PUBLIC ACT 312 ARBITRATION

JOHN H. SHEPHERD, CHAIRMAN

In the Matter of:

CLINTON COUNTY and
CLINTON COUNTY SHERIFF,

Employer,

-and-

POLICE OFFICERS ASSOCIATION
OF MICHIGAN,

Union.

Clinton, County of

OPINION AND AWARD OF IMPARTIAL ARBITRATOR

INTRODUCTION

The introductory factual background of this dispute is adequately stated in the Brief of Employer pages 1, 2 and the first 11 lines of page 3, as well as the Brief of the Union page 1. These introductory facts will not be repeated herein.

THE ACT 312 FACTORS

Section 9 of Act 312 sets out the factors upon which the Arbitration Panel shall base its findings to the extent that such factors are applicable to a particular case. Since the statute uses the word "as applicable", the arbitrator assumes that not all factors need be given equal weight and some factors may not be given any weight at all, particularly if the parties chose not to submit significant evidence on any given factor. Some general comments on the factors as applicable to this case will be made below. Thereafter, to the extent that a factor is applicable to a specific issue, further comments will be made in the body on this Opinion.

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"(a) The lawful authority of the employer."

No issue has been raised as to the significance of this factor and it is assumed not to be applicable in this case.

"(b) Stipulations of the parties."

The parties have stipulated to the existing contract and to some facts which may have minor significance to some of the issues. Basically, stipulations of the parties are not of any great significance in this case.

"(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs."

The Employer has raised the interests and welfare of the public in its Brief but little, if any, evidence appears in the record on this issue. There has been no argument made that the public interests and welfare would be substantially harmed by the adoption of any last and best offer submitted herein. The financial ability of the County has not been significantly commented upon by either party. There has been no argument that the County does not have the funds to pay the demand of the Union, nor has the Union claimed that the County would suffer no detriment at all by paying its demands. The wages to be paid to any bargaining unit would simply result in a shifting of priorities within the County in the event that the County finds itself faced with limited funds. In any event, the record in this case does not demonstrate any significant issue on this subject. It may very well be that budgetary requirements will require a reduction in force if larger wages are paid, but there has been no argument made that a reduction in force would have significant effects on the welfare of the public and certainly there has been no showing of the number of officers, if any, who would be laid off if the Union's wage proposal were adopted.

"(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

(i) In public employment in comparable communities.

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(ii) In private employment in comparable communities.

The record shows that Sheriff Department Supervisors recently received a 4% increase in salary plus the Employer agreed to pay the employee portion of retirement benefits amounting to an additional 4.5%. This is in comparison to the 9% requested by the Union in this case for the first year. The Employer has responded that the supervisors were a group of five employees who do not receive over-time and other County employees (i.e. non-police employees) received 6% in the first year of a recent contract and 4% in the second year. The arbitrator finds it difficult to compare any of the other employees to the deputies because of the difference in functions between deputies and supervisors as well as the difference in risk which exists between the job of a deputy sheriff and other employees who perform non-police functions. These comparisons cause as much confusion as enlightenment although the arbitrator believes that it appears more realistic to compare deputy sheriffs to police supervisors than to compare them to non-police employees. To the extent that such comparisons become relevant in the body of this Opinion, the arbitrator will lean in favor of comparing the deputy sheriffs to other police employees i.e., to supervisors in Clinton County and to supervisory and/or non-supervisory police employees in other counties.

> "(e) The average consumer prices for goods and services, commonly known as the cost of living.

There is some evidence in the record of the cost of living and to the extent that it was documented by testimony or exhibits, the arbitrator will take this factor into account in the body of this Opinion.

> "(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received."

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The parties have commented upon this factor extensively in their breifs, and these comments need not be repeated. They have some relevance and will be taken into account in the section on wages or wherever they apply elsewhere.

> "(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings."

There is no substantial evidence of any changes which have taken place during the pendency of the arbitration proceedings.

> "(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."

The employer has urged the arbitrator to take into account increased labor costs and other settlements in 1982. These factors have been taken into account and to the extent that they are applicable herein they have been referred to in this Opinion. The parties have not urged upon the arbitrator that there are other factors which ought to be taken into consideration. Given the fact that all factors need not be given equal weight, the arbitrator has attempted in this Opinion to balance the various factors which are applicable.

The parties have not urged upon the arbitrator that there are factors other than the above which ought to be taken into consideration.

COMPARABLES

Each of the parties has submitted extensive evidence both in testimony and exhibits as to the comparable counties. The arguments raised in the briefs will not be repeated herein.

The Union has relied heavily on the fact that its comparable counties are contiguous to Clinton County and that, therefore, the characteristics of those counties ought to be given greater weight than to counties of similar population and income in other parts of Michigan.

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The Employer has concentrated its arguments on population, income and other statistics independently of the geographical proximity of such counties to the County in question.

There is some merit to both sides of this argument, but the arbitrator believes that, on balance, considerable weight ought to be given to geographical proximity since the duties of a police force bear some relationship to the location where the services are performed. This does not mean that no weight should be given to those counties which are similar in population, income and other statistics even though they are not contiguous. This simply means that some additional weight should be given to the counties which are in close proximity to Clinton County.

THE ISSUES

Wages:

The Union demands a 9% increase in the first year of the contract. In the second year, the Union requests a 4% increase effective January 1 and an additional 4% effective July 1. When spread over the two-year life of the contract, the total cost of the Union package is approximately 15%.

The Employer offers 6% in the first year and 4% in the second year. As an alternative, the Employer offers to pay the pension costs in the second year which come to approximately 4.6%. The total cost of the Employer's package spread over two years is approximately 10%.

The Employer argues that the Union's offer is above the amount given to the command officers in the first year. The Union replies that the Employer's offer is far below that which was awarded to the command officers. On this issue, it appears that in the first year of the command officers arrangement they received an amount which would be exceeded by the Union's request herein in the approximately percentage of 1.4%. The Employer's offer in this case appears to be about 2.8% below that of the command officers

arrangements for the first year. When it is considered that the benefit awarded to the command officers of payment of their pension costs, they will receive more spendable income for tax reasons (since such benefits are not taxable) and therefore the despairity between the amounts awarded to the deputies and the command officers is made even larger. The net effect of this is that the last and best offer of the Union in this case is closer to the increases given to the command officers in the first year of their agreement than is the last and best offer of the Employer. Neither one is on the mark but the Union in this case has departed from the mark in an upward direction less than the Employer has departed in a downward direction.

Exhibit 7 submitted by the Union shows that if we consider the cost of living, the increases given to the Union in prior years resulted in the deputies not keeping pace with increases in the cost of living. The proposal of the Union in this case will cause them to make a slight gain above the cost of living for a relatively few months and they then, at least according to the Union's projections, may fall behind again even under the present proposal. Even if the Union's projections as to the cost of living are not entirely accurate and if the cost of living should rise at a slower rate, the Union still has a persuasive argument that its present package is not excessive in view of the fact that the deputies lost considerable ground in prior years. This argument of the Union, while of some benefit to them in this case, may cause them harm in future years; nevertheless, the facts of this case appear to give the advantage to the Union on its present proposal.

The arbitrator has indicated that the comparable counties submitted by the Union are to receive greater weight and, therefore, the argument of the Union relative to the comparable counties found on page 5 of the Union's Brief carries more weight with the arbitrator than the arguments of the Employer. In a difficult case, this weight to be given to comparables can have the effect of tipping the scale in favor of one side or the other, and the arbitrator uses this factor in this case in favor of the Union.

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Union Exhibit 6 indicates that with the proposed raises, Clinton County will not be out of line with the comparable counties proposed by the Union.

The Employer has placed some emphasis upon other benefits awarded to the deputies in prior years such as health insurance. The arbitrator assumes that these benefits would be available under any circumstances and that they exist in all comparable counties. The cost of health insurance will rise for everyone, and in the history of collective bargaining this benefit appears to be a built-in stable benefit. The issue for the arbitrator is whether the wage package is reasonable under all of the circumstances and for the above reasons, it has been determined that the proposal of the Union is more reasonable than the one submitted by the Employer under the circumstances of this case at this time.

Therefore, the last best offer of the Union is adopted.

Health Insurance for Retirees:

The Union proposes that retirees be covered completely for health insurance and argues that several of the comparable counties have some form of this provision although the Union concedes that none of the comparable counties gave such benefits by contract. The Employer claims that the County could be required to pay for more health insurance for retirees than for existing employees and that the burden is both too heavy and too uncertain.

Union Exhibit 10 shows the Employer-paid health insurance for future retirees. This Exhibit shows that no comparable county submitted by the Union gives the benefit demanded by the Union in this case.

The arbitrator adopts the Employer's position stated in its Brief on pages 5-7.

There is no doubt that this provision would be desirable for the employees but the evidence in the record does not demonstrate that enough thought has been given to the financing of the proposal over the long term to warrant making such an award at this time. As indicated in the Brief of the Employer, the financial impact of the Union's wage proposal is considerable. Given the fact that the Union has prevailed on its proposal, more time

should be given to the Union and the County to review the financial impact and the means of funding this proposal. The record is inadequate for the arbitrator to be able to conclude that the Union's proposal is reasonable under the circumstances of this case.

Sickness and Accident Insurance:

The Employer proposes benefits which would pay $150.00 per week after 30 days with a limitation of one year. This is the present benefit. The Union proposes to change the fixed amount to a figure of 2/3 of base pay.

The Union argues that this would make the benefit equal, on a percentage basis, to what is was earlier before there were increases in salary. The Union claims that by leaving the benefit at $150.00 per week, the Employer has failed to take inflation into account.

The Employer argues that the employees already get 13 days sick leave and when viewed with the entire compensation package, the present benefit of $150.00 per week is adequate.

Both parties seem to agree that neither the Employer or the deputies may take advantage of either proposal to gain an economic benefit. This is essentially because the sickness and accident insurance benefits are tied in with other sick leave benefits and the employees would not be able to make money by being ill.

Both sides have merit to their arguments but it appears to the arbitrator that the Union has not shown a similar or identical benefit in comparable counties and that the figure of 2/3 could be an arbitrary figure. The record does not establish that 2/3 is precisely the figure to use in order to compensate for inflation, given the various elements of the compensation package and given the fact that the Union has prevailed on its wage package in this arbitration. It appears to the arbitrator that it would be best to defer changing the present sickness and accident benefits until the parties have been able to measure the impact of the present wage award and until the Union makes a better record for the

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proposition that 2/3 is the appropriate amount taking into account all aspects of the compensation package.

It also appears to the arbitrator, taking into account the arguments raised in the Briefs, that the burden placed upon the Employer is far in excess of any immediate benefit to the employees.

Accordingly, the last offer of the Employer is adopted on this issue.

Personal Days:

The deputies are currently allowed three days per year for personal days. The Employer proposes to reduce this number to two days, and the Union proposes to leave the personal day allowance at three days.

The Employer desires to reduce this number because in an earlier agreement an arrangement was made whereby employees would report for work 15 minutes early for briefing in exchange for getting one extra personal day per year. Apparently the employees filed a wage/hour claim arguing that this portion of the agreement was invalid and it was subsequently dropped. The Employer now says that it wants the extra day back because the quid pro quo is gone.

The Union argues that there is nothing in the record to justify a decrease in the number of personal days.

The arbitrator obtained the impression that the Employer is being vindictive and desires to take away a benefit for reasons unrelated to the merits of the case, i.e. whether three personal days are reasonable under all of the circumstances.

Accordingly, the Union's offer of three personal days is adopted for the duration of the contract in question.

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Prescription Drug Rider:

Under the current agreement, the employees are required to pay $2.00 on a co-payment basis for each prescription. The Employer proposes that this amount be increased to $3.00. The Union proposes that the $2.00 figure remain in effect. February 1, 1984 is the earliest date that such a change can be made.

The Employer argues that costs have increased and that the employees should share a larger amount of prescription costs in order to ease the health insurance burden on the Employer. The Employer further argues that the increase is minimal and does not impose a significant hardship on employees.

The Union argues that an increase would impose a hardship on the employees.

The arbitrator feels that the Employer's proposal is reasonable and gives the County a benefit which is far greater to the County than is the almost insignificant impact on the employees if they are required to pay one extra dollar per prescription beginning February, 1984, by which time they will have received significant increases in wages under the award made in this case. On this issue, the arbitrator has placed great weight upon factor (f) of Section 9 of Act 312.

The arbitrator notes that in order for an employee to be affected by this provision, the following events must occur:

- The employee or a member of his/her family must require prescription drugs;
- The cost of the prescription must exceed the amount of the co-payment;
- The pharmacist must be unwilling to absorb the additional $1.00 co-payment.

As a practical matter, the overall impact on the group of employees will probably be insignificant.

Accordingly, the proposal of the Employer is adopted.

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Training Time:

Under the current agreement, the Employer is required to give 36 hours of training to the employees in the case of deputies and 40 hours training for each dispatch/corrections officer. The Union proposes that this requirement be continued. The Employer proposes that there be no minimum mandatory training time. The Employer argues that the present arrangements are unreasonably high. Captain Robert Ferry testified that it is difficult to find enough subjects to teach for 36 or 40 hours. The Captain's testimony is summarized on page 14 of the Employer's Brief and the arbitrator believes that the Captain is correct and that the present arrangements are unreasonable. The problem which the arbitrator has, however, is that even though the Union's offer is unreasonable, the Employer's offer is worse.

The parties agreed that some mandatory training time is in the public interest and in the interest of the parties. Otherwise there would have been no such provision in this agreement. Granted the provision was inserted by an arbitrator but the arbitrator must have found that under the circumstances existing in Clinton County, some mandatory training time is essential to these parties. It is therefore totally unreasonable for the Employer to insist that there be no minimum mandatory training time. To rule in favor of the Employer on this issue would allow the Employer to offer no training time when it is clearly agreed by both parties that some training time is essential. If the Employer had offered at least some mandatory training time and had proposed specific types of essential training, the Employer might have received some consideration from the arbitrator. However, in view of the fact that the Employer has offered no minimum training at all, the arbitrator feels he has no choice but to adopt the Union's offer which keeps the present minimum mandatory training time in effect.

Professional Police Officer's Liability Insurance:

The current language of the contract, Section 15.2, will not be repeated herein.

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The present contract provides for insurance to protect employees against civil actions based upon acts of employees carried out within the lawful scope of their authority occurring while in the course of their employment. If damages are awarded against an employee in such an action and if such a judgment is in excess of the policy limits, the County indemnifies the employee for such excess unless the Board of Commissioners for just cause determines that the employee is not entitled to such indemnity.

The Union wishes to keep this provision in effect. The Employer agrees to provide insurance and legal representation but no indemnity. The Employer argues that the indemnity provision is too broad and exposes the County to unknown liabilities against which it cannot protect itself and which might conceivably cause the County to become insolvent. In some portions of its argument, the Union seems to be saying that the present language indemnifies employees for all civil actions and that such protection is required in order to permit employees to effectively perform their duties. The Employer, on the other hand, fears such an indemnity for the reasons stated above.

Before deciding whether the present language in the contract should remain in effect or whether there should be a change, the arbitrator must first make a determination of precisely what the present contract language means. The arbitrator believes that both the Union and the Employer have not correctly stated the true meaning of the present contract.

In the arbitrator's opinion, the present language does not require the Employer to indemnify employees for judgments entered in all civil actions. The indemnity is a limited indemnity which applies only in limited circumstances. In order for there to be an indemnity, the following facts must all occur:

- There must be a civil action commenced for damages caused by acts of an employee carried out within the lawful scope of his/her authority occurring while in the course of his/her employment;

- If the act of the employee fell within the lawful scope of his/her authority and if the act occurred while in the

course of employment, there must then be a judgment entered against the employee. The indemnity does not apply if the judgment is entered against the County for its own acts.

- The judgment must be in excess of the established policy limits. It is obvious to the arbitrator that if the act of the employee is not covered by the insurance policy, there would be no indemnity. This is because the contract language says that "the County shall indemnify the employee for said excess". The words "said excess" refer to the excess on the insurance policy. The insurance policy only applies on those acts carried out within the lawful scope of an employee's authority occurring while in the course of his/her employment.

This means that if, for any reason, there is no insurance coverage, there is no indemnity. And if there is insurance coverage, there is only an indemnity for the amount of a judgment which exceeds the amount of the insurance coverage.

The County Board of Commissioners may under such circumstances still be absolved from an indemnification if they find that for just cause the employee is not entitled to such indemnity. The question of whether in any given case there is "just cause" must be left to negotiation between the Employer and the Union and/or arbitration. In any event, the County can protect itself by increasing the policy limits. The County has no exposure on any indemnity if the act of the employee is not covered by the insurance policy. This clearly protects the County against the risk of an employee committing an act for which there is no insurance.

The arbitrator makes no comment on whether there is any fault to be found with the current language; he has simply stated his interpretation of its meaning and as so interpreted, it does not create the danger which is feared by the Employer.

Accordingly, the last offer of the Union is adopted.

Duration/Retroactivity:

The Employer argues that noneconomic benefits may not be made retroactive. The Union argues that all provisions of the contract should be made retroactive and that

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there is legal authority to permit such an interpretation. The issues have been well briefed by the parties and the details of their arguments need not be repeated herein.

It appears to the arbitrator that there is a conflict in the Michigan Court of Appeals on this issue and that the arbitrator is thus left with having to pick the better of the two positions. For the reasons stated in the Union's Brief, the arbitrator adopts the Union's position.

Any other position could result in the Employer deliberately refusing to agree to a contract simply to permit itself to terminate an employee and deprive the employee of arbitration rights. Even if the disagreement with the Union were in good faith, the innocent victim of a failure of the Employer and the Union to agree would be a discharged employee who had the misfortune of being discharged during a period of disagreement between the County and the Union. It seems unreasonable and unfair for this to happen and it does not seem a reasonable interpretation of the statute to allow arbitration rights to be subjected to caprice or fortuitious circumstances. It is also clear to the arbitrator that arbitration rights are a "benefit" under a contract and therefore come within the terms of the amendment to the statute.

The Employer has raised the issue of whether retroactivity applies to employees who are no longer employed by the County, i.e. to employees whose employment terminated while this arbitration was pending or during the period that the contract was not in effect because the parties failed to agree. By making all provisions of the contract retroactive, if an employee were to be deprived of any benefit under the contract simply because his/her employment terminated before the agreement was signed, such employee would also be the victim of either caprice or fortuitious circumstances. Furthermore, during the period of employment between the expiration of the old contract and the termination of employment, the employee would have been working for wages or would have been receiving other benefits below or different from those provisions mandated by the new contract. Either the County or the employee (on those issues where an arbitration award reduces the benefit)

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would reap a windfall. Accordingly, the new contract is retroactive to all employees as to all provisions and as to all employees even if their employment terminated prior to the signature date of the new contract.

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