1601

STATE OF MICHIGAN

EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

TEAMSTER'S UNION LOCAL 214

MERC Case # G95 G-4008

Petitioner-Union,

-and-

MEADOWBROOK MEDICAL CARE FACILITY

Respondent-Employer

_____/

MERC Appointed Fact-Finder:

Jamil Akhtar
401 S. Woodward, Suite 450
Birmingham, MI 48009
(248) 642-5533

_____/

FACT-FINDER'S REPORT AND RECOMMENDATIONS

Sept. 1997

A. STATUTORY PROVISIONS

Fact finding in the State of Michigan is required under the applicable provisions of the Labor Relations and Mediation Act (Act 176 of the Public Acts of 1939, as amended), the Public Employment Relations Act (Act 336 of the Public Acts of 1947, as amended), and the general rules and regulations of the Michigan Department of Labor / Employment Relations Commission. The administrative rules pertaining to fact finding are found in part 3 of the Administrative Rules and Regulations, R423.431 through R423.435.

Although the statutes and rules of the Department of Labor and Employment Relations Commission do not provide the fact finder with guidelines under which to reach findings of fact, conclusions of law and recommendations, many fact finders look to the legislative intent contained in Act 312 of the Public Acts of 1969, as amended. Further, Section 9 of Act 312 (MCLA 423.239) sets forth the public policy of this State relating to public sector labor disputes and the criteria to be followed by a State-appointed arbitrator in rendering his report. Therein, the factors to be considered are:

423.239 Findings and orders; factors considered.

> **Sec. 9.** Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its' findings, opinions and order upon the following factors, as applicable:

(a) The lawful authority of the employer;
(b) Stipulations of the parties;
(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs;
(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;
    (ii) In private employment in comparable communities;
(e) The average consumer prices for goods and services, commonly known as the cost of living;
(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;
(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings; and
(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."

B. THE MEADOWBROOK MEDICAL CARE FACILITY

The Respondent-Employer, Meadowbrook Medical Care Facility ("the Employer"), is a public employer as otherwise defined by Act 336 of the Public Acts of 1947, as amended. Petitioner, Teamsters Local 214 ("the Union"), is the certified collective bargaining agent representing employees holding the classifications of:

1. Nurses' Aides (CENAs);
2. Dietary Aids;
3. Housekeeping Aids;
4. Laundry Aids;
5. Recreational Therapy Aids;
6. General Maintenance;
7. Janitor; and
8. Cooks.

The Meadowbrook Medical Care Facility is established under the applicable provisions of the Social Welfare Act, being Act 280 of the Public Acts of 1939, as amended. The Facility is governed by a three-person board, two of whom are appointed by the Antrim County Board of Commissioners, with the third member being appointed by the Governor.

Funding for the Facility is provided by way of reimbursements from Medicare, Medicaid, private insurance carriers, and direct pay by a limited number of patients. A vast majority of the funding for the Facility comes from Medicare and Medicaid payments.

The Facility is a skilled nursing facility with 113 beds available for county residents. The Facility does not receive any supplemental funding from the Antrim County Board of Commissioners, nor is there any special millage which has been passed by the citizens of Antrim County to underwrite the cost of the Facility.

A detailed explanation of the funding of the Facility was set forth in the affidavit of Mr. Patrick Horan, which is summarized on pages 6 through 11 of the Employer's post-hearing brief. This Fact

Finder has had an opportunity to carefully review the response of the Union relating to the affidavit of Patrick Horan and is persuaded to adopt the Employer's position in general terms, as it relates to past and present funding. In addition, this Fact Finder considers and gives great weight to Mr. Horan's future projections relating to changes proposed by the Governor and Legislature, to take effect in 1998.

C. BARGAINING HISTORY BETWEEN TEAMSTERS LOCAL 214 AND MEADOWBROOK MEDICAL CARE FACILITY

The employees in this bargaining unit, Local 214, have been represented by the Teamsters Union since June, 1991. It is the only group of employees at the Meadowbrook Medical Care Facility represented by a labor organization. The parties negotiated a first contract which was effective October 11, 1992 and which expired by its' own terms on October 11, 1995.

Both prior to and after the contract's expiration, the parties met in an effort to reach a successor agreement. In all, the parties met in seven (7) collective bargaining sessions and one (1) mediation session conducted by State Mediator, Lou Emmons. Although a number of tentative agreements were reached on issues raised by the parties, several issues remain in dispute.

Ultimately, the Union petitioned for fact finding on April 15,

1996. In its' petition, the Union indicated there were approximately thirteen (13) issues in dispute. The Employer filed its' Answer on April 30, 1996, identifying approximately seventeen (17) issues in dispute.

On October 21, 1996, the parties, represented by attorneys Philip Nantz and Robert White, participated in a telephone conference call with the Fact Finder. During that call, the parties agreed upon twenty (20) issues which remain in dispute.

A fact finding hearing was scheduled for December 5, 1996, at which, the parties explored a possible settlement of the issues. With the parties' consent, this Fact Finder acted as mediator in an attempt to narrow the outstanding issues. At the end of the second day, a comprehensive settlement to resolve all outstanding issues between the parties was recommended. This settlement was rejected by the Union, who requested that a new fact finding hearing be scheduled.

A second fact finding hearing was then scheduled for January 31, 1997 in Bellaire, Michigan. After the hearing started, counsel for the parties' met in an attempt to agree on the outstanding issues in dispute. As a result of this caucus, the parties' attorneys spent the remainder of the day outlining a settlement agreeable to both sides. At the end of the day, the specific parameters were approved by other parties' bargaining teams and a tentative agreement was

reached, subject to ratification by the Union and the Antrim County Family Independence Agency Board. On February 25, 1997, the Union rejected the tentative agreement.

Another fact finding hearing was then scheduled for May 19, 1997, at which the parties stipulated to the admission of both parties' written exhibits, as previously supplied to one another and the Fact Finder. The parties also entered into various factual stipulations, updated certain exhibits, and the Employer offered the written affidavit of Mr. Patrick Horan, C.P.A.. The Fact Finder gave the Union two (2) weeks, until June 2, 1997, to provide the Employer with a written response to Mr. Horan's affidavit. On June 13, 1997, the Employer received a letter from Mr. Gary Kushner, C.P.A., in response to Mr. Horan's Affidavit.

Also at the May 19, 1997 hearing, the Union raised an additional item to the fact finding. Over the Employer's objection, the Union submitted a separate record via the testimony of employee and Chief Union Steward, Iris Musser, and admitted certain written exhibits on the topic of mandatory overtime. The Employer objected to this item, inasmuch as it was not raised by the Union or discussed in negotiations nor during mediation. This issue will be discussed further below.

Finally, it was agreed that the parties' respective post-hearing briefs were to be postmarked by July 21, 1997.

D. OUTSTANDING ISSUES TO BE DECIDED BY THE FACT FINDER

The outstanding issues to be decided by this Fact Finder are as follows:

1. Wages: 1995 - October 11, 1999;
2. Retirement;
3. Term of the Collective Bargaining Agreement;
4. Paid Personal Days;
5. Waiver Provision;
6. Payoff of Frozen Sick Bank;
7. Employer's Increase Contribution for Monthly Health Care Costs;
8. Holiday Pay for Third-Shift Employees;
9. Funding Reduction Provisions;
10. Increase in Premium Pay for Worked Holidays;
11. Bereavement Leave;
12. Retroactivity;
13. Payment of Union Dues for New Hires;
14. Pro-Rated Personal Days for New Hires;
15. Agency Shop Provision;
16. Check Off of Union Dues and Agency Shop Fees;
17. Grievance Arbitration Provision; and
18. Mandatory Overtime.

FINDINGS OF FACT AND RECOMMENDATIONS

D-1. Wages:

(a) Wages (October 1995 - October 1996):

On April 5, 1997, the Facility implemented a $0.34 per hour pay increase for all employees of record as of that date, retroactive to December 17, 1995. The $0.34 per hour increase represents the pass through money authorized by the Legislature for County-run medical care facilities. According to representations made by the Employer - apparently concurred in by the Union - the funds for implementation of the $0.34 per hour pay increase had to be requested by May 1, 1997, or the Facility faced the possibility of the loss of said funds.

The Union stipulated on the record during the May 19, 1997 hearing that it had agreed to the $0.34 per hour across the board pay increase. However, the Union took the position that the pay increase should apply to all employees who were on the County payroll prior to April 4, 1997, and further, that the pay increase should be retroactive to the expiration of the parties' collective bargaining agreement, being October 11, 1995.

Thus, the only issues for determination by this Fact Finder are who shall receive the $0.34 per hour and whether or not the $0.34 per hour should be retroactive to October 11, 1995.

It is the recommendation of this Fact Finder that the $0.34 per

hour be paid only to those employees who were employed at the Facility on and after October 11, 1995 and who had completed their probationary period. This Fact Finder is specifically recommending that any employee who had completed his or her probationary period and voluntarily terminated employment with the Facility after December 15, 1995, shall receive retroactive pay for that period.

The Fact Finder is without information as to why the Employer chose December 17, 1995 to be the retroactive date. However, there is information on the record (contained on pages 17-21 of the Employer's Brief) that the Facility's determination to grant $0.34 per hour was based upon its' ability to obtain the maximum pass-through amount from the State.

(b) Wages (October 11, 1996 - October 11, 1997):

Ability to Pay. Based upon the facts presented to this Fact Finder, the Employer is not denying a present ability to meet and pay the wage demands of the Union. However, the Employer is quick to point out - and makes a strong argument in doing so - that its' present healthy financial position has been weakened by a decrease in the number of beds being utilized (which has negatively impacted associated reimbursements) and the increased cost of providing statutory care to the citizens of Antrim County.

It would appear from reviewing the documents contained in Employer's Exhibit #24 that as of December 31, 1995, the Facility had

retained earnings of $2,992,758.00 and reserves for future capital purchases of $1,505,928.00.

The Employer also suggests that the appropriate comparable communities are those such as are set out in Exhibit #28, attached to the Employer's Brief. I find that the comparables offered by the Employer are the appropriate comparisons to be used for the purpose of making the recommendations contained herein for contract years 1996-1997, 1997-1998 and 1998-1999.

When comparing the 1996 maximum rates for employees in the CENA classification (Employer's Revised Exhibit #28), it is evident that Meadowbrook Medical Care Facility employees are among the lowest paid in the comparable facilities. The comparable facilities and maximum rates for 1996 are as follows:

#1	Brookhaven (Muskegon County Medical Care Facility)	9.48
#2	Oakview (Mason County Medical Care Facility)	9.41
#3	Manistee County Medical Care Facility	9.17
#4	Emmet County Medical Care Facility	9.11
#5	Newaygo County Medical Care Facility	8.60
#6	Grandvue (Charlevoix County Medical Care Facility)	8.25
#7	Grand Traverse County Medical Care Facility	8.19
#8	Oceana County Medical Care Facility	8.10

#9	**Meadowbrook Medical Care Facility**	**7.96**
#10	The Maples (Benzie County Medical Care Facility)	7.68

Employer's Revised Exhibit #29 demonstrates that employees of Meadowbrook Medical Care Facility who are employed in the classification of Recreational Therapy Aid are the third lowest paid among the comparable employers. A breakdown of the ten (10) comparables is as follows:

#1	Brookhaven (Muskegon County Medical Care Facility)	9.48
#2	Mason Medical Care Facility	8.74
#3	Newaygo County Medical Care Facility	8.60
#4	Emmet County Medical Care Facility	8.54
#5	Oceana County Medical Care Facility	8.33
#6	Manistee County Medical Care Facility	8.32
#7	Grand Traverse County Medical Care Facility	8.19
#8	**Meadowbrook Medical Care Facility**	**7.91**
#9	The Maples (Benzie County Medical Care Facility)	7.89
#10	Grandvue (Charlevoix County Medical Care Facility)	7.88

A comparison of the Housekeeping Aids' maximum pay for 1996 (Employer's Revised Exhibit #30) demonstrates that employees of Meadowbrook Medical Care Facility are paid lower than five (5) of the comparable facilities:

#1	Oakview (Mason County Medical Care Facility)	8.74
#2	Emmet County Medical Care Facility	8.54
#3	Newaygo County Medical Care Facility	8.38
#4	Manistee County Medical Care Facility	8.32
#5	Oceana County Medical Care Facility	7.99
#6	**Meadowbrook Medical Care Facility**	**7.91**
#7	Grandvue (Charlevoix County Medical Care Facility)	7.88
#8	Grand Traverse County Medical Care Facility	7.76
#9	The Maples (Benzie County Medical Care Facility	7.68

As to the Laundry Aid classification (Employer's Revised Exhibit #31), employees of Meadowbrook Medical Care Facility are paid at the mid-range of the other comparable communities. A breakdown of the comparable facilities is as follows:

#1	Manistee County Medical Care Facility	8.54
#2	Emmet County Medical Care Facility	8.54
#3	Newaygo County Medical Care Facility	8.38
#4	Oceana County Medical Care Facility	7.99
#5	**Meadowbrook Medical Care Facility**	**7.91**
#6	Grandvue (Charlevoix County Medical Care Facility)	7.88
#7	Grand Traverse County Medical Care Facility	7.76

#8	The Maples (Benzie County Medical Care Facility)	7.68

Next, as to the classification of Dietary Aid (Employer's Revised Exhibit #32), Meadowbrook employees in this classification rank seventh (7th) out of the nine (9) comparable communities. A breakdown of said rates is as follows:

#1	Brookhaven (Muskegon County Medical Care Facility)	9.29
#2	Oakview (Mason County Medical Care Facility)	8.74
#3	Emmet County Medical Care Facility	8.54
#4	Newaygo County Medical Care Facility	8.38
#5	Manistee County Medical Care Facility	8.32
#6	Oceana County Medical Care Facility	7.99
#7	**Meadowbrook Medical Care Facility**	**7.91**
#8	Grandvue (Charlevoix County Medical Care Facility)	7.88
#9	Grand Traverse County Medical Care Facility	7.76

For employees holding the classification of Cook, Employer's Revised Exhibit #33 demonstrates that Meadowbrook's Cooks are within the mid-range compared to the other eight (8) communities. A breakdown of the comparable wages is as follows:

#1	Grand Traverse County Medical Care Facility	I.	11.22
		II.	8.40

#2	Emmet County Medical Care Facility	I.	10.89
		II.	9.85
#3	Brookhaven (Muskegon County Medical Care Facility)		10.01
#4	Mason Medical Care Facility	I.	9.90
		II.	9.14
#5	**Meadowbrook Medical Care Facility**		**9.33**
#6	Grandvue (Charlevoix County Medical Care Facility)	I.	9.16
		II.	9.42
#7	Newaygo County Medical Care Facility		9.01
#8	Manistee County Medical Care Facility		8.92
#9	Oceana County Medical Care Facility		8.71

Finally, Meadowbrook employees in the General Maintenance classification (Employer's Revised Exhibit #34) rank seventh (7th) among the eight (8) communities, with the breakdown as follows:

#1	Emmet County Medical Care Facility	9.51
#2	Brookhaven (Muskegon County Medical Care Facility)	9.38
#3	Grandvue Medical Care Facility	8.70
#4	Newaygo County Medical Care Facility	8.64
#5	Oceana County Medical Care Facility	8.55
#6	The Maples (Benzie County Medical Care Facility)	8.31
#7	**Meadowbrook Medical Care Facility**	**8.28**
#8	Grand Traverse County Medical Care Facility	7.76

A very difficult issue to come to grips with is the tremendous turnover rate in the CENA classification. Presently, based upon Employer Exhibit #5, there are sixty-three (63) CENA employees, of which twenty-two (22) were hired in 1996. This would indicate that roughly thirty-five percent (35%) of the employees in the CENA classification were hired to replace employees who terminated employment with the Facility.

This high turnover rate, in all probability, is grounded in the fact that the starting hourly rate for the position is $4.75 per hour. The maximum pay for a CENA-classified employee is $7.62 per hour for 1995, or $15,849.00 per year. However, it is obvious most CENA-classified employees work substantial overtime hours, and in fact, it appears the average employee works an additional 100-150 hours per year on an overtime basis (Employer's Exhibit #5).

Both the Employer and the Union have proposed a $0.30 per hour across-the-board increase for all employees, at all steps. This Fact Finder therefore recommends that, effective October 11, 1996, a $0.30 per hour across-the-board increase be granted to all employees.

(c) 1997 - 1998 Wage Increase:

The Employer proposes a $0.30 per hour across-the-board increase. Likewise, at page 9 of its' Brief, the Union has stated that it had previously accepted the $0.30 per hour across-the-board increase offered by the Employer.

Accordingly, this Fact Finder is recommending that a $0.30 per hour across-the-board increase be granted to all bargaining unit employees, as of October 11, 1997.

(d) Wage Re-Opener - October 11, 1998:

The Employer has requested a wage re-opener for October, 1998, continuing through October 11, 1999. The Union, at page 11 of its' Brief, has indicated it is willing to enter into a four (4) year contract if a specific wage increase were included for the 1998-1999 contract year.

Based upon the difficulties the parties had in reaching an agreement, or even being able to sit across the table from one another, this Fact Finder believes it to be in the parties' best interests to extend the contract term to expire on October 11, 1999. This would mean that, if all parties accepted this Fact Finder's recommendations, there would be labor peace for at least twenty-four (24) months before negotiations would commence on a new contract.

Based upon my projections as to the wage increases which have historically been provided to the comparable communities, I find that $0.35 per hour will, in all probability, do no more than keep Meadowbrook employees in their current positions, in relation to the other medical care facilities which have been adopted as comparables (Employer's Exhibit 28).

This Fact Finder is therefore recommending that a $0.35 per hour across-the-board increase be granted to all members of the bargaining unit, effective October 11, 1998.

D-2. Change in Retirement Contributions:

The Employer has requested that members of the bargaining unit contribute 5% of their salary to help underwrite the cost of the Pension Plan currently in effect for Facility employees. The Employer presented significant arguments demonstrating that the contribution rate by the Facility will increase from $48,000.00 in 1996, to $96,000.00 in 1997, and is projected to be $130,000.00 in 1998.

The Union countered by arguing that for the past several years the Facility has not made any contributions to the retirement system. This is based upon the fact that the investment income has exceeded the investment assumptions made by the State actuaries. The Facility has taken advantage of the additional income realized in excess of the actuarial investment assumptions and has determined not to make any contributions in the past.

The evidence demonstrates that the Facility did not set aside, in any one specific fund, the money it saved as a result of not making the contributions. But as pointed out above, Employer's Exhibit #24 demonstrates that the Employer had retained earnings of $2,992,758.00 at the end of the December 31, 1995 fiscal year.

The Union also argues that in 1982, the employees gave up a pay increase in exchange for the Employer picking up the employees' contributions to the pension system. However, the Employer is now requesting that the employees pay 5% of their wages to the pension system. This Fact Finder is uncertain as to whether the Employer's proposal is based on the contractual wage rate or W-2 wages paid.

Nevertheless, in light of the fact that a majority of the employees are, in most instances, in a position of being near the bottom of the wage scale in relation to the comparable facilities, it is extremely difficult for this Fact Finder to recommend that the employees contribute to the pension plan. If such a contribution were to be awarded, it would have the effect of diminishing the employees' true wages by the percentage of their contribution, keeping in mind that said contributions represent after-tax dollars.

The relative percentages paid as retirement contributions by employees in the comparable medical care facilities are set out in Employer's Exhibit #39. As this chart illustrates, contribution rates vary between facilities, ranging from 0% contribution for Emmett, Grand Traverse, Grandvue, Manistee and Oakview, to Maples paying 1%, Oceana paying between 3% and 5%, Newaygo paying between 2% and 4%, and Brookhaven paying between 3% and 5%.

Based upon projections that the Employer's contribution will raise from $48,000.00 in 1996 to $130,000.00 in 1998, this would

indicate an $82,000.00 increase during this two (2) year period, or $41,000.00 per year on average. Further, there are approximately 100 employees represented by the Union who are members of the MERS Pension Plan.

Therefore, it is this Fact Finder's recommendation that, effective October 1, 1998 (contemporaneous with commencement of a $0.35 per hour across-the-board roll-in), each employee who is a member of the pension system will be required to contribute up to two percent (2%) of their gross wages, in order to pay for any increase in the cost of the pension plan in excess of $96,000.00.

By adopting this formula, the Employer will be required to contribute the first $96,000.00 of pension plan costs and the employees would be required to pay for any amount in excess of $96,000.00, with a cap of 2%. In the event an additional contribution is needed to fully fund the pension system, the Employer would then be required to contribute an amount above the employee 2% contribution.

Alternatively, this Fact Finder would recommend that the MERS Pension System be discontinued and the employer and employee contributions be rolled into a defined contribution plan administered by a third party administrator. Within such a scheme, the Employer would provide for a 4 to 1 match (up to a maximum of $750.00 per year) and the employee would contribute between 2% and 5% of their

gross wages, keeping in mind the employee contributions would be before-tax dollars. If a defined contribution retirement system is set up, it would eliminate the uncertainties of funding a defined benefit plan.

D-3. Term of the Contract:

It is the recommendation of this Fact Finder that the Contract be retroactive to October 11, 1995, and continue in effect until 11:59 p.m. on October 10, 1999.

D-4. Personal Days:

The Employer has proposed a change in the manner in which personal days are awarded to the employees. The Employer's proposal is as follows:

> "Regular full-time employees earn five (5) personal days if the employee works more than 1,800 hours during a qualifying year, three (3) if the employee works more than 1,300 hours during a qualifying year. Part-time employees earn four (4) personal days if worked more than 1,300 hours during a qualifying year, three (3) if the employee works 1,300 hours or less during a qualifying year."

The present practice of the parties is that regular full-time employees earn five (5) personal days per year, regardless of the number of hours worked. Regular part-time employees earn four (4) personal days per year, if they work more than 1,300 hours during a qualifying year. Finally, three (3) personal days are awarded to part-time employees who work 1,300 hours or less during a qualifying

year.

The Union is requesting that the current language be maintained. On the other hand, the Employer makes a forceful argument that the language in the contract encourages employee absenteeism. However, as I understand the Employer's proposal, it would penalize an employee for utilizing vacation time, personal days, or when an employee is injured in the course of employment. Further, an employee who takes an unpaid leave of absence under the Family Medical Leave Act, would also lose their personal days.

This Fact Finder is therefore adopting the Employer's proposal, subject to the following modifications:

1) Time missed from work due to an employee sustaining an on-the-job injury and receiving statutory Workers' Compensation Benefits shall not be used to reduce the number of paid personal days for the first two (2) years;

2) The amount of time the employee takes for vacation, likewise, shall not be used to reduce the number of paid personal days;

3) The use of personal days shall, likewise, not be used for the purpose of reducing the number of hours needed to qualify for personal leave days;

4) The amount of time an employee takes off under the Federal Family Medical Leave Act shall be deducted from the

employee's total number of credited hours used to calculate the number of paid personal days; and

5) All other unpaid leaves of absence, except for jury duty and military leave, shall, likewise, be used to reduce the employee's credited hours in determining the number of paid personal days.

Because this Fact Finder is mindful of the amount of overtime an employee is required to work, based upon the short staffing of the Facility, it is my further recommendation that any employee who works in excess of 2,200 hours in any one (1) year will be granted an additional paid personal day off during the following year.

D-5. Waiver Provision:

The Employer's proposed Waiver Provision provides:

> "The Union expressly agrees that this section is, in part, intended to mean that any economic or non-economic term and condition of employment not specifically covered in this agreement as written, shall not be subject to any notification and/or bargaining obligation. The Union further expressly agrees that the facility, in its' sole discretion, make take whatever unilateral action the facility deems appropriate with respect to such economic and non-economic terms and conditions of employment not specifically covered in this agreement as written. Such action by the facility shall not be subject to challenge."

Based upon my thirty years' experience in public sector labor negotiations, I find the Employer's position to be overreaching, and quite possibly, in violation of the Public Employment Relations Act.

Most recently, the Michigan Supreme Court in Port Huron Education Assn. v. Port Huron School District, 452 Mich. 309 (1996) and Detroit Police Officers' Assn. v. City of Detroit, 452 Mich. 339 (1996), has specifically held that past practices of the parties are mandatory subjects of collective bargaining.

Here, the Management Rights clause contained in the present collective bargaining agreement, which has been carried forward, provides the Employer with ample discretion and ability to manage the affairs of the Facility.

This Fact Finder is impressed with the fact that the management team in place at Meadowbrook has done an outstanding job in managing the fiscal affairs and patient care aspects of the Facility. It is to be commended for said actions.

However, when it comes to employee rights, it is the public policy of this State, as set forth in the Public Employment Relations Act, that all wages, hours, and other terms and conditions of employment are mandatory subjects of collective bargaining. Thus, if the need to take action arises during the course of the collective bargaining agreement, with respect to correcting a problem which the parties did not contemplate, the avenues open to the Employer include requesting bargaining on the subject matter, requesting mediation, and/or taking any other course of action available under the applicable provisions of the contract and the PERA.

Therefore, for these reasons this Fact Finder believes the Employer's proposed Waiver Provision language should be flatly rejected.

D-6. Frozen Sick Bank:

The Employer proposes that the employees be given the option of purchasing all of their frozen sick bank at 50%, or leaving the bank as is, per the letter of understanding entered into under the expired 1992-1995 Contract. Conversely, the Union, by way of its' Brief, has indicated that "this is a non-issue".

This Fact Finder awards the Employer's position with the understanding that any employee who does not wish to cash out their frozen sick bank at 50%, will retain the option of receiving 100% payoff at the time of separation of employment. However, this Fact Finder does recommend that the parties agree to a specific date by which the employees will have to make their election, and would further recommend that this be done within ninety (90) days of the signing of a new agreement.

D-7. Contributions to Health Benefits:

With regard to health benefits, the Employer has offered to increase the maximum monthly amount contributed by the Facility to $190.00 for the first year of the contract, $195.00 for the second year, and $200.00 for the third.

The Union has countered with requests for $195.00 for the first

year of the contract, $205.00 for the second year, and $215.00 for the third year of the contract. The present maximum contribution is $185.00 per month.

Thus, this Fact Finder recommends that, effective October 11, 1997, the Employer's contribution be raised to $200.00 per month. Further, effective October 1, 1998, the Employer's contribution should be raised to $205.00 per month.

In so doing, this Fact Finder does not provide for any retroactive reimbursements to the employees, other than to state that if the contract is not instituted on October 11, 1997, then the payments of $200.00 per month would be retroactive to that date, once the parties have formalized their agreement.

D-8. Holiday Pay for Third-Shift Employees:

The Employer wants an employee who commences work at 11:00 p.m. on the date of the holiday to receive holiday pay, whereas the Union wants the continuation of the old contract language (as interpreted by a grievance arbitrator) to continue.

By way of illustration, under the Employer's proposal, if December 25th is a paid holiday, an employee who comes to work on December 25th, at 11:00 p.m., and who works one (1) hour on December 25th, would receive eight (8) hours of holiday pay. The Employer's reasoning is that the employee's shift started on December 25th. However, the Union's position is that an employee who starts work on

December 24th and works seven (7) hours on December 25th, is then entitled to the holiday pay.

This Fact Finder recommends that the parties adopt one of two positions. The first approach would be that the status quo be maintained and that the terms of the grievance arbitration award be implemented by the parties. The second, alternative approach, would be that the holiday pay be paid to the employee for the actual number of hours worked on the holiday [i.e., an employee who works seven (7) hours, would receive seven (7) hours holiday pay; the employee who works one (1) hour would receive one (1) hour holiday pay, etc...].

D-9. Funding Reduction (Employer Proposal):

The Employer has proposed that it have the right, in the event of the change in funding from either the State or Federal government, to make a dramatic cut in employee wages and benefits. The Employer's proposal has been presented as follows:

> "In the event that at any time during the term of this Agreement the funding mechanisms through which the Facility receives reimbursement monies from state and/or federal sources are changed or otherwise revised resulting in a reduction in the level of funding received by the Facility, such as for example, a decline in the variable cost component of the Facility or the implementation by the state of a new reimbursement system, then the Facility shall have the right to immediately and automatically reduce all contractual pay rates. It is provided, however, that this automatic and immediate reduction shall not result in pay rate levels lower than those in effect as of October 1, 1994. The Facility may also be unable to

> continue to maintain benefit levels set forth in this Agreement. It is provided, however, that the Facility agrees to notify the Union prior to implementing any further reduction in wages beyond the October 1, 1994 levels and prior to implementing any reduction in benefits and upon written request of the Union submitted to the Facility within seven (7) calendar days following date of notification, the Facility further agrees to meet with the Union for the purpose of receiving any input the Union may care to present prior to such implementation. In order to be held, any such meeting must occur within ten (10) calendar days following the Facility's receipt of the Union's meeting request."

The problem with the Employer's proposal is that any reduction, no matter how slight, would allow it to immediately trigger the reduction in pay to the 1994 levels and to then take further action to reduce employee benefits.

This Fact Finder is mindful that changes are about to take place in 1998, which could have a dramatic impact on the Facility's ability to continue to provide the high quality of services which the citizens of Antrim County have grown to expect. The County Board of Commissioners has demonstrated an unwillingness to participate by way of general fund appropriation or authorizing addition millage. At this point in time, said appropriation or dedicated millage is not required, in light of the fact that the Facility has in excess of $2,000,000.00 in retained earnings. However, the Facility could find itself in a position of scraping the bottom of the barrel during the life of this collective bargaining agreement if the parties were to

extend the contract to October of 1999.

Therefore, this Fact Finder recommends that the parties adopt the following funding reduction language:

> "If at any time during the term of this agreement the funding mechanism through which the facility receives reimbursement monies from state or federal sources are changed, resulting in a significant reduction in the level of funding received by the facility, such as, for example, a decline in the variable cost component of the facility or the implementation by the state of a new reimbursement system, which has a substantial impact on the amount of revenues received by the facility from the state, then the facility shall have the right to re-open this contract for the purpose of bargaining concessions with the Union.
>
> As a prerequisite of requesting concession bargaining from the Union, the facility shall be required to open its' books to the Union and to have an outside certified public accountant issue an audit letter setting forth the projected loss of state and/or federal revenue.
>
> The Union shall be required to meet with the Employer within seven (7) calendar days of receipt of the notice to commence bargaining on contract concessions and the parties shall, at the same time the notice is given to commence bargaining, notify the Employment Relations Commission to assign a fact finder, or, if the parties can so agree, to request that the Employment Relations Commission appoint a fact finder agreed upon by the parties.
>
> The facility will not be allowed to take any unilateral action until completion of the fact finding process."

D-10. <u>Premium Pay for Holidays Worked</u>:

It would appear that the parties are in agreement that the

existing language of the contract shall be maintained in this area, and therefore, the current language shall be continued.

D-11. Definition of "Immediate Family" for Paid Bereavement Leave:

The Employer has requested that the current language be maintained, whereas the Union had originally requested that the sister-in-law and brother-in-law be added as a member of the immediate family. However, by way of its' Brief, the Union has withdrawn its' proposal. Thus, the existing contract language in this area shall be continued.

D-12. Retroactivity:

This Fact Finder has dealt with the issue of retroactivity in the various issues discussed above. Retroactivity as to wages shall be in accordance with the recommendations set forth in Part D-1(a) through D-1(d) above. All other provisions shall be effective as of October 11, 1997, unless otherwise specifically changed in the individual paragraphs of this Fact Finder's report.

D-13. Payment of Union Dues:

The Union has agreed to withdraw its' request that Union dues and/or the service fee commence after ninety (90) calendar days. The Employer requests that the existing language be maintained, which provides that newly hired employees are required to pay Union membership dues or the Union non-member service fee, effective with

the first full calendar month following the completion of the newly hired probationary period established in the contract.

The Union has withdrawn its' demand upon this issue, and therefore, it is the determination of this Fact Finder that the current language shall be continued.

D-14. Pro-Rated Personal Days for New Hires:

Apparently there is some confusion as to whether or not employees hired after commencement of the contract year receive pro-rated personal days. The director of the Facility indicated that, even though the Facility is not required to do so under the terms of the contract, employees hired after the commencement of the contract year are awarded a limited number of personal days.

Therefore, this Fact Finder recommends that the existing language, as well as the practice established by the Employer, also be continued. This may be accomplished by way of a letter sent to the Union from the Employer, indicating the nature of the current practice.

D-15. Continuation of Modified Agency Shop Provision:

This Fact Finder has reviewed the parties' respective positions and it is his recommendation that the current contract language in this area be continued.

D-16. Payroll Deduction:

This Fact Finder has reviewed the parties' respective positions

and it is his recommendation that the current contract language be continued. In addition, the current language will provide for an orderly process for payroll deduction of Union dues or the Agency Shop fee.

D-17. Binding Third Party Grievance Arbitration:

The Employer wishes to eliminate binding arbitration as a terminal step of the grievance procedure. On the other hand, the Union wishes to continue the current grievance arbitration provision in the collective bargaining agreement.

Arbitration as the terminal step of the grievance procedure is well established in our society and it is difficult to understand why the Employer would make such a proposal. Without grievance arbitration, an employee would be left with virtually no recourse if the Employer violated the terms and conditions of the collective bargaining agreement, or, if the employee was terminated without just cause.

In Michigan, an employee who seeks to file a lawsuit alleging breach of contract must first allege and prove his Union breached its' duty of fair representation. Absent a grievance procedure which terminates in binding arbitration, an employee would be without recourse. Public employees would be placed in virtually at-will employment relationships - which the Public Employment Relations Act sought to eliminate when enacted by the Michigan legislature in the

late 1960's. Without further comment, this Fact Finder recommends the existing contract language be maintained.

D-18. Mandatory Overtime:

During the course of the fact finding hearings, which lasted about five (5) months, the Union raised the new issue of mandatory overtime. The Employer has taken the position that the issue of mandatory overtime was not listed by the Union in its' Petition for Fact Finding, and thus, is not properly before this Fact Finder.

However, this Fact Finder believes he should be guided by the public policy of this State, set forth in Act 312, which evidences the intent of the legislature when resolving these types of labor disputes. Section 9(g) of the Act provides:

> "... changes in any of the foregoing circumstances during the pendency of the arbitration proceeding ...".

Further, Section 9(h) provides:

> "... 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 ...".

Based upon the foregoing, this Fact Finder believes that he may properly review the issue of mandatory overtime. However, the problem with the Union's proposal is that it does not offer this Fact Finder any proposed language to be adopted.

This Fact Finder therefore recommends that the following language be adopted:

> "All overtime assignments in excess of two (2) hours shall be first offered to the employees on the shift where the overtime is to be worked, and who are scheduled off on their leave days.
>
> If the supervisor is unable to contact an employee who is scheduled off on their leave day, the supervisor shall then request the employees who are presently working to volunteer to work the overtime assignment.
>
> The Employer shall establish a voluntary overtime list, which shall be effective for a ninety (90) day period. Before forcing an employee to work an eight (8) hour overtime assignment, the shift supervisor shall first contact the employees on the voluntary overtime list to see if they are willing to work the overtime assignment.
>
> If no employee volunteers to work the overtime assignment, the employee with the least amount of seniority who is then working will be ordered to work the overtime assignment. However, no employee shall be required to work more than eight (8) hours during one calendar week."

E. CONCLUSION

It may be worthwhile for the parties to consider an economic re-opener for the 1999-2000 contract year, which would have the effect of providing for a stable three (3) year labor-management relationship. In light of the fact that neither party has suggested a contract period beyond 1999, this Fact Finder is without authority to award such an extension. However, based upon my relationship with the parties, and my understanding of the nature of the disputes, this

Fact Finder believes it to be in the best interests of all parties to develop a long and continuing labor agreement.

For the State of Michigan,
Department of Labor,

_____
Jamil Akhtar

Dated: September 3, 1997