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STATE OF MICHIGAN
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Fact-Finding Between:

THE CITY OF PONTIAC

and

PONTIAC MUNICIPAL EMPLOYEES ASSOCIATION

Hearings Held October 15, 17, 24 and 31, 1973

Before Richard I. Bloch, Esq.

Appearances:

For the City

Douglas Dahn, Esq.
Tolleson, Burgess & Mead

For the Association

James Statham, Esq.
Gregory, Van Lopik & Higle

Pontiac; City of

FINDINGS OF FACT AND RECOMMENDATIONS

The Pontiac Municipal Employees Association represents approximately 180 clerical and office workers employed by the City of Pontiac, Michigan. A dispute having arisen over proposed changes to the existing collective bargaining agreement, and the statutory prerequisites to fact-finding having been met, the Fact Finder was appointed pursuant to Section 25 of Act 176 of Public Acts of 1939, as amended, and the Regulations of the Michigan Employment Relations Commission. Hearings commenced on October 15, 1973 and continued on October 17, 24 and 31.

The Association raises nine contentions concerning contract revisions, four of them economic and five non-economic. What follows are the respective positions of the parties, the findings of fact and recommendations.

I. GRIEVANCE PROCEDURE

The Association here contends that the present grievance procedure is unsatisfactory inasmuch as, among other things, the Association is foreclosed from pursuing grievances at higher steps of the procedure if it fails to process the grievance (by filing or otherwise) within certain time limits after receiving a negative response from the City. It proposes, therefore, that the City be similarly barred for failure to answer a grievance within established time limits.

The City contends the existing structure provides adequate protection, since a grievance automatically moves to the next step if not answered by the City. Thus, if cases do exist where grievances have not been answered, the City maintains the grievants have not been disenfranchised thereby.

It is apparent from the testimony and evidence that the dispute settlement procedure between the Association and the City has thus far been imperfect at best. Cases do exist where complaints, potentially meritorious and obviously entered in good faith, have received no response from the City. The fact that such grievances automatically progress to higher levels of the grievance procedure

does not mean the parties have suffered no detriment. First, the grieving party may eventually bring the case to binding arbitration, but with little or no prior knowledge as to the other party's position. More importantly, however, failure to answer, though not impeding the procedural integrity of the system, drains it of its substance and deprives it of its essential value -- that of providing an internal forum for quick, informal and inexpensive resolution of disputes.

The problem stems from the parties' failure to agree upon and employ a grievance report form. Thus, if the City has, at times, failed to respond to a grievance -- and it has -- the Association has tendered its complaints in varying manners, couched in language which at times raises questions as to whether it desires informal discussion or formal grievance proceedings. At the hearing, the parties agreed with the Fact Finder that a simple grievance form would solve this problem. None having been forthcoming prior to the end of hearings, however, it is hereby recommended that such form be adopted. At the least, the form should contain the name of the grievant, the reason for the complaint, the section of the contract in question, the date, and the signature of the authorizing union official. A grievance should be stated with sufficient particularity to advise the other party as to the general nature of the claim. Further, space should be provided for the other party's answer, with the signature of the responding representative and the date. Ideally, answers should be reasonably responsive and it should be remembered that the fact that a complaint is, in the opinion of the recipient, unmeritorious, does not mean that no response is required. Similar space,

complete with dates and signatures of representatives, should be provided for the more advanced steps of the grievance procedure.

In this manner, no doubt will exist in the City's mind as to when a formal complaint has been lodged, the Association will be reasonably advised of the City's outlook on the matter and both parties will serve the community more effectively insofar as they are able to implement in-house resolution of their differences.

II. DISCIPLINE

Presently, the collective bargaining agreement between the parties specified the following:

> ARTICLE V, Section 5 -- Discipline
>
> A. The city shall not discipline or discharge a bargaining unit employee without just cause. Should it become necessary for the city to discipline an employee, the following procedure will generally be adhered to:
>
> 1. It shall be the policy of the city to warn an employee orally for the first offense; to give at least one written warning for a second offense; to give suspension not to exceed three (3) days for the third offense; to give suspension not to exceed two (2) weeks for the fourth offense; and, finally, more severe discipline.
>
> 2. Nothing in this section, however, shall prevent a Department Head from appropriately disciplining an employee immediately should circumstances warrant.
>
> 3. It shall be understood that an employee shall be given a reasonable opportunity to have a union official present during any act of suspension or dismissal.

The Association requests that paragraphs 2 and 3 in the above-mentioned sections be deleted and replaced by the following language:

> 2. It shall be understood that the Union president shall be present during any act of suspension or discharge.

The facts do not support the case for the requested change. The existing language sets forth, in paragraph 5(A)(1), the City's commitment to a system of progressive discipline. However, situations may well arise of so drastic and immediate a nature, albeit on a first offense basis, that mere oral warning may be inappropriate. Removal of paragraph A(2), particularly considering its specificity, would effectively prevent the City from taking more extreme measures when such action is warranted. This is a situation which neither City nor Association could tolerate for long. Moreover, in view of the fact that all discipline is subject to the requirement of good cause shown, and considering the Association's access to the grievance procedure in cases where just cause is lacking, there appears no reason for the change. The Association's suggested language would also delete paragraph A(3), providing as it does for "reasonable opportunity" to have a union official present in cases of discipline. Again, however, instances may surely arise where it is impractical or unreasonable to await the presence of the union president, as the requested language would require. The finding here is that the existing language provides adequate protection to employees. No change is recommended.

III. SUPERVISORY DUTIES

The collective bargaining agreement presently provides, in Section 8 -- Supervisory Duties -- that "supervisors shall not wholly perform duties done by subordinates except in cases of real emergency or reduction in the work force." The Association suggests the following language as an alternative:

> Supervisors shall not perform duties performed by subordinates:
>
> I. except in cases of real emergencies and then only until bargaining unit employees can be obtained.
>
> II. except for activities necessary for the training of subordinates or in case of real emergency, and then only until bargaining unit employees can be obtained.

In response, the City suggests the following:

> Supervisory Duties.
>
> (a) Supervisors shall not wholly perform duties done by subordinates except in cases of real emergency or reduction in work force. Supervisory personnel shall not spend a majority of their time engaged in work activities consistently and routinely performed by their subordinates.
>
> (b) The intent of the above provision is not to use supervisors in place of bargaining unit employees on jobs where employees are laid-off; nor use supervisors to replace bargaining unit employees to avoid extended periods of overtime or any call-in time.

The City contends the language is essential due to the necessity of having supervisors in the Clerical and Inspection areas, yet

without sufficient funds and manpower to completely remove such supervisors from bargaining unit work. On the other hand, it is apparent that this provides significant potential for erosion of the bargaining unit. The language proposed by the City does much to affirm its intent to avoid such effect, and the evidence sustains the need for supervisors who do, in fact, perform some work within the bargaining unit. Thus, no change is recommended at this time. To the extent the language serves in fact to produce an erosion of the bargaining unit in a manner contrary to the expressed intent of section (b) supra, the Association should pursue its remedies in other fora.

IV. SITUATIONS NOT COVERED BY CONTRACT

Article X, Section 6 of the present agreement states that:

> It shall be the intent of the Union and the City to keep this Working Agreement in accord with the best interests of the employee and the City. Should this Agreement not be sufficient to cover a situation, then in such an event the City and/or Department Head may negotiate an acceptable provision with the Union, and, if necessary, the same shall be added to this Working Agreement. (Emphasis added).

The Association suggests changing the clause so as to make such negotiation mandatory, not permissive. It cites the recent removal of the 'coffee area' as a prime example of a working condition over which the City would have had to bargain were such language incorporated in the Agreement. Having been a visitor to the coffee room during that period of time aptly described by the Union as the "golden age," the Fact Finder recalls with nostalgia this oasis of

stout machines, promising gustatory adventures for but a token contribution. Now, the machines stand elsewhere, this pleasant retreat having fallen to the demands of expanding government. Today, those who sit do so side by side in chairs fastened by the legs to the concrete wall, lest, one conjectures, even they wander off in despair. However, let these words stand as lasting tribute to that "golden age," for the language proposed by the Association is not recommended for inclusion in the final agreement. The language is too broad. Under it, no aspect of City management would be immune from the bargaining process. No new policy or program, no matter what nature, could be implemented without bipartite discussion. Similar language, recently removed from the Firefighters agreement, was significantly less broad, yet was the source of constant confusion and irritation during its existence. The Fact Finder would be rendering a disservice to both parties to recommend inclusion of the suggested provision.

V. PROMOTIONS AND RECLASSIFICATIONS

ARTICLE VI

Promotions and Reclassifications

Section 1. Promotions

A. Promotions to fill vacancies will be made in order of final score on such examinations as may be conducted in accordance with procedures established by the Personnel Department. Upon failure to satisfactorily complete the probationary period an employee who has been promoted will be returned to his former department or division and former position, provided that he may be transferred to a similar position within another department or division if one is available and he requests it.

B. All vacant positions to be filled in the bargaining unit shall be filled competitively. Examination announcements specifying minimum qualifications shall be distributed to departments and divisions and posted on official bulletin boards. Regular City employees shall be given an opportunity to fill vacant positions before outside the service recruitment is undertaken.

D. Examinations will be conducted if two (2) or more candidates are certified. Examinations shall be confidential except that a candidate and his unit steward, at the request of the candidate, may inspect the completed examination of the candidate but may not copy questions nor take notes during such inspections.

1. Examinations shall be conducted within thirty (30) days of the posting for the examinations. The filling of vacant positions tested for shall occur within thirty (30) days after the examinations are conducted.

The essence of the Union's concerns and suggestions center around testing procedures employed by the City. The testimony and evidence at the hearings in this matter leave no doubt that there presently exists considerable latitude for serious, albeit unintentional, discrimination in existing promotion practices.

The original legal concept of discrimination was based on malevolent intent. As such, the discriminator had the purpose of wilfully denying benefits to an employee because of the class to which the person belonged. A woman would be denied a promotion, for example, because the City's representatives or agents believed in a restricted role for women. Again, state of mind was the key.

The modern view of discrimination, however, goes far beyond this point. Paraphrasing the United States Supreme Court in Griggs v. Duke Power Company (401 U.S. 424), under Title VII of the Civil Rights Act of 1964:

> Practices, procedures or tests, neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of improper discriminatory employment practices.
>
> What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment, when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.
>
> The Act proscribes not only over discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> Good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in-headwinds for minority groups and are unrelated to measuring job capability.
>
> Congress directed the thrust of the Act, [Title VII], to the consequences of employment practices, not simply to motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relation to the employment in question.

Several points should be made clear. The arbitrator finds no discriminatory intent on the part of the City. This opinion should

be in no way construed as such. What is apparent, however, is the potential for such discrimination in present promotion procedures. The recommendations made herein are made in the hope of accomodating the mutual desires of both Association and City to insure employment practices which relate as closely as possible to valid criteria and leave the least possible room for consideration of irrelevant factors such as, for example, sex or race.

Presently, in accordance with Article VI, Section 1, supra, the City employs examinations, both written and oral, to determine promotions. The Association proposes to limit testing to written examinations only, and suggests the following change:

> Change the first sentence in Section I(A) to read as follows:
>
> > Promotions to fill vacancies will be made in order of final scores on written examinations conducted in accordance with procedures established by the Personnel Department.

However, it is apparent that situations may arise where the necessity of testing either purely mechanical skills or personality attributes may require oral tests. Further, oral testing may be a valuable method of going beyond that information revealed even by the most scrupulously validated and administered examination. Thus, the Association's proposal which would require promotions to be based solely on the order of final scores on written examinations is not recommended. However, the evidence indicates that, despite efforts to insure impartiality in the oral interviews (for example, by using

personnel from outside the City to conduct such interviews), the scope of the questioning and standards employed by examiners may, at times, exceed the bounds of relevance. The Fact Finder recommends that a verbatim record be made of such interviews, either by tape or stenographic service, which record would be capable of later transcription should a challenge arise as to the nature of the oral test. Further (and the City has already indicated its propensity toward this), a bipartite panel of observers might well be enlisted to view the proceedings.

The Association also recommends that Article VI(B) be amended to read as follows:

> All vacant or newly-created positions to be filled in the bargaining unit shall be filled competitively. Examination announcements specifying minimum qualifications shall be distributed in departments and divisions and posted on official bulletin boards no later than fourteen (14) days following the occurrence of the vacancy or new position.

The Association contends that inclusion of the requirement that "newly-created" (as well as vacant) positions be filled competitively would obviate problems created by, among other things, the hiring of outside individuals into upper-level positions under the Public Employment Program (P.E.P.) created by the Emergency Employment Act of 1971. Considering the nature of the program, however, the Association's position is not demonstrably changed by the suggested language. First, the Association has the right to insist that all vacant positions be filled only through competitive testing procedures. Moreover, the City presently recognizes the Association's right to

insist that no positions above the 'entry level' be filled by P.E.P. participants except by examination. According to the testimony, the City could not use P.E.P. people in entry level jobs since this would have entailed promoting present employees to higher levels, thus requiring unbudgeted expenditures. Accordingly, P.E.P. recruits were placed in the higher positions. Contractually, and according to P.E.P. guidelines, acquiescence by the Association was necessary for this.[1]

Assuming existence of the Association's language, and assuming further the reasonable possibility that experienced bargaining unit personnel would be, for the most part, successful in competing against unemployed applicants; either (a) the program would not have been implemented or (b) the Association's acquiescence would have been sought. In retrospect, then, the situation for both parties would remain substantially unchanged. It is recommended that the present language remain as is.

The Association further suggests that examination announcements be distributed and posted no later than fourteen days following occurrence of a vacancy or new position. It contends that failure to do so allows interim replacements to acquire substantial amounts of experience in the position and thus obtain unfair advantages at the time of competitive testing. In response, the City maintains it

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[1] Some dispute exists as to whether such agreement was obtained, but that issue is not before the Fact Finder.

is often impossible to determine whether the vacancy should be filled. Notwithstanding the City's concerns, the Fact Finder believes it is in the best interests of all to make such decision and post quickly to avoid precisely the situation the Association complains of. It is recommended that such language be incorporated.

Similarly, the Association requests that, within fourteen days after posting, the examination shall be given and the position filled. Presently, examinations are conducted within thirty days of posting and the filling of vacant positions occurs thirty days after testing. Considering the necessities of validating tests and the scheduling problems inherent in administering them, the present time limits are neither unrealistic nor unfair. Assuming candidates know reasonably quickly of the availability of the position, (and the language recommended above looks to that end), then the procedure enables prospective candidates to prepare for the examinations. At the same time, these procedures recognize the necessities of the City in maintaining a business as usual.

The Association would also amend Article VI(D) to state that "if only one candidate from the unit is certified he shall receive the position." The problem with this is that certification as interpreted by the parties does not necessarily mean qualification for the job. Tests might still be necessary to assure job competence. Accordingly, such language is not recommended.

The Association suggests also that:

> If no employee from the bargaining unit applies for the position or passes the examination for it the City is free to fill the position from outside the bargaining unit. However, the City must give the same written examination to applicants for the position outside the bargaining unit as it does to employees in the bargaining unit and require the same passing grade as a prerequisite to job eligibility.

The City does not object to the first sentence of this provision, but contends that the second sentence is outside the scope of the Association's bargainable interests -- that is, the ability to bargain over hiring methods outside the bargaining unit. The Association's language is overly broad in this respect and, accordingly, is not recommended.

VI. TUITION REIMBURSEMENT

Here, the Association proposes that members of the bargaining unit who take a course of study which will be of value to their jobs, or to such jobs to which advancement is possible, shall, upon presentation of the proper receipts, receive from the City a refund of expenses incurred in taking the course. Such refund would include cost of tuition, registration fees and essential materials and equipment used and paid for by the student.

The Union's proposal concerns itself with an important facet of employee development -- the ability to take job-related courses. Such enrichment is of unquestioned value to both employee and employer. The problem with the Union proposal is that, as stated, it is too vague. It contains, for example, no methods of determining

which courses are, in fact, related and of value to an employee and his or her job. No restriction is built in concerning the amount of tuition reimbursement to which an individual employee might be entitled.

The evidence and testimony indicate that the City and the Association are not in basic disagreement over establishment of a program. It is, therefore, recommended that such program be immediately established and implemented and reduced to contract language which will include language presently set forth in the draft of training guidelines submitted as Union Exhibit 16. There may be some deletion or polishing of some of this language, but the resulting provision should include (1) criteria by which both parties can be advised as to the type of training which will qualify for tuition reimbursement, (2) prior approval by the City, and (3) applicable limitations on the amount of reimbursement available to any individual employee. The draft guidelines submitted cover many of these requirements. The recommendation is that such guidelines be immediately finalized, with whatever adjustments are necessary, to be implemented in the agreement resulting from these recommendations so as to avoid further delay.

VII. REIMBURSEMENT FOR OVERTIME WORK

The present agreement makes no provision for compensatory time off in lieu of overtime pay. The Association proposes the following language concerning compensatory time:

> That members of the bargaining unit may receive cash payment for overtime work or accrue said hours as compensatory time, but all compensatory time accrued must be used in the year earned or it will be paid in cash at the end of that year, provided that ten (10) compensatory days, non-cumulative, may be carried forward into the following year.

Presently, the contract with the Patrolmen unit in Pontiac carries similar language. Also, a provision with management people provides compensatory time off at the option of the City. This general policy recognizes that when a person works overtime he or she should, in most cases, be compensated.

The City's reluctance in the present context concerns scheduling problems inherent in replacing bargaining unit personnel. In view of these problems, but considering the Association's desire for time off instead of overtime pay, the recommendation is that the Ascoaition's language be incorporated into the collective agreement, but modified to reflect the City's wish to grant compensatory time at its option. In this manner, it is hoped the parties can accommodate the Association's request while availing the City of additional budgetary flexibility.

VIII. WAGE READJUSTMENT

The third economic issue presented by the Association concerns readjustment of wages of certain classifications. In its Exhibit 17, the Association compares the 1965-72 pay increases of bargaining unit members to the percent increases of Firefighters, Police, and members of the AFSCME Local. On balance, it is apparent that the negotiated increases of the PMEA fall short of the negotiated in-

creases of other bargaining units. The Association would have the Fact Finder determine the difference between these percentage increases and suggest the award of the differential as a lump sum increase in this year. The suggestion has little to commend itself. First, it ignores the dollar value of the salaries paid the individual classifications, as well as the nature of the work itself. Also, not the least of its problems, is the fact that such suggestion would result in wage increases this year in the general area of 30% to 40% for each employee. (This, in addition to the Association's suggested increase of 7.5%). The request is denied.

IX. WAGES

The Association's position, as amended during the hearing, is a 7.5% across-the-board increase for all classifications, retroactive to January 1, 1973. The City, for its part, offers a 5% across-the-board increase, also retroactive. Comparative figures as to wage settlements are always meaningful in attempting to make recommendations or awards concerning wages. Here, the arbitrator notes that the pattern in Pontiac with other bargaining units has been one of multi-year agreements. The Firefighters entered into a two-year contract with the City, under which they received a 7% across-the-board increase the first year, and a 6% across-the-board increase the second year. The AFSCME Local bargained a three-year contract with the City, under which salary increases for the first year are 7%, 6% in the second year, and 5% in the third year. Single-year contracts also exist. The Police Patrolmen unit received a 5.9%

across-the-board increase. The City's supervisors, bargaining as a unit, received a 7.5% increase (effective July 1, 1973), as did non-Union and management personnel not represented by a collective bargaining agent. That increase was also effective as of July 1, 1973. In the case of both the supervisory personnel and the non-Union and other management personnel, however, this wage increase was the first in eighteen months.

Whether by advocate or arbitrator, recommending a wage settlement is difficult business in these times. On the one hand, a nation facing an energy crisis and predictable business slowdown must be increasingly cognizant of the impact of unrealistic wage settlements in the public as well as private sector. On the other hand, news from the Labor Department indicates that, led by the advancing costs of a declining fuel supply, the wholesale price index jumped 1.8% in November. Rising food prices have caused the index to rise by 17.5% this past year. Considering the general economy and wage settlements relevant to the Pontiac situation, the Fact Finder recommends a 6.6% across-the-board increase on a one-year basis. Evidence was not presented at these proceedings concerning the possibility of a multi-year contract, but the Fact Finder notes that such agreement would serve the interests of both parties to the collective bargaining process and the community as well. The agreement would serve to add stability and predictability in a period of unstable

economic conditions which could only serve to benefit both employees and citizens of Pontiac.

Richard I. Bloch

Richard I. Bloch

Date: December 24, 1973