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IN THE MATTER OF FACT-FINDING UNDER ACT 176
PUBLIC ACTS OF 1939 AS AMENDED

COMMISSIONERS OF THE COUNTY OF MACOMB
AND PROSECUTOR OF THE COUNTY OF MACOMB,

-and-

MERC CASE NO.: D85 A-108

POLICE OFFICERS ASSOCIATION OF MICHIGAN
(PROSECUTOR'S ASSISTANTS)

APPEARANCES:

POLICE OFFICERS ASSOC. - William Birdseye, Advocate
& Ann Maurer, Union Rep.

COMMISSIONERS OF THE
COUNTY OF MACOMB

- George E. Brumbaugh, Jr.
Asst. Corp. Counsel &
William Israel, Director
Personnel-Labor Relations

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June 5, 1986

By: Richard L. Kanner

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STATE OF MICHIGAN
EMPLOYMENT RELATIONS DIVISION
DETROIT OFFICE

Macomb County

The undersigned was appointed by the Michigan Employment Relations Commission to make findings of fact and recommendations in the captioned matter.

Testimony and evidence was submitted, addressing the following issues:

1. Duration
2. Salary
3. Compensation for On-Call Duty
4. Compensation for Saturday Duty
5. Bar Dues
6. Just Cause for Discipline/Discharge
7. Grievance Procedure for Non-Disciplinary Matters
8. Agency Shop
9. Dues Checkoff

Subsequently, the parties submitted final offers supported by Briefs. Both parties agree that the contract is to begin January 3, 1985, but retroactivity and length of the contract are in dispute.

COMPARABLES

I deem the measuring of the parties' respective offers against the median salary of Assistant Prosecuting Attorneys (hereinafter Assistants) in comparable communities as of considerable weight. The rationale underlying such conclusion, absent any other consideration, is comparable pay for comparable work.

Accordingly, where the complexion of other communities is similar, particularly insofar as impacting on duties and responsibilities of Assistants, the determination of median salary paid is a salient measurable and objective factor denoting the value placed upon such services by the middle group of communities.

In my view, the ascertainment of such middle or median group of communities is the primary goal of a fact finder. This is because such person should not pioneer by making a recommendation out of whole cloth and unsupported by factual evidence. Absent evidence that duties and responsibilities are greater or smaller, to recommend a parties' offer which is at either the high or low end of the salary

of comparable counties is, in my view, irresponsible.

It remains to be seen where Macomb County falls within a comparable grouping of similar counties, and whether the subject Assistant's duties and responsibilities are greater or less than those who are employed in the median community.

The parties agree on the following comparables:

Genesee
Oakland
Ingham
Saginaw
St. Clair
Kent
Kalamazoo
Washtenaw

The Union asserts that Wayne County, together with a comparison of salaries in the Michigan Attorney General's Office and the United States Attorney's Office, should be added.

I am persuaded to add Wayne County for the reason that it is a large metropolitan area as is Macomb County. It, therefore, presents similar law enforcement problems with attendant similar duties and responsibilities of Assistants.

I do not, however, agree that Assistant Attorneys General and Assistant United States Attorneys work in a similar environment to Assistant Prosecuting Attorneys.

Also, I note that the salary for the highest Assistant United States Attorney is \$16,000 higher than the highest Assistant Prosecuting Attorney in Wayne County.¹ Also, the highest Michigan Assistant Attorney General is paid a salary of \$57,252.00 or \$6,000.00 higher than a Wayne County Prosecuting Attorney IV

¹ The Assistant United States Attorney receives \$67,000.00 per the testimony of Carl Marlinga, Macomb County Prosecuting Attorney. The Wayne County Assistant Prosecuting Attorney VI receives \$51,871.00. (Union Exhibit 1)

Such high salaries unduly raise the median for Assistant Prosecuting Attorneys to an unrealistic level as is hereinafter discussed.

There is some discrepancy between the figures for the Principal Trial Lawyer level between the Union and County as follows:

County Comparable Figures

Wayne ²	\$51,871
Genesee	51,739
Oakland	51,692
Ingham	45,820
Saginaw	42,443
St. Clair	41,075
Kent	40,456
Kalamazoo	40,000
Washtenaw	34,276

Union Comparable Figures

Wayne	\$51,871
Genesee	51,739
Oakland	51,692
Ingham	44,485
Saginaw	46,264 (1/86)
St. Clair	41,075
Kent	54,460
Kalamazoo	40,000
Washtenaw	n.a.

(Union Exhibit 1, Employer Exhibit 3)

While there is a difference in Ingham County figures between the two parties, I deem it inconsequential as not substantively affecting the median.

As to Kent, the discrepancy is substantial and was apparent during hearing. The parties agreed to a conference with Kent County in order to reconcile the difference. However, due to a misunderstanding, the Union unilaterally called Kent County and received the salary figure, and submitted it by letter dated February 13, 1986 to the fact finder. It is noted, however, that such figure received from the Union reflects January, 1986 salaries and, not January, 1985 salaries as is the fact with the other above comparables. Also, the Union's Brief incorrectly recites 54,460 as the highest Kent County salary. However, the Kent County letter dated February 13 reflects the highest

² As to Wayne County, Union 1 denotes \$51,871.00, but the Union's brief reflects \$58,000.00. I recommend the inclusion of Wayne County.

salary as \$50,810.

In any event, I cannot accept the Union's figure for Kent County as not properly in evidence pursuant to the agreed upon conference call. Therefore, I will accept the Counties' figure as to Kent County of \$40,456. (Employer Exhibit 3)

As to Washtenaw County, the Union's Exhibit 1 reflects that the salary for the highest level is not available. Therefore, I will accept the Counties' above figure.

Finally, as to Saginaw County, it is noted that the Union used January, 1986 - not January, 1985 figures as did the County.

Accordingly, I accept all of the above County figures including Wayne County, and find the median is \$42,443.

MEDIAN OR AVERAGE

It is noted in respect to the median that the average is \$44,374. I deem the median a more realistic figure for the reason that it more accurately and fairly weights extra-ordinarily high and low figures.³ To the contrary, the average is unfairly affected by extreme figures at the high and low end.

It is significant, therefore, that the Union has based its offer on an average of \$51,361 taking into account both the Michigan Attorney General and Assistant United States Attorney's extraordinarily high salaries and also the incorrect Wayne County salary of \$58,000 and the January, 1986 Saginaw figure. Such \$51,361 demand would preceptiously raise Macomb County near the top of the comparables.

Such demand by the Union leads to a discussion of whether the Macomb County Assistant's level of experience, duties and responsibilities exceed those

³I noted at hearing that I would use a median-not an average.

of the counties clustered around the median level.

LEVEL OF EXPERIENCE, DUTIES AND RESPONSIBILITIES

Proof that the level of experience in each grade of Assistants is greater than that of comparable Counties, would, of course, be a pertinent factor militating in the Union's favor. But, according to Carl Marlinga, Prosecuting Attorney for Macomb County, such a compilation and comparison has not been made.

As to additional duties and responsibilities, William Dardey, an Assistant, and Division Chief, testified that, with the advent of Marlinga in January of 1985 as a newly elected Prosecuting Attorney for Macomb County, a reorganization of his staff ensued. Macomb County was divided into four geographical areas, and a Division Chief was appointed for each area. Such officer has greater administrative responsibility being in charge of a division.

Assistants I and II in each division now, for the first time, have the responsibility for both Circuit Court felony trials and District Court examinations and misdemeanor trials. In addition, all Assistants now have responsibility for extradition, habitual criminals, and white collar crimes.

Although his hours are 8:30 a.m. to 5:00 p.m., he has been coming in at 8:00 a.m. to fulfill his extra duties. He also pointed out that Marlinga instituted a tougher plea bargaining policy. Hence, there are a greater number of trials.

Marlinga affirmed Dardey, and added that Assistants now engage in submitting more extensive briefs, and appear at sentencing with written memoranda. The work load has also increased by virtue of a 50 percent increase in cases in 1985 and an 18.6 percent increase in appellate work. Although the total complement has only reduced from 40 to 39, two Assistants are engaged full time in Grand Jury duties.

Marlinga has also ordered that Assistants get involved earlier in criminal investigations which, together with the above recited duties, adds to their work load.

Accordingly, many Assistants work longer hours in contradistinction to the practice under the former Prosecuting Attorney of allowing Assistants to leave after court was adjourned.

While Marlinga has had no trouble in hiring seven new Assistants in 1985, and has only sustained a loss of four or five, he has had to hire some new Assistants at higher classification rates in order to compete with other comparable counties notwithstanding their lack of experience.

It is also a fact that Marlinga has precluded Assistants from any outside legal practice which has resulted in a \$5,000.00 loss per year to a few of them.

Michael Suhy, Assistant Prosecuting Attorney, submitted a schedule denoting the duties of various classifications of Assistants in comparable communities. (Union Exhibit 18) It is noted thereon that, as to felony trials, Macomb and Wayne Assistants in all classifications are involved. But in most other comparable counties only higher level Assistants are so involved.

As to special assignments such as grand juries, organized crime, narcotic investigation, et cetera, all levels except Assistant Prosecuting Attorneys are involved in Macomb County. In most other comparable counties, only top levels are so involved.

I am persuaded that as a result of Marlinga's new reorganization of the subject bargaining unit, it has sustained a substantial increase in duties, responsibilities, and hours of work. Accordingly, such fact militates in favor of the salary level above the median of comparable counties.

The County asserts that the high retirement benefits of Macomb Assistants is a factor militating in favor of its salary offer. Pension contribution for

1984 was \$5104 compared to a median of \$3502 for other comparable counties, not including Wayne County. (Employer Exhibit 3) However, as pointed out by the Union, very few, if any, Assistants have availed themselves of pension benefits.

THE PARTIES' RESPECTIVE OFFERS

The County offer for a three year contract is as follows:

<u>CLASSIFICATION</u>	<u>PAY RANGE 7-1-85</u>	<u>PAY RANGE 1-1-86</u>	<u>PAY RANGE 1-1-87</u>
Principal Trial Lawyer	31,763 - 42,350	33,033 - 44,044	34,355 - 45,806
Assistant IV	30,219 - 40,425	31,532 - 42,042	32,783 - 43,724
Assistant III	28,875 - 38,500	30,030 - 40,040	31,232 - 41,642
Assistant II	24,988 - 36,650	27,027 - 36,036	23,597 - 35,396
Assistant I	23,100 - 30,800	24,024 - 32,032	

2. A. Assistant III is the benchmark classification. All other classifications have rates of pay that are expressed in relation to Assistant III.
Principal Trial Lawyer is 110% of Assistant III
Assistant IV is 105% of Assistant III
Assistant II is 90% of Assistant III
Assistant I is 80% of Assistant III
- B. This relationship will remain until 1-1-87 when Assistants I and II will be merged. When this occurs, the pay rate for the new classification will be set at 85% of the Assistant III.
- C. When the classifications of Assistant I and II merge in 1987, all classifications will be renamed as follows:
Principal Trial Lawyer becomes Division Chief
Assistant IV becomes Deputy Division Chief
Assistant III becomes Senior Assistant Prosecuting Attorney
3. A. In addition to the creation of the relationship between classifications, the pay ranges within classifications are established. The starting (or minimum) salary for all classifications will be set at 75% of the maximum salary. This will be true for 1985 and 1986.
- B. In 1987, when the two lowest classifications are merged, the starting salary for the new classification will be set at 66-2/3% of the maximum salary. The relationship will remain at 75% for all other classifications.

The Union offer for a one year contract is as follows:

Effective January 3, 1985

	<u>Start</u>	<u>1 Year</u>	<u>2 Years</u>	<u>3 Years</u>	<u>4 Years</u>	
Principal Trial Lawyer	31,217	33,009	34,802	36,594	38,386	
(Equity adjustment)	11,000	11,000	11,000	11,000	11,000	
	<u>42,217</u>	<u>44,009</u>	<u>45,802</u>	<u>47,594</u>	<u>49,386</u>	
(Percent increase)	4%	4%	4%	4%	4%	
	<u>43,906</u>	<u>45,770</u>	<u>47,634</u>	<u>49,498</u>	<u>51,361</u>	Percent
						Over Top
Assistant IV	30,326	32,141	33,955	35,770	37,594	Salary Class
(Equity adjustment)	3,550	3,550	3,550	3,550	3,550	Below
	<u>33,876</u>	<u>35,691</u>	<u>37,505</u>	<u>39,320</u>	<u>41,134</u>	20.06%
(Percent increase)	4%	4%	4%	4%	4%	
	<u>35,231</u>	<u>37,118</u>	<u>39,005</u>	<u>40,892</u>	<u>42,779</u>	
						10.04%
Assistant III	29,434	31,171	32,908	34,645	36,382	
(Equity adjustment)	1,000	1,000	1,000	1,000	1,000	
	<u>30,434</u>	<u>32,171</u>	<u>33,908</u>	<u>35,645</u>	<u>37,382</u>	
(Percent increase)	4%	4%	4%	4%	4%	
	<u>31,651</u>	<u>33,458</u>	<u>35,264</u>	<u>37,071</u>	<u>38,877</u>	
						10.43%
Assistant II	25,866	27,650	29,434	31,217	33,001	
(Equity adjustment)	850	850	850	850	850	
	<u>26,716</u>	<u>28,500</u>	<u>30,284</u>	<u>32,067</u>	<u>33,851</u>	
(Percent increase)	4%	4%	4%	4%	4%	
	<u>27,785</u>	<u>29,640</u>	<u>31,495</u>	<u>33,350</u>	<u>35,205</u>	
Assistant I	22,298	24,416	26,535	28,653	30,771	
(Percent increase)	4%	4%	4%	4%	4%	
	<u>23,190</u>	<u>25,393</u>	<u>27,596</u>	<u>29,799</u>	<u>32,002</u>	

It is noted that the comparables have been based on top level Principal Trial Lawyer salary rates, and I have found the median is Saginaw at \$42,443. The Counties' offer of \$42,350 is at the median and represents a 5.16% increase, but is retroactive to July 1, 1985.

The Union offer of \$51,361 is close to that of the top three comparables, and represents a 33.8% increase retroactive to January 3, 1985.

I am persuaded that the factor of greater duties and responsibilities and additional work time and loss of outside income of the Macomb Assistants due to the recent reorganization warrants recommending a salary increase in excess of that proposed by the County. In my view, placing Macomb at the level of Ingham County-\$45,820 (an 8.2% increase over the present County offer) would adequately compensate the Assistants for the above added factors, and still place Macomb near the median level.

I am of the opinion that a closer and more scientific comparison of duties, and experience with the top three counties is necessary before any higher recommendation would be warranted.

While I am cognizant that other employees in Macomb County received a 4% raise in 1985, I am of the view that they cannot be compared to the Prosecuting Attorneys. It is only the Prosecuting Attorneys who have sustained a reorganization with said resultant figures.

It is noted that there is a 10% spread between the five salary levels except that Assistant IV is only 5% higher than Assistant III. I recommend that the said raise in salary be applied equally to all levels thereby retaining the same above recited percentage differences between each level.

I further recommend that the salary be retroactive to January 3, 1985 for the reason that such reorganization occurred in February, 1985.

TERM OF THE CONTRACT

The County offers a three year contract ending December 31, 1987.
The Union offers a one year contract ending December 31, 1985.

I recommend that the Union's offer be accepted. This is for the reason that no figures for 1986 salaries as to comparables was submitted.

Further, all contracts for Union employees in Macomb County ended on December 31, 1985. No wage pattern has, therefore, been established for 1986.

Finally, this is a first contract. As such, the parties need a one year period during 1985 to deal with equities attendant to their respective positions. Hence, they should be given an opportunity to negotiate a year or more contract starting January 1, 1986 without input from an outsider.

COMPENSATION FOR ON-CALL, SATURDAY DUTY AND BAR DUES

I have reviewed the testimony and arguments of the parties in connection with the above issues.

In the event this was a Public Act 312 proceeding, I would be bound to address the merits of the above issues, and award either parties' last best offer. But, as a Fact Finder, my duty is only to recommend a settlement which hopefully guides the parties toward a mutually agreed upon contract.

I have, heretofore, recommended a salary increase of 19.4%⁴ to match salaries paid in Ingham County. Such salary increases a substantial raise taking full account of additional duties, responsibilities, and work time of Assistants. If such recommendation is accepted by the County, I do not feel that additional demands of the Union in respect to the above items should be

granted.

Union Offer: JUST CAUSE FOR DISCIPLINE AND DISCHARGE

Discipline.

- A. Disciplinary action or measures shall include the following: oral reprimand, written reprimand, suspension (notice to be given in writing), discharge. Nothing in this action, however, shall prevent the Employer from appropriately disciplining an employee, should circumstances warrant, up to and including discharge.
- B. Disciplinary action may be imposed upon an employee only for failing to fulfill his responsibilities as an employee. Any disciplinary action or measures imposed upon an employee may be processed as a grievance through the regular grievance procedure, or through the Special Conference provision as provided for in this Agreement.
- C. If the Employer has reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public.

Discharge

- A. The Employer shall not discharge any employee without just cause. If, in any case, the Employer feels there is just cause for discharge, the employee and the Union shall be notified in writing that the employee has been discharged.
- B. The Union shall have the right to take up the suspension and/or discharge as a grievance at the third step of the grievance procedure, and the matter shall be handled in accordance with this procedure.
- C. Any employee found to be unjustly suspended or discharged shall be reinstated with full compensation for all lost time, offset by any other Employer paid benefits or compensation, and with full restoration of all other rights and conditions of employment.

This article shall supercede the applicable portions of Public Act 329 of 1925, as amended.

The Employer's offer includes a Hearing Board whose decision, however, is only advisory to the Prosecuting Attorney. The Prosecuting Attorney retains full discretion relative to accepting or rejecting the Hearing Boards' recommendation.

The offer of the Union and the County places in dramatic juxtaposition the dichotomy between the desire of the Prosecuting Attorney to unilaterally determine just cause for discipline or discharge, and the bargaining unit's concern with job security based upon proof of just cause for discharge or discipline.

I am persuaded to recommend the Union's offer with one modification as hereinafter set forth.

I fully recognize the difficulty faced by an Employer in carrying the burden of proof necessary to persuade an arbitrator to sustain discipline or discharge. Particularly, where professionals are involved, it is understandable that the Employer would desire to retain sole discretion relative to discipline and discharge.

Professionals such as teachers, nurses, engineers, and psychologists have, in this Fact Finder's experience, have been subject to discharge under labor contracts containing just cause and arbitration provisions. While the discipline and discharge issues in these cases, based upon unsatisfactory work performance, are among the most difficult, experienced arbitrators have, in my view, measured up to their responsibilities in an efficient manner. Thereby, through arbitration, the Employee is protected against unjust treatment.

Viewed from the County's standpoint, the morale of the bargaining unit is detrimentally impacted when an Assistant is unjustly disciplined or discharged. Such unjust discipline or discharge would also tend to contribute to a greater turnover which, of course, is disadvantageous to the County.

While it is not to be presumed that the Hearing Board will reach an unjust decision, particularly in view of the fact that it is made up of Assistants appointed by the Prosecuting Attorney and the aggrieved Assistant who together appoint a third Assistant, mistakes do happen. Also, in the event the Prosecuting Attorney rejects the recommendation of the Hearing Board, the

bargaining unit might well consider such action as unfair.

Accordingly, in line with my authority to modify either parties' offer, I recommend that new Assistants be placed on probation for one year wherein the Prosecuting Attorney has full discretion to discipline and discharge. Such a provision, together with a more careful screening of applicants, will provide a safety valve for the Prosecuting Attorney. Thereby, during the first year, he will be able to closely peruse the work of the new Assistant, and make a unilateral determination as to his/her ability.

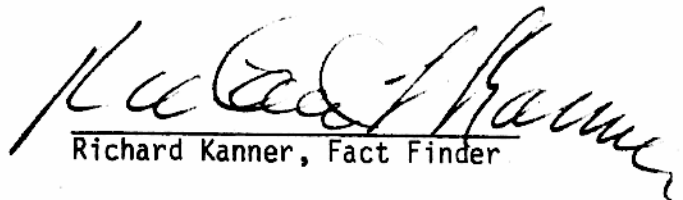
Therefore, I recommend the above Union's offer subject to a one year probation period for newly hired Assistants.

CONCLUSION

The other issues pertaining to a grievance procedure, agency shop, and dues checkoff have been settled.

I note that the County, in its letter of February 13, 1986, interjects for the first time the following issues: leave of absence and longevity compensation policy. There being no testimony appertaining thereto, I have no authority to address these issues.

June 5, 1986


Richard Kanner, Fact Finder