STATE OF MICHIGAN

EMPLOYMENT RELATIONS COMMISSION

ANN ARBOR POLICE COMMAND OFFICERS
TEAMSTERS LOCAL 129,

Employee Representative
and Petitioner,

and

MERC Arbitration 312
D84 C-1103.

CITY OF ANN ARBOR, MICHIGAN,

Employer.

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APPEARANCES

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## OPINION AND AWARD

BACKGROUND:

This matter was initiated by a letter from the Employment Relations Commission, dated March 10, 1986, assigning the matter to the impartial arbitrator and chairman, pursuant to the Police-Firefighters' Arbitration Act (Act 312, Public Acts of 1969, as amended) for the purposes of binding arbitration.

The schedules of both parties prohibited a pre-hearing conference until April 18, 1986. Both parties waived the statutory requirements as to the time limits of the proceedings. Complete arrangements for the forthcoming statutory hearing were agreed upon.

Thereafter, severe problems arose internally in the labor organization representing the bargaining unit. Local 129 of the International Brotherhood of Teamsters was placed under the trusteeship of Local 214.

At a second pre-hearing conference on June 24, 1986, the bargaining unit was represented by employee members of the bargaining team without counsel or other representation of the labor organization. The Employer was represented by counsel and City executives. Both sides concurred in the chairman's decision to adjourn the matter without date and to have the parties follow the matter of the restructure of the labor organization between themselves and thereafter advised the chairman of the results in order that the matter might proceed to the statutory hearing.

On August 19, 1986, an attorney on behalf of the bargaining

unit advised that the parties were continuing to negotiate. A written request for remand under the statute was made under date of August 25, 1986, and was granted. Thereafter, the parties sought the services of a State mediator on October 10 and November 13, 1986, and jointly waived the statutory requirement of a timely hearing.

A pre-hearing conference was held February 6, 1987. Both sides were represented by counsel. Arrangements for the statutory hearing were completed. The hearing began March 24, 1987, and continued on March 25, 26, 31, and April 1, 7, 8, 10, and May 6, 1987. The completed transcript was received by the parties and the chairman on July 18, 1987. In accordance with an agreement between the parties, all final briefs were received by the chairman on August 26, 1987.

The employer and the bargaining unit have had a long history of association in the area of labor relations. The employer recognizes the very high level of professional police service which the unit renders to the City. The bargaining unit recognizes the many advantages of employment by a progressive and fiscally sound employer. The last contract between the parties expired June 30, 1984. The parties have continued the relationship according to the statute on the terms and conditions of the expired contract. Mutual efforts of the parties were unsuccessful in reaching a total agreement between themselves. Thus, in accordance with the statute, the matter proceeded to the statutory hearing, wherein testimony was adduced regarding five

remaining, unresolved issues.

From the inception of the matter as of March 10, 1986, the arbitrator has been greatly impressed by the cooperation, mutual respect, and basic goodwill exhibited between the parties. Both sides were represented by highly competent attorneys, who were, in turn, supported by very skillful and dedicated persons in regard to the preparation and presentation of the extensive exhibits.

## ISSUE I

How many sick leave hours should bargaining unit employees be credited per month?

The City's last best offer of settlement is adopted regarding this issue.

The proposed replacement language is as follows:

Article XII - Sick Leave

> Section 2: During the period from July 1, 1984, through June 30, 1985, each employee of the unit shall be entitled to sick leave of (1) one workday (of ten (10) hours) with pay for each completed month of service. Effective retroactive to July 1, 1985, each employee of the unit shall be entitled to sick leave of (8) eight hours with pay for each completed month of service. Employees who render part-time services shall be entitled to sick leave for the time actually worked at the same rate as that granted full-time employees.

FINDINGS OF FACT:

I

That in about 1974, in connection with the Ann Arbor Police

Department's establishing a work schedule of a ten-hour workday for a four-day week, the allowance of ten hours per month sick leave was provided to equal a day's work per month, and that when the work schedule was changed sometime in 1985 to provide for an eight-hour workday for a five-day work week, no change was made in the sick leave allowance.

II

This allowance of ten hours per month exceeded the monthly allowance of all other City employees, except the two units of employees within the single bargaining unit servicing the Fire Department, which employees are not all on the current five-day work schedule.

III

The current allowance exceeds the allowance in this area for all employees of the employer in all of the organized units within the City, except for the aforementioned Fire Department, and also includes the allowance provided for the unorganized employees.

IV

Sick leave is provided as insurance that an employee will receive a full week's wage whenever occasional sick leave prevents full performance of the scheduled work week.

V

The City's offer of eight hours' sick leave per month after July 1, 1985, will be entirely adequate to provide this insurance in light of the history of use of sick leave by this unit.

VI

The City's offer will provide for an allowance that is equal to the current allowance in all of the communities listed by the bargaining unit as comparable. It is to be specifically noted that the bargaining unit comparable of Southfield, Michigan, provides for "one day per month with unlimited accumulation." The City's offer provides one day a month and the element of the extent of accrual is not being considered in this issue.

These findings have been made pursuant to Section 9 of the Statute, setting forth eight factors to be considered.

Factors (a), (b) and (c) are not applicable.

Factor (d), involving comparables of the employees performing similar service and employees of other comparable communities, has been fully complied with. Testimony regarding comparables of private employment in comparable communities was not introduced by either party.

Factor (e) (Cost of Living) is not applicable to this issue and was not raised.

Factors (g) and (h) are not applicable, inasmuch as no testimony was introduced by either party.

## ISSUE II

How many sick leave hours should be paid to bargaining unit employees upon death or retirement?

The City's last best offer of settlement is adopted. The proposed contract language is as follows:

Article XII - Sick Leave

Section 4: In addition to compensation for absences due to sickness, the following shall apply:

a) 1) Before June 30, 1987, an employee who dies before retirement or retires from the City service and is entered on the retirement or pension roll of the City, upon such death or retirement, shall be paid for his unused sick leave credits accrued to the time of death or retirement.

2) On or after June 30, 1987, an employee who dies before retirement or retires from the City service and is entered on the retirement or pension roll of the City shall, upon such death or retirement, be paid for his unused sick leave credits up to a maximum of 960 hours or the amount accrued by the employee as of January 1, 1987, whichever is greater.

FINDINGS OF FACT:

I

Members of this bargaining unit have always been able to accumulate sick leave without a limit or "cap" on the hours of accumulation. (T., Vol. I, p. 90.)

II

Upon retirement, the members of this bargaining unit have been paid for the total number of hours at their then current hourly rate. (Contract, Article XII, Section 4.)

III

The City's position throughout negotiations and certified to the Employment Relations Commission in the petition filed for this arbitration is that accumulated sick leave will be "capped" at 960 hours for purposes of payout at retirement. (T., Vol. I, p. 89.)

IV

At the beginning of testimony on this issue, the union raised a challenge that the arbitrator lacked jurisdiction to consider this issue because of Article 9, Section 24, of the Michigan Constitution of 1963. (T., Vol. I, p. 85.) This reads" "The accrued financial benefits of each pension plan and retirement system of the State and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."

VI

The union agreed to proceed with the taking of testimony on the issue. (T., Vol. I, p. 85.)

VII

The City agreed to this arrangement. The matter proceeded with the taking of testimony, and counsel for the parties were directed by the chairman to submit a brief on this point for the guidance of the panel. (T., Vol. I, p. 86; Vol. II, p. 153.)

VIII

The City's last best offer provides that upon death or retirement after June 30, 1987, the employee will be paid in full for all sick leave accrued as of January 1, 1987, or 960 hours, whichever is greater.

IX

The last collective bargaining agreement between these parties covered the period of July 1, 1981, to June 30, 1984. (Joint Exhibit No. 2.)

X

As of June 30, 1984, each member of the bargaining unit had accrued financial benefits which cannot be altered unilaterally by either party in accordance with the State Constitution. (Joint Exhibit No. 2.)

XI

Since June 30, 1984, both sides have complied with Section

13 of the Act, which states: "During the pendency of proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by the actions of either party without the consent of the other, but a party may so consent without prejudice to his rights or position under the Act." The residents of Ann Arbor have enjoyed uninterrupted police service of a high professional level. The members of the Command Unit have continued to receive all of the wages, hours and other conditions of employment provided under the expired contract, while the wages, hours, and other conditions of employment under a new contract were being determined. These elements of the new contract will become effective as of July 1, 1987.

Thus, a member of this unit has an individual number of accrued hours of sick leave as of June 30, 1984, which will be diminished only if utilized for sick leave purposes, in accordance with established policy.

XII

The City's last best offer provides for an increase in an individual employee's number of accrued hours from the number as of June 30, 1984, to the number of hours as of January 1, 1987, or to 960 hours, whichever is greater. This is in accordance with the City's last best offer.

The City's last best offer does not contemplate reducing the accrued benefit, which in this case is the figure as of June 30, 1984. Rather, the accumulation is continued for two and a half of

the total three-year term of the contract, with a cap of 960 hours thereafter for all employees not in excess of 960 hours as of January 1, 1987.

Thus, the City's last best offer does not violate the constitutional provision in question.

Further, the City's last best offer complies with the APTE opinion (154 App. 440, 1986) in that the "accrued financial benefits" under contract ending June 30, 1984, are not diminished. The compliance of the parties with Section 13 of the Statute, pending determination of new contractual obligations and rights, does not result in additional "accrued financial benefits."

Inasmuch as the City's last best offer will not result in a reduction of "accrued financial benefits," the union claim that the chairman lacks authority because of the text of the Michigan Constitution is not recognized.

The City's position as initially established and upon which the union based its claim was altered very substantially by testimony and in its last best offer. The City Administrator testified that the last best offer "will undoubtedly contain some type 'grandfathering or grandmothering' to recognize the rights that people have accrued as of the end of the last contract." (T., Vol. II, p. 8.)

XIII

Section 9 of the Statute directs that the arbitration panel shall base its finding opinion orders upon the eight factors "as

applicable." Factors (a), (b) and (c) are not applicable, inasmuch as no testimony regarding them was entered upon the record.

Factor (d) requiring comparison of 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 requires adoption of the City's last best offer.

The City's exhibit lists employees by organized bargaining unit with an additional group entitled Unorganized Employees. Total City employees in all categories is 855 within the following units:

| | | |
|---|---|---|
| Non-Union - 198<br>AFSCME - 309<br>Communications Operators - 13<br>Firefighters - 117<br>AAPOA - 120<br>Police Command - 32<br>Police Clerical - 13<br>Teamsters - 53 | ) | TOTAL: 855 |

All City employees, except those in the Police Command and Fire Departments, have a cap of 960 hours accumulated sick leave, for which they will be paid upon death or retirement. It is to be noted that the policemen are organized into a separate bargaining unit and that their contract provides for a cap of 960 hours for this benefit.

There are two groups of employees within the single, organized bargaining unit of the Fire Department. Those employees who work a 40-hour week currently are capped at 1,320 hours, and the employees who are on a 24-hour shift (suppression) have a cap

of 1,440 hours. (Union Exhibit 19.)

Therefore, of the total of 855 employees, all but 117 Firefighters and the 32 Command Police Officers presently have a cap of 960 hours. Seven hundred and six of the 855 employees are thus capped. Of the 855 employees, 657 are organized into seven separate bargaining units. Thus, under the City's offer, this unit will be at least comparable and equal with the employees of five of the other departments and with 706 out of the 855 total employees. Thus, in reality, because of the "grandfathering" provision of the City's last best offer, current individual members of the unit will establish individual accrued benefits as of January 1, 1987, which in many instances will substantially exceed 960 hours.

Union Exhibit Number 9 at page 3 sets forth the accumulated sick leave as of September 18, 1986, for the current 31 members of this unit. Only six persons have accumulated less than 960 hours, leaving 25 Command Officers with individual accrual figures as of that date ranging from 1,007 to 2,112 hours. The City's last best offer will not place members of this unit below the vast majority of other City employees regarding this benefit, and because of the "grandfathering" aspect, 25 of the 31 members will receive benefits considerably in excess of the comparables.

Factor (d) (i) requires consideration of the comparison between employees of this bargaining unit with employees in comparable communities. No testimony was provided on the record by either side regarding this benefit as it is extended to the general

employees of the respective comparable communities. The City's Exhibit C-9 lists its own comparable communities and the amount of sick leave hours employees of the Police Department are paid for at their retirement:

Sick Leave Paid Upon Retirement
--City Comparable Cities--
(Amended Exhibit)

| City | Maximum Hours Receivable Upon Retirement |
|---|---|
| East Lansing | 480 |
| Grand Rapids | 161 |
| Lansing | 680 |
| Wastenaw County | 480 |
| Average | 450 |
| Ann Arbor | Unlimited (1,720)* |

*Average of four recent retirees from unit who retired with an average of 27.4 years' service.

Source: Union contracts and Controller's Office records.

The City's last best offer will still lead all of its comparables in this benefit.

City Exhibit C-13 lists the union's comparable communities and the number of hours their Command Officers receive upon death or retirement.

Sick Leave Paid Upon Retirement
Union's Comparable Cities

| City | Maximum Hours Receivable Upon Retirement |
|---|---|
| Lansing | 680 |
| Livonia | 2160 |
| Pontiac | 600 |
| Southfield | 62.4 |
| Sterling Heights | 76 |
| Warren | 1440 |
| Average | 836 |
| Ann Arbor | Unlimited (1,720)* |
| Ann Arbor Compared to Average | +884<br>+105.7% |

*Average of four recent retirees.

It will be noted that the City's last best offer provides a benefit wherein Ann Arbor will be above four of the listed communities. The range of hours in this exhibit is most noteworthy in light of the factor of comparability. At the low end is Southfield, which allows 32.4 hours to their employees, followed by Sterling Heights, which allows 76 hours, all the way up the scale to Livonia, which pays for 2,160 hours.

Factor (e) is Cost of Living, and no testimony was offered by either party in this area.

Factor (f) provides for comparing "the overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time,

insurance and pensions, medical and hospital benefits, the continuity and stability of employment, and all other benefits received." The City's offer will not reduce the overall compensation presently received by the great majority of the members of this unit because of the "grandfathering" provisions, and for others the level will not be diminished below that of the great majority of employees of the City.

Factor (g) is not applicable, inasmuch as no testimony in this direction was adduced on the record.

Factor (h) reads: "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."

This factor requires recognition that the normal provision of sick leave is "sick leave is only for sick leave or other sicknesses in the family and other prescribed reasons in the contract. And so it is an insurance so an employee continues to get their total pay all the way through." (T., Vol. 1, p. 51.) The City's offer will continue to provide this insurance by a very substantial margin on the basis of evidence of sick leave use by this unit. In 1986, the 31 members of the Command Unit averaged 13.045 hours per employee of sick leave as against an allowance of 120 hours. (Vol. 1, p. 117.)

## ISSUE III

SICK LEAVE PAY IN FINAL AVERAGE COMPENSATION (FAC):

The bargaining unit's last best offer is adopted, i.e., Article XII, Section 4 (e), is retained unchanged.

The last contract between the parties, which expired June 30, 1984, covered this matter in Article XII, Section 4 (e), "For employees not on Department payroll as of January 1, 1982, sick leave payout at retirement will be included in final average compensation."

"It (sick leave included in final average compensation) was retained for pre-January 1, 1982 hires." (T., Vol. I, p. 99.)

Thus, at the present time, there is an absolute prohibition against any inclusion of sick leave in the final average compensation for members of the bargaining unit, except those "grandfathered in," i.e., those hired before January 1, 1982.

All present members of this bargaining unit are "grandfathered," inasmuch as they were all hired before this effective date. (T., Vol. II, p. 117.)

The history of the inclusion of accumulated sick leave in the FAC (Final Average Compensation) is succinctly stated in Union Exhibit 10, page 5, first paragraph: "By force of a long-standing practice which was started before the association was recognized as bargaining agent, that cash payment is regarded as an item of earning which with other earnings is factored into the item "Final Average Compensation." It is recogniaed that this

statement was not made in reference to this bargaining unit, but it is recognized to be valid so far as the history of the relationship between the City and this bargaining unit regarding this benefit.

The long-standing and uncontroverted policy must be recognized as a condition of employment between the City and this unit.

During all negotiations on this issue to be incorporated in the contract to begin July 1, 1984, the City sought to eliminate all sick leave hours as a factor of final average compensation (City Exhibit, Page 1, after Cap, FAC). The union sought to maintain the status quo.

As related in detail above on the previous issue, the union asserted that the 1963 Michigan Constitution provision of Article 9, Section 24, was a prohibition against the panel considering this issue; at the same time, the union agreed to proceed with the hearing on the record, to offer exhibits, and to fully participate.

The chairman directed the parties to submit a brief on the constitutional question and related law for the education of the arbitrator, and the hearing continued to its completion. Each party filed the directed brief, which are incorporated as Appendices to this Opinion and Award.

In summary, the union asserts Article 9, Section 24, of the 1963 Michigan Constitution, prohibits the reduction of accrued financial benefits, and cites APTE vs. City of Detroit at 154 Mich. App. 440 (86) as authority for defining accrued

financial benefits as including "services that had already been rendered," and that the accrued sick leave (subject to the recognized policy of allowing use for sick leave purposes by the employee) was within the definition of "services that had already been rendered."

The City asserts that any constitutional prohibition that might exist was fully waived by the action of the union in certifying the issue for arbitration and not raising the constitutional provision until the hearing had begun. Further, the City argues that sick leave at retirement is not a "pension benefit," nor is it an "accrued" pension benefit and, lastly, that the constitutional article does not apply to financial benefits that have not yet accrued.

It is beyond the purview of an arbitrator in an Act 312 statutory hearing to interpret the State Constitution, or to weigh and determine arguments and counter-arguments relative to possibly conflicting State Law. That responsibility must be left to other forums.

However, this issue did proceed through the whole hearing process, with multiple exhibits introduced by each side. Therefore, the panel does make the following findings of fact, as per the Statute, subject, of course, to change through action of a higher authority.

The last best offer of the City is substantially different from its prior position. The union's last best offer remains its initial position of seeking to retain the status quo. The City's

last best offer is incorporated in its following suggested language:

Article XII - Sick Leave

Section 4 e):

e) 1) For employees not on department payroll as of January 1, 1982, sick leave payout at retirement will not be included in final average compensation.

2) Effective June 30, 1987, employees hired before January 1, 1982, shall have no more than nine hundred and sixty (960) sick leave hours included in final average compensation for pension purposes. However, for such employees whose bank of sick leave payable upon retirement exceeds 960 hours as of June 30, 1987, the amount of sick leave hours whose payout at retirement may be included in the final average compensation calculation for pension purposes shall be reduced from the actual amount as of June 30, 1987, to 960 hours as of June 30, 1990. This reduction shall be made in 36 equal monthly increments.

FINDINGS OF FACT:

I

Within Section 9 of the Statute, Factor (a), "The lawful authority of the employer" is admitted by the inclusion of this City-initiated issue in the petition filed by the union, and by the subsequent stipulation of the parties at each of the two pre-hearing conferences.

II

Re: Factor (b) of Section 9 of the Statute, there are no

stipulations between the parties affecting this issue.

III

Factor (c) of Section 9 of the Statute reads: "The interests and welfare of the public and the financial ability of the unit of government to meet those costs."

These elements are fully met by the continuing service by the Command Unit and the financial ability of the unit is satisfied by the testimony of the Deputy Controller; "At the present time, the pension fund is adequately funded." (T., Vol. III, p. 31). Further, at no time during the hearing on this, or any other issue, did the City offer testimony regarding an inability to pay.

IV

Factor (d) of Section 9 of the Statute provides: "Comparison of 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."

The members of the Fire Department are found to be "other employees performing similar services." The City's last best offer reducing the accumulated sick leave of the individual member of the unit to 960 hours by 1/36 per month between June 30, 1987 and June 30, 1990, would substantially reduce this benefit for the Command Unit members in comparison to the Firefighters, who currently have a contractual agreement with the

City to maintain this benefit in this regard unchanged until July 1, 1991 (Joint Exhibit 3, p. 31, paragraph 59B).

Members of the Firefighters' bargaining unit are constituted into two groups, which currently enjoy the right to accumulate and factor into FAC "the accrued sick leave."

The members of all other bargaining units currectly have a cap of 960 hours on this benefit (Union Exhibit 19), but no testimony was entered on the record reflecting how this figure was reached, or what amount of accumulated sick leave was lost by members of those bargaining units in this area.

The City has not met the requirement of this factor to a degree entitling it to its last best offer.

Regarding Factor (d) (i) of the Statute, which reads: "In public employment in comparable communities."

City Exhibits C-27 and 28 are found to be the most valid comparisons between the Ann Arbor Command Officers and both the City and the union's comparables. This exhibit compares the cost to the employer of a percentage of the Unit payroll, plus the employee's contribution as a percent of salary as the total cost to the individual city of its pension coverage. The City of Ann Arbor and all government entities designated as comparable by both the City and union are listed numerically according to the highest percentage dedicated to this benefit to the lowest percentage.

1. Pontiac - 53.35%
2. Lansing - 31.65% (listed as comparable by both parties)
3. Warren - 30.63%
4. Sterling Heights - 30.50%
5. Ann Arbor - 28.29%
6. Livonia - 26.26%
7. Southfield - 23.59%
8. Grand Rapids - 22.69%
9. East Lansing - 21.87%
10. Washtenaw County - 15.85%

Noting that Ann Arbor is fifth among the ten listings, it is found that current benefits project a cost to the City of Ann Arbor for pension purposes, which is just and comparable.

Testimony was offered to the effect that Pontiac's obligation of 56.35 is extremely high, due to past financial difficulties. Testimony was further offered that Washtenaw County, because of its particular situation, was truly not comparable. Giving full weight to the respective testimony and removing these two entities from the list will continue to result in Ann Arbor being in the same relative position.

No exhibit was entered setting forth this Ann Arbor cost figure on the basis of its reduced cost to be realized if the City's last best offer was adopted. Therefore, no finding of fact can be made for this comparison.

It is found that City Exhibits 19 and 22, while valid in their

figures, do not show that the cost of the uncapped sick leave benefit alone, as part of the FAC, makes a substantial difference in the final pension, compared with the comparables.

The City has not demonstrated such incomparability between its costs and that of comparables to justify changing the status quo.

V

No testimony of Factor (d) (ii) was introduced by either side.

VI

Factor (e) of Section 9 of the Statute provides: "The average consumer prices for goods and services, commonly known as the cost of living."

This factor is not applicable, inasmuch as no testimony regarding it was introduced on this issue.

VII

Factor (f) reads: "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."

The panel finds that this benefit is of application to a fixed number of employees and that while it is possible to view

the benefit as "generous," it will be eliminated and disappear with the passage of time, and as such there is no justification for adopting the City's offer.

VIII

Factor (g) is not applicable, inasmuch as there have been no changes.

IX

Factor (h) reads:"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."

The panel finds the adoption of the City's best offer would very substantially penalize present employees to a degree which would be unfair. Normally, changes in collective bargaining agreements pertain to future benefits and do not result in loss of accumulated benefits.

City Exhibit 24 is recognized as accurate in its presentation, but the disparity between Ann Arbor and its comparables will disappear under present language with the passage of time.

## ISSUE IV

RESIDENCY:

The Union's position in this matter is adopted; that is, that the status quo will be retained so far as a change in the residency requirement for members of this bargaining unit.

Regarding the application of the eight factors, as applicable under Section 9 of the Statute:

Factor (a), the lawful authority of the employer, is not applicable, inasmuch as neither side challenged it.

Factor (b), the stipulation of the parties is not applicable, inasmuch as there have been none.

Factor (c) requires the consideration of "the interest and welfare of the public" and "the financial ability of the unit and government to meet these costs."

The interest and welfare of the public will not be changed, nor diminished, by the adoption of the union position in this matter. Neither would the interest and welfare of the public be substantially improved by the adoption of the City's position, in light of the facts as developed on the record.

FINDINGS OF FACT:

I

There was no showing by the City that the interest and

welfare of the public was not being inadequately served by the present policy. The City seeks to improve on this factor.

II

The history of residency in the City of Ann Arbor as a condition of employment by the City of Ann Arbor, with reference to this bargaining unit, is one of vacillation. For a long time (years not specified), the City had no residency requirement. During the tenure of Mayor Wheeler, a residency clause was added to the contract with the Command Officers, providing for "grandfathering" of the then present members of the bargaining unit. (The exact dates of tenure of the Mayor not specified.)

Thereafter, during the service of Mayor Lou Belcher, the requirement was eliminated from the contract. Mayor Belcher preceded the current Mayor Pierce. (No exact dates furnished.) At no time was any member of this unit forced to move into the City. The current administration now seeks to reinstate a residency requirement in connection with its efforts to establish a city-wide residency requirement for all City employees. (T., Vol. III, pp. 58 through 61.)

III

Of the 31 members of the bargaining unit as of December 31, 1986, eight live in Ann Arbor and 28 live outside of Ann Arbor in 11 different communities, ranging from three to twenty miles from Ann Arbor. (T., Vol. III, pp. 61 through 68.)

IV

There was no testimony by either side that the current status adversely affected the performance of any member of the unit. (T., Vol. III, p. 78.)

V

Bad weather impacts on non-City and City residents in the same way, as the affected employee does not allow enough time to get to work. (T., Vol. III, p. 70.)

VI

Regardless of the place of residence, an Ann Arbor Command Officer within the City of Ann Arbor has all the power of a sworn police officer, whether he is on a regular tour of duty, or not. (T., Vol. III, p. 73.)

VII

There is a clearly defined policy regarding carrying or not carrying a gun while off duty in Ann Arbor. (T., Vol. III, p. 74.)

VIII

Regardless of place of residency, Command Officers do initiate and perform police services while off duty in Ann Arbor. (T., Vol. III, p. 81.)

IX

While it is debatable whether or not an Ann Arbor policeman, as a resident of Ann Arbor, has an impact on crime because of his residency, there is a perception by the public that an officer living in the neighborhood makes that neighborhood more protected. (T., Vol. III, p. 91.)

X

There is a contradiction between the City's goal of providing more police protection to the community by requiring Command Officers to reside in Ann Arbor and written Departmental policy. City Exhibit 32 provides guidance for off-duty police personnel, which, in effect, discourages participation while off duty in mundane types of occurrences, regardless of residency. Mundane is further defined as misdemeanors, neighborhood disputes, or minor types of things.

XI

There is a controversy between the City goals of requiring Command Officers to reside in the City, and written Departmental policy concerning police activities and conduct while off duty, regardless of residency.

The City appears to desire Command Officers to reside within its boundaries in order that greater police services can be provided by these residents during their off hours. City Exhibit

32 establishes Departmental policy, which discourages rendering services of a mundane type. This is further defined as not becoming involved in misdemeanors, or neighborhood disputes. (T., Vol. III, pp. 97 to 99.)

XII

On the basis of six years as Chief of Police of Ann Arbor, preceded by 26 years of highly meritorious police service in Detroit, culminating as a Precinct Commander, and on the basis of a B.A. Degree in Police Administration, and an M.A. Degree in Public Administration, the Chief testified that from a professional standpoint, police officers should reside in the city where they work. (T., Vol. III, p. 91.) During the 26 years of service in Detroit, there was a residency requirement, which was complied with. The Chief testified that as a result of his various assignments during his tour of duty at Detroit, he sometimes resided as far as 35 miles from his duty station.

The Chief testified that during his eight-year tenure as head of the Department, there have been no problems on the part of either patrol officers, or command officers, not arriving for work on a timely basis, regardless of where they live geographically. (T., Vol. III, p. 106.)

The Ann Arbor SWAT is a response unit which is mobilized, regardless of the hour, to deal with emergencies, such as a barricaded gunman. The Department selects the members of this

unit. Thirteen of the 15 members so selected do not live in the City. There has never been any difficulty in mobilizing the team for any reason. (T., Vol. III, pp. 108 through 111.)

The Chief also testified that as a purely personal preference, he would prefer to live where he chose, rather than in compliance with the City requirement for executives of his class. (T., Vol. III, pp. 109 and 110.)

XIII

Residency does not play a part in the service by Ann Arbor Command Officers, which were described as "the finest group of professionals of any law enforcement agency...." (T., Vol. III, p. 112.)

XIV

The City seeks to advance two of its interests in requiring Command Officers to live in the City. The first is the matter of distance affecting the ability to report for work in emergencies. The second, as residents, they would have a natural interest in seeing that the level of all City services was being maintained.

XV

Requiring Command Officers to reside in Ann Arbor will increase the police presence in Ann Arbor and add to the public's perception of increased police services.

XVI

There was no testimony that the current policy failed to serve the interest and welfare of the public. There is an aspect of exploitation on the part of the City's demand in that these employees would be, by tradition and Departmental policy, rendering police services while off duty, for which there appears to be no consideration or recognition.

Thus, on balance and in light of the above set out findings of fact, it is found that the interest and welfare of the public would not be advanced by the adoption of the City's demand in this area.

A second aspect of Factor (c) is the financial ability of the unit of government to meet the costs. This factor is not applicable because the City's last best offer involved no additional costs and, further, the City did not offer testimony indicating a financial inability.

Factor (d) called for the comparison of wages, hours and conditions of employment of Command Officers, with the wages, hours and conditions of employment of other employees performing similar services. Within the City of Ann Arbor, these employees would be the other units in the Police and Fire Departments.

XVII

Currently, no bargaining unit of any uniformed employees in Ann Arbor has a residency requirement, although the City is seeking

to establish this requirement with each bargaining unit. (T., Vol. III, p. 179.)

The 13-member organized police clerical unit is not currently subject to a residency requirement, but the current contract provides this requirement if any other police unit is subjected to a residence requirement. (T., Vol. III, p. 115.)

XVIII

"Similar services" also include employees furnishing fire protection. Currently, none of the employees within the Fire Department are required to reside in Ann Arbor, although the City is seeking to establish such a requirement. (T., Vol. III, p. 115.) Continuing the status quo on the residency issues for this bargaining unit will maintain the current comparability among these employees.

Applying this factor to "other employees," generally it is found that the approximate 300 members of the AFSCME Local must reside in Ann Arbor, by contract, so far as new hires are concerned. The approximate 198 non-union City employees must reside in the City. This is out of a total City employee population of 855. Thus, the status quo of this 31-member unit on the issue of residency would not substantially alter or affect the total percent for purposes of comparability.

Considering this factor among comparable communities, the City offered no testimony to advance its demand. The union, by Exhibit 15, Page 3, lists its six comparables. Three require

residency, two do not require residency, and one has a mixed requirement allowing for senior members to continue to reside outside the City of Pontiac and prohibiting senior employees, who are residents of the City, from moving out of the City. Thus, continuing the status quo will continue the unit's comparability, which is not substantially outside the majority of communities listed.

Factor (d) also provides for comparison of wages, hours and conditions of employment in the private sector of comparable communities. Neither party offered any testimony in this regard. It is noted and found, however, that a residency requirement in private employment is not a condition of employment in the vast majority of jobs.

Factor (e) provides for the consideration of the effective cost of living on this issue. Inasmuch as there is no cost involved, this issue has no effect.

Factor (f) provides for consideration of "the overall compensation presently received by the employees....and all other benefits received."

It is found that upon the whole record, there would be no costs to the employer and no consideration of any kind provided to the employee, but the City would be provided with substantial additional police services by unit members in their off duty time as residents; thus, basic fairness requires the adoption of the union's position.

Factor (g) considers changes in any circumstances during

the pendency of the arbitration proceedings. Inasmuch as there were none, this factor has no applicability.

Factor (h) provides for consideration of "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 private employment. Fairness to all present members is an element within this factor to be considered. It is found that while the wording of the City's last best offer would exempt present members now residing outside of Ann Arbor, it would impact upon those members now living in Ann Arbor as of 6/30/87, by requiring them to remain Ann Arbor residents in order to maintain their positions.

It is found that there is a further unfair aspect to the City's last offer by virtue of the operation of the Statute. The last contract between the parties expired June 30, 1984. Section 13 of the Statute provides that wages, hours, and other conditions of employment may not be changed by either party during the pendency of proceedings. Thus, since July 1, 1984, to date, the members of this unit have been free to choose their site of residence. By acceding to the City's offer, those members living in Ann Arbor, with the right to move, would have lost that right on the very last day of the contract period being established by these proceedings, having had no notice of the impending loss.

The City has not established a basis for adopting its last

best offer by a preponderance of competent material and substantial evidence on the whole record, as required.

## ISSUE V

WAGES:

The bargaining unit's last best offer is adopted.

Factor (a) of Section 9 of the Statute is not applicable, inasmuch as the parties, by stipulation, recognize the lawful authority of the employer.

Factor (b) of Section 9 of the Statute was not applicable during the statutory hearing, inasmuch as there were no stipulations regarding this issue. However, each of the last best offers provided for a three percent raise in the third and final year of the contract; thus, in effect, providing a stipulation for the third-year raise.

Factor (c) of Section 9 of the Statute is partially applicable. "The interest and welfare of the public" is found by the panel to be satisfied by either of the last best offers in that a raise will assure the continuation of a high level of police service in Ann Arbor. The latter element of this factor, i.e., "the financial ability of the unit of government to meet those costs" is not applicable, inasmuch as the City asserted no such claim in any degree.

Factor (d) of Section 9 of the Statute is applicable, and the panel must first consider wages, hours, conditions of employment

of other employees performing similar services, which is understood to mean other units of the Police Department, and employees of the Fire Department.

It should be noted that the last contract between the City of Ann Arbor and these Command Officers covered the three-year period of July 1, 1981, to June 30, 1984. According to the City's Exhibit 33, for the year of July 1, 1984, to July 30, 1985, the police officers' (AAPOA) bargaining unit and the City agreed to a three percent raise. A similar raise was agreed upon for the year July 1, 1985 to June 30, 1986. The contract with that unit has now expired and the new contract is in negotiation, and the employer's witness testified that a three percent raise is being offered for the year of July 1, 1986 to June 30, 1987.

The last best offer of the City to the Command Officers provides for no raise in the first year and a 2.23 percent raise in the second year, and a 3 percent raise in the third year. Thus, the police officers were provided for two separate three percent raises versus the offer of 2.23 percent to this bargaining unit over the same period. The union's last best offer calls for 1.5 percent in the first year, three percent in the second year, and three percent in the third year. Thus, comparison requires the panel to find that the union's last best offer is more comparable than the City's last best offer, so far as the police officers' unit is concerned.

The thirteen employees within the police clerical offices constitute a bargaining unit performing similar services

requiring the application of comparability with the Command Officers regarding wages, hours and conditions of employment, generally. According to City Exhibit 51, the City and this unit have reached an agreement providing for a three percent raise effective July 1, 1984, July 1, 1985, July 1, 1986, July 1, 1987, and July 1, 1988. For the three-year period of the contact being herein arbitrated, the City has provided that unit with raises of three percent, three percent, and three percent, while its last best offer to the Command Officers was zero, 2.23 percent, and three percent. The panel, therefore, finds that the union's last best offer is more comparable than the City's last best offer.

The thirteen communications operations' employees constitute a bargaining unit performing similar services requiring the application of comparison with the Command Officers regarding wages, hours, and conditions of employment, generally.

According to City Exhibit 51, this unit was provided with a three percent raise for the year of July 1, 1984 to June 30, 1985, which was the last year of the contract, and negotiations are underway for the next contract. Thus, this unit obtained a three percent raise in the same year as the first year of the contract being arbitrated. The City's last best offer to the Command Officers provided for no raise in this year. The last best offer of the union provided for a raise of 1.5 percent. The panel finds that the union's last best offer more closely provides comparability than the City's last best offer.

All employees of the Ann Arbor Fire Department, including

Command Officers, are in a single bargaining unit. Their duties constitute "similar services" requiring the application of comparability to the Command Officers of the Police Department. According to City Exhibit 51, this bargaining unit received a raise of three percent for the year July 1, 1984 to June 30, 1985, and a three percent raise for the year of July 1, 1985 through June 30, 1986. Their contract expired June 30, 1986, and negotiations for a renewal are underway. The two-year period in which a three percent raise each year was provided constitutes the first two years of the contract being arbitrated. The City's last best offer of zero percent and 2.23 percent, for a total of 2.23 percent over two years, is found by the panel to be less comparable than the union's last best offer of 1.5 and three percent, for a total of 4.5 percent over the same period.

Within the City of Ann Arbor, there are two other groups of employees who are organized into two bargaining units, constituting "other employees," generally, and thus are included in this factor, mandating comparison of wages, hours and conditions of employment with the Command Officers.

There are 309 employees in the AFSCME unit of the City, according to City Exhibit Number One. For the three-year period of July 1, 1984 to June 30, 1987, these employees received a three percent raise each year. This is the period of the contract being herein arbitrated. The panel finds that the union's last best offer of 1.5 percent, three percent, and three percent, for a total of 7.5 percent compounded, is closer to the nine percent

total compounded awarded the AFSCME employees than the City's last best offer of zero percent, 2.23 percent, and three percent, for a total of 5.23 percent compounded, and must be adopted to maintain the relative comparison wages.

In City Exhibit Number One, there are 53 employees within the bargaining unit, identified as Teamster supervisors. According to City Exhibit 51, these employees also received a three percent raise in each year of the three-year period identical to that being herein arbitrated. The panel again finds that the union's last best offer of 1.5 percent, three percent, and three percent, for a total of 7.5 percent compounded, is closer to the nine percent compounded awarded this unit than the City's last best offer of zero, 2.23 percent, and three percent compounded, and must be adopted to maintain the relative comparison regarding wages.

City Exhibit Number One establishes that there are 198 non-union employees. Subsequent testimony established that all department heads are counted in this group.

City Exhibit 51 reveals that in each year of the three-year period of June 30, 1984 to July 1, 1987, these employees were awarded a three percent raise for a compound raise of nine percent. This period is identical with the contract period being arbitrated. Within the group of employees recognized as department heads, testimony by City officials established that while the department heads as a whole received a three percent raise, individuals within that group were accorded raises of 1.5 percent to 4.5 percent annually. The panel finds that the union's last best

offer of 1.5 percent, three percent, and three percent compounded provided the basis of closer comparability than the City's last best offer of zero percent, 2.23 percent, and three percent, for a total of 5.23 percent compounded. In addition to wages, this factor also mandates comparison of "hours and conditions of employment" between the Command Officers and other City employees in the different categories. Extensive City Exhibits were produced, reflecting total gross annual wages of Command Officers equally and exceeding, in some instances, the total gross annual wages of all other City employees. The panel specifically finds that the involuntary overtime mandated by the City in its decision to provide a high level of police service to the public is substantially the reason for the disparity in the total gross wages.

The panel also finds from a consideration of all of the testimony and exhibits that the "conditions of employment," constituting benefits different from other City employees on the part of the Command Officers, are justified, in light of the special qualifications of these employees, and have been recognized and negotiated by the City.

Factor (d) (i) requires comparison of wages, hours, and conditions of employment of these Command Officers with "public employment in comparable communities."

Although this factor provides for the comparison of "public employment," no testimony was provided by either party regarding any other public employment but Police Command Officers.

The City in its exhibit entitled "Comparables" lists the Cities of Lansing, Grand Rapids, Washtenaw and East Lansing as comparable. To establish comparability by these four entities, the City surveyed all Michigan cities with populations of fifty thousand to one million, and applied to those cities ten factors. Those factors are significant college presence, not a suburb, population size, median household income, percent of four or more years of college, total crime, percent below poverty line, percent change in population 1970-1980, percent change in SEV/Capita 1970-1980, and relative tax burden. A grid was prepared. The resulting comparable governmental units were a result of all units sharing more than one-half of the ten characteristics with Ann Arbor. Thus, Lansing shared eight characteristics, Grand Rapids shared seven, Washtenaw County Sheriff's Office shared seven, and East Lansing shared six. Kalamazoo was exempt because it has a Public Safety Department in which a majority of its employees perform both police and fire duties.

The union identified its comparables as Warren, Lansing, Sterling Heights, Livonia, Pontiac, and Southfield in its Exhibit U-18. The criteria utilized by the union were:

1) Population 1980 and 1982.
   Ann Arbor was ranked fourth out of a total of seven, exactly in the middle.

2) State equalized valuation 1983.
   Ann Arbor was ranked fourth out of a total of seven, exactly in the middle.

3) State equalized valuation 1985.

Ann Arbor was ranked fifth out of a total of seven, one below the median.

4) Property tax levies 1983.

Ann Arbor ranked third out of a total of seven, one above the median.

5) Property tax levies 1985.

Ann Arbor ranked fourth out of a total of seven, exactly in the middle.

6) Per capita money income 1979 and 1981.

In 1979, Ann Arbor was ranked fourth; in 1981, Ann Arbor was ranked third, a movement above the exact median.

7) Change in per capita income between 1979 and 1981.

Ann Arbor was second, with a 12.79 percent increase, exceeded only by Lansing.

8) Government employment 1983.

Ann Arbor was ranked fourth for both full-time, only, and full-time equivalent.

9) Comparable tax rates 1985.

Ann Arbor ranked second, exceeded only by Pontiac.

10) Per capita revenue.

Ann Arbor ranked fourth, exactly in the middle.

11) Ranking of per capita expenditure for police.

Ann Arbor ranked fifth, exceeding only Pontiac and Lansing.

Thus, the panel finds that each party has declared a list of comparables by almost totally different criteria. Population is the one criterion in common. Income is considered by the City as the household income and per capita by the union. The SEV changes of 1970-1980 were considered by the City, and the union lists them for 1983 and 1985. The tax burden criterion was utilized by both the City and the union, but different scales were selected. Both parties are in compliance with the statutory requirements. Lansing is the only entity on both lists.

Problems for the panel arise when it is asked to accept the Police Department of these two lists as comparable to each other. The City Exhibit C-61 is an organizational chart of the Ann Arbor Police Department identifying areas of responsibility and levels of command. City Exhibits 63, 64 and 65 are each two-page job descriptions for Ann Arbor Staff Sergeants, Lieutenants, and Captains. No comparable exhibits for any other department were submitted by either party.

Thus, the panel has no information concerning the relative levels and area of responsibility of Command Officers identified as Sergeants, Lieutenants, and Captains in all of the other

departments. The problem is further amplified by the fact that among the cities listed by Ann Arbor as comparable, there are no captain ranks in East Lansing or Washtenaw County (Exhibit C-88). The City's witness could not explain how the duties of an Ann Arbor captain are performed in East Lansing (T., Vol. VI, p. 18). Neither could this witness furnish this information about the Washtenaw County Sheriff's Office.

Warren was included by the union as a comparable. Testimony was furnished that there are no captains in the Warren Police Department. A witness testified that there was no level of command in Warren between a Lieutenant and a Deputy Chief, and that "some lieutenants were shift commanders." (T., Vol. VI, p. 23.) Also, there are 39 corporals in Warren who were not identified as being in or out of the command unit. (T., Vol. VIII, p. 11.)

A further aberration in comparing the ranks of the Ann Arbor Command Officers appeared in connection with the union-listed comparable of Southfield. In that department, there are three Captains who are not part of the bargaining unit.

Further barriers to a clear understanding of the relative value of the various benefits enjoyed by Command Officers in all listed comparable cities were the different years and different methodology used by the City and the union in the preparation of very extensive spread sheet exhibits. The union Exhibits of U-46, 47, 48, 49, 50 and 51 were all prepared as of January 1, 1986. City Exhibits C-71, C-73, C-73R, C-80, C-81, C-88, C-89, C-104, C-111 and C-111R, C-117 and C-117R, were all prepared as of

July 1, 1986. City Exhibit C-127, C-128 and C-129 were prepared as of June 30, 1987.

All of these exhibits were found to be competent evidence, but confusing and unconvincing because of these multiple differences. For further example, while the exact dollar value of the various benefits of Ann Arbor Command Officers were set forth, similar exact dollar cost figures were not available from all comparables, and projections and calculations were entered as substitutes. Sick leave use is a particular example. While the arithmetic utilized may be accurate, the projection may not be valid, and the results were found to be unconvincing by the panel.

Given these obstacles, it may be helpful to rank the total cost to the employer of the Staff Sergeant of all comparable cities listed by both parties, according to Exhibits C-73, C-104, and M-46. It is to be noted that some cities are listed twice and there is a one-year difference in some listings.

| Rank | City | Date of Exhibit | Total Cost | Exhibit Number |
|---|---|---|---|---|
| 1 | Pontiac | 1/1/87 | $71,135.00 | U-46 |
| 2 | Pontiac | 1/1/86 | $67,447.00 | 104-R |
| 3 | Sterling Heights | 1/1/86 | $60,857.00 | 104-R |
| 4 | Sterling Heights | 1/1/87 | $60,232.00 | U-46 |
| 5 | Livonia | 1/1/87 | $57,530.00 | U-46 |
| 6 | Southfield | 1/1/87 | $55,714.00 | U-46 |
| 7 | Ann Arbor | 1/1/86 | $55,530.00 | C-73R |

| Rank | City | Date of Exhibit | Total Cost | Exhibit Number |
|---|---|---|---|---|
| 8 | Livonia | 7/1/86 | $55,059.00 | C-104R |
| 9 | Southfield | 7/1/86 | $54,330.00 | C-104R |
| 10 | Ann Arbor | 1/1/87 | $54,313.00 | U-46 |
| 11 | Warren | 7/1/86 | $54,108.00 | C-104R |
| 12 | Lansing | 1/1/87 | $50,137.00 | U-46 |
| 13 | Lansing | 7/1/86 | $48,249.00 | C-73R |
| 14 | Washtenaw Cty Sheriff's Office | 7/1/86 | $44,177.00 | C-73R |
| 15 | East Lansing | 7/1/86 | $43,874.00 | C-73R |
| 16 | Grand Rapids | 7/1/86 | $43,451.00 | C-73R |

Ann Arbor is ranked seventh on this list on the basis of total cost determined by the City and is ranked tenth on the basis of total cost determined by the union.

The panel finds that given all of the inadequacies of the evidence regarding comparables, the current ranking is not substantially different from the position sought by the employer. The City Administrator, on behalf of the City, testified regarding pay scales of the Police Department, "should be compared somewhat between the average and the high." T., Vol. VII, p. 106.)

Finally, the panel finds that there was not sufficient material and substantial evidence on the whole record applicable to this Factor (d) (i) in selecting one of the last best offers.

Factor (d) (ii) is not applicable, inasmuch as no testimony by either party was introduced concerning it.

Factor (e) provides for consideration of "the cost of living." The fact that the term of the contract being arbitrated (7/1/84 to 6/30/85) has been completed allows for exact determination of the difference in the Consumer Price Index (CPI) between the beginning and the end of the contract. The panel is excused from engaging in speculation and predictions in this instance.

There are a number of different and valid cost of living indices. The witness for the City testified that the CPI-W for Detroit "is much more appropriate (than any other) because it is more narrowly focused on the kinds of things that are purchased by people who work." (T., Vol. V, p. 7.)

The witness for the union testified that although the union exhibits had been prepared using the CPI-U index, their calculations regarding the effect of both the W and U indices resulted in no substantial differences over the time periods involved. (T., Vol. VIII, p. 29.)

The panel will, therefore, utilize CIP-W in determining the change in the CPI.

According to the City's Exhibit C-60, the Detroit CPI-W figure as of 6/30/84, was 297.0.

One year later (6/30/85), the index stood at 307.4, for a rise of 3.5 percent. This is the period of the first year of the contract being arbitrated.

One year later (6/30/86), the index stood at 310.2, for a rise of .9 percent. This is the period of the second year of the contact. One year later (6/30/87), this index, as published

in the Monthly Labor Review of August 1987 and examined by the chairman of the panel, stood at 319.7, for a rise of 3.06 percent. This is the period of the third year of the contact. Thus, in the three-year period of the contract, the CPI-W has risen 7.645 percent.

The panel finds that the union's last best offer of 1.5 percent, three percent, and three percent, for a total of 7.5 over the three-year period, is more closely identical to the actual rise in the CPI-W than the City's offer of zero, 2.23 percent, and three percent. The panel takes note of the City's position that their offer would more rapidly restore equity between the CPI-W and the real income of the bargaining unit. However, the panel finds that by adopting the union's last best offer, a slight reduction in the real income increase since the ending of the last contract on 6/30/84 will be accomplished, and that an even greater but undetermined benefit has accrued to the City through the postponement of the payment of the raise.

The panel further finds that the City's evidence is not so substantial as to overcome and surpass the substantial evidence considered regarding Factor (d).

Factor (f) provides for the consideration of "overall compensation --- and all other benefits received." The panel notes that the sick leave benefit is being reduced, in accordance with the last best offer of the employer. The panel finds that there has not been the required material and substantial evidence on the whole record to justify any other

changes in any other benefit received.

Factor (g) is not applicable, inasmuch as the record contains no testimony in this regard.

Likewise, Factor (h) is not applicable, due to the total absence of evidence on the record.

The panel finds that by stipulations agreed to by the parties on the occasion of each of the two pre-hearing conferences, together with the record of the statutory hearing and this Award and Opinion, constitutes the entire collective bargaining agreement between the parties.

EMPLOYEE'S DELEGATE:

Jerry Caster
c/o Teamsters Local 129
2825 Trumbull
Detroit, MI 48216

DATE: 11-16-87

CHAIRMAN:

Richard H. Senter
543 N. Rosedale Ct.
Grosse Pointe Woods
Michigan 48236

DATE: 11/9/87

EMPLOYER'S DELEGATE:

Richard Parker
Ann Arbor Director of
Labor Relations
P.O. Box 8647
Ann Arbor, MI 48107

DATE:

changes in any other benefit received.

Factor (g) is not applicable, inasmuch as the record contains no testimony in this regard.

Likewise, Factor (h) is not applicable, due to the total absence of evidence on the record.

The panel finds that by stipulations agreed to by the parties on the occasion of each of the two pre-hearing conferences, together with the record of the statutory hearing and this Award and Opinion, constitutes the entire collective bargaining agreement between the parties.

| EMPLOYEE'S DELEGATE: | CHAIRMAN: | EMPLOYER'S DELEGATE:* |
|---|---|---|
| _____ | Richard H. Senter | Richard Parker |
| Jerry Caster<br>c/o Teamsters Local 129<br>2825 Trumbull<br>Detroit, MI 48216 | Richard H. Senter<br>543 N. Rosedale Ct.<br>Grosse Pointe Woods<br>Michigan 48236 | Richard Parker<br>Ann Arbor Director of<br>Labor Relations<br>P.O. Box 8647<br>Ann Arbor, MI 48107 |
| DATE: | DATE: NOV 9, 1987 | DATE: NOV 18, 1987 |

*Concurring as to the Opinion and Award on Issues I, II, and the stipulations between the parties; and dissenting as to the Opinion and Award on Issues III, IV, & V.

## APPENDICES

A) Union's Brief on Pension-Related Issues.

B) Union's Brief on Resicency Issue.

C) City's Brief on Legal Issues Raised by Union.

D) Chairman's letter dated 4/25/86, to the parties, setting forth results of prehearing conference of 4/18/86.

E) Chairman's letter dated 6/27/86, to the parties, setting forth results of prehearing conference of 6/24/86.

F) Chairman's letter dated 2/16/87, to the parties, setting forth results of prehearing conference of 2/6/87.

A

STATE OF MICHIGAN
DEPARTMENT OF LABOR
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the matter of:

CITY OF ANN ARBOR,

Employer,

-and- Case #D84C-1103

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, Local Union No. 129,

Labor Organization.
_____/

UNION'S BRIEF ON PENSION-
RELATED ISSUES
Background

On March 24, 1987, formal interest arbitration hearings commenced pursuant to 1969 Public Act 312 involving the above-referenced parties. By virtue of a letter dated February 13, 1986 from City Labor Relations Representative Richard Parker to Shlomo Sperka, Director of the Bureau of Employment Relations, the City identified two proposed modifications to the parties' current Sick Leave program. These proposed modifications have been identified as Issues #9 and #10 to these proceedings.

The City proposes:

"(9) **Article XII - Sick Leave - Section 4 a.**
Change to provide that upon death or retirement, employees be paid up to 960 hours of accumulated sick leave rather than their unlimited accumulation as at present.

(10) **Article XII** - Sick Leave - Section 4 e.
Change to provide that no sick leave payouts at retirement are to be factored into final average compensation. Currently employees hired before January 1, 1982 have sick leave payouts factored into F.A.C."

The Union has consistently argued to retain the status quo.

Presently, employees assigned to the Command Officers' bargaining unit earn ten (10) hours of sick leave per month. This sick leave, when unused, may be accumulated with no maximum limited attached. Union Exhibit 9, page 4 shows the accumulated sick time for each bargaining unit member as of September, 1986.

Upon the retirement of a member of the bargaining unit, the employee may "cash-in" his total accumulated sick leave at 100% of his hourly rate at the time of retirement. The amount of money received is thereafter treated as earnings in the last year worked and is factored into the employee's final average compensation (FAC) for pension calculations.

In the negotiations leading to the 1981-1984 Agreement, the City and the Union agreed to restrict the ability to factor sick leave payouts into the FAC to those employees on the department payroll as of January 1, 1982.

The City now proposes to cap the accumulation of sick leave at 960 hours and eliminate the ability to factor sick leave payout into FAC entirely.

## Argument

From at least October, 1985 on, the Union has consistently taken the position that the City may not insist upon the inclusion of its proposed Sick Leave modifications in the new Agreement because, if adopted, the changes would have a direct and substantial impact upon the members' pension rights.

Article 9, Section 24 of the 1963 Michigan Constitution provides:

> "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."

The Union contends that an Act 312 Panel may not, in light of this Constitutional provision, impose new restrictions on accrued and vested benefits that, in turn, will diminish a member's pension.

In Association of Professional and Technical Employees (APTE) v. City of Detroit, 154 Mich. App. 440 (1986), plaintiffs brought suit against the City of Detroit and the General Retirement System seeking a permanent injunction to prohibit the city from implementing a minimum age requirement for the receipt of vested pension benefits.

The employees in APTE received pension benefits under one of two plans. Employees hired before July 1, 1980 received benefits under what was referred to as the "40 and 8" plan where the employee could begin receiving pension benefits on the 30th anniversary of the date of hire provided that the employee worked at least eight years and had reached the age of 40. Employees hired after July 1, 1980, received benefits under the "10 and vesting" plan whereby the employee received benefits upon the 30th anniversary of the date of hire provided the employee worked at least 10 years.

The City of Detroit proposed to add an additional condition to an employee's receipt of vested benefits whereby the employee could not receive the vested pension until age 62. When the employees would not agree to the proposal, the City proposed an amendment to its charter that would unilaterally impose the additional condition on any of the plaintiffs who did not resign by May 21, 1984.

The trial judge concluded that the City's unilateral imposition of the minimum age requirement violated Article 9, Section 24, of the Michigan Constitution. The City of Detroit appealed and argued that the "accrued financial benefits" protected by Article 9, Section 24 arose only upon the employee's retirement and did not exist while the employee was still working. The Court of Appeals found the City's argument without merit.

The Court, referring to the Supreme Court's Advisory Opinion re Constitutionality of 1972 PA 258, 389 Mich 659 (1973), noted that in determining what was meant by the phrase "accrued financial benefits", the intention of the framers of Article 9, Section24 was to obviate the previously established harsh rule that pensions granted by public authorities were not contractual obligations but gratuitous allowances which could be revoked at will.

The APTE Court further explained that the Supreme Court's Advisory Opinion implicitly acknowledged that "accrued financial benefits" had arisen as to "services that had already been rendered by the employees, even though the employees had not yet retired and would have to continue making future contributions" to the plan. 154 Mich. App. at 445.

The APTE Court, in agreeing with the Supreme Court's Advisory Opinion, concluded:

> "The intention of the framers was not as defendant city argues in this case, merely to protect pension benefits of retirees, but was also to protect pension benefits related to work already performed by current employees. Thus, we find that the financial benefits of a pension plan accrue while the employee performs his work for the public employer.
>
> Furthermore, unlike the proposed future contribution increase addressed in the advisory opinion, the defendant city's proposed unilateral imposition of a minimum age requirement in this case directly diminishes and impairs plaintiffs' "accrued financial benefits." If defendant city were allowed to impose this minimum age requirement, it would substantially delay the receipt of pension benefits related to work already performed by plaintiffs. For

example, an affidavit filed by an employee represented by one of plaintiff labor organizations reveals that if the minimum age requirement is imposed on his vested pension benefits, which are related to work he has already performed, receipt of these benefits will be delayed by more than thirteen years. Under the presently applicable "40 and 8" plan, the employee would be eligible to receive a vested pension of $734.78 on January 1, 1988, when he was forty-eight years old. However, under the proposed plan of defendant city, the employee would not be eligible to receive his vested pension benefits until December 8, 2001. During this period of more than thirteen years the employee loses substantial vested pension benefits and may even forfeit his pension benefits if he dies during this period.

Based on this direct diminution and impairment of plaintiffs' vested pension benefits related to work already performed by plaintiffs, we conclude that the trial judge properly found that defendant city's proposed unilateral imposition of the minimum age requirement would violate Const 1963, art 9, Section 24. Thus, plaintiffs were entitled to judgment as a matter of law, and the trial judge properly granted their motion for summary judgment."

154 Mich. App. at 446-47
(Emphasis added)

The Union contends that the APTE situation is analogous to the City of Ann Arbor's proposals herein and its holding is directly applicable.

The City proposes to place a cap of 960 hours on unit employees who, by and large, have exceeded the 960 hours for some time. As of September, 1986, only 6 out of the 31 total employees have not reached the proposed 960 hour maximum. One of those 6 employees is only 22 hours short of the cap. 11 employees have in excess of 1500 hours and 7 more have between 1200 and 1500 hours of accumulated time.

Just what does the City propose to do with the time already accrued by these employees in excess of 960 hours? The City still isn't quite sure. Union Exhibit 9, page 5 shows the amount of earnings that will be lost by these employees if the City is allowed to retroactively extinguish these otherwise vested hours. At today's rate and without further accumulations, employees in the bargaining unit could lose anywhere from $2,203.11 to $21,058.56. Not only will this be lost in the sick leave payout but it will also be lost for FAC purposes which will directly impact upon the employee's pension level. The City is asking this Arbitrator to diminish its present retirement obligation by diminishing one of the vested factors that establish the pension benefit. This is expressly prohibited by Article 9, Section 24.

The City may try to argue that accrued sick leave is not contemplated as a factor in "final average compensation" as that term is defined in the Police and Firefighter Pension Act, 1937 P.A., 345, as amended, MCLA 38.551 et seq. See e.g. Gentile-Yank v. City of Detroit, 139 Mich. App. 608 (1984).

However, it must be remembered that the City was never initially compelled to factor sick leave payout into FAC. This was voluntarily assumed by the City as a benefit to be provided to its command officers. Certainly, a municipality can improve upon a statutorily established plan.

The Union is simply saying that once the City adopted this payout and FAC procedure, it cannot now retroactively strip its police command officers of their vested, accrued sick leave particularly where, as here, it directly impacts upon the pension benefit.

The City may also try to argue that the accrued sick leave is not a "vested" benefit because it may be used or exhausted by an employee as needed. While an employee may use or exhaust his sick leave before retirement, this is a voluntary act taken by the employee. He assumes the responsibility for diminishing his pension benefit. This also holds true for the employee who cashes in 50% of his sick leave earned on a yearly basis. In these situations, the employees have a choice and the diminishment is within their control.

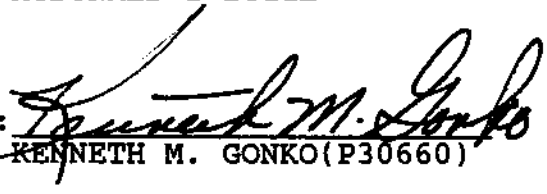
Finally, the City may argue that since the Union eliminated FAC roll-in of sick leave payments for post-January 1, 1982 hires, it can now be extended to pre-January 1, 1982 hires. This argument is likewise without merit because at the time this restriction was implemented, no one in the unit was impacted and no vested benefits were extinguished.

The Arbitrator must realize that we are dealing with more than just a sick leave issue here. The City has adopted and fostered a plan where command employees are allowed to improve

their pension status by reducing their usage of sick leave during their active employment. In return, the City has enjoyed literally no abuse of sick leave and has benefited by virtually zero interruption in services received from its command officers due to illness. The City now wants to retroactively reduce its pension obligation by asking this Arbitrator to unilaterally strip the unit employees of their accrued sick leave and extinguish their ability to roll in the payout into the FAC. No matter what you call it, the issue clearly remains one of pension impact and diminishment.

For all of the foregoing, the Union respectfully submits that this Arbitration Panel is without jurisdiction to grant the modifications proposed by the City.

Respectfully submitted,
MONAGHAN, CAMPBELL, LoPRETE,
McDONALD & SOGGE

BY: 
KENNETH M. GONKO(P30660)

DATED: April 22, 1987

STATE OF MICHIGAN
DEPARTMENT OF LABOR
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the matter of:

CITY OF ANN ARBOR,

Employer,

-and- Case #D84C-1103

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, Local Union No. 129,

Labor Organization.
_____/

UNION'S BRIEF ON RESIDENCY ISSUE

Background

On March 24, 1987, formal interest arbitration hearings commenced between the parties to the above-referenced matter pursuant to 1969 Public Act 312. At that time, the subject of "Residency" had been identified as "Issue #15".

The City quoting from a letter dated February 13, 1986 to Mr. Shlomo Sperka, Director of the Bureau of Employment Relations, took the following position on the residency issue:

> "(15) Article XVI - General - New Section
> Add a new provision to require that employees entering the bargaining unit who are hired into city employment after the effective date of the new agreement must establish and maintain their residency within the Ann Arbor City limits."

The Union took the position of maintaining the status quo (i.e. no residency requirement either for hire, continued employment or promotion).

On March 26, 1987, the parties began litigating the residency issue. Referring to the City's exhibits on residency, there appeared an unmarked document entitled "City Issue: Residency". That document reads:

> "Issue: Should Police Command Officers who are hired into city employment after the effective date of the new agreement be required to be city residents?
>
> Current Practice: Command Officers are not now required to reside within the city limits of Ann Arbor.
>
> City Position: Any new employee of the city hired after the effective date of the new agreement who thereafter seeks to be promoted to the Police Command Unit will be required to be a city of Ann Arbor resident prior to becoming a member of the Command Unit.
>
> Union Position: Status Quo."
>
> (Emphasis added)

At first blush, this position appears different from the City's February 13, 1986 position in that it specifically ties eligibility for promotion into the potential candidate's residency status. The Union's position remained unchanged.

The City proceeded to present its case on the residency issue and assured the Arbitrator and the Union, through its witnesses, that the proposed residency requirement would, in no

way, impact upon members presently within the Command Officers' bargaining unit. In fact, they went further to note that the proposal would only apply to new employees hired after the expiration of the collective bargaining agreement (i.e. June 30, 1987). This representation appears to conflict with the express language of the proposal that makes it applicable to "any new employee of the city hired after the effective date of the new agreement" (i.e. July 1, 1984).

At the conclusion of the City's case on residency, the Arbitrator expressed concern over his jurisdiction to decide this issue in light of the City's representations that the proposal would not apply to members presently in the bargaining unit and would only take effect after June 30, 1987. Noting Local 1277, AFSCME v. City of Center Line, 414 Mich 642 (1982), the Arbitrator questioned whether the City's proposal was a "mandatory" subject of bargaining or a "permissive" subject of bargaining. He thereafter requested instructions or enlightenment from the parties.

At a subsequent session, counsel for the Union suggested that, depending upon the exact contractual language proposed, the issue could become mandatory or permissive. He requested, in light of the City's multiple positions to date, that the City submit exact language that would be incorporated into the collective bargaining agreement if adopted by the Act 312 Panel.

The City initially balked but, on April 8, 1987, submitted a third written "proposal" on residency. That document, identified and admitted as City Exhibit 110, reads as follows:

> Issue: Should bargaining unit members be required to be residents of the city of Ann Arbor?
>
> Current Practice: Command officers are not now required to reside within the city limits of Ann Arbor.
>
> City Position: Effective June 30, 1987 all members of the bargaining unit shall be required to maintain their residence within the city limits of the city of Ann Arbor. Provided, however, this requirement shall be waived for persons who were employed by the city of Ann Arbor as of June 30, 1987 who were not city of Ann Arbor residents as of that date.

This proposal substantially reversed the position taken by the City's witnesses who earlier testified that their proposal would not impact upon any of the present unit members.

The Union, seeking further clarification on the language, questioned City Attorney Melvin Laracey who authoritatively elaborated as follows:

1. All Command Officers hired before June 30, 1987 who reside in Ann Arbor must maintain their Ann Arbor residence.
2. All Command Officers hired before June 30, 1987 who reside outside of Ann Arbor do not have to maintain Ann Arbor residency.
3. A police officer hired after June 30, 1987, must, as a condition of promotion into the Command Officer's unit, establish and maintain residency within Ann Arbor.
4. A police officer hired before June 30, 1987 who maintains an Ann Arbor residency must, as a condition of promotion, remain an Ann Arbor resident.

The City has called no further witnesses to substantiate support for this new position. The Union's position, again, remained unchanged.

## Issue

Whether the City's recent proposal on Residency is properly before the Arbitration Panel.

## Argument

The Union has the distinct impression that the City really does not know just what it wants on this issue. The City seems to be frantically scrambling for some sort of language that will even remotely approach a mandatory subject of bargaining. Once again, their chicanery has failed.

It is undisputed that the only issues properly before an Act 312 Panel are mandatory subjects of bargaining. In Local 1277, AFSCME v. City of Center Line, 414 Mich 642 (1982), Justice Williams, in writing for unanimous Court, went into great detail concerning the history of Act 312, the duty to bargain pursuant to PERA and the impact that the mandatory/permissive dichotomy has on the Act 312 process. Justice Williams follows an excellent discussion on bargaining to impasse with his conclusions on the proper jurisdiction of the Act 312 Panel. Speaking for the Court, he concluded:

> "The distinction drawn between mandatory and permissive subjects of bargaining is significant in determining the scope of the Act 312 arbitration panel's authority. Given

> the fact that Act 312 complements PERA and that under Section 15 of PERA the duty to bargain only extends to mandatory subjects, we conclude that the arbitration panel can only compel agreement as to mandatory subjects. It would be inconsistent to conclude that the arbitration panel can issue an award on a permissive subject when the parties do not even have a duty to bargain over such a subject. To hold otherwise would grant the Act 312 arbitration panel a free hand to compel agreement on any matters, even those beyond "wages, hours and other terms and conditions of employment". It is clear that the Legislature, while interested in foreclosing strikes in police and fire departments and providing an "alternate, expeditious, effective and binding procedure for the resolution of disputes" did not intend for the arbitration panel to have unbridled authority."
>
> 414 Mich at 654-55
> (Emphasis added)

The question then becomes whether the City's recent proposal is a mandatory subject properly before this Arbitrator.

Ordinarily, a residency requirement has been found to be a mandatory subject for bargaining. In Board of Education of the School District of the City of Detroit, 1974 MERC Lab. Op. 813, the Commission held that:

> "It is clear that residency as a condition of employment is a mandatory subject of bargaining, and that an employer may not unilaterally adopt such as a condition or requirement of employment to an organized bargaining unit. Detroit Police Officers Association v Detroit, 391 Mich 44, 85 LRRM 2536 (1974). We find that the mere adoption of resolutions or ordinances concerning residency or other conditions of employment, if unilateral, is in derogation of the employer's obligation to bargain with the representative of the employees and is indeed a violation of the Act, quite independent of subsequent implementation of such resolutions. DPOA v Detroit, supra; Detroit Board of Fire Comm'rs., 1970 MERC Lab OP 953; Detroit Police Dept.., 1974 MERC Lab Op 470; and Flint Civil Service Commission, 1972 MERC Lab Op 913."

However, the Commission, in so ruling, recognized the employer's obligation to bargain with the employee's representative when the proposed change impacted upon the organized bargaining unit.

Until the submission of City Exhibit 110, the City took the position that under no circumstances would proposed residency changes impact upon members presently in the bargaining unit. The early proposal impacted upon "new employees" hired after June 30, 1987. Since the only way an employee can become a member of the Command Officers' unit is through promotion from the patrol officers' ranks, the City's early proposals impacted entirely upon the Ann Arbor Police Officers Association and its membership. Quite simply, the City's initial proposals were purely hiring and promotional standards for police officers.

Have the circumstances changed in light of the City's latest proposal? The Union contends they have not.

Pursuant to the City's latest proposal, present members of the Command Officers' bargaining unit who are not Ann Arbor residents do not have to maintain an Ann Arbor residency either for continued employment or promotion. As such, these employees (24 out of 31 total members) will never be impacted by the City's proposal.

Pursuant to the City's latest proposal, present members of the Command Officers' bargaining unit who are Ann Arbor residents may move out of the City until June 30, 1987 and still maintain their employment as a command officer. The City's proposal in this regard is triggered on June 30, 1987 and impacts only upon Ann Arbor residents "as of that date". Accordingly, an Ann Arbor resident command officer may disestablish his residency any time before June 30, 1987. Since this is contemplated by the written language as proposed, conceivably no one presently assigned to the bargaining unit would be impacted by the City's latest proposal despite Mr. Laracey's representations.

Pursuant to the City's latest proposal, employees presently employed but assigned to the patrol officers bargaining unit will be impacted significantly by the restrictions. It must be remembered that the latest proposal, unlike its predecessors, is not restricted to "new employees hired after the effective date of the new agreement". Upon specific questioning by Union counsel, Mr. Laracey explained in no uncertain terms that a police officer hired after June 30, 1987 who lives outside of Ann Arbor will, as a condition of promotion into the Command Officers' unit, have to maintain a residency within the City of Ann Arbor. Further, a police officer hired before June 30, 1987 will, as a condition of promotion, have to remain an Ann Arbor resident.

The only impact the City's latest proposal will have on present members of the command bargaining unit will be on those employees who reside in Ann Arbor on June 30, 1987. Thereafter, we are dealing with the terms of an expired bargaining agreement that is not within the purview of this Arbitrator. It is obvious what the City is attempting to do. In order to somehow transform a purely permissive or illegal subject of bargaining into a mandatory one, the City has resorted to its usual chicanery by attempting to impact 7 out of 31 unit members on the last day of the collective bargaining agreement! Hopefully, the Arbitrator will see through this ruse and identify the City's ploy for what it is -- an outright sham.

Assuming the Arbitrator is willing to review and decide the issue as it impacts upon the present bargaining unit, is he also willing to impose, unilaterally, a mandatory condition of bargaining upon the AAPOA bargaining unit?

In City of Detroit (DPOA), 1973 MERC Lab. Op. 470, the Commission held, in no uncertain terms, that standards and criteria to be used in establishing a promotional eligibility list in a unit of non-supervisory police officer's for promotions outside the unit is a mandatory bargaining subject on which the union representing the non-supervisory unit may demand bargaining although the positions are included in the existing supervisory unit. Case affirmed DPOA v. City of Detroit, 61 Mich. App. 487 (1975): lev. den. 395 Mich. 756 (1975).

Since the only way person may enter the command officers' unit is by promotion from the AAPOA unit, and since the City has indicated, through Mr. Laracey, that current police officers who are Ann Arbor residents must maintain their Ann Arbor residency as a condition of promotion into the command unit and future police officers must establish residency as a conditin of promotion, the City is attempting to "back-door" its obligation to bargain with the AAPOA by foisting the decision on this Arbitrator in their dubious attempt to convert an otherwise permissive subject into a mandatory one.

In sum, should this Arbitrator assert jurisdiction over this proposal (which, by the way, was never bargained at all let alone bargained to impasse), he runs the serious risk of breaching his jurisdictional authority.

Accordingly, before reaching a decision on the merits, the Union respectfully requests this Arbitrator to decline jurisdiction on this issue as proposed.

Respectfully submitted,
MONAGHAN, CAMPBELL, LoPRETE,
McDONALD & SOGGE

BY: Kenneth M. Gonko
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DATED: April 22, 1987

CITY OF ANN ARBOR AND
TEAMSTERS LOCAL 129
MERC ACT 312
CASE NO. D-84C-1103

# CITY'S BRIEF ON LEGAL ISSUES RAISED BY UNION

## I Issue Regarding Article IX, §24 of Michigan Constitution

### A. Preliminary Discussion

This Act 312 proceeding commenced on January 24, 1986 with the filing by the Union of a petition for arbitration with the Michigan Employment Relations Commission. The Act 312 binding interest arbitration process does not begin until the statutory right is invoked by one of the parties through such a petition. See Ottawa County v Jaklinski, 423 Mich 1, 12-13 (1985).

On February 13, 1986, the City of Ann Arbor wrote Mr. Shlomo Sperka, the Director of MERC, with a list of all the unresolved City issues. (The Union received a copy of the letter.) Included in that list were issues 9 and 10, which were City proposals to place a 960-hour cap on sick leave payout on retirement for command officer employees, and to eliminate the inclusion of the sick leave payout in the final average compensation figure when calculating employee pensions.

After the appointment of the impartial chairman of the arbitration panel on March 10, 1986, the chairman held two pre-

arbitration conferences with the parties to discuss the issues to be arbitrated. The first prehearing conference was held on April 18, 1986 and the second was held on February 6, 1987. After both conferences, the chairman sent letters to both parties summarizing the results of the conferences. In both letters, the chairman noted that "both parties have stipulated and agreed to the timeliness and jurisdiction of the panel."

Having never raised the issue once since the beginning of this proceeding, and having remained silent through two prehearing conferences held over half a year apart, the Union, on March 10, 1987--just two weeks before the beginning of the statutory hearing--raised for the first time the claim that: "The arbitrator is without authority or jurisdiction" to decide issues 9 and 10 identified by the City in its February 13, 1986 letter to MERC. The Union raised the argument by appending two one-sentence statements to its position papers on these issues in its book of exhibits, and by including a copy of one page from the Michigan Constitution.

B. Argument

1. Waiver

It is the position of the City of Ann Arbor that the Union has improperly raised this issue at this point in the Act 312 proceeding. Both before and after the commencement of the Act

312 proceeding, active bargaining continued between the parties. In fact, after the proceeding had commenced and at the request of the parties, a mediator was brought in for three weeks for a last attempt to bring the parties into settlement of a contract. Throughout all of the bargaining, the Union never announced that it did not have to or would not bargain over City issues 9 and 10 because any change in the areas covered by those issues was barred by the Michigan Constitution.

The terms and conditions of a pension plan are a mandatory subject of bargaining under the Michigan Public Employee Relations Act. See POA v Detroit, 391 Mich 44, 63 (1974). Had the Union at any point during the bargaining process announced that it would not bargain over such a mandatory issue, the City could have filed an unfair labor practice charge with MERC and gotten a ruling from the Commission on whether the parties were required to bargain over the City pension issues. This is exactly the role the legislature intended MERC to play in Act 312 proceedings. See POA v Detroit, 391 Mich 44, 56-57:

> "The enforcement mechanism of the labor statutes result from the filing by one party of an 'unfair labor practices' charge against the other party. In the context of bargaining an unfair labor practices labor charge might, for example, allege that party will not meet in good faith to bargain or that a party refuses to discuss a mandatory subject of bargaining, or, as the DPOA charged herein, that the City has taken unwarranted unilateral action. If the administrative agency (MERC in Michigan) finds that the charges are true, it has the discretionary power to

> issue an order to bargain in good faith on the unresolved issues. The aggrieved party may appeal such an order to the Court of Appeals; or, MERC may itself petition the Court of Appeals for enforcement of the order to bargain. The result sought by the legislature in providing this enforcement machinery is to return the parties to the bargaining table to resolve their differences."

In effect, the Union's announcement of March 10, 1987, through its exhibits, that the changes advocated by the City in City issues 9 and 10 are foreclosed by the Michigan Constitution is a declaration that bargaining (and thus Act 312 arbitration) over the issues is impermissible. If the chairman allows the Union to make such an argument, and if the chairman decides to accept the argument, then the chairman will have allowed the Union to circumvent the carefully crafted Act 312 scheme developed by the Michigan legislature. Indeed, Act 312 constitutionality has been upheld precisely because of the limited, narrowly prescribed role afforded interest arbitrators under the act. See Detroit v DPOA, 408 Mich 410, 453-6 (1980).

The statutory scheme in Michigan shows that the Michigan Employment Relations Commission has exclusive jurisdiction over statutory bargaining rights issues. In Michigan Law Enforcement Union v City of Highland Park, 138 Mich App 342, 348 (1984), the Court of Appeals stated that: "MERC has exclusive jurisdiction over claims of unfair labor practices, MCL 423.216; MSA 17.455(16)." To protect the bargaining rights of both public employers and employees:

> "The legislature has, through PERA, assured public employees [and employers] of protection against unfair labor practices, and of remedial access to a state level administrative agency with special expertise in statutory unfair labor practice matters." Detroit Fire Fighters v City of Detroit, 408 Mich 63, 684 (1980).

These procedural protections are found in §16 of PERA, MCLA 423.216. They include (1) hearings conducted by hearing officers according to the Administrative Procedures Act with the requirement of the use of strict rules of evidence, MCLA 423.216(a); (2) review of the hearing officer's decision by the Michigan Employment Relations Commission, MCLA 423.216(b); and (3) the right of review directly to the Court of Appeals, MCLA 423.216(d)-(e). Not only is review directly to the Court of Appeals, but §16(g) of the act, MCLA 423.216(g), provides that such appeals: "For good cause shown shall take precedence over all other civil matters [in the Court of Appeals] except earlier matters of the same character."

The procedural protections of PERA are missing from Act 312 proceedings. Act 312 impartial arbitrators need not be lawyers, and almost assuredly cannot individually match the labor law legal expertise that the Michigan Employment Relation Commission commands as a whole. In contrast to MERC proceedings, Act 312 arbitrators can consider any evidence "deemed relevant by the arbitration panel." MCLA 423.236. Most importantly, the standard for judicial review of Act 312 decisions is sharply

limited. MCLA 423.242 allows judicial review of an Act 312 decision, "but only for reasons that the arbitration panel was without or exceeded its jurisdiction, [or] the order is unsupported by competent material and substantial evidence in the whole record, or the order was procured by fraud, collusion or other similar and unlawful means." For a discussion of the limited nature of this review, see Detroit v DPOA, 408 Mich 410, 480-483.

These Act 312 limitations make sense when the arbitration is confined to the narrow issue of selecting or crafting provisions of a labor contract for the parties. However, when a party seeks to inject complicated legal issues into an Act 312 proceeding, as has happened here, the limitations of Act 312 render the process inappropriate for proper resolution of the issues.

The Union may argue that the legal issue it is trying to raise can be considered under §9(a) of Act 312. The language in §9(a) that refers to the "lawful authority of the employer," however, is obviously not intended to allow the introduction of wide ranging legal issues. If it were, then the subsection would provide that the lawful authority of both the employer and the employees could be considered. After all, either party to a labor contract is equally capable of acting improperly or making illegal proposals. Because §9(a) refers only to the employer's lawful authority, it must refer to fiscally related factors that are peculiar to public employers, such as the legal limit on an

employer's taxing authority. This is how the provision was applied in Detroit v DPOA, 408 Mich 410 at 487. In this way, §9(a) is consistent with the other factors listed in §9, which also focus on financial factors.

The constitutional argument raised by the Union invokes sophisticated legal concepts and implicates numerous court decisions in Michigan as well as elsewhere. The issue is precisely the kind of issue that MERC is qualified to consider and, indeed, intended by the Michigan legislature to consider. Consequently, the Union should not be allowed to skirt the authority of MERC and the statutorily established MERC procedures by raising at the last minute in an Act 312 proceeding this kind of legal issue. Because the Union never raised the issue at a time when it could have been referred to MERC for proper resolution, the chairman should rule now that the Union is precluded from trying to get the issue decided at this late date in an Act 312 proceeding.

2. Sick Leave Payout at Retirement Is Not a "Pension Benefit."

The Michigan constitutional provision cited by the Union, Article IX, §24, only protects "pension" or "retirement system benefits." The payout at retirement of a City employee's unused sick leave is not a pension benefit. Rather, it is a wage or compensation benefit. In effect, the City pays an employee for

every hour of sick time that the employee does not use by instead coming into work. Thus, this is really just another form of compensation to the employee for work already performed. In this sense, it is the same as payment for unused vacation time, which the Sixth Circuit Court of Appeals has held is "merely a form of deferred compensation for services already performed." United Mine Workers of America v Jerical Mining, Inc, 492 F Supp 132 (ED Ken, 1980), citing Local 58, AFL-CIO v Sun Products, 521 F2d 1286 (CA 6, 1978).

Similarly, the inclusion of sick leave payouts in the final average compensation calculation for pension purposes does not magically render the actual payout a "pension benefit." It is no more a "pension benefit" for purposes of Article IX, §24 of the Michigan Constitution than are wages, which, of course, are also included in the final average calculation.

Thus, the Union's argument proves too much. If sick leave payouts are "pension benefits" that may not be constitutionally tampered with, then so is everything else that goes into the final average compensation calculation. Taking the Union's argument to its logical conclusion, the City could never seek to lower any component of final average compensation, including wages or overtime pay. The absurdity of this conclusion reflects the absurdity of the Union's basic argument.

3. Sick Leave Payout Is Not an "Accrued" Pension Benefit.

Even assuming that sick leave payouts and their inclusion in final average compensation are somehow "pension" benefits, the benefits are still not protected by Article IX, §24 of the Michigan Constitution because they are not "accrued" pension benefits. They are not "accrued" benefits because employees who now have banked unused sick hours have no present entitlement to be paid for them. Only at retirement can they be paid for any unused hours. If an employee leaves City employment before retirement age, the employee is not paid for any of the sick time. Similarly, the number of hours payable at retirement is reduced by any amount used by the employee prior to retirement. Theoretically, at least, even an employee with a very high number of hours banked now might, by the time of his retirement, have used them all and be entitled to no payout. Consequently, since the actual sick leave payout is contingent upon (1) retirement, and (2) the number of sick leave hours used prior to retirement, it cannot be considered to be an "accrued" benefit.

On this point, a review of the court history of Article IX, §24 is instructive. In Advisory Opinion Re Constitutionality of 1972 PA 258 (1973), the Michigan Supreme Court explained that the provision had been adopted in reaction to several previous Michigan court decisions. These decisions had held that cities

could decrease or terminate employee pension benefits even "after the employees had completed their prescribed period of employment and had begun to receive retirement benefits." 319 Mich at 659 [emphasis added]. Thus, the Court said, Article IX, §24 represents "the intention of the framers of the Constitution to obviate this harsh rule." 389 Mich at 660.

Illuminated in this historical light, the meaning of the phrase in Article IX, §24, "accrued financial benefits of each pension plan and retirement system," becomes clear. This provision was adopted to protect pension benefits that had already become payable (i.e., "accrued") to an employee or retiree. In the language of pension plans, such benefits are said to be "vested." This interpretation of Article IX, §24 was in fact followed very recently by the Court of Appeals in APTE v Detroit, 154 Mich App 440 (1986). There, the Court very directly equated the constitutional phrase "accrued financial benefits" with "vested pension benefits." 154 Mich App at 446.

In contrast, there is nothing "vested" about the amount of sick time that an Ann Arbor command officer, or any other City employee, will be paid on retirement. The amount is wholly dependent on whether any or all of the sick time is used before retirement. Indeed, the amount of time in an employee's account fluctuates every month, sometimes even decreasing. Under the Union's argument, this would be impermissible. C.f., Phelps v Wayne Circuit Judge, 225 Mich 509, 517 (1923) where the Supreme

Court defined "accrued" as meaning "to become a present and enforceable right." [emphasis added]

Finally, the decision in Firefighters Union v Mt Clemens, 58 Mich App 635 (1975) indicates strongly that Article IX, §24 of the Constitution has no impact on the issue of whether sick leave payouts should be included in the pension calculation of final average compensation. The Mt. Clemens case concerned this same issue. There, the City of Mt. Clemens had unilaterally decided to stop including the payout in the final average compensation calculation. The fire fighters (represented, incidentally, by Ronald Helveston of the Detroit labor law firm of Sachs, Nunn, Kates, et al.) claimed the city had to bargain over the change under the provision of the Public Employees Relations Act. MERC agreed with the union and the city appealed. In its decision, the court first quoted Article IX, §24 of the Constitution. It then went on to hold, in the same paragraph of its opinion, that the city was required to bargain over the change. Obviously, therefore, the Court of Appeals sees nothing in the constitutional language that precludes bargaining over this issue.

4. Article IX, §24 Does Not Apply to Financial Benefits That Have Not Yet Accrued.

Even if the argument of the Union is accepted in its totality, Article IX, §24 of the Michigan Constitution would only

apply to those sick leave "benefits" already "accrued" by City employees. This is clear from the Michigan Supreme Court's decision in Advisory Opinion Re Constitutionality of 1972 PA 258, 389 Mich 659, 663 (1973), where the Court said: "Under this constitutional limitation, the legislature cannot diminish or impair accrued financial benefits, though we think it may properly attach new conditions for earning financial benefits which have not yet accrued." This means, of course, that future and thus as yet "unaccrued" benefits are not protected against "diminishment" by this constitutional provision even if it is deemed applicable to this proceeding. See also APTE v Detroit, 154 Mich App at 447.

During the pendency of an Act 312 proceeding, the parties are precluded from unilaterally changing "wages, hours [or] other conditions of employment." MCLA 423.243. See Ottawa County v Jaklinski, 423 Mich at 14. However, under Jaklinski, "the substantive right to continue to accrue benefits [under a public employee labor contract] terminates with the contract" when the contract expires and the issue of the terms of a new contract is submitted to Act 312 interest arbitration. 423 Mich at 23 [emphasis added]. When the new contract is arbitrated, there is no requirement or entitlement to have provisions of benefits from the old contract automatically included in the new contract. Consequently, in this case, even if the Union's constitutional argument is accepted, there would be no legal impediment to ap-

plication of the City's proposals on sick leave payout and final average calculation as to sick leave amounts credited to employees after the expiration of the command officers' contract on July 30, 1984.

II Residency Issue

The City's offer on this issue, as reflected in the contract language submitted by the City on April 8, 1987, would clearly make residency a condition of continued employment within the bargaining unit for those members subject to the residency requirement. Under Police Officers Association v Detroit, 391 Mich 44, 57-63, this kind of requirement is a mandatory subject of bargaining that is a proper issue for resolution in an Act 312 proceeding.

April 21, 1987

Mel Laracey

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(313) 884-4173

April 25, 1986

Howard Shifman, Esq.
1026 W. Eleven Mile Road
Royal Oak, MI 48067

Mel Laracey, Esq.
c/o City of Ann Arbor
P.O. Box 8647
Ann Arbor, MI 48107

Re: City of Ann Arbor and Teamsters Local 129;
MERC Act 312, Case Number D84 C-1103.

Gentlemen:

The results of the pre-hearing conference in this matter, conducted on Friday, April 18, 1986, in the City Offices of Ann Arbor, are set out.

Present and representing the bargaining unit was Mr. Larry D. Gregory, the Secretary-Treasurer of Teamsters Local 129. He was accompanied by the following members of the Command Unit bargaining team: Dale Heath, John Bodenschatz, David Miller, Jack Ceo, and Robert Conn.

Present and representing the employer was Mr. Mel Laracey, City Attorney for Ann Arbor. He was accompanied by Richard Parker, Ann Arbor Director of Labor Relations; D.L. Johnson, Deputy Police Chief; and Robert Treadway, a Senior Personnel Technician of Ann Arbor.

Mr. Gregory advised that Howard Shifman, Esq., will represent the bargaining unit, and that he, Mr. Gregory, will serve as the delegate on the arbitration panel. Mr. Parker advised that he would serve as the delegate representing the employer on the panel.

In the matter of future executive sessions, the Chairman advised that they would be called at the joint request of the two delegates, or at the call of the Chairman. In the event the executive session is initiated by the joint action of the delegates, it is agreed that the delegates will have

read the complete transcript of the hearing prior to the executive session.

The parties jointly agreed that the statutory hearing will be held on June 9, 10, 16, 17, 23 and 24, 1986, beginning daily at 10:00 a.m. and continuing until 4:00 p.m., or the completing of the testimony by the witness so testifying at 4:00 p.m. The location of the hearing has not been finally established. The employer offered the conference room in the Ann Arbor City Offices. This was not satisfactory to the bargaining unit. The bargaining unit suggested the conference room of the Ann Arbor City Airport, which was determined to be available. This was not satisfactory to the employer. The employer suggested that the hearing be alternated between the conference room in City Hall and the conference room at the airport. This was not satisfactory to the bargaining unit.

The Chairman observes that this alternating of the location of the hearing appears to be a rational compromise. However, lacking an agreement between the parties as to the location of the statutory hearing, it is the decision of the Chairman that the hearing will be conducted on the premises of the Employment Relations Commission on the 14th floor of the State Plaza Building, located at 1200 Sixth Avenue, Detroit, Michigan 48226.

It was agreed between the parties that the City will proceed with its case, issue by issue. That is, the City will put in its affirmative case on an issue, and the bargaining unit will respond with its defensive position on that issue. There will be the usual direct, cross, redirect, and recross examination allowed. When the testimony on that issue is concluded, the City will proceed to the next issue, in the same manner. The Chairman advised the parties that there would be an opportunity for rebuttal testimony at the conclusion of the hearing. However, it is hoped that all testimony on a particular issue will be presented at one time and appear in a single location in the transcript. After the City has concluded its presentation of all testimony on all issues, the bargaining unit will proceed in the same fashion.

In the matter of exhibits, the parties agreed that one copy of each exhibit will be exchanged directly between the parties, postmarked not later than May 27, 1986. Each party will supply a copy to the Chairman. With respect to

any problems with the exhibits in the matter of admissibility, the parties will directly contact each other, in order that the objections may be resolved and exhibits admitted without further objection. These objections are to be communicated to the opposing party, postmarked not later than June 4, 1986.

The parties stipulated and agreed as to the timeliness and jurisdiction of the panel. Each party has furnished to the Chairman a signed waiver of the time limits imposed by the statute.

There is no current agreement between the parties as to the duration of the contract to be negotiated. It is noted that the last contract expired June 30, 1984.

In the matter of determining the economic and non-economic status of each issue, the parties agreed that this will be determined at the time the last best offers are made. Subject to reconsideration, the parties agreed that the issue represented by Article 16, "General Section 22," dealing with mace, is non-economic.

The last best offers by each party are to be made in writing and furnished to the Chairman, postmarked not more than ten days from the date of the closing of the hearing. The parties agreed that there shall be no provision for amended last best offers.

In the matter of pre-hearing briefs, the parties agreed that it was optional with each side.

In the matter of post-hearing briefs, the parties agreed to furnish a brief to the Chairman, postmarked not more than 30 days after the receipt of the transcript, and the Chairman will furnish opposing briefs to the parties.

In the matter of closing arguments, the parties agreed that the issue was optional with each side, but in the event one of the parties exercised the option to make a closing argument, it would not exceed 30 minutes.

All parties agreed and stipulated that the statutory hearing will be restricted to the issues as set out in the letter dated February 13, 1986, by Richard N. Parker, and directed to Mr. Shlomo Sperka, as Director of the Employment

Relations Commission. All other issues and aspects of the contract have been resolved and agreed to.

A change in the agreed dates of hearing will be granted by the Chairman on the basis of good cause shown. The parties agreed that where the request is made with less than five full working days' notice to the Chairman, the party seeking the adjournment will be solely responsible for the daily fee of the Chairman.

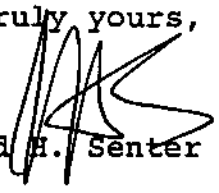
The parties are not yet in agreement on the comparables which each will use.

The parties understand there will be no restriction on rebuttal exhibits.

The Chairman initiated a discussion with the parties concerning the possibility of a remand, as per Section 7A of the statute. At the time of the hearing, neither party indicated that it was interested in a remand. The Chairman advised that upon the joint request of the parties, a remand would be granted, pursuant to the statute, but in no event would the remand exceed the statutory limit of duration, nor would it have the effect of postponing any of the agreed dates of hearing.

The hearing was adjourned at 11:40 a.m.

Very truly yours,



Richard H. Senter

RHS/af

cc: Mr. Larry D. Gregory
Mr. Richard N. Parker
Mr. James Amar
Mr. Raymond J. Marcoux

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COUNSELLOR AT LAW

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June 27, 1986

Mr. James Amar
Executive Assistant
Michigan Employment Relations Commission
14th Floor, 1200 Sixth Ave.
Detroit, MI 48226

Re: City of Ann Arbor and Teamsters Local 129;
MERC Act 312, Case No. D84 C-1103

Dear Mr. Amar:

This is the status report. In accordance with my letter to the original parties in this matter, the second pre-hearing conference was conducted on the morning of June 24, 1986, in the Detroit offices of MERC.

Appearing for the petitioning bargaining unit were John Bodenschatz, Robert Conn, and Dale Heath. Appearing for the employer were Don Johnson, Richard Parker, and Mel Laracey, Esq.

Mr. Larry D. Gregory, the Secretary-Treasurer of Teamsters Local 129, who signed the Petition on behalf of the bargaining unit in this matter, was expected, but did not appear.

Mr. Conn, in his capacity as Chief Steward of the Command Unit of the Ann Arbor Police Department, presented to the Arbitrator, with copies to others present, a letter dated June 24, 1986, signed by Joseph Valenti, as President of Teamsters Local 214 (State, County and Municipal Workers). A copy is enclosed for your full information.

Mr. Valenti advises that Local 129 is being "transitioned into Local 214" and when that is accomplished, it is expected that Local 214, by authority of the International Union, will be empowered to represent the bargaining unit in this matter.

A full discussion was engaged in by all parties as to the ramifications of this letter, and how best to serve the interest of both sides.

The bargaining unit expressed itself as ready to proceed, under time constraints, while the Union sorts out the necessary changes. The Union recognizes that Local 214 is unable to schedule dates of hearing or make any other arrangements until it is so authorized by the International.

The Employer stated that the delay is a concern, but appreciates the Union position and will have to give the matter further attention to determine its liabilities. Both parties concurred in the decision of the Chairman to adjourn the matter without dates, and direct both parties to deal directly between themselves in the matter of following the procedures taken by the Union to accomplish the promised changes.

When the parties are in a postion to proceed, or otherwise dispose of the matter, the Chairman will be contacted and appropriate hearing dates established.

Very truly yours,

Richard R. Senter

RHS/af

cc: Mel Laracey, Esq.
Mr. Robert Conn
Mr. Richard Parker
Mr. Larry Gregory
Mr. Joseph Valenti

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February 16, 1987

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6735 Telegraph Road
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Melvin Laracey, Esq.
c/o City of Ann Arbor
P. O. Box 8647
Ann Arbor, Michigan 48107

Re: City of Ann Arbor and Teamsters Local 129;
MERC Act 312, Case No. D84 C-1103.

Gentlemen:

The results of the pre-hearing conference in this matter conducted on Friday, February 6, 1987 in the offices of the City of Ann Arbor are set out below.

Representing the bargaining unit was Mr. Kenneth M. Gonko. He was accompanied by Mr. Jerry Caster, business representative of Teamster Local 129 at 2825 Trumbull, Detroit, Michigan 48216, and by Mr. Bob Conn, Mr. Dale Heath, and Mr. John Bodenschatz of the bargaining unit.

Representing the employer was Mr. Melvin Laracey. Also present was Mr. Richard Parker, the Ann Arbor Director of Labor Relations, and Don Johnson, Deputy Police Chief.

The parties respectively advised that Mr. Caster would serve as the delegate on behalf of the bargaining unit and that Mr. Parker would serve as the delegate on behalf of the employer. There would be no substitutions of delegates and they will not appear at the statutory hearing as a witness.

The parties are advised that the chairman is amenable to executive sessions following the statutory hearing upon the joint request of the two delegates. Inasmuch as the award by statute must be based on the record, it is understood that the delegates will have read the complete transcript of the hearing prior to any executive session.

The parties jointly agreed that the statutory hearing will be held on March 24th, 25th, 26th and 31st and April 1st, 3rd, 7th and 8th in the basement conference room of the Ann Arbor Municipal Airport located at 801 Airport Drive, Ann Arbor, Michigan 48104, telephone number 994-2841. The hearings will begin daily at 10 A.M. and continue through 4:30 P.M. By a copy of this letter being designated for Mr. Marcoux of MERC, he is requested to arrange for the presence of a reporter. The parties agreed that the bargaining unit as the petitioner in this matter will present its case issue by issue with direct testimony, cross examination, redirect, and re-cross examination to be conducted issue by issue. The employer will present its case in the same way.

The parties agreed to a direct exchange between themselves of all exhibits with two copies of each exhibit to be mailed to the Chairman of the Panel postmarked not later than March 10, 1987. In the event that amended exhibits are found to be necessary by either party, they will be exchanged in the same way with two copies to be mailed to the Chairman postmarked not later than March 19, 1987.

Both parties have stipulated and agreed to the timeliness and jurisdiction of the panel.

There is no current agreement between the parties as to the duration of the contract being negotiated. It is to be noted that the last contract between these parties expired on June 30, 1984. The parties agreed that the last best offers will be submitted by each of the parties directly to the arbitrator postmarked not later than two weeks after the close of the statutory hearing. The Chairman will mail the offers to the opposing side. The parties agreed that there would be no provision for amended last best offers in this matter.

The parties agreed that pre-hearing briefs were optional with each party. The parties also agreed that, at this time, closing arguments are viewed as optional by each party, but in the event closing arguments are undertaken, the argument will be restricted to thirty minutes by each side.

Both parties advised that they would be submitting post-hearing briefs. It was agreed that they will be mailed to the Chairman postmarked not later than thirty days after receipt of the transcript. The Chairman will mail copies to the opposing parties.

The parties agree that all outstanding issues are contained in the letter dated February 13, 1986, from Mr. Richard N. Parker, and addressed to Mr. Shlomo Sperka, as director of MERC, with the exception that the issue identified as No. 6 appearing at the top of page 2 of the letter and entitled Article 10 Holidays, has been settled and agreed to by the parties. All other listed issues remain unresolved and they constitute the entire matter before the Chairman. No other issues will be incorporated into the statutory hearing.

The comparables to be used by each party will be identified and furnished with the exhibits.

Rebuttal exhibits will be prepared and exchanged prior to the scheduled end of the hearing.

A change in the agreed dates of hearing will be granted by the Chairman on the basis of good cause shown. Where the request is made with less than five full working days notice to the Chairman, the party seeking the adjournment will be solely responsible for that daily fee of the Chairman.

The hearing was adjourned at 10:50 A.M.

Very truly yours,

Richard H. Senter

RHS/pv

cc: Jerry Caster
Richard N. Parker
James Amar
Ramond J. Marcoux