be tied to any specific time limit. With regard to assessing discipline, the Employer contends that an employee may be on vacation or otherwise unavailable. Therefore it should not be held to a specific time limit.

Union Response: Retain current language.

The Union argues that it would be unfair not to inform the employee within a reasonable period of time that he or she is being charged with committing an infraction, so that the employee may be in a position to prepare a defense.

Recommendation: Increase the time for informing an employee of an alleged infraction from 3 to 5 days (Section 4); retain 5 day limit on assessing discipline (Section 5).

The Genesee County contract with supervisors gives the employer "a reasonable time after completion of an investigation" to assess discipline. The 1993-96 contract

with the SEIU is identical with the AFSCME contract except that it allows 5 days for the Employer to inform an employee of an infraction. The previous SEIU contract provided for a 3 day period for the Employer to advise the employee of an infraction. Other County Board Commissions contain no language on this issue.

To allow the Employer unlimited time before advising an employee that he or she is believed to have committed an infraction could put the employee at a disadvantage in preparing a defense. An increase from 3 to 5 days, as was done in the SEIU agreement, would be reasonable.

The parties may wish to consider substituting the word "determines" for "learns." The phrase would then read "within five (5) working days of the day that the Employer determines that an infraction has occurred." This would allow for the Employer to investigate before determining whether an infraction has occurred.

The Employer contention that it may need more than 5 days to assess discipline is not persuasive. Section 5 provides for serving the discipline "either personally or by certified mail with a copy to the Union unit chairperson." This should cover any period that the employee is not accessible.

ARTICLE IX - SENIORITY

Section 1 (c):

Union Proposes: Delete provision that 90 day limit for employment of temporary employees does not apply to "special grant programs or traditional summer programs."

Employer Response: Retain current language.

Recommendation: Retain current provision.

The Union concern is "to prevent any Employer agency from having people employed here for longer than 90 days in an attempt to erode the bargaining unit or to replace existing members or positions." (Tr. I-143)

This concern appears to be dealt with in the final part of Section 1 (c) starting with ". . . it is the intent . . .," which says that employees hired in "special grant programs or traditional summer programs" . . . may not be used "for the purpose of eroding the bargaining unit on a permanent basis."

ARTICLE IX - SENIORITY

Section 2:

Union Proposes: Delete the second sentence: "Seniority for lay off and recall purposes shall be on a classification basis within the bargaining unit."

Employer Response: Retain current provision.

Recommendation: The Union proposal must be considered together with its proposal on Article X - LAYOFF AND RECALL, where it proposes deleting the second sentence of Section 2 a: "Employees will be laid off according to seniority within classification."

The discussion centered on the situation in which the Employer decides to lay off an employee within a classification which exists in two divisions e.g., Engineering Aide II.

It is clear from the first sentence of Article X, Section 2 a, that the Employer makes the determination of the classification to be reduced within the affected division(s). The second sentence provides that "Employees will be laid off according to seniority within classification." Article IX - SENIORITY, Section 2 provides that "Seniority for layoff and

recall purposes shall be on a classification basis within the bargaining unit."

The Employer interprets these provisions as follows: "We look at the affected division. We then take the least person in grade in that division and lay that person off. Now, that person may have bumping rights elsewhere, but we don't retain the person with the least amount of in-grade service . . . for layoff purposes." (Tr. I-165-166)

The Union agrees that this has been the process followed by the Employer in effecting layoffs. It wants to change the process so that if there is an Engineering Aide II in another division than the one in which the layoff is to occur, who has less bargaining unit seniority than the Engineering Aide II in the division where the layoff is to occur, the lower seniority Engineering Aide II should be laid off.

The Employer response is: "We're saying at the time of layoff, we want those that have been in that class the longest, and we want to move out those that have been in that class the least in that particular department. It creates a less amount of disruption. We then retain greater historic longevity ad knowledge of the department and the division and the class by doing that." (Tr. I-170-171)

The Employer position is a more logical way to approach the issue of layoff. (Recall was not discussed.) But the current contract language is not clear on the manner in which layoffs are to be processed. Nor would the Union proposals

lead to less confusion. The parties should consider modifying the current language to make it clear that, in layoffs, classification seniority within division will be followed. The current language is clear that total bargaining unit seniority shall govern in bumping.

ARTICLE X - LAYOFF AND RECALL

Section 2 a: Discussed under Article IX - SENIORITY.

Section 5:

Employer Proposes: Reduce benefits, except sick and accident, to remain in effect for one (1) month rather than three (3) months following the end of the month in which the layoff occurred as in the current agreement.

Union Response: Retain current provision.

Recommendation: Retain current provision.

Other County Road Commission agreements provide for 3 months in Ingham and to the end of the current month in Washtenaw. Macomb, Oakland and Saginaw have no provision on this issue (Employer Ex. 11).

Given the current national controversy over health care and the problem of uninsured persons, it would be inappropriate to reduce benefits at this time.

ARTICLE XI - VACANCIES, PROMOTIONS AND TRANSFERS

Employer Proposal: Replace the current Article with an entirely new article.

The Employer states that its purpose is "to remove the ambiguities from this article and make it simply a much more understandable and workable article within the contract." (Tr. II-5)

Union Response: Retain current Article XI.

The Union raised a number of questions regarding changes and omissions in the Employer proposal as compared with the current contract. The Employer did not agree with the Union position on these matters (Tr. II-13-18).

Recommendation: Retain current Article XI.

A major rewriting of this provision of the Contract as proposed by the Employer should be accomplished by negotiations rather than through Fact Finding.

ARTICLE XV - WAGES AND RATES

Section 1:

Employer Proposes: Delete.

The Employer contends that under MANAGEMENT RIGHTS - Article IV, it has the authority unilaterally to develop job descriptions and that this is not a negotiable matter (Tr. II-43).

Union Response: Retain Section 1: " . . . until the Union and the Employer reach written agreement regarding the content and salary grade level of all bargaining unit job descriptions. Such agreement shall also contain the procedure to be used to change the aforementioned job descriptions and salary grade levels.

"Upon such written agreement, the language contained in Article XV, Section 1, will be declared void." (Employer Ex. 14)

The Union argues that the job descriptions referred to on p. 56 of the current agreement are negotiable (Tr. II-43).

Recommendation: Retain Section 1 per the Union proposal.

Page 56 of the current contract states: "The Employer will provide updated job descriptions as soon as possible, but no later than November 1, 1992."

When the parties agreed to this statement, they did not remove Section 1 of Article XV, Section 1, which states that the 1976 Study " . . . which has been adopted by the Employer and ratified by the Union and the Employer is incorporated in this Agreement." The reference to "updated job descriptions" on p. 56 must refer to the job descriptions contained in the 1976 Study. Furthermore, the Management Rights Article does not specifically include job descriptions in its enumeration of rights reserved to the Employer. Therefore, the job descriptions developed by the Employer, are subject to negotiation.

ARTICLE XVII - HOLIDAY PAY

Section 1 a:

Union Proposes: Add Martin Luther King's birthday as a new holiday.

Employer Response: Retain current provision.

Recommendation: Retain current provision.

If, however, the Union wishes to substitute Martin Luther King's birthday for an existing holiday, this would be acceptable.

While there is merit in having Dr. King's birthday declared a Holiday, it would result in the Genesee County Road Commission having 14 paid holidays which is more than any of the County Road Commissions cited in Employer Exhibit 17. Even the Union Exhibit on Holidays shows that in agreements having Dr. King's birthday as a Holiday, only Genesee County Community Mental Health Services, Genesee County Courts, and Genesee County Sheriff's Department have more than 13 paid Holidays. Five other agreements cited by the Union, including Wayne County, have 13 or fewer paid Holidays including Dr. King's birthday.

ARTICLE XIX - HOSPITALIZATION INSURANCE

Employer Proposes:

1. Increase prescription co-pay from $3 to $5.
2. Change the base Blue Cross Blue Shield Plan from MVF-2 to BC-BS Preferred Provider Plan.
3. Employer to have right to substitute carriers or become self-insured provided the coverage is equivalent.
4. Retirees and dependents will be covered under the above plan "to the extent permitted by said plan."

Union Response: Retain present plan.

Recommendation: The Fact-Finder is inclined favorably toward the Employer's wish to reduce health care costs. However, changing basic plans is too important to be instituted without consultation with the Union. The two plans involved in the change were not put into evidence and there was no evidence introduced regarding the extent of discussion with the Union regarding the major changes proposed by the Employer.

The increase of co-pay for prescriptions from $3 to $5 seems reasonable and is in line with most other Road Commissions and other Genesee County contracts. However, the Employer proposal does not appear to provide for reimbursement for deductible costs in excess of $50 for one person and $100

for 2 or more persons as in the current contract. What is the Employer proposal on this? Also, the coverage of retired employees is not spelled out e.g., Will their co-pay, presently $2, be increased? What does the phrase "to the extent permitted by said plan" mean for retired employees?

These and other questions need to be elucidated for a full understanding of the Employer proposal. Furthermore, the Union's objections need to be spelled out rather than merely stating a blanket preference for the current agreement on health care. The parties are urged to negotiate further on the issue of health care.

ARTICLE XXI - GENERAL

Section 6:

Employer Proposes: Delete "or working conditions" from two places where it occurs in this Section. The Employer would continue to negotiate over the rate of a new classification.

The Employer argues that each and every time a new class is created by the employer, "we do not wish to sit down and individually negotiate all of the other working conditions that are the topic of collective bargaining for a large unit." (Tr. II-63)

Union Response: Retain current language.

The Union contends that it is obligated to "provide meaningful union input in the establishment of working conditions." (Tr. II-66)

Recommendation: Add "peculiar to the new classification" at the end of Section 6.

The Employer has a legitimate concern that it should not have to revisit working conditions that are uniformly applicable to the entire bargaining unit every time a new classification is established. By adding the words "peculiar to the new classification," this concern should be alleviated.

ARTICLE XXI - GENERAL

Section 5:

Union Proposes: Add "Engineering Aides and Stock Clerks shall be reimbursed up to one hundred dollars ($100.00) per twelve (12) month period for the purchase of approved safety boots."

The Union contends that Engineering Aides and Stock Clerks are required to wear construction soled boots by supervisors and have to purchase such boots (Tr. II-75). The Employer denies that there is such a requirement.

Employer Response: Opposes this addition.

It is the Employer's position that it is obligated to provide "certified safety equipment" which is required by law. Safety boots do not fit this requirement.

Recommendation: Add a new subsection (e) to Section 5: "If employees are required by supervisors to wear safety boots, the Employer shall provide such boots or shall reimburse employees up to $100 for purchase of such boots."

The Fact-Finder considers that supervisors represent management. Therefore, if a supervisor requires that safety boots be worn on particular jobs, the Employer should provide them, as it does for other safety equipment. If, however, supervisors do not require that employees wear safety boots,

there is no obligation that the Employer provide this equipment or reimburse employees for purchase of such equipment.

ARTICLE XXII - RETIREMENT

Section 1 a; c and f:

Union Proposes: In Section 1 (a) and (c), the number of years required for retirement from 25 to 23; and in Section 1 (f), reduce the employee contribution from 6% to 4%.

Employer Response: Retain current provision.

The Employer provided evidence to support its contention that this Union was not being treated unfavorably compared with other Genesee County employers (Employer Ex. 21).

Recommendation: Retain current provision.

The Union did not provide any evidence regarding comparisons with other contracts.

GENERAL - SUBCONTRACTING

New Provision:

Union Proposes: A new provision: "The Employer agrees that no bargaining unit work or services performed or assigned to any member of the bargaining unit will be subcontracted, performed or conveyed, in whole or in part, to any other non-bargaining unit person(s) or vendor(s). Subcontracting shall not be used for any reason to replace, reduce hours of work, or to erode the bargaining unit."

Employer Response: Rejects the Union proposal.

Recommendation: A new Section 7, to be added to Article XXII: "Subcontracting shall not be used to replace bargaining unit employees, reduce hours of work, or to erode the bargaining unit."

Exhibits introduced by both the Employer and Union indicate that most County Road Commissions have subcontracting provisions. None, however, are as restrictive upon the Employer subcontracting work as the Union proposal. The Recommendation meets the Union concern that subcontracting not be used to replace employees, reduce hours of work or erode the bargaining unit without interfering with the Employer's right to subcontract for other legitimate reasons.

WAGES

Employer Proposes: $600 lump sum payment, not rolled into the base, payable the first payroll period after signing of the new Agreement or implementation of final offer, whichever is later; Pro-rated for employees with less than one year of service.

$600 lump sum payment 12 months after the first payment; pro-rated on same basis as first lump sum payment.

3.0% across the board effective 24 months after signing of new agreement or implementation of final offer.

Union Proposal: $1200 signing bonus following ratification and Board approval.

1993 - No wage increase

1994 - 3.5% increase based on average wage, effective 9/1/94.

1995 - 3.5% increase based on average wage, effective 9/1/95.

Recommendation: $600 lump sum payment upon Union ratification and Board approval of agreement.

3.0% increase across the board, effective mid-way between November 1, 1993 (the date to which the current contract was extended) and the date that the new agreement is ratified by the Union and approved by the Board (e.g., If the Agreement is signed on November 1, 1994, this increase would be effective as of May 1, 1994). A 3.0% increase effective 24 months after the first 3.0% increase (which would be on or about May 1, 1996).

The recommended contract would expire on or about May 1, 1997 as compared with an expiration date of November 1, 1997 (assuming agreement is reached by that date) according to the Employer proposal (Tr. II-99); and January 1, 1996 according to the Union proposal (Tr. II-98).

Neither party achieves its full objective following this recommendation. It substitutes a 3.0% increase for the Employer proposal of a $600 lump sum 12 months after the first lump sum payment. The Union does not achieve its objective of receiving a $1200 lump sum payment upon the signing of the new agreement. Instead, it receives a 3.0% increase effective on or about May 1, 1994 (instead of 3.5% effective September 1, 1994), and another 3.0% increase effective about May 1, 1996, instead of the 3.5% increase effective September 1, 1995 which it sought. The percentage increases are also made across the board rather than based on the average wage of bargaining unit members.

By making the first 3.0% increase effective mid-way between the extended expiration date of the current agreement and the date that a new agreement is reached neither party gains from extending negotiations over a new agreement.

October 31, 1994
Dated

Jack Stieber
Fact-Finder