

1944

STATE OF MICHIGAN  
DEPARTMENT OF LABOR  
EMPLOYMENT RELATIONS COMMISSION  
ARBITRATION UNDER ACT 312, PUBLIC ACTS OF 1969, AS AMENDED

In The Matter of the Arbitration Between

THE COUNTY OF MONROE  
Employer,

-and-

LABOR COUNCIL, MICHIGAN  
FRATERNAL ORDER OF POLICE  
Union.

---

MERC No. D88 D1260  
Opinion and Award

RECEIVED  
JUN 26 4 19 65  
STATE OF MICHIGAN  
DEPARTMENT OF LABOR  
EMPLOYMENT RELATIONS COMMISSION

APPEARANCES

FOR THE COUNTY:

Thomas H. Derderian, Esq.

FOR THE UNION:

David K. Sucher, Esq.

PANEL

Martin L. Kotch  
Thomas H. Derderian  
Michael P. Somero

Chairperson of Arbitration Panel  
Employer Delegate  
Union Delegate

## I. INTRODUCTION

This matter comes before this Panel pursuant to Act 312, Public Acts of 1969, as amended, for the purposes of hearing and deciding unresolved issues in the contract dispute between the parties. The preceding Collective Bargaining Agreement expired on December 31, 1988. A petition for arbitration was filed by the Union on December 12, 1988, and an amended petition was filed on April 25, 1989.

A pre-hearing conference was held before Martin L. Kotch, the Arbitrator appointed pursuant to Act 312, on November 30, 1989. Several issues were presented to the Arbitrator as being unresolved. A contemporaneous arbitration was taking place with another, related bargaining unit, the deputies' unit of the Monroe County Sheriff's Department. The parties, subsequent to that conference, agreed to postpone action on the present arbitration in the hopes that resolution of the already commenced deputies' arbitration might produce resolution of the instant arbitration as well. This did not come to pass, and the parties proceeded with hearings on August 29, 1990, as previously scheduled, before Panel Chairperson Kotch.

At that hearing, prior to the formal opening of the record, the parties engaged in significant bargaining, resulting in a settlement of all outstanding economic issues. That settlement remains intact, and the economic issues are contained herein as a stipulated award issued by the Panel. The parties agreed to reduce to writing their agreement as to the remaining non-economic issues (promotions and job bidding) to be forwarded to the Panel Chairperson for inclusion in the stipulated award. Again, unfortunately, the parties were unable to reach agreement on the language regarding these issues, and an evidentiary day of hearing on those issues was held on November 7, 1990. Upon close of the hearing, it was agreed that Last Best Offers were to be submitted to the Arbitrator no later than November 16, 1990, with briefs on the issues to be submitted on January 16, 1991. At that time, the

parties specifically waived the statutory six month time requirement for filing of Act 312 awards.

## II. BACKGROUND

Section 8 of Act 312 provides as follows:

As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. *The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9.* (Emphasis supplied).

The statute is silent as to the weight to be accorded the eight factors listed in section 9. With respect to non-economic issues, such as those present here, there is little of concern regarding comparison of wages and the other financially-rooted criteria of section 9. Indeed, an examination of the statutory criteria yields only a few categories to be applied. Among these are the interest and welfare of the public, irrespective of financial considerations, and "those other factors generally taken into consideration in the creation of a Collective Bargaining Agreement through bargaining, mediation, fact-finding, arbitration or otherwise..." These factors were found in the implicit concern for the best qualified command officers, i.e., an efficient and competently directed law enforcement agency, and the desire of the Union for the benefits of seniority, specifically reward for time in grade.

Among the most critical statutory factors, and the only one to receive *explicit* treatment by the parties was the comparison of the employees engaged in this arbitration with those similarly engaged in comparable communities. And, as to comparability, the parties relied on the exhibits submitted to the Frankland panel in the dispute between the County and the Monroe County Sheriff's Department Deputies' unit. (MERC Case No. D88 D-1212.) At the hearing on that matter substantial testimony, together with exhibits, was presented

concerning comparability.

The same exhibits submitted to the Frankland panel were submitted to this Panel *without further comment*. In view of the decision of the parties to submit exhibits identical to those provided the panel in the deputies' arbitration, without further elucidation, great deference should be given to the analysis engaged in, and the conclusions reached by that panel with respect to comparable communities.

Both parties in the prior dispute, and thus here, agreed upon St. Clair and Saginaw Counties. The Union proposed, in addition, Ingham and Washtenaw Counties, and the City of Monroe. Of those, the panel accepted Ingham, rejecting Washtenaw and the City of Monroe. The Employer proposed, along with the stipulated Counties, Bay, Berrien, Calhoun, Jackson and Ottawa. Each of these was accepted by the Frankland panel. This Panel has reviewed the analysis engaged in by the Frankland panel, and finds it to be unexceptionable. Moreover, as noted above, in the absence of testimony concerning comparability, or pointing to any significant errors on the part of that panel, the interest of the parties and the public is best served by utilization of the same yardsticks employed in adjudicating a similar dispute, of very recent vintage, between the parties. Thus, this Panel accepts in whole the external comparables accepted by the Frankland panel in the dispute between the County and the Deputies.

The Frankland panel accepted two of the three internal comparables submitted to it by the Employer in the prior dispute. The Employer proposes a fourth internal comparable to this Panel, the Monroe County Deputy Sheriffs. Because the issues here are non-economic, and thus significantly different from those presented to the Frankland panel, the utility of the four internal comparables proposed by the Employer, having quite different personnel and performing very different tasks, is minimal at best. Promotion to higher command position has little or no parallel in the proposed internal units. As a consequence, the four internal

comparables proposed by the Employer are rejected.

#### A. PROMOTIONS: SECTION 7.7

The present Collective Bargaining Agreement contains, in section 7.7, the following language:

All candidates for promotion to the position of lieutenant must have served as a sworn, certified deputy sheriff for a minimum of eight (8) years with the Monroe County Sheriff's department.

The Union seeks significant changes in this section, particularly as it relates to the above language. The Union seeks totally to eliminate deputies as potential candidates for either Lieutenant or Captain, and Sergeants as candidates for Captain. The Union's Last Best Offer further contains a seniority requirement for eligibility for promotion to Lieutenant or Captain.<sup>1</sup> The position taken by the Union is, essentially, that one cannot be an effective Lieutenant or Captain without having first moved through the ranks. This is essential, argues the Union, in order to gain experience and knowledge. Deputies moving directly into higher command positions do not have experience in first line supervision.

The Union seeks to retain language, omitted by the Employer in its Last Best Offer, requiring the Sheriff to promote to the next vacancy the candidate with the highest point allocation when that person is bypassed on the first promotion. The Union sees this as a reward for achievement, and as a guarantee against bias. Finally, the Union proposes additional language which would require the Sheriff to fill all vacancies from the promotional list within 90 days of the vacancy date. This, argues the Union, is to prevent the "temporary" filling of a vacancy for an extended period.

---

<sup>1</sup> Promotion to Lieutenant is restricted to Sergeants with 4 years of experience. If no one qualifies, the top 5 seniority Sergeants are eligible. Promotion to Captain is limited to Lieutenants with 2 years, and if no one is eligible, all Lieutenants are eligible.

The Employer argues that the Union's proposal is neither in the public interest nor in the interest of the Department. Further, the Employer contends, such language would cause the Employer to violate its agreement with the deputies' bargaining unit.

The Employer contends that the Union has no evidence to buttress its opinion testimony that moving up through the ranks produces more qualified command officers. In contrast, the Employer points to the testimony of Undersheriff Cole, who testified that the system worked best when open to all. In his experience, he testified, seniority had no correlation to command ability. Further, the Employer argues, by adopting the Union's position, the choice of candidates would be severely restricted. Thus, with respect to promotion to Lieutenant, the Employer's choice of eligible candidates would decrease from 45 to 7, under the present seniority list. In sum, the Employer argues that the Union has no evidence to support its position, and the Employer's Last Best Offer is in conformity with the law and long standing practice between the parties. That practice encourages open competition and assures that the successful applicant for promotion comes from the strongest possible field.

## **DISCUSSION**

It is important to reiterate, at the outset of the discussion of the positions taken by the parties in their Last Best Offers, that the issues before the Panel are entirely non-economic. This does not obviate the necessity of reference to the statutory criteria in section 9 of Act 312; the statute does not require adoption of the Last Best Offer which more nearly complies with the applicable factors, but does require that findings, opinions and orders must be "based upon" those factors.

This Panel, therefore, while charged with the creation of contract provisions which are based upon the statutory criteria of section 9 of the Act, is not constrained to accept

*either* of the Last Best Offers. It may fashion its own language, so long as that language is based on the statutory criteria. Of course, to depart significantly from the expressed desires of *both* parties would defeat the purpose of all of collective bargaining, i.e., to permit the parties to give expression to their contractual wishes, and to have those wishes realized within the framework of *quid pro quo* bargaining. Last best offer compulsory arbitration is a pale substitute for mutually agreed upon contracts, and contract language not derived from the proposals of either is party paler yet. Yet, it may well be that language not entirely reflective of the Last Best Offer of either party may best serve the parties and the public interest.

As earlier noted, few of the applicable factors listed in section 9 pertain to the issues before the Panel. Subsections (a), (b), (e), (f) and (g) have no bearing here, and have been addressed neither by way of exhibit nor testimony. The bulk of the evidence, as opposed to argument in support of positions taken, relates to comparables, and this only in exhibit form, with no buttressing testimony. It is to the comparables that we first turn. Again, these are St. Clair, Saginaw, Ingham, Bay, Berrien, Calhoun, Jackson and Ottawa Counties. Looking to Union Exhibit 4, we see that Ingham requires the rank of Sergeant for promotion; Saginaw likewise. St. Clair also requires Sergeant status (1 year) for promotion to Lieutenant, with Lieutenant status (1 year) for promotion to Captain. Employer's Exhibit 2 indicates that Bay County opens promotions to all in the bargaining unit. Berrien County, for positions similar to those at issue here, requires Sergeant status, or at least, supervisory experience. [The Exhibit is unclear as to whether one not now in the bargaining unit, but who has previously held Sergeant's rank, is eligible for promotion.] Calhoun County requires present membership in the bargaining unit for promotion, as does Ottawa County. The information for Jackson County appears not to speak to promotions to Lieutenant or Captain.

The practices of comparable communities buttresses the position of the Union. Promotion to Lieutenant appears to be reserved to those holding, or who at least have held, Sergeant's rank. The position with respect to promotion to Captain is not as clear. Apparently some promotional opportunities are open to Sergeants, though St. Clair County makes such a promotion explicitly unavailable to Sergeants. Thus, with respect to comparables, there is greater support for the position of the Union. Viewed from the perspective of the public interest, there is a greater balance in the positions asserted. The Employer argues that it should not be restricted to what might clearly be a limited number of eligible candidates, but rather should have the widest possible pool from which to select its Lieutenants and Captains. There is merit to this position, especially in view of the size of the Department and its command structure. For its part, the Union contends that the Department, and thus the public interest, would best be served by experience in command as a factor in promotion to and within the command structure. And, as to "such other factors," time in grade is clearly a frequently bargained-for criterion in collective bargaining agreements. The language arrive at below with respect to this issue more nearly follows the Union's position, but by reducing eligibility requirements in terms of years in command grade, provides for a wider pool of candidates than does the Union's proposed language.

Present contract language makes deputies eligible for promotion to Lieutenant with 8 years of service in the Monroe County Sheriff's Department, and to Captain with 10 such years. A balance of the Employer's interests with those of the Union suggests retention of deputy eligibility for promotion to Lieutenant, but not for promotion to Captain. In partial answer to the Employer's concern about available pools, the Union's proposal extends eligibility to all Lieutenants where none meet seniority requirements.

The Employer asserts that acceptance of the Union's position will be at variance with its contractual obligations to the Deputies' unit under their recently created agreement. It is



difficult to see how the Employer can preempt the Union or this Panel by contracting with a stranger to this agreement, and then claiming a bar or estoppel. This Panel is not prevented from fashioning contract language at variance with that agreed to by the Employer with another Union in another collective bargaining agreement.

With respect to the Union's proposal that vacancies must be filled within 90 days, no comparable provisions have been pointed to, nor has the Union supported its position with testimony. The interests in having vacancies filled are balanced by the need for flexibility to meet exigent circumstances.

### **ORDER**

In view of the foregoing, it is the Order of the Panel that section 7.7 of the Agreement read as follows:<sup>2</sup>

**Section 7.7** (Promotions) When the Sheriff determines that an opening or vacancy exists for promotion to the positions of Lieutenant and/or Captain, employees covered by this Agreement and Deputies in Unit 1 shall be eligible for promotion based on the following:

All openings for promotion within the Sheriff's Department will be posted for a period of ten (10) days. Such posting shall be in conformance with the normal posting procedures.

The Sheriff will evaluate all applicants who respond to such posting in accordance with the point allocation as outlined in Section 7.71 below. The Sheriff shall have the right to promote either of the two (2) top candidates as based on their total point accumulations as outlined in Section 7.71. If the Sheriff does not choose the candidate with the top point allocation but instead promotes the candidate with the second highest point accumulation as

---

<sup>2</sup> Significant changes from present contract language are presented in bold type.

determined by Section 7.71, such candidate passed over for promotion will automatically receive the next similar position which becomes available prior to the publication of the results of the next examination that is given.

All candidates for promotion to the position of Lieutenant must have served as a sworn, certified Sergeant with the Monroe County Sheriff's Department for a minimum of two (2) years, or as a sworn, certified deputy sheriff for a minimum of ten (10) years with the Monroe County Sheriff's Department.

All candidates for promotion to the position of Captain must be a member of the bargaining unit as of the date of the posting of the vacancy, and must have had two years of previous command experience with the Monroe County Sheriff's Department. -

Michael P. Somero - Union Delegate:

Concur 

Dissent \_\_\_\_\_

Thomas H. Derderian - Employer Delegate:

Concur 

Dissent \_\_\_\_\_

#### B. PROMOTIONS: SECTION 7.71

Both parties have agreed on the elimination of the Michigan Law Enforcement Officers Training Council as the administrator of the written examination, and on the use of an impartial outside agency in its stead. [There is disagreement on the extent of arbitral review of such an agency's actions.] In addition, the parties have agreed that the Sheriff is to send his subjective evaluation to the Personnel Department prior to having knowledge of a candidate's written evaluation score. Finally, both parties have agreed to the deletion of the last sentence of section 7.71(A), beginning "A candidate may take such test...."

The Union has proposed alterations in the present language of section 7.71, seeking to enhance the value of seniority in the evaluation process. It proposes that seniority have

allocated to it 2 points for every year of departmental seniority with a maximum of 30 points, rather than the 1.5 and maximum of 20 points under the present contract. Further, the Union proposes to reduce the point allocation for the written examination from 60% to 50%. The Union further seeks an administration of the written examination every two years, unless there are no eligible candidates. Finally, the Union seeks an extension of probationary time for a promoted candidate for three additional months.

The Employer argues that there is no evidence whatsoever to support the Union's proposal altering point allocation in the evaluation process. Only half of the comparables grant any points for seniority, and those points represent a much smaller portion of the total evaluation provided for in those contracts than is currently the case under this Collective Bargaining Agreement.

## DISCUSSION

On the basis of comparables alone, the Union's position has minimal, if any support. Nonetheless, consistent with the discussion under section 7.7, there is merit to the claim that time in grade, particularly where that reflects experience in command, is deserving of consideration. The language arrived at in section 7.7 provides a compromise between the "no deputies" Union approach, and the "deputies eligible for all posts" position of the Employer. Part of that compromise involves recognition of service in a command position. Symmetry is achieved by making tangible this recognition in the evaluation process as well as in eligibility. Thus, as to the evaluation process, it is determined that time in command position is to receive a "bonus" allocation of points, *without otherwise disturbing the point allocation structure of the present contract*. For promotions to Lieutenant and Captain, all candidates will receive .10 points for every month of classification seniority as a command officer in the Monroe County Sheriff's Department, to a maximum of 24 months, or 2.4

points. This language rests on a presumption that experience gained while in a command position is worthy of *objective* recognition. Such objective recognition is provided for nowhere else in the Collective Bargaining Agreement. It is believed that this provision reflects the public interest, and takes into account the realities of the collective bargaining process which the Act provides for in Section 9(h), "Such other factors..."

The Union has proposed that the probationary period in new job classifications provided for in section 7.71 be extended for a three month period. Its rationale is to permit the Sheriff, at his discretion, additional time to evaluate a marginal employee. The Employer voices no objection to this extension, and it is agreed that such language is to be included in the new Collective Bargaining Agreement.

The Union proposes a written examination every two years unless the eligibility list is exhausted. The Employer, for its part, seeks examinations given at the discretion of the Sheriff. Present contract language provides for examinations to be given once every two years or as needed. Again, there was no testimony with respect to this issue, nor do the exhibits on comparables suggest any pattern to be followed. Present contract language has been regarded by the parties with some uncertainty. A proposal which appears to be acceptable to the parties is that language provide that need be determined by the Sheriff, but that in no event is he to offer examinations more than once every twelve months.

The Employer's proposal for the submitting of a resume is objected to by the Union. Again, in the absence of any particularly persuasive reason or strongly urged position, the determination of the Panel is to leave the contract as it now stands, without such language.

While agreeing on the elimination of MLEOTC, and the substitution of an outside agency to administer examinations, the parties remain in dispute concerning the extent to which the actions of that agency are to be reviewable by an arbitrator. The parties agree that the selection of the agency may be grieved under the provisions of Article 4 of the Collective

Bargaining Agreement. The Employer, however, would limit that grievance to a review of lack of impartiality in the administration of the examination. Given the right of the Employer to manage its enterprise, the additional language proposed by the Employer would seem to be unnecessary, since such a lack would appear to be the only grounds on which a grievance could reasonably and credibly rest. In the interests of economy of language, it is determined to reject the additional language proposed by the Employer.

### ORDER

In view of the foregoing, it is the Order of the Panel that section 7.71 of the Agreement read as follows:<sup>3</sup>

**Section 7.71 Each candidate's total point score will be determined by the total of points earned in Sections 7.71 (A), (B), and (C) as follows:**

(A) Written Examination: All applicants for promotions as defined under this section must take a required written examination which will be administered and scored by an impartial outside testing agency to be determined by the Sheriff and the County. The selection of such testing agency may be grieved under the provisions of Article 4 of this agreement. Each candidate's score will be multiplied by 0.6, (60%), to determine his/her point allocation for promotion evaluation purposes under this section. Written examinations will be given once every two (2) years or as needed in the determination of the Sheriff. Examinations for promotions will not be given more than once in a twelve month period.

(B) Seniority: All applicants for promotion to the position of Lieutenant or Captain will receive 1.5 points for every year of departmental seniority they have accumulated as defined in Section 7.1 of this Agreement, up to a maximum total of twenty (20) points. In

---

<sup>3</sup> Significant changes from present contract language are presented in bold type.

addition, all applicants will receive .10 points for every month of classification seniority as a command officer with the Monroe County Sheriff's Department, to a maximum of 24 months, or 2.4 points.

(C) Sheriff's subjective evaluation: The Sheriff shall evaluate all candidates for promotion based upon their past job performance, experience and education. The Sheriff will assign a point score or from a minimum of zero (0) to a maximum of twenty (20) points based upon his subjective review and evaluation. The Sheriff shall send the subjective evaluation to the Monroe County Personnel Department prior to reviewing the written examination of a candidate. A score of ten (10) points will be considered a satisfactory evaluation. A score of below ten (10) points will only be given in instances of a review considered by the Sheriff to be below the standard of satisfactory. Any applicant receiving such a below satisfactory review may, by written request to the Sheriff or his designated representative, receive in writing the reasons for such review. Such below satisfactory review evaluations by the Sheriff are subject to the grievance procedure. However, if the grievance is taken to arbitration, the arbitrator shall only have the authority to change the decision of the Sheriff if it is demonstrated that the Sheriff has not reviewed the candidate's past job performance, experience, and education in a fair and impartial manner or that the Sheriff's evaluation was arbitrary, capricious, done in bad faith, and/or for discriminatory purposes.

(D) Each candidate shall, upon written request of the Sheriff or his designated representative, be entitled to review all scores he/she received under this section. With the exception of review by a candidate of his/her own score, all evaluations under this Agreement are to be kept strictly confidential. No candidate will be allowed to review any other candidate's evaluation. All employees promoted under the provisions of this Agreement shall serve a probationary period of six (6) months in their new job classification

from the effective date of such promotion. The Sheriff may, at his discretion, extend this probationary period for an additional three (3) months and must notify the employee in writing that this extension has been made. The Sheriff may revoke the promotion of such employees who do not in his discretion satisfactorily complete this six month probationary period. However, such a decision on the part of the Sheriff is subject to an independent arbitrator's review under the provisions of Article 4 described herein. The arbitrator must find the Sheriff had sufficient reason and just cause for such a revocation in order to uphold such a decision. All employees who do not properly complete their probationary periods following promotion shall be returned to the job classification they held before being promoted.

Michael P. Somero - Union Delegate:

Concur 

Dissent \_\_\_\_\_

Thomas H. Derderian - Employer Delegate:

Concur 

Dissent \_\_\_\_\_

#### C. JOB BIDDING: (PROPOSED NEW SECTION 5.14)

The Union has proposed language permitting each employee to bid on all job assignments, on a seniority basis. The Union argues that command officers had been allowed to so bid in the past, and wishes to restore the prerogative as to all jobs. As the Union concedes, there is no support for this position in the comparable communities relied on by it or the Employer. In testimony, the Union's witness referred to jobs "historically and traditionally" performed by unit members. The Employer argues that this Panel would have to determine what such jobs were, and that this is beyond the scope of the Panel's authority. The Employer contends that the job bidding proposal is, in reality, an attempt to secure job security for unit members, i.e., is a work preservation proposal.

It is not within the purview of this Panel to determine what is, or has been unit work. More importantly, whatever the Union's motivation for its proposal, it is without any support

in comparable communities. Absent a strong showing that such bidding was a pattern in law enforcement agencies, the need for flexibility in assignment in such agencies would militate against the Union's proposal. Since that proposal is found to be without support, externally and testimonially, it is determined that the Union's proposed section 5.14 will not be included in the contract.

Michael P. Somero - Union Delegate:

Concur \_\_\_\_\_

Dissent MPS

Thomas H. Derderian - Employer Delegate:

Concur THD

Dissent \_\_\_\_\_

#### D. STIPULATED AGREEMENTS

The following, from Joint Exhibit 1, reflects a settlement by the parties of all remaining economic issues. The parties agree that this settlement is to be issued as a stipulated portion of the award of this Panel:

#### ORDER

- a) Wages: 6% wage increase for all members of the bargaining unit for the year 1989. Such increase is retroactive to January 1, 1989. 5% wage increase for all members of the bargaining unit for the year 1990. Such increase is retroactive to January 1, 1990. 4% wage increase for all members of the bargaining unit for the year 1991.
- b) Rank Differential: The present rank differential language in the 1986-1988 collective bargaining agreement will be deleted.
- c) Pension Multiplier: The present language in the 1986-1988 collective bargaining agreement will remain unchanged.
- d) Pension Eligibility: The present language in the 1986-1988 collective bargaining agreement will remain unchanged.
- e) Life Insurance: The present language in the 1986-1988 collective bargaining agreement will remain unchanged.
- f) Sick Pay Benefits: The present language in the 1986-1988 collective bargaining agreement will remain unchanged.



In addition to the foregoing, the parties have stipulated that the language agreed to by the parties in the provisions included in Employer Exhibit V, are incorporated by reference herein, and are made part of the stipulated portion of the award of this Panel. Those provisions included in Employer Exhibit V are: Section 3.34; Section 4.2 Step 2; Section 5.7; Section 5.11 (Schedules); Section 5.13; Section 7.22; Section 7.23; Section 7.54; Section 7.62; Section 7.1 (Definition of Seniority); Section 8.4; Section 12.1 (Rules and Regulations); Section 12.2; Section 12.21.

Michael P. Somero - Union Delegate:

Concur MPS

Dissent \_\_\_\_\_

Thomas H. Derderian - Employer Delegate:

Concur THD

Dissent \_\_\_\_\_

May 10, 1991

Respectfully Submitted,

Michael P. Somero  
Michael P. Somero  
Union Delegate

Martin L. Kotch  
Martin L. Kotch  
Panel Chairperson

Thomas H. Derderian  
Thomas H. Derderian  
Employer Delegate