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STATE OF MICHIGAN

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

RE: CITY OF MIDLAND AND MIDLAND
MUNICIPAL EMPLOYEES ASSOCIATION
John Shepherd 10-26-77

Case No. D-76-G-2229

RECOMMENDATION OF FACT FINDER

The parties to this case are the City of Midland (the City) and the Midland Municipal Employees Association (the Association). The parties have agreed that there are two issues to be resolved by the Fact Finder. These issues are:

I. Does the 1974 Agreement entered into between the parties provide for a cost of living allowance (COLA) which was to be paid to the employees for work performed in the year preceding such payment? A related issue is whether a COLA payment remains to be paid for the third year of the three year contract negotiated in 1974.

II. Is the City permitted under its charter to negotiate collective bargaining agreements which are retroactive to the date of expiration of previously expired agreements?

There is another issue on which the Association desires the Fact Finder to make a recommendation. The City requests that the Fact Finder not make a recommendation thereon. That issue is:

III. What shall the basic wage formula be in the contract presently being negotiated by the parties?

The parties have agreed that a recommendation on the first two issues listed above would assist them in arriving at a solution in their present negotiations. There are other issues which have not been resolved by the parties but they agree that negotiations are being pursued constructively on such issues and fact finding is not required. This recommendation will be

Midland, City of

prepared in two parts. Issues I and II will be the subject of a recommendation immediately. A recommendation on issue III will be prepared at this time but will be withheld for 30 days to permit the parties to continue negotiations. In the event that the parties are not successful in negotiating a resolution of the basic wage formula within 30 days, the recommendation on issue III will be published.

I. Does the 1974 Agreement entered into between the parties provide for a cost of living allowance (COLA) which was to be paid to the employees for work performed in the year preceding such payment? A related issue is whether a COLA payment remains to be paid for the third year of the three year contract negotiated in 1974.

The Association entered into its first written agreement with the City in 1972 and negotiated a two year contract. The Association represents salaried employees other than police, firemen and supervisory employees. Such supervisory employees originally were a part of the contract bargaining unit in question but voluntarily separated themselves out of the Association and are no longer part of that bargaining unit. In 1974 the City and the Association negotiated a three year contract. The members of the Association were concerned with inflation and negotiated a cost of living allowance (COLA) for the three year contract.

The City negotiated with other groups at approximately the same time. It is agreed by the parties that the basic contract negotiated and signed by the Association and all of the other groups provides essentially as follows regarding the COLA payments:

a. A fixed basic wage increase for year #1 of the contract.

b. A fixed increase in each classification for year #2 plus a lump sum COLA payment to be paid at the beginning of the second contract year.

c. A fixed increase in each classification for year #3 plus a lump sum COLA payment to be paid at the beginning of the third contract year.

Detailed tables were appended to the contract in question to indicate the formula to be applied in arriving at the COLA payment in each of years #2 and #3. There were separate tables prepared for each year.

The issue in this case relates to the claim of the Association that in the contract, the COLA payments were to be paid for the previous year's work rather than for the year just beginning. Under the interpretation of the Association, the COLA payment made at the beginning of year #2 was for work performed in year #1; the COLA payment made at the beginning of year #3 was for work performed in year #2. The Association claims that the COLA payment for year #3 is yet to be paid. The amount was to have been negotiated after the rate of inflation had been determined by the appropriate agency of the United States Government.

The Association then argues that in the present negotiations for a new contract, the base, from which new wages will be computed, should include the last COLA payment which has been improperly withheld by the City. The City argues that no further COLA payments are due under the 1974 contract.

The Association bases it claim that a third COLA payment is due upon a written addendum to the contract which was negotiated a few months after the basic 1974 agreement was signed. The Association concedes that in the absence of the addendum, the City's interpretation of the contract is correct.

The addendum is therefore crucial to a determination of the case and for this reason it is appended to this recommendation as an exhibit.

The Fact Finder has reviewed all of the testimony, documents and arguments of the parties and concludes that the City's interpretation of the 1974 contract is correct for the following reasons:

1. The addendum, by the admission of the Association, does not specifically grant a third COLA payment nor does it

specifically apply the COLA payments made in years #2 and #3 to the previous year's work. The Association argues that there is something implicit in the language of the addendum which leads to such an interpretation. The Fact Finder can find no such implication.

The addendum begins,

> As provided on page (x) of Appendix of the Agreement, the Midland Municipal Employees Club (now the Association) and the City of Midland mutually agree on the following method of paying cost of living adjustments as a clarification of step 2 found on page (ix):

Page (x), in referring to the COLA tables found in the contract states "the method of prorating these amounts upon termination or for new hires shall be approved by the Club." The addendum then sets forth a scheme for payment of the COLA to employees who enter or leave the bargaining unit during the term of the contract. Thus, a subsequent clarification of the COLA allowance for such employees was contemplated by the parties in the original contract and it is not accurate for the Association to argue that it can be implied from the fact that entering and terminating employees were provided for in the addendum that all employees were to be similarly treated.

2. The letter transmitting the opposed addendum to the Association says,

> Pro-rating of the cost of living adjustment- Although it is clear the City's original proposal was to adjust pay for future work, I recognize the Club's position. Accordingly, a proposed addendum is attached for your review.

The Association argues that this letter of transmittal necessarily acknowledges the Association's point of view and results in the Association's interpretation being applied to the contract. However, this letter of transmittal is subject to varing interpretations and it is the addendum itself which controls. The City has correctly argued that the addendum does not specifically grant the Association what it claims and that the Association failed to complain about the language but, rather, accepted the

addendum as written after careful review.

3. The Association argued that there would have been no logical reason to treat entering and leaving employees differently from others and that, therefore, the addendum must necessarily be read to include all employees even though there is an absence of language specifically making such an inclusion. (The addendum does, in fact, provide for COLA payments to certain groups of entering and terminating employees by giving such employees a COLA payment for past work.) However, the City argues that there were sound reasons for the disparate treatment of entering and terminating employees based upon the equities of the varing situations of such employees. The Fact Finder determines that it does not offend logic for the parties to treat entering and leaving employees differently than employees who are on the job throughout the life of the contract. Therefore, it is reasonable for an addendum such as the one in question not to include all employees especially when the basic contract anticipated that, "the method of pro-rating these amounts upon termination or for new hires shall be approved by the Club."

4. The Association argues that a letter of October 24, 1974, militates in favor of its position. The letter, signed by the City Manager, encloses certain addendums and says,

> The purpose of this letter is to set forth to you the City's final position as it relates to the three issues most recently discussed with your committee. The issues are payment of certificate pay, shift differential pay and pro-rating of cost of living adjustments.

This is nothing more than a reference to the subject matter of the addendum which is, in fact, the pro-ration of COLA (albeit for certain classes of employees.) The letter itself does not point to one interpretation or the other.

5. The contract provides for these payments to be made in July i.e. the beginning of the contract year rather than at the end of the year. This tends to indicate that the COLA payments

were not for past work. If the COLA payment were to be for past work one would expect the 1974 contract to contain a table for the payment to be made at the end of the third year just as the two existing tables apply (in the Association's view) to the end of the first and second year.

6. However, there is no third table in the 1974 contract, thereby supporting the City's view that the tables apply to years #2 and #3.

7. The Association argued at first that its concern in 1974 was with the then double digit inflation rate and that if the City's interpretation of the contract were accepted, the wage increase in year #1 would only have been 7.1%. It would have required the COLA payment made at the beginning of year #2 to bring the increase in pay to the double digit rate of at least 10%. The City then demonstrated that the 7.1% increase in the base wage must be considered with other cash increases (e.g. shift differentials, education bonus, longevity) and when so considered the total cash increase in benefits in year #1 was 10.17%. The Association then acknowledged that this was correct. Thus, the Association's desire to meet double digit inflation was satisfied in 1974 without the necessity of applying the COLA payment made in year #2 to the work performed in year #1. A chart submitted by the Association to prove that the wage increases were not commensurate with the rate of inflation must be rejected by the Fact Finder because the chart does not take into account the additional cash benefits referred to above. These benefits were acknowledged by the Association to be relevant.

8. Witness, Bob Strejc, President of the Municipal Supervisory Association was on the bargaining team in 1974 when the supervisors were still a part of this bargaining unit. He testified that it was his understanding that the contract was to be interpreted to mean that at the end of the first year there

would be a COLA payment for the preceding 12 months. Then, over the next three years a like payment would be made based upon the increase in the cost of living. He testified that he has not kept notes and that his memory could be faulty but that this was the intention of the parties. He testified that in the new contract which the supervisors negotiated with the City, the third payment was not provided for. Strejc testified that the supervisors decided to sacrifice a point in order to get a contract.

The Fact Finder determines that Mr. Strejc's testimony does not support the Association's position. He stated that his memory might be faulty and even if his memory is correct, it merely reflects what was in the minds of the Members of the Association. His testimony does not clearly demonstrate that there was a meeting of the minds on both sides as to the interpretation proposed by the Association.

9. Witness, Bill Sirrine, was President of the Association (then known as the Club) in 1974. He testified that it was his understanding that there would be a COLA payment at the end of each year for three years. When asked why this was not specifically written into the contract he responded that the Club was going to see if they wanted it and whether it was going to be the same as in previous years. He stated that they thought they would have to agree on the third year later. When he was asked by the representative of the City why the third table was not built into the contract he responded that he did not know unless it was because the third year was to be negotiated. He stated that the City probably did not want the third table but that it was <u>assumed</u> that there would be a third payment.

The Fact Finder determines that this witness, too, states what his understanding was but acknowledges that the language reflecting his understanding does not appear in the agreements. His testimony does not clearly show that the

"assumption" that there would be a third year COLA payment was made by both sides. For reasons stated above, the logic of the situation dictates that the parties could have negotiated a third year COLA payment or could have made an agreement which did not provide for a third year COLA payment. In the absence of any clear logical mandate in either direction, the language of the contract will have to control.

10. Witness, Ray Westra, was called for the purpose of demonstrating that when he obtained employment with the City he was told by the personnel department that there would be a COLA payment consistent with the interpretation placed upon the contract by the Association. In fact, Westra simply testified that he was told that a cost of living formula was in the contract. Thus, the City did not make any admissions to anyone who testified at the Fact Finding Hearing that the Association's interpretation of the contract was correct.

11. This case demonstrates a situation where the language of the contract clearly and admittedly does not give the Association what it claims. A Fact Finder or a Court can not make a new contract for the parties and there is no evidence of any mutual mistake justifying a reformation of the contract to conform to the alleged intention of <u>both</u> parties. The Association emphasized that the contract was drafted by the City. Ambiguities in agreements must be resolved against the party drafting the agreement. However, this is not a case of ambiguous language but rather, it is a case of a complete absence of language and therefore the rule that ambiguities must be resolved against the party drafting the agreement does not apply.

Accordingly the Fact Finder recommends as follows:

A. The 1974 contract does not require a third COLA payment to be applied to the work performed in year #3.

B. The contract negotiated in 1974 did not provide for a COLA payment to be paid for work performed in the year preceding such payment.

II. Is the City permitted under its charter to negotiate collective bargaining agreements which are retroactive to the date of expiration of previously expired agreements?

The City has claimed that it is not permitted under its charter to bargain with the Association on the question of whether wages and other benefits negotiated in a new agreement can be made retroactive to the last date of the former agreement which has now expired. The expiration date was June 30, 1977 and the City claims that it cannot pay any benefits beyond those provided for in the 1974 agreement between July 1, 1977 and the effective date of the new contract which has yet to be adopted. The City relies for its position on Sec. 3.11 of the City Charter, which provides as follows:

> Sec. 3.11. Increase or decrease of compensation.
>
> The Council shall not grant or authorize extra compensation to any city officer, elected or appointed, or to any employee, agent, or contractor, after the service has been rendered or the contract entered into: nor shall the salary of any city officer, elected or appointed, be increased or decreased after his election or appointment during any fixed term of office for which he was elected or appointed.

Article 11 Sec. 3 of the Michigan Constitution states:

> Neither the legislature nor any political subdivision of this state shall grant or authorize extra compensation to any public officer, agent or contractor after the service has been rendered or the contract entered into. (The Michigan Constitution of 1908 had the word, "employee" after, "agent.")

The state constitutions of Pennsylvania, Colorado, Missouri, Wisconsin and Texas (to name only a few) each have some similar provision respecting the granting of extra compensation for services already rendered or contracts already made.

There have been several decisions holding that this provision prohibits awarding pensions retroactively or even retroactive pension increases. Jameson v. Pittsburg 381 Pa. 366, 113 A 2d 454 (1954); Sena v. Trujillo 46 N.M. 361, 129 P 2d 329 (1942);

Cleveland v. Bond 518 S.W. 2d 649 (Mo. 1975). This view has not been allowed to pass without criticism. In Jameson, Justice Musmano vigorously dissented. In doing so he discussed the purpose of this "extra compensation" provision:

> It seems obvious to me that the prohibition... was never intended to prohibit the legislature from discharging a moral obligation to the servants of the state. The target of the prohibition was political favoritism. It was designed to prohibit the enrichment of individuals by rewarding them from the public treasury.

The Michigan Attorney General has had an opportunity to express an opinion on this issue and has indicated that MCLA 38.814 establishing a sliding scale for pensioners and applying a new system to persons already retired was not in contravention of the provisions of the 1908 constitution. Op. Atty. Gen. 1955-1956 No. 2810, p. 766. In any event, the Michigan Constitution specifically eliminated employees from the prohibition.

In 1965, the legislature adopted the Public Employment Relations Act (PERA), MCLA 423.201 et seq. Under that Act a public employer is required to bargain collectively with the representative of its employees. Under the Act the subject matter of wages, hours and other terms and conditions of employment are mandatory subjects of bargaining. In the opinion of the Fact Finder, the question of retroactive pay fits into the category of mandatory bargaining issues and the only question which remains is whether the provision of the Midland City Charter can change the obligation of the City to bargain collectively with its employees. That question has been resolved by the Michigan Supreme Court in Detroit Police Officers Association v. City of Detroit, 391 Mich. 44. Briefly, that case stands for the proposition that the obligation to bargain collectively on an issue which is mandatory under PERA cannot be avoided through the enactment of a city ordinance. The Midland Provision is part of the City Charter, but a City Charter cannot violate state law and therefore the Fact Finder concludes that the City may not use the

provisions of Sec. 3.11 of its Charter to argue that it may not negotiate the retroactivity of wages. Any other interpretation would permit the City to delay bargaining for an inordinate period and use its own charter to reap the benefits of a delay caused by the City itself. Although the Fact Finder sees no evidence of willful delay on the part of the City, the good faith of the bargainers in a particular case whould have no bearing on the interpretation to be given the charter or upon the obligations of the City toward its employees. The purpose of the Charter Provision in question was to prevent fraud being perpetrated upon the City, it was not to permit the City itself to perpetrate fraud upon its employees.

In any event, the employees are working without a contract and they are being compensated at rates equal to those which were paid under the old agreement which is now expired. It, therefore, cannot be said that their compensation has been fixed in any amount. The City and the employees have simply arrived at a temporarily expedient way of paying the employees while their rate of pay is being negotiated. The Fact Finder does not believe that retroactive pay would be "extra compensation" within the meaning of the City Charter. The City has placed much emphasis upon the fact that it has not negotiated retroactive contracts with other groups of employees based upon the Charter Provision. For the reasons stated above, the City's interpretation of its rights under the Charter and the acquiescence by the other employee groups have both been without foundation.

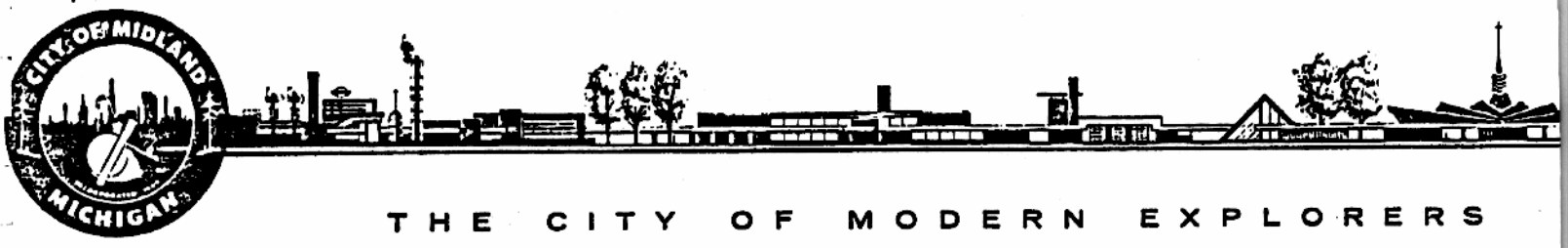
The Association claimed at the hearing that the 1974 agreement was concluded after July 1, 1974, and all benefits were made retroactive. The City's response to this claim is that the signature page of the agreement was signed by the parties before July 1, 1974, and that thereafter additional time was needed to have the contract typed and revised. After the revisions were approved, the signature page was appended to the final document.

Although this factual question is not crucial to a determination of the issue, the Fact Finder believes that a contract is not binding upon the parties until there has been a meeting of the minds and it is clear in this situation that there was no meeting of the minds until well after July 1, 1974. Therefore, the benefits were made retroactive. These events simply take away some weight from the City's argument that it has never negotiated a retroactive agreement.

The recommendation of the Fact Finder is that the City is not precluded but is rather, mandated to bargain on the question of retroactivity of wage rates.

JOHN H. SHEPHERD
Fact Finder

Dated: October 26, 1977



THE CITY OF MODERN EXPLORERS

MIDLAND MUNICIPAL EMPLOYEES CLUB
JULY 1, 1974, AGREEMENT
ADDENDUM THREE

As provided on page x of Appendix A of the Agreement, the Midland Municipal Employees Club and the City of Midland mutually agree on the following method of paying cost of living adjustments as a clarification of Step 2 found on page ix:

I. Employees who successfully complete their original City employment probationary period before any July cost of living adjustment payment shall receive a partial payment in that July equal to the percentage of the fiscal year ending in which they were on non-probationary, permanent, full-time status (months of such status, using the tenth of the month deadline, divided by 12) applied to the lump sum paid to others in the same pay range.

II. Employees promoted or transferred into this bargaining unit before any July cost of living adjustment shall have a partial payment determined as in I above.

III. Permanent employees who are terminated from full paid status in this bargaining unit for any reason except dismissal shall receive a sum determined as follows:

1. Calculate the percent change in the index from the previous May to the most recent month released by the United States Department of Labor prior to the termination.

2a. For employees terminating on or after July 1, 1974, up to or including July 21, 1975, the lump sum shown on the 1975 table for the particular percentage change calculated shall be accomplished by multiplying the lump sum by a percentage. The percentage shall be the number of months of the fiscal year (a month is counted if termination occurs on or after the 22nd of that month) in the unit divided by 12; or

2b. For employees terminating on or after July 22, 1975, up to or including July 21, 1976, use the 1976 table to find the

lump sum as described in 2a. Add the cost of living adjustment paid to such employee in July, 1975, and prorate as described in 2a; or

2c. For employees terminating on or after July 22, 1976, use the 1976 table to find the lump sum. Add the cost of living adjustments paid to such employee, if any, in July, 1975, and 1976, and prorate as described in 2a.

APPROVED:

William H Sivorine
Employees Club

10-29-74
Date

APPROVED:

C. R. Nelson
City of Midland

10-29-74
Date

Revised September 3, 1974