1946

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICE
EMPLOYEE RELATIONS COMMISSION

In the Matter of Statutory Arbitration
pursuant to PA 312 of 1969, being
MCLA 423.231 et seq, as amended
between:

COUNTY OF OTTAWA and
SHERIFF OF OTTAWA COUNTY,

Employer,

MERC CASE NO: L99, G-8011

-and-

POLICE OFFICERS ASSOCIATION
OF MICHIGAN,

Association.

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ACT 312 OPINION AND ORDERS

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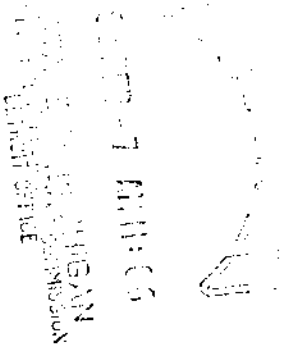

APPEARANCES

PANEL

Mark J. Glazer, Chairman
Richard Schurkamp, Employer Delegate
Frank Guido, Associate Delegate

FOR THE EMPLOYER

Norman E. Jabin
Attorney at Law
2525 E. Paris SE #100
Detroit, MI 48226-2917

FOR THE ASSOCIATION

Frank A. Guido
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27056 Joy Road
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The prior contract expired on December 31, 1999. The Association filed for Act 312 arbitration on June 5, 2000. The Association listed the issues in dispute as follows:

> The Petitioner has engaged in good faith bargaining and mediation and the parties have not succeeded in resolving the disputed matters. The following is a list of any issues in dispute and the related facts thereto.
>
> 1. Wages - Road Patrol and Detective
> 2. Wages - Specialist Pay
> 3. Wages - Detective Premium
> 4. Longevity
> 5. Vacation Allotment
> 6. Workers' Compensation Supplement
> 7. Retiree Health Insurance - Premiums
> 8. Retiree Health Insurance - Spouse & Dependents
> 9. Call-In Pay
> 10. Overtime Calculation
> 11. Seniority During Short-Term Disability
> 12. Seniority - Inter-Unit Bumping
> 13. Grievance Procedure
> 14. Arbitrator's Powers

The Employer answered the petition on June 19, 2000 as follows:

> ANSWER TO ACT 312 PETITION
>
> The County of Ottawa (the "county") by its attorney, Norman E. Jabin, answers the petition filed in this matter as follows:
>
> 1. The County acknowledges that the parties have not, to date, reached an agreement on the issues itemized in the petition.
> 2. The parties have not reached an agreement on the following additional issues:
>   A. Health insurance-cafeteria plan and flexible spending account
>   B. Prescription co-pay
>   C. Costs of grievance arbitration
>   D. Effective date of implementation of changes

A pre-hearing was held on September 19, 2000, at which the time the issues in the petition and answer were deemed economic and the retroactivity of the listed issues was also included as a relevant issue. The summary of the pre-hearing, which was not objected to by the parties, stated:

> This will confirm the arrangements made at our prehearing on September 19, 2000.
>
> 1. There will be a hearing on comparability on Monday, January 15, 2001 at 10:00 a.m. Thereafter, hearing dates will be set. A court reporter will be necessary at the County offices on Fillmore Street.
>
> 2. The parties have waived all time limits, including the completion of the award by the panel chairperson.
>
> 3. The panel delegates are Pat Spidell and Rich Schurkamp.
>
> 4. All issues are economic.
>
> 5. Comparables shall be exchanged within 45 days of the prehearing.
>
> 6. Exhibits will be due two weeks before the hearing.
>
> 7. Retroactivity is an issue.
>
> 8. The parties will proceed issue be (sic) issue.
>
> 9. There will be an executive session at the request of any of the panel members.
>
> Please contact me if there is anything to be clarified or corrected. Enclosed is my interim statement.

On September 26, 2001, the Association accepted the Employer's offer of settlement, but indicated that it considered that there were remaining issues concerning "duration (retroactive) on wages and grievance procedure duration (retroactive/prospective)".

The settlement was reached and an arbitration hearing on the Association- promulgated issues was held on October 4, 2001. The first issue presented by the Union pertained to retroactivity of wages for deputies who either retired or died during the pendency of the proceeding. There was one deputy who had retired and another deputy who died shortly before the Act 312 hearing. The Association did not ask for retroactivity on wages when a separation was based upon anything except retirement or death.

The Association also presented an issue pertaining to grievances that had been moved to arbitration. The Employer had been resistant to the arbitration of grievances that post dated the expiration of the prior contract. The Association asked that it retroactively be granted the opportunity to arbitrate those pending grievances.

The final Association issue concerns duration, which was designed to allow the arbitration of grievances subsequent to the termination of the contract. The Association's last best offers are attached.

The Employer presented a variety of objections to the Association issues, including a challenge that the grievance issue is a permissive topic of bargaining, and is therefore not properly before the Act 312 panel. The Employer also contends that the arbitration issue is non-economic, and is therefore not subject to retroactivity. The Employer has further challenged the timeliness of the Association's issues, maintaining that they are not subject to the Act 312 process since they were not contained in the initial petition. The Employer's last best offers are attached as an exhibit.

Patrick Spidell of the Association was the sole witness. He indicated that the Association is seeking retroactivity on wages for a retired and a deceased deputy. The Association representative

further indicated that the issues only became relevant after a deputy retired during the pendency of the Act 312 proceeding and a deputy died shortly before the hearing.

In regard to the arbitration issues, Mr. Spidell said that the Association's concern over being prevented from arbitrating grievances was discussed with the Employer prior to the filing of the Act 312 petition and during the pendency of this matter. Mr. Spidell noted that the Employer has taken the position that post-expired contract grievances are not arbitrable. The Association's requests for arbitration included both 312 and non-312 eligible bargaining unit members. Between eight and twelve grievances were taken to the appointing authority, which is the MERC. The agency refused to appoint an arbitrator, based upon the Employer's position in this matter.

The Association representative stated that the Association's issue pertaining to duration is designed to avoid the present problem concerning the Association's inability to arbitrate grievances during the pendency of an Act 312 proceeding.

Mr. Spidell testified that the arbitration issues presented in this matter were not specifically included in the Act 312 petition. He added that during a telephonic pre-hearing, the Association dropped its issues #13 and #14 concerning grievance procedures and the arbitrator's powers.

POSITION OF THE ASSOCIATION

RETROACTIVITY OF WAGES

It is asserted that fairness and equity requires retroactive payments to the affected deputies. The Association emphasizes that the Employer failed to present any witnesses to support its position. It also argues that the prior Chiesa award offers little guidance. In contrast, the City of Troy and Police Offices Labor Council case, 2000 MERC Act 312, 276 is said to support the Association's position.

RETROACTIVE APPLICATION OF ARBITRATION AND
PROSPECTIVE APPLICATION OF ARBITRATION
THROUGH A DURATION OFFER

The Association seeks the right to arbitrate grievances filed subsequent to the expiration of the predecessor contract. It notes that the Employer has refused to arbitrate 12 grievances. The Association asserts that the Employer is improperly seeking to deny the right for deputies to arbitrate, and it maintains that arbitration is the preferred method of dispute resolution.

The Association further cites the County of Ottawa v Jaklinski case, 423 Mich 1, 377 NW 2d 680 for the proposition that the employer and a union can agree to arbitration rights in their contract. Regarding duration, the Association contends that its proposed language will prevent future problems in regard to the arbitration of grievances.

POSITION OF THE EMPLOYER

It is asserted that contrary to its position during the initial pre-hearing conference, the Association at the arbitration hearing submitted proposed contract language on the retroactivity of wages and grievance-related issues. The Employer further argues that the Association failed to include the present issues in its petition for Act 312 arbitration. It is also noted that the tentative agreement between the parties included an effective date for implementation, which was the only issue in the petition, and that the Association dropped issues pertaining to the powers of the arbitrator and issues pertaining to the grievance procedure during a pre-hearing conference. Based upon the procedural deficiencies, the Employer asks that the issues raised by the Association be denied.

Concerning the merits of the retroactivity of wages issue, it is maintained that retired employees do not have rights under the contract. Further, it is contended that the prior Chiesa award

between the parties should be determinative, and that in that award the arbitrator refused to grant retroactivity of wages to retired deputies. Finally, the Employer argues that retroactivity for retirees is a permissive topic of bargaining and should not be considered by the panel.

Concerning the retroactivity of arbitration and its prospective application, it is noted that the Association failed to litigate the various denials by the Employer of arbitration. Also, it is maintained that Act 312 denies retroactivity for non-economic issues and that under Section 10 of the Act, arbitration is a non-economic issue. Further, it is contended that the question of retroactivity of arbitration is a permissive topic of bargaining and is therefore outside of the jurisdiction of the panel.

Regarding the duration issue, it is emphasized that both sides have accepted a three year contract and therefore a four year agreement is inappropriate. Also, it is noted that the Association is improperly seeking to obtain a contract provision on a permissive topic of bargaining.

DISCUSSION

It must be initially determined if the last best offers presented by the Association can be properly considered by the panel. Section 8 of Act 312 states:

> 432.238 Identification of economic issues in dispute; submission and adoption of settlement offers; findings, opinion, and order.
>
> Sec. 8. At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive. The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree,

> shall make written findings of fact and promulgate a written opinion and order upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to each economic issues, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration, more nearly complies with the applicable factors prescribed in section 9. The findings, opinion and order as to all other issues shall be based upon the applicable factors prescribed in section 9. This section as amended shall be applicable only to arbitration proceedings initiated under section 3 on or after January 1, 1973.

The use of the word "or" in the first sentence means that the panel can either decide to identify the economic issues at the end of the hearing or before that time. *The Random House Dictionary of the English Language* defines "or" as, "used to connect words, phrases or clauses representing alternatives." Therefore, the panel can properly decide the relevant issues prior to the arbitration hearing.

Rule 423.505 of the MERC provides for the submission of a petition for Act 312, which occurred in this case. Neither the petition nor the answer which were submitted include an issue pertaining to arbitration rights or prospective application of arbitration rights.

The MERC rules further provide in Rule 7 that a pre-hearing conference shall be held at which time issues are to be identified. The rule says:

> R 423.507 Arbitration hearing.
>
> Rule 7. (1) An arbitrator shall conduct a prehearing conference within 15 days of the arbitrator's appointment. It may be conducted by telephone conference call.
>
> (2) The prehearing conference shall be used to discuss matters relating to the proceeding, including all of the following:
>
> (a) Issues raised in the petition for binding arbitration submitted to the commission.
>
> (b) Issues that the parties have resolved.

(c) Whether the issues in dispute are economic or noneconomic.

...

A pre-hearing conference was held in this matter and a pre-hearing report was submitted on September 25, 2000, which incorporated the issues found in the petition and answer and deemed them economic. Thereafter, the Association in a telephone pre-hearing conference dropped "grievance procedure" and "arbitrator's powers" as issues.

The question of the retroactivity of arbitration rights and the prospective application of those rights was raised by the Association for the first time shortly before the October 2001 arbitration hearing in a September 26, 2001 letter and in a telephone conference in August of 2001. However, it was never made clear that the Association was intending to submit last best offers on these issues. More importantly, the Association never asked to amend the petition or the pre-hearing order to allow a consideration of the arbitration-related issues. Moreover, the Employer never agreed to allow these issues to be considered by the panel.

It only became apparent that the Association wanted last best offers on the arbitration-related issues at the 312 hearing. This is not to say that the Association wasn't seriously concerned about losing arbitration rights: it was, and this was expressed to the Employer during negotiations and at the time that the requests for arbitration were denied. However, the Association's position was not expressed either in the petition or at the pre-hearing conference, when issues were identified as required by the rules.

Because of the requirements of Act 312, and the commission rules as it relates to the identification of issues, it would be inappropriate to consider the arbitration-related last best offers

of the Association. Act 312 and the commission rules clearly require the identification of issues well in advance of the hearing. When the Association waited until the time of the hearing to raise its arbitration-related issues, it violated the rules and the Act, and it would be improper to consider the last best offers at this time.

There is also a practical reason for reaching this conclusion. A contrary result would allow parties in the future to "sandbag" each other with new issues at the time of the hearing or shortly before, to the detriment of the process. I want to emphasize that the Association is totally in good faith in this case, and that it has serious and legitimate concerns.

However, if I were to create a precedent by allowing an issue to be added near or at the hearing, when it is opposed by the other side, serious problems could be created. For instance, an employer could discover during the pendency of a 312 hearing that its health care provider had dramatically increased its costs. If the employer could add issues at the last minute, there would be nothing to prevent the employer from requesting a change in the health care provider, even though it had not previously presented that as an issue. If the union had reached prior settlements on other issues, with the expectation that the health care provider would not be an issue, the sudden introduction of the health care issue could be unfair and could lead to an unexpected and unanticipated result.

Moreover, if issues could be added at the last minute absent an agreement, the pre-hearing required by MERC as well as the petition as required by Act 312 could be rendered meaningless. The issues included in the petition and at the pre-hearing would only represent possibilities that could be changed unilaterally, and at the last moment. This would discourage the parties from reaching settlements and would make it difficult for them to prepare for Act 312 hearings, since they

wouldn't know what were the final issues. Most importantly, however, the Act and the rules prohibit a consideration of the arbitration-related issues at a time near or at the scheduled arbitration hearing.

The situation is different for the retroactivity of wages for employees who have either retired or died. Wages was listed as an issue on the petition and was identified as an issue in the pre-hearing. Further, the retroactivity of wages was identified at the pre-hearing conference as an issue.

The application of retroactive wages to deceased and retired deputies is within the ambit of the petition and the pre-hearing. Further, in the prior Chiesa Act 312 award involving these parties, G92J-0654, last best offers on the retroactivity of wages for retired deputies were presented to the panel. There is no indication that the Employer challenged the jurisdiction of the panel to consider the retroactivity of wages issue.

Therefore, the retroactivity of wages issue should be considered on the merits. The arbitration-related issues are denied on procedural grounds and should not be considered on the merits.

RETROACTIVITY OF WAGES TO A RETIRED AND A DECEASED DEPUTY

The Association seeks retroactivity of wages to deputies who either retired or died. The Employer asks that retroactivity be denied to the two deputies who are affected by the Association's last best offer.

The panel is required to apply Section 9 of the act, although it need not provide each factor equal weight. Section 9 says:

> 423.239 Findings and orders: factors considered
>
> Sec. 9. Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of

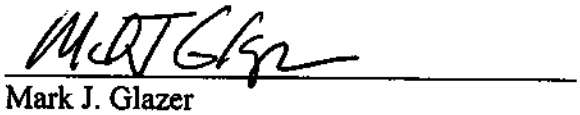
employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable.

(a) The lawful authority of the employer.
(b) Stipulations of the parties.
(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally.
    (i) In public employment in comparable communities.
    (ii) In private employment in comparable communities.
(e) The average consumer prices for goods and services, commonly known as the cost of living.
(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceeding.
(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining mediation, factfinding, arbitration or otherwise between the parties, in the public service or in private employment.

The only testimony presented was from Association representative, Patrick Spidell. The Employer presented the prior Chiesa award as a rationale for denying the Association's last best offer.

In the Chiesa award, the Association sought wage retroactivity for deputies who retired. This retroactivity requirement was included within the wage offer. The Employer's last best offer would have limited retroactivity to employees who were currently employed in the Sheriff's Department. Arbitrator Chiesa concluded that the Employer's last best offer seemed reasonable, without providing an explanation for his rationale

The present record provides an additional factor not found in the prior Chiesa award: the request for retroactivity for a deceased deputy. Pursuant to Sections (h) and (c) of Section 9, it would appear that employee morale would benefit, which would translate into improved service for the public, if deputies could anticipate receiving retroactive wages should they die. Under the Employer's proposal, a deputy who is killed in the line of duty would not receive the wage increases of Act 312. This could be deleterious to morale. Accordingly, the Association's last best offer on the retroactivity of wages should be awarded.



Mark J. Glazer
Chairperson

January 3, 2002

Article XIV
WAGES

U-2

PRESENT: No language currently exists.

PROPOSED: Add language to contract.

14.3: Retroactive application of wages to January 1, 2000 shall be applied and paid to any individual, or estate of any individual, having separated from service after January 1, 2000 due to retirement or death, but excluding those individuals who separated from service for any other reason.

U-3

Article XIX
GRIEVANCE PROCEDURE

PRESENT: No language currently exists.

PROPOSED: Add language to contract.

19.14: The right to arbitrate grievances 2000 shall be retroactively in effect as of January 1, ~~1999~~ for those grievances which have been filed and appealed to arbitration by the Union on or after January 1, ~~1999.~~ 2000

U-15

Article XXVI
DURATION

PRESENT:

26.1 (ii):

This Agreement shall be effective for employees in the classifications of Detective and Road Patrol Deputy August 5, 1998, and shall remain in full force and effect until December 31, 1999, and shall become automatically renewable from year to year thereafter, unless either party wishes to terminate, modify or change this Agreement, in which event, notification of such must be given to the other party in writing sixty (60) days prior to the expiration date of this Agreement, or any anniversary date thereof.

PROPOSED:

26.1 (ii):

This agreement shall be effective for employees in the classifications of Detective and Road Patrol January 1, 2000, and shall remain in full force and effect until December 31, 2002. This agreement shall become automatically renewable from year to year after December 31, 2002, unless either party wishes to modify or change this agreement, in which event, notification of such must be given to the other party in writing sixty (60) days prior to December 31, 2002, or any anniversary date thereof. Upon transmittal of such notice, this agreement shall remain in full force and effect after December 31, 2002 until the earlier of: execution of a successor agreement through negotiated settlement (or compulsatory arbitration), or December 31, 2003; provided that such continuation of this agreement shall not constitute a waiver or bar to any claim for retroactive application of wages and/or benefits in any successor agreement.

Article XIX
Grievance Procedure

PROPOSED:

The employer considers this to be a non-economic item.

Current contract language to continue.

Article XIV
Wages

PROPOSED:

Current contract language to continue. Wages to be implemented in accordance with the terms of the tentative agreement between the parties (Attachment to Joint Exhibit #3).

With respect to employees that have left the bargaining unit prior to the award, retro-active pay will be available only to those persons continuing in employment in some other position in the Sheriff's Department as of the effective date of the award.

Article XXVI
Duration

PROPOSED:

26.1 (ii)

This agreement shall be effective for the classifications of Detective and Road Patrol

Deputies (effective date of award), 20___, until December 31, 2002 and shall become automatically renewable from year to year thereafter, unless either party wishes to terminate, modify or change this agreement, in which event, notification of such must be given to the other party in writing sixty days prior to the expiration date of this agreement, or original anniversity date thereof.

ORDER

RETROACTIVITY AND WAGES FOR
DECEASED AND RETIRED DEPUTIES

The panel orders the adoption of the Association's last best offer on retroactivity of wages for deceased and retired deputies.

2/4/02 Mark J Glz

Mark J. Glazer
Neutral Chairperson

Frank A. Guido
Association Delegate

Richard Schurkamp
Employer Delegate/Dissents

ORDER

RETROACTIVITY AND WAGES FOR
DECEASED AND RETIRED DEPUTIES

The panel orders the adoption of the Association's last best offer on retroactivity of wages for deceased and retired deputies.

2/04/02 _____
Mark J. Glazer
Neutral Chairperson

_____
Frank A. Guido
Association Delegate

_____
Richard Schurkamp
Employer Delegate/Dissents

ORDER

LAST BEST OFFERS CONCERNING RIGHT TO
ARBITRATE GRIEVANCES AND DURATION AS
IT PERTAINS TO THE RIGHT TO ARBITRATE

The Association's last best offers on the right to arbitrate pending grievances and duration as it pertains to arbitration are denied on procedural grounds.

2/04/03

Mark J. Glazer
Neutral Chairperson

Richard Schurkamp

Richard Schurkamp
Employer Delegate

Frank A. Guido
Association Delegate/Dissents

ORDER

LAST BEST OFFERS CONCERNING RIGHT TO ARBITRATE GRIEVANCES AND DURATION AS IT PERTAINS TO THE RIGHT TO ARBITRATE

The Association's last best offers on the right to arbitrate pending grievances and duration as it pertains to arbitration are denied on procedural grounds.

2/4/02

Mark J. Glazer
Neutral Chairperson

Richard Schurkamp
Employer Delegate

Frank A. Guido
Association Delegate/Dissents

ASSOCIATION DELEGATE/DISSENT

The decision of the panel, denying on procedural grounds, the Association's last best offers on the right to arbitrate pending grievances and duration as it pertains to arbitration, is erroneous as a matter of law, consequently, the arbitration panel has

exceeded its jurisdiction. In addition, the decision is not supported by competent, material and substantial evidence on the whole record.

The panel concluded, "When the association waited until the time of the hearing to raise its arbitration related issues, it violated the rules of the Act, and it would be improper to consider the last best offers at this time." (page 10) The panel also concluded, "Most importantly, however, the Act and the rules prohibit a consideration of the arbitration related issues at a time near or at the scheduled arbitration hearing." (page 11) The arbitration panel cites section 8 of the Compulsory Arbitration Act, as well as administrative rules 423.505 and 423.507 in support of its conclusions. Contrary to the panel's conclusions, however, neither the statute nor the administrative rules foreclose raising of issues in dispute prior to the close of a hearing, especially where, as the record conclusively establishes here, the Employer and Union were both on notice of the existence of the dispute throughout the pendency of the arbitration "proceeding." Section 8 of the Compulsory Arbitration Act provides in pertinent part:

> At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue... (Emphasis supplied).

It is erroneous, therefore, for the panel to have concluded that waiting until the time of the hearing to raise an issue constitutes a violation of both the rules and the Act, or that the

rules prohibit consideration of arbitration related issues at a time near or at the scheduled arbitration hearing. To the extent the administrative rules are either interpreted or applied as suggested by the panel, the rules would be in conflict with the statute. To the contrary, however, the administrative rules are not as restrictive as asserted by the panel. Administrative Rule R423.507 (1) and (2) mandate the conducting of a pre-hearing conference subsequent to the appointment of the arbitrator. As stated in the rule the pre-hearing conference is to be used to "discuss matters," including discussion about the "issues raised in the petition..." Nowhere within administrative rule R423.507 (1) and (2) or section 8 of the statute is it stated that a party is foreclosed and prohibited from raising issues after the pre-hearing conference or at any time prior to the hearing.

The Act, in section 8, recognizes that it is only after a hearing has been initiated that issues are to be identified for the purpose of setting into motion the remaining statutory requirements concerning submission of last offers. "At...the conclusion of the hearing," by simple logic, means the hearing has already been initiated and concluded. "Before the conclusion of the hearing," does not mean before the hearing is initiated, instead, it means before the conclusion of an already initiated hearing.

Unfortunately, the panel has opted for an incorrect reading of section 8 and a restrictive, unsupported reading of the administrative rules; reaching the erroneous conclusion that a party is foreclosed from raising issues at the compulsory arbitration hearing itself. It is apparent that the panel is

impermissibly substituting the word "proceeding," which implies the entire compulsory arbitration process, from filing of a petition to the point of an award issuing, (see section 3 of the Act) for the word "hearing," which is the actual evidentiary process (see sections 6 and 8). The fact that initiation of the hearing was delayed to October 4, 2001, (by stipulation of the parties) does not alter the statutory mandate of when issues are to be identified.

The panel's recitation of "practical reasons" disregards the clear statutory rights of the parties. In any event, the "last minute" problems envisioned by the panel are, at least in the present matter, of no merit. It is undisputed that the Employer was on notice prior to and during the proceeding, that an issue existed regarding the Employer's refusal to allow arbitration of grievances. In addition, the panel fails to recognize the existence of section 7a of the statute providing for remand of disputes for further collective bargaining. This provision insulates the parties in the event of a "surprise" submission of an issue, by authorizing the panel to require the parties to engage in further bargaining concerning the issue prior to consideration of the matter in compulsory arbitration.

Notwithstanding the panel's erroneous conclusions as a matter of law, the decision of the panel is not supported by competent material and substantial evidence on the record. In this regard, the unrebutted testimony of POAM Business Agent Patrick Spidell, identified the longstanding nature of the dispute concerning retroactivity of arbitration of grievances and that the issue was

a subject of negotiation and discussion prior to and subsequent to filing of the petition for compulsory arbitration. (Tr. p. 24). Numerous letters were exchanged between the parties and the American Arbitration Association from October 26, 2000 (preceding the pre-hearing conference, as well) through September 13, 2001, regarding requests for arbitration of grievances and the Employer's refusal to engage in arbitration. (Union Ex 5 to 13). In fact, on September 26, 2001 (Jt. Ex. 3) the Association placed a contingency on acceptance of the Employer's offer to settle made during the pendency of the compulsory arbitration proceeding, stating that the offer would be accepted subject to the Union's right to continue pursuit of the issues of grievance arbitration (retroactive/ prospective) in compulsory arbitration. As a result, the factual conclusions of the panel, suggesting the Union failed to timely raise this issues in dispute are not supported by competent material and substantial evidence on the whole record.

The Association's panel delegate respectfully dissents from the decision of the panel.