

12/8/03

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

In the Matter of Arbitration Pursuant to
PA 312 of 1969, as Amended, Between:

City of Muskegon Heights Police Department,
Patrol Unit,

Union,

-and-

City of Muskegon Heights,
Employer.

MERC CASE NO.: LO1 J-7004
Panel Chair: Martin L. Kotch
OPINION AND AWARDS

APPEARANCES

FOR THE CITY:

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FOR THE UNION:

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PANEL

Mr. Melvin C. Burns II,	City Delegate
Mr. Fred W. Bennett,	Union Delegate
Prof. Martin L. Kotch,	Panel Chair

1. INTRODUCTION

This matter is before the Arbitration Panel pursuant to PA 312, as amended, MCLA 423.231, et seq. The parties in this matter of the City of Muskegon Heights Police Department Patrol Unit, referred to as the "City," and Teamsters Local 214, hereinafter referred to as the "Union."

The Union filed its petition in this matter on June 19, 2002. On September 22, 2002, the commission appointed Mr. Martin L. Kotch as Chairperson of the Arbitration Panel, herein referred to as the Arbitrator.

At the pre-hearing conference in this matter, it was agreed that Mr. Melvin C. Burns II, would be the City's Panel delegate, and that Mr. Fred W. Bennett would be the Union's delegate. The parties agreed to waive all time limits including the time for the preparation and issuance of the opinion and orders in this matter.

2. COMPARABLES

The parties were unable to agree on a list of comparables, apart from the cities of Big Rapids and Cadillac. Each party submitted a list to the Arbitrator for purposes of selection and an interim ruling. In an interim order, dated May 27, 2003, the Arbitrator chose, in addition to the two cities agreed upon, the cities of: Grandville, St. Joseph, Niles and Sturgis

3. FINANCIAL BACKGROUND OF MUSKEGON HEIGHTS

The City urges the Panel to give the greatest weight to the statutory factor commonly referred to as "ability to pay," in light of the financial exigency faced by the City.¹

The City has had a fund balance deficit for many years, and remains in deficit at the present time. Its projections with respect to revenues from income tax and from state revenue sharing lead it to expect reductions in those areas. Further, the City has experienced an

¹MCLA 423.239 Sec. 9 (c): "The interests and welfare of the public and the financial ability of the unit of government to meet those costs."

increase of over 12% in terms of benefit costs over the term of the most recent collective bargaining agreement with no change in benefits.

In terms of wages, addressed more fully below, the Union's offer, compounded, would be about 9.3% over three years. Such a wage increase would place Muskegon Heights toward the top of comparable communities. The City argues that in light of its financial exigency, such an increase would wholly undermine its state-mandated deficit elimination plan, and would not be justified in terms of comparable communities. The City's deficit elimination plan contemplates a wage freeze through the year 2006. The Union disputes the size and nature of the City's deficit, and argues that it will be eliminated in the year 2003.

4. ISSUES BEFORE THE PANEL

- (1) Section 5.1 - Grievance and Appeal Procedure
- (2) Section 5.4 - Written Reprimands and Suspensions
- (3) Section 14.1 - Maintenance of Standards
- (4) Section 19.1 - Holidays
- (5) Section 20.1 - Vacation Leave
- (6) Section 23.2 - Dental/Optical Insurance
- (7) Section 24.1 - Longevity
- (8) Section 27.1 - Uniform and Cleaning
- (9) Section 29.2 - Position Compensation Plan, Calendar Year 2002
- (10) Section 29.2 - Position Compensation Plan, Calendar Year 2003
- (11) Section 29.2 - Position Compensation Plan, Calendar Year 2004
- (12) Section 31.1 - Work Periods
- (13) Section 37.1 - Part-Time Officers
- (14) Section 39.1 - Muskegon Heights Promotional Procedure
- (15) Section 39.1 - Muskegon Heights Promotional Procedure
- (16) Section 39.1 - Muskegon Heights Promotional Procedure

Prior to commencement of proofs, the parties agreed that with the exception of Issues 3, 14, 15 and 16, all issues were economic.

1. CITY ECONOMIC ISSUE: SECTION 5.1
Grievance and Appeal Procedure

The City wishes to add the following language: "to set a wage rate. . . ." The Union seeks to maintain their current contract language.

DISCUSSION

The City's proposal here seeks to clarify and make more emphatic what it contends is already granted by the Management Rights clause. The Union expresses fear of a unilaterally imposed classification and unchallenged wage rate until the next negotiations. The Union has failed to make out a case for its concern; it has shown no likelihood of such an imposition. Additionally, the Union concedes that it would have a remedy under current statutory and contractual language. This is clearly a matter best left to negotiations, with the Union retaining its current remedies in the interim.

The Panel adopts the position of the City on this issue.

2. UNION NON-ECONOMIC ISSUE: SECTION 5.4
Written Reprimands and Suspensions

The Union proposes new language, providing for the deletion of written reprimands from an employee's file six months after issuance. A first suspension would be deleted nine months after issuance, and a second, 12 months after issuance. Once deleted, these disciplinary actions could not be used for purposes of further discipline. The City proposes to maintain current contract language.

DISCUSSION

The current collective bargaining agreement contains no provisions providing for the cleansing of an employee's file after a period of good behavior. Such language is now virtually universal in contemporary collective bargaining agreements. The Union's proposal, however, contains rather short time periods.

The Panel has concluded that a more appropriate framework should be: six months-written reprimand; 12 months-first suspension; 18 months-second suspension. Thus, the new subsection would read as follows:

Written reprimands shall be deleted from an employee's file six (6) months after issuance. An employee's first suspension shall be deleted from his/her file twelve (12) months after issuance. An employee's second suspension shall be deleted from his/her file eighteen (18) months after issuance. Once discipline is deleted from the employee's file, it may not be used for purposes of further discipline.

3. UNION NON-ECONOMIC ISSUE: SECTION 14.1 **Maintenance of Standards**

The Union proposes to add new language to the end of section 14.1:

and the conditions of employment shall be improved wherever specific provisions for the improvement are made elsewhere in this Agreement. It is agreed that the provisions of this Section shall not apply to inadvertent or bonafide errors made by the City or the Union in applying the terms and conditions of this Agreement if such error is corrected within thirty (30) days from the date of the error or from the date the error is brought to the attention of the opposing party, whichever is later.

The Union maintains that the language is designed to amplify the present language. It is intended to provide that any new benefits become part of the standard. This, the City

argues, becomes a "past practice" clause. Any improvement in benefits would automatically become a fixed part of the contract. The City argues that no comparables have any such language in their agreements, and that such language is unduly restrictive.

DISCUSSION

The Union has given no substantial reasons for the adoption of this proposed language. An analysis of the contract of the comparables provides no support for its proposal. The Union seeks language providing for a "instant" past practice without putting forward any justification. Indeed, an unintended consequence might be that the City would be reluctant to implement one-time benefits, for fear of their becoming permanent.

The Panel adopts the position of the City on this issue.

4. UNION ECONOMIC ISSUE: SECTION 19.1

Holidays

The Union proposes to add the language to this section of the contract which would provide for the payment of two-and-one-half (2½) times the regular hourly rate for all unscheduled hours (call-in or hold-over) worked on a holiday. The City proposes the current contract language.

The Union argues that this is essentially a morale question. Employees called in or held over, miss family time. They should be additionally compensated for this, particularly since the need for such unscheduled overtime arises from chronic understaffing on the part of the Department.

The City contends that the Union's overtime proposal is utilized in only one of the comparable communities. Two communities pay double time, one pays time-and-one-half, and one gives only compensatory time. Placing Muskegon Heights at the top of the overtime scale, particularly in these financially exigent times is, the City argues, wholly without support.

DISCUSSION

The Union has presented no evidence that morale is low in the Department as a result of holiday overtime. The pay scale for holiday pay in Muskegon Heights equals or exceeds that of all but one of the comparable communities. Even without the current financial situation in Muskegon Heights, there would be little reason to support the Union's proposal.

The Panel adopts the City's proposal with respect to this issue.

5. UNION ECONOMIC ISSUE: SECTION 20.1

Vacation Leave

The Union proposes a change in the vacation leave benefit for employees with over 16 years of tenure. The present contract contains a two-tiered system: those hired before July 1, 1992, may earn up to 25 vacation days, those hired after earn a maximum of 20 days. The Union's proposal adds a new step, providing for 25 days after 25 years. This is still less than the current contract provision, since those hired before July 1, 1992 can accumulate 25 days at 20 years. The Union's proposal would place Muskegon Heights close to the average of the comparable communities.

The City argues against the proposal because it would have an, as yet, undetermined negative impact on the Department's budget. The City disputes the Union's assertion that its proposal would place Muskegon Heights at or near the average of comparable communities.

DISCUSSION

Elsewhere in this Opinion and Award is a discussion of the severe wage restriction necessitated by the financial exigency in which the City finds itself. In that discussion, it is noted, the financial exigency cannot, and does not, require that the Union receive no new or enhanced benefits whatsoever. Vacation leave is a case in point. The present contract places the Union at the bottom of the comparable communities. While, under different circumstances, the Union's Last Best Offer might be regarded as too accelerated an upward

movement, the City's proposal of no change, part of a litany of *status quo* proposals, is even less justified. Statutory requirements compel adoption of the Union proposal.

The Panel adopts the Union's proposal with respect to this issue.

6. UNION ECONOMIC ISSUE: SECTION 23.2
Dental/Optical Insurance

The Last Best Offers of the parties regarding this issue are close, as are the merits of the justifications provided for those offers. The Union seeks a \$60 contribution, the City offers \$50. There is no dispute that the current amount, \$40.50, is inadequate. The Union is also seeking flexibility in choosing a new plan. While, once again, the parties read comparable figures differently, the City's proposal would leave the Union at the bottom of comparable communities; the Union's proposal would place Muskegon Heights in the middle of that group. The dollar differential, in terms of cost to the City, is relatively small. The flexibility sought by the Union is likely to prove of benefit to both parties. In light of the closeness of the dollar figures, the weight of comparables and the benefits of flexibility, the Union's proposal prevails.

The Panel adopts the Union's proposal with respect to this issue.

7. UNION ECONOMIC ISSUE: SECTION 24.1
Longevity

The Union has proposed an increase in the maximum amount upon which longevity is calculated for employees hired after July 1, 1980, from \$10,000 to \$20,000. The Union argues that the \$10,000, which has been in place for 23 years, has kept longevity payment as an artificially low level.

The City contends that there is no justification whatsoever for this doubling of longevity costs, contending that this proposal is an attempt to reinstitute a provision previously dropped

in earlier collective bargaining. In addition to the City's severe financial constraints, the present longevity payment is well at the upper level of comparable communities. The City is certainly keeping pace with those communities, and the Union has presented no justification for a 100% increase.

DISCUSSION

While there may indeed have been a long-standing cap on longevity, Muskegon Heights is comfortably placed within the list of comparable communities. The Union's proposal would vault it to the top of that list. Little, if any, justification has been put forward for such a dramatic increase, particularly in light of the City's financial condition.

The Panel adopts the City's proposal with respect to this issue.

8. JOINT ECONOMIC ISSUE: SECTION 27.1

Uniform and Cleaning

The Union proposes an increase in uniform and cleaning allowance from \$600 to \$800. The City proposes an increase to \$700.

Testimony at the hearing suggested that even \$800 was inadequate to meet the needs of an officer, although this could not be conclusively demonstrated with respect to each officer. Moreover, the Union has shown that virtually all comparables provide a greater benefit than does Muskegon Heights.

The City argues that the increase will have a direct impact on the city's deficit. While this is true, any increase, in any area of the contract, could be said to have that effect. In fact, the City has itself proposed to increase the deficit with respect to this issue; what remains in dispute is – how much?

While examination of the benefits provided in this area by comparable communities is difficult, owing to the variety of schemes employed by those communities, it does seem clear that Muskegon Heights is at the bottom of the list, and its proposal would not place the City

in an unreasonably elevated position relative to the others.

The Panel adopts the proposal of the Union with respect to this issue.

9. UNION ECONOMIC ISSUE: SECTION 31.1

Work Periods

The Union proposes to add language to this Section of the contract providing for a \$.50 per hour shift differential for any employee who works on the second or third shifts. The City seeks to maintain the present contract language.

DISCUSSION

The Union argues that its proposed differential would be in compensation for the interruption of the normal biological rhythm, experienced by those who have to work second or third shifts. The City contends that there is no justification for such a differential, particularly when examining comparable communities. Four of these have no such differential; the remaining two have much smaller shift differentials than that proposed by the Union.

The use of multiple shifts is common in the workplace today. Given the prevalence of two working persons in the family, second and even third shifts are often desirable, considering the need for child care, etc. The onus previously attached to such shifts has receded, if not entirely disappeared, despite the acknowledged biological interference created by them. The additional factor of practice among the comparable communities serves to remove any substantial justification for the Union's proposal.

The Panel adopts the proposal of the City with respect to this issue.

10. UNION ECONOMIC ISSUE: SECTION 37.1

Part-time Officers

The Union proposes elimination of the language in this Section which denotes current

full-time positions as 14 in number. The City proposes to retain the current language.

DISCUSSION

The Union asserts that its proposal is based on the attempt by the City to lay off full-time employees, an effort which it discontinued, following the Union's threat of legal action. The Union's fear, apparently, is that the City will feel free to lay off full-time employees above the number of 14, replacing those employees with part-time employees.

The City contends that the intent of the Union's proposal is to restrict, in some undefined way, its ability to supplement the workforce with part-time officers. Only one of the comparable communities has any language similar to that proposed by the Union.

The Union's fear arises from the fact that the current full-time deployment is approximately 23 officers. A letter from the Union to the City makes clear the Union's intention to fight any wholesale attempt to replace full-time with part-time officers. There is no evidence that the City is embarked upon such course of action, and every indication, as the Union's letter makes clear, that it would be both unlawful and in violation of the contract.

The number 14 in the present contract arises from the size of the Department at the time of the inclusion of this language during earlier contract negotiations. The City, for its part, is fearful that it will be restricted from utilizing part-time officers even if, for whatever reason, there is a reduction in the current complement of full-time officers.

The current contract language is, perhaps, anachronistic, but its elimination might serve as a mechanism to unduly restrict departmental staffing. As the Union itself points out in its letter to the City, the current contract serves to protect full-time officers. A revisiting of this Section in the next negotiations might be well advised. At the present time, particularly in light of language in the contracts of comparable communities, the excision of this one clause seems inadvisable. It might well create a contractual limbo, fraught with the potential for greater dispute than is present now.

The Panel adopts the proposal of the City with respect to this issue.

- 11. UNION NON-ECONOMIC ISSUE: SECTION 39.1 (subsection 8)**
- 12. UNION NON-ECONOMIC ISSUE: SECTION 39.1 (subsection 9)**
- 13. CITY NON-ECONOMIC ISSUE: SECTION 39.1 (proposed subsection 10)**
Muskegon Heights Promotional Procedure

The current contract provides for a written exam, followed by an oral examination. Police officers with five years of service on the Muskegon Heights Police Department and currently employed by the Department are eligible to write the examination. The contract provides that an Oral Board will determine the top three candidates and forward those names to the Chief, (subsection 8) who shall make the final selection from those three candidates (subsection 9).

Both parties are dissatisfied with the current contract language. The City is concerned about potential inability to fill vacancies from within the ranks; the Union is concerned about preferential treatment, or, conversely, the failure to fill a vacancy in order to avoid appointing a given individual.

The Union proposes to modify subsections 8 and 9 with the following language:

8. The Oral Board shall score all candidates separately on the Oral Board examination.

The Oral Board examination shall have the same number of possible points as the written examination.

9. The Chief shall make the final selection from the top three candidates as determined by their combined total score on the written and oral examinations.

The City proposes to retain the current language and add a subsection (10). The proposed subsection 10 reads as follows:

If after the City has provided two (2) consecutive promotional examinations, and no current employee successfully completes the written examination provided for in subsection 4 above, the City is free to accept applicants who have at least five (5) years of police service in a police agency other than the Muskegon Heights Police Department.

The difficulties with each of the proposals are relatively clear. The Union's proposal places an inordinate amount of power over the decision-making process in the hands of outsiders, two of whom are uninvolved with police work. The City's proposal reaches outside the Department after only two tests without result. Such a selection method must undoubtedly be fraught with the possibility of resentment and loss of morale.

As this has been designated a "non-economic issue," the Panel has the statutory authority to craft contractual language which differs from that proposed by either party. The procedure adopted by the Panel provides a two-part vehicle for advancement from the position of patrol officer to that of sergeant, listed below, in contractual language:

SECTION 39.1 MUSKEGON HEIGHTS PROMOTIONAL PROCEDURE.

1. Vacancies in the classification of sergeant shall be posted ten (10) days before testing.
2. Patrol officers, whether internal or external to the Muskegon Heights Police Department, desiring to take the written examination, shall make such request in writing.
3. A written and an oral examination shall be given to fill vacancies in the classification of sergeant. Where a vacancy has been posted, and one or more candidates pass the written examination, the vacancy must be filled within 30 days of the exam.
4. Candidates must pass the validated written examination with a minimum score of seventy (70%) percent, as reported by the testing agency, in order to be eligible for the oral examination.
5. Patrol officers having attained five (5) years service on the Muskegon Heights Police Department and employed by the Muskegon Heights Police Department are eligible to write examination.
6. Candidates with Associate's Degree or better will be preferred over those candidates without said degree.
7. The Oral Board will be comprised of three (3) individuals from outside the

Muskegon Heights Police Department. They shall be:

- A. A police officer ranking lieutenant or above.
- B. A Muskegon Heights citizen.
- C. A person from human resources, business or public safety field.

- 8. In the event that no candidate passes an initial written examination, the Department shall offer a second examination no sooner than sixty (60) nor later than ninety (90) days subsequent to the first examination.
- 9. In the event that no candidate passes the second examination, the Department shall offer a third examination within sixty (60) days of the giving of the second examination. This third examination will be open to Department members as well as to police officers from other police agencies, who have at least five (5) years of police service in a police agency other than the Muskegon Heights Police Department.
- 10. With respect to all examinations, all candidates who meet the passing score as provided in this Section will be interviewed by the Oral Board. The Oral Board rank the candidates and send forward the names of all the candidates and their rankings to the Chief. The Chief will fill the vacancy from the list forwarded by the Oral Board.
- 11. If no candidate passes the third exam, the Chief will fill the vacancy with a person who meets the experience criteria listed above. Such a person may come from within or outside of the Muskegon Heights Police Department.

14. JOINT ECONOMIC ISSUE: SECTION 39.1

Position Compensation Plan (Year one (1) of contract)

15. JOINT ECONOMIC ISSUE: SECTION 39.1

Position Compensation Plan (Year two (2) of contract)

16. JOINT ECONOMIC ISSUE: SECTION 39.1

Position Compensation Plan (Year three (3) of contract)

Wages have been presented as three different issues, one for each year of the proposed contract. Thus, each party has presented three wage proposals, corresponding to each year

of the proposed three-year contract.

The City's proposals are identical for each of the three years: a wage freeze – 0%, 0%, and 0%.

The Union's proposals are identical for each of the three years: 3%, 3%, and 3%.

DISCUSSION

The City has relied heavily on the Act 312 decision in the matter of the *City of Flint and The Flint Police Officers Association* in forming its arguments with respect to wages.² As in Flint, the City Muskegon Heights is under a state mandate to bring its budget into balance. To that end, as required by law, it has filed a deficit elimination plan with the state.

The comments of the Panel in the Flint matter are instructive for our purposes here:

There is no question but that the dedicated members of the Flint Police Department deserve to be properly compensated for the difficult and important work that they perform. In the past, the parties have been able to achieve contracts through collective-bargaining.. Regretfully, a fiscal crisis of an unprecedented magnitude has placed the officers and the City in a position where they are in Act 312, with the City facing over \$27 million of debt. This Opinion is reflective of the fiscal crisis, but represents an outcome that is determined by the statutory requirements of Act 312.

Despite the Union's arguments, it appears to the Panel that an actual, and ongoing, deficit exists in Muskegon Heights. While the actual dollar amounts are greater in Flint than in Muskegon Heights, the percentage of deficit, in terms of the general fund, are quite similar. However, the major difference is the speed with which the deficit is being reduced. The City's budgets, and its fiscal posture in this Act 312 proceeding, including its Last Best Offer, were all predicated on a five year reduction, with a wage freeze during that time period. As the testimony from the City Manager indicated, the City is on a much faster pace, and is approaching positive balance much sooner than anticipated, unlike the situation obtaining in Flint. At present, the deficit is about \$400,000 less than was projected.³

²MERC Case No.: L98 F-8012 (Glazer Panel)

³City Exhibit 14, Deficit Elimination Plan

Given the rapid nature of the City's emergence out of deficit, a total wage freeze is unnecessary. In the third year of the contract the financial condition of the City, pursuant to the current projections, will be on a much sounder footing. That being the case, it would be unjustified to demand further financial sacrifice of this bargaining unit.

The City has argued that reliance on comparables is misplaced, due to the financial exigency facing it. But the data from the comparable communities are still there, are a statutory factor, and with a freeze, Muskegon Heights will have fallen substantially behind the other communities. There is a financial emergency in Muskegon Heights with an obligation to get out of deficit mandated by the state. Financial exigency, the state mandate, and statutory factors such as ability to pay and comparability must somehow be balanced. Thus, a return to comparability too soon could create a drag on the now faster-than-anticipated recovery. But no reference to comparability might well be to demand a sacrifice of the police officers in excess of the constraints of the financial crisis.

The 3% offer of the Union per annum might well have been reasonable were it not for the financial exigency of the City. Based on the deficit plan, the speed with which it is being met, which, of course, has an impact on ability to pay, and comparability, a 3% increase is reasonable for the third year of the contract.

In light of the above, the Panel has determined as follows:

With respect to Issue 12, year one (1) of the contract, the Panel adopts the City's proposal – 0%

With respect to Issue 13, year two (2) of the contract, the Panel adopts the City's proposal – 0%

With respect to Issue 14, year three (3) of the contract, the Panel adopts the Union's proposal – 3%

SUMMARY OF ISSUES BEFORE THE PANEL

<u>ISSUE</u>	<u>PREVAILING PARTY</u>
1. Section 5.1 - Grievance and Appeal Procedure	CITY
2. Section 5.4 - Written Reprimands and Suspensions	PANEL LANGUAGE*
3. Section 14.1 - Maintenance of Standards	CITY
4. Section 19.1 - Holidays	CITY
5. Section 20.1 - Vacation Leave	UNION*
6. Section 23.2 - Dental/Optical Insurance	UNION
7. Section 24.1 - Longevity	CITY
8. Section 27.1 - Uniform and Cleaning	UNION
9. Section 29.2 - Position Compensation Plan Calendar Year 2002	CITY*
10. Section 29.2 - Position Compensation Plan Calendar Year 2003	CITY*
11. Section 29.2 - Position Compensation Plan Calendar Year 2004	UNION*
12. Section 31.1 - Work Periods	CITY
13. Section 37.1 - Part-Time Officers	CITY
14. Section 39.1 - Musk. Heights Promotional Procedure	PANEL LANGUAGE
15. Section 39.1 - Musk. Heights Promotional Procedure	PANEL LANGUAGE
16. Section 39.1 - Musk. Heights Promotional Procedure	PANEL LANGUAGE

* Retroactive Applicability

SIGNATURES OF PANEL MEMBERS

DATE: _____

Martin L. Kotch, Chairperson

DATE: _____

Fred W. Bennett, Union Delegate
(Concurs on all issues awarded to
Union; dissents on all issues
awarded to City)

DATE: _____

Melvin C. Burns II, City Delegate
(Concurs on all issues awarded to
City; dissents on all issues
awarded to Union)