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In the Matter of Act 312 Statutory Arbitration between:

CHARTER TOWNSHIP OF WATERFORD
Employer,
-and-

WATERFORD TOWNSHIP FIRE FIGHTERS ASSOCIATION, Local 1355, IAFF, AFL-CIO,
Union.
_____/

MERC Case No. D03 H-2207

ARBITRATION PANEL'S FINDINGS, CONCLUSIONS, AND ORDERS.

BEFORE A PANEL CONSISTING OF:

Benjamin A. Kerner, Neutral Chair
Ronald R. Helveston, Union Delegate
Stanley W. Kurzman, Employer Delegate

Appearances:

For the Employer:	Stanley W. Kurzman Stanley W. Kurzman, PLLC
For the Union:	Ronald R. Helveston Helveston & Helveston, P .C.

Also present for part or all of the proceedings: Robert E. Butcher, Scott Carter, Matthew J. Covey, Jeff Finkbeiner, Joe Heffernan, Dennis R. Leppan, Robert Seeterlin, William S. Smith, Agnes Spitzer-Greig, Bruce Whiteside, Jeffrey F. Wise.

Dated: March 28, 2006

BACKGROUND.

By petition dated June 1, 2005, the Union gave notice that there was a dispute concerning the wages, hours, and working conditions of the firefighters in the Charter Township of Waterford. The Union listed 7 issues as being in dispute:

Wages 1/1/04
Wages, 1/1/05
Wages, 1/1/06
Pension –Multiplier
Pension-Deferred Retirement Option Plan
Advanced Life Support (ALS) transport premium pay
Minimum Staffing of ALS rescue vehicles.

By letter dated July 21, 2005, the Employment Relations Commission appointed the undersigned Neutral Arbitrator as Chair of a panel to be convened to take evidence and to resolve the labor dispute. In due time, the Employer submitted its list of proposals, which overlapped with the Union's proposals in some instances and in addition covered the following proposals:

Sick leave, short-term disability/ long-term disability benefit.
Health insurance coverage.
Health Reimbursement Arrangements—
Amendment to drug testing procedure
Pension--New Hires.

I called a pre-hearing conference, which was done by telephone conference on October 19, 2005. The parties there agreed to a number of pre-hearing steps, including the exchange of exhibits and the exchange of witness lists. The parties stipulated that this would be a three year contract, beginning Janu-

ary 1, 2004 and running to December 31, 2006. The parties further stipulated that all prior contract provisions not at issue were to be carried forward into the contract-to-be-formed. The parties also stipulated that they waived compliance with that portion of Section 6 of the governing statute, MCL 423.236 that requires a hearing to begin within 15 days of the appointment of the neutral arbitrator. At the pre-hearing conference the parties set dates for the hearings, as well as an order of proceeding, such that an orderly presentation of evidence could be expected.

Hearings were held at the headquarters of the fire department, Waterford Township, on November 29, December 6, 7, and 16, 2005. The parties marked, qualified, and entered 92 Union Exhibits and 72 Employer Exhibits (marked 100-171) (plus 3 rebuttal exhibits). Testimony was taken from Agnes Spitzer-Greig, Gene Butcher, Bruce Whiteside, Bill Smith, Robert Seeterlin, and Joe Heffernan.

On several issues, through the efforts of the parties' representatives—bargaining before and after the hearing sessions with the Panel -- it became apparent that there was substantial agreement. These items (1-4) have been made the subject of awards, as shown below, based on the stipulations of the parties. Additional subjects were deferred for possible resolution by the Neutral Arbitrator at a later time (ALS premium pay and ALS Rescue vehicle minimum staffing as well as Pension-DROP plan) (items 5-6). The subject of Pension

multiplier dropped out of consideration in these proceedings, based on the identical Last Best Offers of the parties. And, finally, four subjects (Wages-04; Sick Leave/Short-Term disability/Long-Term disability; New Hire pension; and amendment to Drug testing procedure) (Items 7-10) remained in dispute. On these subjects the Panel received evidence, and will make the determinations shown below.

BASIS OF AWARDS.

The governing statute makes clear on what grounds a panel can base its awards. They are contained in Section 9 of the statute, MCL 423.239, as follows:

(a) The lawful authority of the Employer.

(b) The 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.

(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....

COMPARABLE COMMUNITIES.

The statutory factor 9(d)(i) allows the Panel to look to the terms and conditions of employment of similarly situated employees in comparable communities. The Union and the Employer agree as to certain communities that are comparables. These are Canton Township, Clinton Township, Pontiac, Dearborn Heights, Royal Oak, Shelby Township, Redford Township, St. Clair Shores, and Westland. In addition, the Union would have the Panel consider

the following communities to be comparable: Bloomfield Township, Southfield, Roseville, and West Bloomfield.

The Union offers evidence that the four listed "additional" comparables are similar in respect to basic community characteristics as well as in the nature of the fire department operations. For instance, the Union (in U. Exh. 63) shows that three of the four communities are within 50% greater or 50% smaller taxable valuation in 2004. Roseville had a taxable valuation of $1,235,492,000 in 2004, whereas the Township of Waterford had a taxable valuation of $2,387,273,000 in 2004. Thus, Roseville is 48.2% of the value for Waterford. Southfield has a taxable valuation for 2004 of $3,386,748,000. This is 41.9% higher than Waterford's taxable valuation. The evidence showed that the criteria of 50% more or 50% less is a frequently used criteria for defining comparable communities, and has been incorporated in the manual, Interest Arbitration by Bill Aitchison.

By the same criterion, West Bloomfield has more than 50% the taxable valuation of Waterford. The taxable valuation in 2004 in West Bloomfield was $3,660,466,000. That is 53.3% of the taxable valuation of Waterford. On other characteristics of the communities, too, West Bloomfield is significantly different than Waterford. For instance, median family income for West Bloomfield, according to the 2000 census, was $91,661, whereas Waterford had a family income of $55,008, a difference of +66.6%.

Bloomfield also has a high median household income, compared to Waterford, being (according to the 2000 census) $103,897, even more than the 66.6% difference seen for West Bloomfield. On household income Roseville has a median household income of $41,220 whereas Waterford has a median household income of $55,008, for a difference of -25%. On household income Southfield has a median figure of $51,802 for a difference of -5.8%.

With regard to the operations of the Fire Department, the evidence shows that the paramedic service in Waterford is of paramount importance, accounting for 84% of the runs in 2004. The other communities that the Union would have included also have paramedic services, but the data do not allow a comparison of the run numbers or percentage of fire runs vs. paramedic runs.

Another significant criterion is the former inclusion of the community in Act 312 proceedings between the parties, or between the Township and its other Act 312-eligible parties. The evidence shows that Bloomfield was included as a stipulated comparable in the 1987 Kahn Fire Fighter award, as well as in the Police Supervisors' Burkholder 1991 Award and in the Police Supervisors' Wolkinson 1978 award.

The evidence also shows that West Bloomfield has been found comparable in the Firefighters' Kahn 1987 award (or, included, if not specifically endorsed), as well as in the Police Officers' Ellmann 1993 award and in the Police Supervisors' Burkholder 1991 award.

The evidence shows that Roseville was included in the Firefighters' Lax 1994 award and in the Police Officers' Ellmann 1993 award. And, Southfield was included in the Firefighters' 1987 Kahn award (U. Exh. 68, p. 4, included without comment).

Of the various criteria on which comparability depends, the Neutral Chair is inclined to give great weight to the criterion of previous use of the community (either by stipulation or by award of arbitrator) in Act 312 proceedings. Nature of the fire department operations runs a close second, and is a highly significant criterion. All of the questioned communities have paramedic services. Taxable valuation and household income have significant bearing, in that these criteria tell us something about how much of a tax base is available to the unit of government. The only communities which appear to be out-of-line on these last mentioned criteria are Bloomfield and West Bloomfield. However, the countervailing fact is that both Bloomfield and West Bloomfield were either proposed and accepted or stipulated by the Employer in more than one Act 312 proceeding. (Firefighters' Kahn 1987 award, U. Exh. 68, p.4; and, Police Supervisors' Burkholder 1991 award, U. Exh. 70, p. 4).

Considering the criteria I have itemized here and, and recognizing that first priority must be given to previously used Act 312 communities, the Neutral Chair has decided to include West Bloomfield, as well as Bloomfield, Southfield and Roseville. The Union delegate concurs in this determination; the Employer

delegate dissents. In sum, for purposes of comparisons of wages, hours and terms and conditions of employment with the Waterford firefighters, the equivalent departments in all of the Union-proposed communities will be utilized.

FINDNGS, CONCLUSIONS, AND ORDERS.

1.. Health insurance coverage.

The parties stipulate that the base plan for the contract period will be Community Blue 10. Employees will pay additional premiums if they elect more expensive coverage. The Employer is adding another insurance to its list of available insurance options, MET TRUST (HAP). It is the intent of the parties to institute all these changes in health insurance coverages as soon as possible, but not later than February 1, 2006. [Factor 423.239(b)]

The Employer delegate and the Union delegate concur in this award.

2. Health Reimbursement Arrangements. (HRAs)

The parties stipulate that the current flexible spending accounts will be moved to health reimbursement arrangements, effective with implementation of the changes in health insurance coverages, but not later than February 1, 2006. In addition, new contributions of $250 annually for individuals or $500 for families will become effective February 1, 2006. [Factor 423.239(b)]

The Employer delegate and the Union delegate concur in this award.

3. Wages, 1/1/05.

Based on the stipulation of the parties [MCL 423.239(b)], the base wage for 2005 will be adjusted for each classification and rank therein by 3%.

The Employer delegate and the Union delegate concur in this award.

4. Wages, 1/1/06.

Based on the stipulation of the parties [MCL 423.239(b)], the base wage for 2006 will be adjusted for each classification and rank therein by 3%.

The Employer delegate and the Union delegate concur in this award.

5. Pension—Deferred Retirement Option Plan (DROP).

Based on the stipulation of the parties, the Deferred Retirement Option Plan is to be implemented in accordance with the Union's last proposal on this subject, leaving aside however, paragraph 7 of such proposal. [1] A specific Plan will be developed by Attorney Michael Vanoverbeke together with a committee composed of Robert Seeterlin and a representative of the Union to be named. (The parties will split the costs incurred.) [Factor MCL 423.239(b)] If, in the end, the parties, working with the assistance of Mr. Vanoverbeke cannot devise a plan acceptable to both sides, the matter will be returned to the Neutral Arbitrator, sitting with two delegates, for resolution under Act 312 procedures.

The Employer delegate and the Union delegate concur in this award.

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[1] "The employer will continue to contribute into the Waterford Township police and fire pension fund under the same actuarial determined percent of payroll contribution as if the employee has not dropped." This Par. 7 is to be deleted from the Plan.

6. Advanced Life Support (ALS) premium pay and Minimum Staffing of ALS Rescue vehicles.

The parties stipulate that if and when the Employer decides to implement a 4th Rescue rig, prior to implementation of that decision, the premium pay and Minimum staffing issues will be bargained to completion by the parties. [MCL 423.239(b)] Failing agreement, the parties here stipulate that the matters of ALS premium pay and Minimum Staffing of ALS Rescue vehicles will be returned to the Neutral Arbitrator, sitting with two delegates, for resolution under Act 312 procedures.

The Employer delegate and the Union delegate concur in this award.

7. Wages, 1/1/04.

The Proposals.

The Employer's last best offer on the issue of wages for the 2004 calendar year is 0% wage increase; The Union's Last Best Offer is 2.0%.

The Evidence.

The Employer offers a generalized position, with respect to this issue and with respect to Pension--New Hires that it is unable to pay more than its offer, based on Section 9(c) of the statute. The Employer cites to the testimony of its auditor, Joe Heffernan, to the effect that a key measure of solvency for a public municipality is the fund balance in comparison to expenditures. The norm which the auditing firm, if not the entire profession, has established for

municipalities is 10% minimum (fund balance compared to expenditures). In the case of some very large municipalities, auditors may be comfortable going as low as 5%. The fund balance in Waterford has been changing in recent years. In 2000 the fund balance was more than 26% of expenditures, whereas in 2004, it was 5.1% of expenditures. The reasons for this shift were examined in the testimony of Mr. Heffernan, and can be summarized as due to a number of factors: On the expenditure side, "costs of people have been increasing much faster than inflation. Health care—and there are exhibits that are more specific to that, but all communities are seeing significant increases in health care, as well as pension contributions." (Heffernan, Vol. I, p. 131) On the revenue side, there has been a reduction in state-shared revenue. There has also been a levelling off of property tax receipts.

In regard to the situation of comparable communities, Mr. Heffernan pointed out that the four cities, St. Clair Shores, Royal Oak, Westland, and Dearborn Heights all have greater ability to levy taxes, 20 mills as compared to 5 mills for charter townships. And, most of the comparable townships have Act 345 millage to fund police and fire pension systems (Clinton Township, Redford Township and Shelby Township). Waterford, by contrast, must rely upon general operating revenues for these expenses.

The net of the situation, according to the Employer, is that the Township does not have funds with which to make good a 2004 increase in wages, on top

of those increases stipulated for 2005 and 2006; or, to put it another way, any increases granted would require a corresponding reduction in services to the public and/or staffing in some sector of the Township's operations.

The Union defends its last best offer on the basis of what has been established in comparable communities, MCL 423.239(d)(i). The Union took a look at a variety of measures of the comparable communities' performance in 2004. For instance, the wage increases actually granted shows that 3.0% is the median for the 13-community group of comparables. (U. Exh. 82) In terms of total cash compensation, the Union utilized a base wage plus holiday pay plus longevity pay plus paramedic premium, plus food allowance plus uniform allowance. The Union's figures do not show a recognition either in Waterford or in the comparables' figures for guaranteed overtime pay, which Waterford and some comparable employees earn (Canton Township, Clinton Township, Redford Township, Shelby Township, Bloomfield Township, W. Bloomfield plus cities of Roseville and Southfield). The Union's figures to not show recognition of the Social Security wage-based contributions that are made on behalf of Waterford firefighters, as well as those of Canton, Clinton and Shelby Townships, and Dearborn and Redford. Given all these limitations and qualifications of the Union's figures, it came up with an overall figure that the Waterford Driver Engineer/Paramedic received overall compensation of $58,619 compared to the Paramedic/Firefighter with Paramedic / Driver Engineer Aver-

age over the 13 communities of $65,631 (U. Exh. 84). This is a difference of 10.7% less in overall compensation, says the Union. This figure merits some wage increase "consistent with wage increases granted by other employers in the comparable communities." (U. Brief, p. 20)

Analysis and Conclusions.

The Employer's arguments and the Union's arguments are like two ships passing in the night. For, whereas the Employer's chief argument is the inability to pay, the Union says the Employer "did not present an ability to pay defense, per se." [U. Brief, p. 6] The Union has argued the wages paid in comparable communities, together with a comparison of overall compensation in comparable communities merits primary consideration. The Employer does not deny the importance of comparable community data, but argues it is circumscribed by the facts pertaining to Waterford, and its limited ability to pay.

Inability to pay is a generalized argument by which a jurisdiction throws up it hands, and says we have no money to pay any wage increases or other increases demanded by the union. Here, it is a modified argument, wherein the Employer recognizes it has contracted certain on-going commitments and has even agreed to an increase in wages in the latter two years of this contract, but draws the line at a 2004-year increase. Granting that the Employer's argument is not a global inability to pay argument, I nevertheless am convinced that the Employer has shown that significant changes in services offered to the public

and in levels of personnel would have to be made, if this Act 312 panel were to come out with a wage increase for 2004. The presentation of Mr. Heffernan regarding what is accepted in the auditing profession for a fund balance was convincing. He testified that the norm for a municipality Waterford's size is 10%. In situations involving much larger jurisdictions, such as Oakland County or City of Detroit, auditors accept a fund balance to expenditure ratio of 5%. It is apparent from the exhibits proffered in this case that Waterford Township is heading for a situation where it is at or near the 5% fund balance to expenditure ratio. Employer Exhibit 107 shows that in 2000 the Township's general fund balance was 26.8%; by 2004, the ratio had declined to 6.3%. Furthermore, the Employer offered Rebuttal Exh. 103, which shows revenues and expenditures and fund balance for the general fund plus fire and police funds. In 2000, the ratio of fund balance to expenditures was 18.2%, whereas in 2004 that ratio was 5.1%.

In addition, the Employer's ability to raise revenues is restricted by a number of factors. First, it has the limited millage authority of a charter township (5 mills) while other jurisdictions with which this Employer can be properly compared have millage authority up to 20 mills (cities of St. Chair Shores, Royal Oak, Westland, and Dearborn Heights). Secondly, the level of taxable valuation of property in the community, the single largest portion of the municipality's income, has leveled off, or increased slightly in accordance with inflation. [Hef-

ferman, vol. I, p. 131 and E'er. Exh. 109] Thirdly, the state revenue sharing money, based on sales tax collections, has been going down in four of the last five years. [E'er. Exh. 110].

The effect of these income streams on Waterford's budget was explored by Mr. Heffernan, and by Director of Fiscal and Human Resources Robert Seeterlin. Mr. Heffernan commented, "I think that Waterford Township—the reason their fund balance is still positive is because, in fact, for four years, in the budget process they really have done a very good job of doing everything they can, including reduction in work force. I believe they have about a ten percent reduction in staffing levels from four years ago, which is not common." [vol. 1, p. 135]

Mr. Seeterlin testified that the Township has already made personnel cuts, of ten percent between 2003 and 2006 [vol. 1, p. 152]. In regard to the Township's ability to absorb a significant wage increase for 2004–and the amount then being considered was 3%–he testified, "The Township—if the award were to grant an increase of three percent [in 2004], the Township would obviously live with the mandate of that contract, and that could come from any number of sources. There would have to be some very difficult decisions to be faced by the Township board...They could reduce the fund balance, but again, the fund balance is used for two specific or main purposes....Certainly a ruling of that magnitude would be an unforeseen expense ....It would most likely

exhaust their entire fund balance, requiring the Township board to allocate additional monies out of the Township general fund fund balance or cut back on operational costs in the general fund [or] there could be cutbacks in other areas of the fire department, including, you know, reduced purchases or staffing cuts." [vol. 1, p. 151-52]

These figures and this testimony make it clear that the course of wisdom is to forego wage increases that would tilt the fund balance into a red-ink or "caution warning" financial situation.

The evidence supports a conclusion that the interests and welfare of the public and the financial ability of the Employer to meet the cost of any 2004 wage increase [MCL 423.23(c)] supports the Employer's last best offer. The Employer delegate concurs with the Neutral Chair's findings and conclusions; the Union delegate dissents.

8. Sick leave/ Short term disability / Long-term disability benefit.

The Proposals.

The current condition of employment is that employees may utilize up to 60 days for each illness/ injury episode at full pay. Thereafter, they can continue to use sick time up to 365 days total, at 75% of pay. [U. Exh. 2, Article XIII] There is no sick bank.

The Employer proposes to change the current system by allowing up to 72 hours of sick leave in any program year (48 hours for regular non-fire sup-

pression personnel). Those hours which are not utilized would be paid at the conclusion of the program year at the employee's then-current rate of pay. Furthermore, the Employer would institute a Short-Term Disability plan for 60 days, to be paid at 80% of wages, then for the next 120 days, to be paid at 60% of normal base wage. Furthermore, the Employer would institute a long-term disability plan that would start at day 181 after injury/ illness and pay 60% of base wages through normal Social Security age.

Employees who have exhausted their paid sick time bank would be allowed to use vacation, personal leave or compensatory leave to cover an illness or injury. Employees on Family Medical Leave must use any available paid time off above 40 hours to cover their medical leave.

There are other provisions, to allow the crediting of some personal leave time to sick banks; to coordinate sickness/ injury leave with worker's compensation benefits; and, to provide for conditions for return to work, including return to work on light duty; and, to define light duty, and to provide for the use of a third physician (when the employee's treating physician and the Township's physician disagree) in the return to work and the defining of restrictions for light duty work.

The Union contends that the status quo, as reflected in Articles XII and XIII of the expired collective bargaining agreement is an adequate statement of

the terms and conditions of work related to sick leave/ short-term disability and long-term disability.

The Evidence.

The Employer presented evidence showing the sick leave provisions of other comparable communities. Each of the 9 comparables on the Employer's list shows that a minimum of 6 days up to a maximum of 12 days [Westland] is permitted to be used. In all 9 Employer-comparables there is a sick bank provision. It ranges from 10 days [Shelby Township] to 2240 hours [in the case of St. Clair Shores] or 300 days [in the case of Redford Township]. [E'er. Exh. 130] The common thread of the sick bank principle is that the days left, either at the end of a program year, or upon retirement or separation are paid at the then-current rate of pay.

The Employer also presented evidence purporting to show that there has been abuse of sick leave in the fire department, as in other departments, leaving to inference the idea that the abuse of sick leave is caused in part (or can be cured in part) by the lack of sick bank days. The Employer's data on this subject shows fire department employees' use of sick leave over a two-year period. [E'er. Exh. 133] The comparative data for other internal Act 312-eligible units is also for a two year period. [E'er. Exh. 134] It shows that the firefighters had the lowest per employee use of sick leave for 2004 [86.2 hours average];

and for 2003 firefighters had one of the lower per employee use of sick leave [92.1 hours average].

For the Union's case, former Union President Bruce Whiteside recounted the history of sick leave systems at this Employer, adverting to the fact that a sick bank had been tried in the early '90's, and the plan was scrapped on the basis of an auditor's recommendation that the Township limit its liability for unpaid sick leave. Further, according to Mr. Whiteside, abuse of sick leave is not a problem in the fire department, interpreting the data in E'er. Exh.133 and 134 to mean that only 10% of overtime is caused by sick time. The vast majority of overtime is called, and has always been called, to run operations. In addition, according to Mr. Whiteside, the Employer has tools available to it to monitor and reduce out-of-ordinary sick leave, specifically by calling for a doctor's note and by sending employees to Employer-selected doctors. The plan proposed by the Employer, in the Union's view, is a blunt tool to solve a miniscule problem, and in view of the history of the sick leave provision, should be left aside in favor of the status quo.

Analysis and Conclusions.

The Employer's evidence, aiming to show abuse of sick leave by the members of this Department, falls short of its objective. Employer Exhibit #133 is a listing of all members of the firefighters unit, with a designation of the number of hours of sick leave utilized in 2003 and 2004. The average has actually

gone down slightly, from 92 hours to 86 hours. What's more, the listing of individual hours, without assessing the reasons therefore, or the frequency thereof, fails to establish that there is any individual or collective abuse of sick leave. Further in this regard, the testimony and tabulated evidence [U. Exh. 90] indicate persuasively that the use of overtime in the fire department is directly related to operational requirements, and is not the result of members' use of sick leave. All of this evidence points to the conclusion that there is either no sick leave abuse by the members of the by the Waterford Fire Department or no systemic sick leave abuse. In other words, there is no problem that needs to be cured.

The Employer's proposal is predicated on a showing of sick leave abuse and the observation that all comparables have some sort of sick leave bank. As discussed above, the Panel cannot find that there is any systematic abuse of sick time in the fire department. The Panel finds that there is a prevalence of sick leave provisions in comparable communities' contracts that feature some type of sick bank. However, a close examination of those plans (E'er. Exh. 130) shows that they are all considerably more lenient than the Employer's proposal here. For example, Pontiac and Westland and Redford Township allow sick leave to be banked up to 12 days per year. (24-hr. employee). The lowest number of days per year allowed to be banked is found in Dearborn Heights (6 days) and Royal Oak (6 days). Thus, this Employer's proposal of 3 sick days

per year for 24-hr. employees (6 days / year for 40 hr. employees) is considerably more restrictive than the equivalent conditions of work in comparable communities. A majority of the Panel finds that the comparison of Waterford management's proposal with the existing conditions of work in comparable communities is not persuasive. By contrast, the Union's proposal of continuing the conditions of employment memorialized in the current contract, Article XII and XIII, has the advantages of stability, continuity, and is supported by the traditional factor of being currently utilized, without generating a management problem that was shown by this evidence to afflict the fire department. A majority of the Panel finds that the Union proposal is supported by this traditional factor. [MCL 423.239(h)] The Union delegate concurs in this determination; the Employer delegate dissents.

9. Pension—New Hires.

The Proposals.

The current benefit for retirement allows for the determination of pensions using a 2.5% multiplier.

The Employer proposes to introduce a second tier for the pension benefit of new hire employees, such that those employees would have their pension benefits calculated on the basis of the following formula:

2.3 % multiplier for 25 years;
1.5% multiplier for years beyond 25
Normal retirement eligibility at age 55 with 25 years of service or at age 60 with 10 years of service;

FAC based on the best 3 of the last 5 years;
FAC includes base pay + holiday + overtime
Cap at 34 years (71% of base wages)

This is the benefit which has been negotiated for the patrol officers, as a partial settlement of a case currently in Act 312 proceedings. "As a result of that settlement, and consistent with the Township's position that it was seeking internal consistency and equity with its public safety units, the Township changed its position to be the same as that which was agreed upon with the Police Patrol unit." [E'er. Brief, p. 14]

The Union proposes the status quo. In other words, the Union proposes that new hires be treated the same as current employees, and be afforded the defined benefit plan currently in effect as defined at Article XXIII of the parties' expired collective bargaining agreement.

The evidence.

The Employer's evidence consisted of the statements by Human Resources and Fiscal Director Rob Seeterlin that the benefit would result in a cost savings; and is appropriate, in view of the Police Officers' plan, who have this benefit. The two-tiered plan is a way of "effectuating change over time without affecting current employees," according to Mr. Seeterlin.

The Employer presented evidence that the costs of firefighters' pension obligations has escalated from $583,000 in 2000 to $1,305,000 in 2005. As a

percent of payroll, the Employers' contribution to the pension fund is 27.61% (in 2005). (E'er. Exh. 118)

The Union offers the equitable argument that the benefits available to new hires ought to be the same as those available to old hands, on the basis that the new hires do the same jobs, take the same risks, and work side by side with old hands. They ought, says the Union, to be entitled to the traditional pension plan now available to all firefighting employees.

Analysis and Conclusions.

The main comparison that the Employer makes is between the firefighters and its police officers. While the police officers' contract is currently under Act 312 submission, the Township argues that the pension benefit for police officers has been changed by interim stipulation of those parties. If so, this agreement would have the effect of introducing a two-tiered model of pension benefits to the patrol officers. As pointed out, however, in the briefing, the current panel cannot know "what the Patrol Officers received in exchange for agreeing to a two-tier pension system." (U. Brief, p. 23) Stating the matter even more directly, there is no showing that there is any formal parity relationship between patrol officers and firefighters. In addition, the members of the patrol officers unit generally are promoted out of the patrol officers' unit by the time they retire, and in fact retire from the ranks of the Police Command Officers. (Seeterlin, Vol. 3, p. 186) Thus, the controlling pension plan for most officers is

likely to be the Command Officers' contract, not the Patrol Officers' contract. There is no showing of any agreement between the Command Officers' bargaining agent and this Employer, even though they, too, are in Act 312 proceedings. (Seeterlin, Vol. 3, p. 190). Thus, in sum, the comparison which the Township offers in support of its two-tiered plan for firefighters' pensions is an internal comparison, and there is no reason for this panel to be bound by the terms and conditions reportedly stipulated between the Township and the patrol officers.

In addition, the Township makes an ability to pay argument, indicating that even though an immediate cost-savings will not be realized, there is a long-term benefit. But, the very premise of an ability-to-pay argument is that there is an imminent need to conserve resources, one that impacts the fiscal year(s) for which the contract is applicable. There is no such claim made here.

Based on the traditional factor [MCL 423.239(h)] that the proposed revision of the pension benefit alters current and stable benefits, for which no legitimate need for change is shown, the Panel adopts the last best offer of the Union. The Union's delegate concurs; the Employer's delegate dissents.

10. Amendment to Drug testing procedure.

The Proposals.

The Drug testing Memorandum in effect at the Waterford Fire Department allows employees to self-refer for E.A.P. benefits and treatment of addic-

tion to alcohol or other drugs. It also allows management to conduct testing (and subsequently, to discipline) under a well-thought-out scheme of interlocking checks and balances triggered by a supervisor's determination that an employee exhibits a reasonable basis to believe that drug or alcohol abuse is occurring. Once an employee is referred for testing under the scheme of checks and balances incorporated in the parties' Memorandum, he may still volunteer to be admitted to the Employer's E.A.P. plan (per the award of Arbitrator Ruth Kahn, interpreting Article XXIV of the parties' contract). The Employer would like to limit an employee's ability to self-refer for E.A.P. treatment to times *other than* when he has been cited for testing. The Employer would add to the end of paragraph IVA of the Memorandum, "A request for entrance into the EAP by the employee must precede the procedures set forth in paragraph VI."

The Union would like to retain the system endorsed by Arbitrator Ruth Kahn, allowing an employee to self-refer to E.A.P. at any first or second time within a five year period, notwithstanding the fact that an order may be in effect for drug and alcohol testing.

The Evidence.

The evidence consisted of Article XXIV of the parties' collective bargaining agreement [Memorandum of Understanding Regarding Alcohol and Drug Policy, or hereafter Memorandum] and Arbitrator Ruth Kahn's award in a case

in which the firefighter was cited for testing in accordance with the Memorandum. He recognized on the way to testing that he "needed help," thus indicating a request to go for E.A.P. treatment for drug /alcohol dependency. He tested positive for cocaine and opiate, according to arbitrator Kahn's report. He was discharged. He claimed in grievance arbitration that he was entitled to be enrolled under the parties' E.A.P., without discipline being assessed subject only to the Memorandum's statement that employees have that right twice in any five years period. [par. VII-G]

Arbitrator Kahn found with regard to the Paramedic/Lieutenant who was the subject of the grievance matter that "the Employer improperly imposed discipline before [the Grievant] was afforded his right to seek help [for the second time during a five year period]." With regard to the meaning of par. VII-G, she wrote, "The parties agreed in VII-G to permit an employee who has tested positive, who successfully completes a treatment program, who returns to work but who then tests positive, to 'have the right to avail him/herself of the Employee Assistance Program...twice in any five year period.' The sole precondition to a treatment program is that the employee has only two chances within five years. The Policy, by offering this second chance for treatment, appears to understand and contemplate that substance abuse is a difficult and often recurring condition." [E'er. Exh. 171, p.5-6.]

Analysis and Conclusions.

Now the parties do not agree that the conditions set forth in Arbitrator Kahn's award are or should be applicable. Rather, the Employer offers to modify the language on the basis of which R. Kahn made her award to indicate that an employee must request entrance into the E.A.P. before the procedures for drug testing are invoked. The Employer states further that the testimony of Lt. Whiteside should be interpreted by the Panel as a statement that the Union contested the underlying grievance considered by Kahn because the case showed a breach of procedure; but that the Union did not object to the termination of the employee in the grievance considered by Kahn for reasons related to the employee's request for treatment. The Employer concludes that, "The current policy is very liberal in attempting to assist an employee who has developed an addiction, but the Township believes that the interpretation of the policy to allow for a request for assistance by the employee when on the way to mandatory testing should not be construed as a self-referral." [Brief, p. 17]

The Union offers to maintain the status quo, as shown in Arbitrator Kahn's opinion interpreting Article XXIV.

I have studied the issue, as presented in testimony of Lt. Whiteside as well as in the grievance report of Arbitrator Kahn. She premises her award on the language of the Memorandum indicating that the parties have agreed to allow an employee to avail him/herself of the E.A.P. twice in any five year pe-

riod. It was the finding that the Grievant's request to enter an E.A.P. occurred a second time within five years of his first request for entrance into the E.A.P. that informed Arbitrator Kahn's opinion. She further interpreted the policy of the parties as appearing "to understand and contemplate that substance abuse is a difficult and often recurring condition," requiring, for some, treatment on more than one occasion.

The considerations raised by the Employer in support of its proposal do not mesh with the overall purposes and procedures of the alcohol and drug policy. There is no distinction raised in the policy between self-referral and referral by a supervisor. Under Par. IV.B. the consequences are the same: "No employee will be disciplined on account of any request for assistance under this section." Similarly, in the situation of a referred employee (either self-referred or Employer-referred) who has completed the E.A.P., the Employer has the opportunity to conduct up to 4 random drug tests. Par. VII.F. But the result of such testing, in the event of a positive test result, is not automatic suspension and/or discharge. Rather, a positive test upon random testing has the same effect as a positive test under Par. VI, namely the opportunity to participate in the E.A.P., at least if the referral for E.A.P. is "no more than twice in any five year period, or three times during the employee's career." Par. VII.G. Thus, an employee who is found to be using alcohol /drugs on an Employer's random test is eligible in some circumstances for a further course of treatment utilizing

the Employer-paid E.A.P. The emphasis is on the employee's opportunity to participate; not on whether the referral is voluntary or pursuant to a positive test result and a drug-testing order. It thus appears that the entire structure of the alcohol and drug testing policy is geared towards allowing an employee "two bites at the apple" in the event of an employee testing positive (provided the use of E.A.P. is not more than twice in 5 years or three times in a career). The language of the policy does not draw a distinction between an employee who voluntarily self-refers and an employee who is caught red-handed by a drug test, undertaken upon proper grounds, including random drug testing following completion of one course of treatment (under Par. VII.F). It would be amending the entire structure of the policy, in a piecemeal fashion, to adopt the Employer's language amending the drug-testing policy. I find that although the arbitration Panel has the authority to do that, it would not be a wise or warranted thing to do, and the parties should live with the policy they have enunciated as Article XXIV of their collective bargaining agreement, including the emendation of it made by Arbitrator Kahn in her 2002 grievance opinion & award. Thus, the present drug policy is supported by MCL 423.239(h), the traditional factor of continuity and stability of the working condition. For these reasons, a majority of the Panel endorses the Union's proposal on alcohol and drug policy. The Union's delegate concurs; the Employer's delegate dissents.

SUMMARY AND ORDERS.

On the contested issues, the Panel awards the Employer's last best offer on Wages—04. The Panel awards the Union's last best offer on Sick Leave/Short-term disability/Long-Term disability. The Panel awards the Union's last best offer on New Hire pension. The Panel awards the Union's last best offer on Amendment to drug testing procedure. On all other issues, the parties have either stipulated to the award, as shown in items 1-6 above, or by operation of statute have adopted the last best offer on which the parties agree (Pension multiplier) or have agreed to continue the previous contract terms.

Benjamin A. Kerner, Neutral Chair

Stanley W, Kurzman, Employer Delegate, concurring in part, dissenting in part.

Ronald R. Helveston, Union Delegate, concurring in part, dissenting in part.

Dated: March 28, 2006.

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