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STATE OF MICHIGAN

EMPLOYMENT RELATIONS COMMISSION

In the Fact-Finding Between:

ASSOCIATION OF CITY OF DETROIT
SUPERVISORS (ACODS)

-and- Case No. D04F-1005

CITY OF DETROIT (CITY)

FINDINGS OF FACT AND RECOMMENDATIONS

The bargaining unit in this case consists of some 85 supervisors, almost all of whom are part of the Department of Public Works. Most of them work in the Vehicle Maintenance (VM) or Solid Waste (SW) Departments. Those in VM mainly supervise auto repair employees. Those in SW supervise vehicle operators and others engaged in sanitation (i.e., removing garbage, picking up bulk materials) or street cleaning (i.e., sweeping or removing snow or ice). Those in the Storeroom supervise storekeepers. The supervisors are represented by ACODS. The people they oversee are represented by AFSCME or the Teamsters.

The previous collective bargaining agreement (CBA) for the period 1998-2001 expired on June 30, 2001.[1] The parties had agreed, however, that the supervisors would continue to work on a day-to-day basis under the terms of the expired CBA. Negotiations for a successor CBA proved fruitless. The services of a mediator did not help. And, in mid-August

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[1] That CBA was not executed by the parties until December 30, 2002, some 18 months after it had expired.

2004, the parties petitioned MERC for the appointment of a fact-finder. MERC named Richard Mittenthal to serve as fact-finder, that is, to hold a hearing, make findings of fact, and propose recommendations to resolve the dispute. Hearings took place at the City-County Building in Detroit on April 18 and 19, 2005. ACODS was represented by L. Rodger Webb, Attorney; the City was represented by Bruce Campbell, Attorney. No transcript was made of the hearing. A post-hearing brief was filed by ACODS on July 18, 2005. No brief was filed by the City.

Each of several disagreements will be separately considered. I shall review the ACODS proposals first and then the City proposals although some of the discussion may overlap.

ACODS Proposals

- "Maintenance of Conditions" clause (new)

ACODS asks that a new clause be included in the CBA to the effect that existing "conditions of employment and... proper practices...beneficial to the employees...shall... be maintained during the term of this Agreement" and that any changes "must be mutually agreed upon..." The City insists no such clause is appropriate.

What ACODS seeks is a freeze on all current practices (or conditions) not covered by the CBA. Such an arrangement is relatively uncommon in collective bargaining relationships because of management's understandable anxiety about "the great uncertainty as to the nature and extent of the commitment..." and its "relentless search for cost-saving changes..."[2] Indeed, most practices in the workplace are not the result of joint determination at all:

> ...They may be mere happenstance, that is, methods that developed without design or deliberation, or they may be choices by Management in the exercise of managerial discretion as to

[2] H. Shulman, "Reason, Contract and Law in Labor Relations", 68 Harv. L. Rev. 999, 1011-12 (1955).

> convenient methods at the time. In such cases, there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things...[3]

There is no evidence that management has been guilty of arbitrary or capricious changes in its practices. No sound basis exists for ACODS' proposal. I recommend it be withdrawn.

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- Clothing Allowance (new)

ACODS asks that supervisors "be paid a clothing allowance of $170..." It stresses that employees who are overseen by the supervisors get a clothing allowance of $170 (AFSCME) or $172 (Teamsters) and that a fact-finder for a prior CBA recommended an allowance of $85 which never found its way into this CBA. The City resists any such allowance, noting that not all Teamster employees get an allowance and that only a minority of AFSCME employees get an allowance.

Supervisors, apart from the Storeroom, do not perform the work of those they supervise. Solid Waste supervisors are not handling garbage or cleaning streets; Vehicle Maintenance supervisors may occasionally have to deal personally with troublesome repairs but that would be an exception rather than the rule. Their job is not likely to expose them to the kind of routine dirty conditions which would warrant a clothing allowance. I recommend that this proposal be withdrawn.

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- Release Time (Memorandum of Understanding, p. 60)

ACODS asks that the two days of release time provided to its President for union business be extended to three

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[3] H. Shulman, Umpire, Ford-UAW, Opinion A-278 (Sept. 1952). Reported at 19 Lab. Arb. 237, 242 (1952).

days and that another ACODS representative should be given release time to handle necessary union business whenever the President is unavailable. The City resists adding an extra day to the President's release time but insists it has granted release time to other ACODS representatives in the President's absence. ACODS disputes this latter claim.

There is no evidence that the two days of release time for the President has been inadequate. I recommend that this portion of the proposal be withdrawn. However, there should be language in the applicable Memorandum which would allow for release time for another union representative in the event the President is unavailable. I recommend such a provision be added to the Memorandum.

* * *

- Equalization of Scheduled Overtime (Memorandum of Understanding, p. 59)

ACODS asks that the records of scheduled overtime worked be provided to the union four times a year (quarterly) instead of twice (semi-annually). The City responds that there is so little scheduled overtime that the extra clerical work is simply unnecessary.

Compliance with ACODS' request (i.e., xeroxing the overtime list and handing it to a union representative) four times a year, instead of twice, would only involve a few minutes of extra work. It would give supervisors a more current view of their overtime situation. And it would not impose an undue burden upon management. I recommend this proposal be adopted.

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- Grievance Procedure (Article 5, Steps 2, 3, and 4)

ACODS requests several changes in Steps 2, 3, and 4 of the grievance procedure. Presently, if the Association fails to appeal from the City's Step 2, 3, or 4 answer within a certain time period, the dispute will be considered settled on the basis of the City's last answer. However, if

the City fails to submit its answer within a certain time period, following one of the Step meetings, the City suffers no penalty whatever. ACODS believe that any such City failure should, subject to the "non-compliance" proviso discussed below, result in the grievance being granted. It proposes that where the City fails to issue a timely answer, where the Association gives the City notice of such non-compliance, and where the City nevertheless still fails to provide a timely answer, the grievance should be considered sustained without precedent. It urges too that a similar arrangement be applied to any Association failure to appeal a grievance to the next step of the procedure following receipt of a non-compliance notice from the City. The City contends, however, that this change is unnecessary due to the small grievance load and would be burdensome due to the additional paperwork imposed on the parties.

The evidence shows numerous instances where the City was extremely late in answering a grievance following a Step meeting. Sometimes, according to ACODS, there was simply no answer at all. The City has offered no satisfactory explanation for its failure to honor the time requirements of the grievance procedure. It suggested that any such failure was not harmful because the grievance then simply moved to the next Step of the procedure. ACODS replied that the City, in these circumstances, often insisted that the grievance be returned to the Step at which no answer had been provided. I am unable, on the record before me, to unravel the claims and counterclaims on this matter. Nevertheless, it seems clear that the City has been seriously remiss in providing timely answers and that Article 5 presently offers no effective remedy to the Association for such inappropriate behavior.

I recommend therefore that some device similar to ACODS' proposal be adopted. If the City's failure to comply with a time limit persists in face of the Association's written demand for compliance, then the grievance should be deemed settled in the Association's favor without precedent. No such non-compliance notice is necessary with respect to the Association's appeal to the next Step in a timely manner. Such a failure should continue to result in a grievance being considered settled, without precedent, on

the basis of the City's last answer. In view of the limited grievance activity in this bargaining unit, the administration of this added non-compliance clause should not prove burdensome and should help to prompt timely answers. Note also that the parties agreed to expand the choice of appointing agencies for arbitral selection to include MERC and the American Arbitration Association in addition to FMCS.

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- Safety (new)

ACODS proposes that a new "safety clause" be added to the CBA requiring that all vehicles purchased after July 1, 2004, for supervisory use "be provided with air conditioning". It proposes further that to the extent that supervisors are required to use prescription safety glasses or work boots, the City should reimburse them for the cost of these items. The City objects, largely because of cost considerations.

As to air conditioning, hot weather is a problem in Detroit no more than two or three months, and then only for relatively short periods. Supervisors, I presume, do not spend most of their time in City vehicles. They are not collecting garbage, picking up bulk materials, and so on. They supervise. Air conditioning is, in any event, more a matter of comfort than safety. Given these circumstances, the extra cost to the City cannot be justified. This proposal should be withdrawn.

As to the reimbursement issue, the City does provide safety glasses to supervisors who require them. Supervisors surely do not need safety glasses at all times. Those who wear prescription glasses can put safety glasses over them as needed. But that is, as I have personally experienced, an awkward arrangement. For any supervisor who is required to wear safety glasses more than 50 percent of a shift, he/she should be reimbursed $100 toward the cost of a single pair of prescription safety glasses. I so recommend.

As to work boots, they can be used both at work and at home. They serve many purposes. The case for reimbursement here is not compelling. I recommend that this proposal be withdrawn.

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- Overtime (Article 14, new section)

ACODS asks that the following contract language be added to Article 14:

> H. Whenever subordinate personnel are permitted to work scheduled overtime, unit members [supervisors] shall also be scheduled to directly supervise the subject work.

It claims that it is unfair to exclude supervisors from this kind of overtime opportunity and also unfair to hold supervisors responsible for the work of others in their absence. The City says this proposal would prompt work management feels is unnecessary and would raise overtime costs unnecessarily.

Surely, the City has the right to determine when and how to utilize its supervisors. It should be free to choose not to have its service/maintenance employees supervised on a weekend. ACODS' proposal is, in a sense, an attempt to equalize overtime opportunity between supervisors and those they supervise. But the equalization concept almost always deals with people in the same work classification and location. And, finally, the supervisors could hardly be held accountable for some employee failure which occurs while they were not present. I recommend that the proposal be withdrawn.

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- Wages (Article 15)

The parties agree on the following wage changes for the 2001-2005 CBA:

Effective July 1, 2001	no increase
Effective July 1, 2002	no increase
Effective July 1, 2003	a 2% increase
Effective July 1, 2004	a 2% increase

The parties agree further that supervisors should receive whatever retroactive pay is appropriate under these arrangements. They agree on the cash bonus set forth in Article 15, Section 1B of the City's proposal. They agree further on a Special Wage Adjustment (SWA) of 50 cents for the following supervisory classifications: Auto Repair Supervisor, Senior Storekeeper, Head Storekeeper, Stores Operations Supervisor, Auto Repair Subforeman, Auto Repair Foreman, Senior Auto Repair Foreman, and District Clerk.

There are two wage disputes. The first is whether the Refuse Collector Foreman (RCF) should also receive this SWA of 50 cents. The second is the effective date of the SWA.

As to the RCF, the City observes that a SWA was given to any supervisory classification that supervised a service/maintenance job which received a SWA. For instance, the Auto Electric Mechanic, General Auto Mechanic, General Auto Body Mechanic, and so on received a SWA under the AFSCME contract. Hence, the City gave each Auto Repair Foreman (or Subforeman) a SWA. The City argues that because the Refuse Collector Operator (RCO) did not receive a SWA under the Teamster contract, it did not provide the RCF with a SWA. It claims it properly applied its SWA standard.

ACODS argues, however, that the RCO is a multi-title job encompassing work as a Vehicle Operator (VO-I or VO-III), as a Sanitation Laborer, and as a Packer Operator. When assigned to VO-I or VO-III, the RCO does receive a SWA; when assigned to Sanitation Laborer, the RCO receives the top rate of this Laborer classification; when assigned to Packer Operator, the RCO receives something extra. The Association believes that because the RCO's compensation includes a SWA part of the time, the RCF should be entitled to a SWA. Moreover, it maintains that job comparisons with similar classifications in other cities support the need for an upward adjustment in the RCF rate as does the recommendation in a prior fact-finding report for these same parties.

ACODS has the stronger argument here. Inasmuch as the RCOs being supervised by a RCF do receive a SWA when working as VOs, the RCF should likewise receive a SWA. The comparability standard in question should be construed broadly given the wage restraint the parties have embraced elsewhere in Article 15. I recommend the ACODS proposal be adopted.

As to retroactivity, the parties disagree on the effective date of the SWA for all supervisory classifications granted an adjustment. The City says Article 15-I-C should be amended to make the adjustment "effective upon ratification of the [collective bargaining] agreement", that is, the future date on which a new CBA is formally approved by the bargaining unit. ACODS says the adjustment, like the general wage increases, should be retroactive, presumably to the first day covered by a newly ratified CBA, namely, July 1, 2001.

To begin with, note that the parties have agreed that no general wage increase is to occur on July 1, 2001 or July 1, 2002. Because that was in response to a need for wage restraint in those years, that same restraint should preclude any SWA for that same period as well. Note also that the 1998-2001 CBA, although covering a period from July 1, 1998 forward, provided an effective date for most SWAs of July 1, 1999 (or in the case of RCFs, July 1, 2000).[4]

Based in general upon what happened under the previous CBA, the SWAs for the supervisors in question (apart from the RCF) should be effective July 1, 2003, and the SWA for the RCF should be effective July 1, 2004. I so recommend. This recommendation is influenced by the City's financial situation as it existed in July 2001, not as it exists today. Had the parties successfully negotiated a CBA in July 2001, they no doubt would have agreed to effective dates consistent for the most part with what they had previously done under the 1998-2001 CBA. There was no compelling reason then to have made SWAs "effective upon

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[4] The Storekeeper supervisors' SWA, however, was made effective July 1, 1998.

ratification of the agreement". The great delay here in finally addressing the bargaining unit's situation can hardly justify a reduction in what would otherwise probably have been granted in July 2001.

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City Proposals

- Work Day (Article 16, new)

The City requests that a new notice requirement be established for supervisors "assigned to 24-hour, 7-day operations", namely, that they "must notify their supervisors [management] that they will not be in to work at least 1 hour before the start of their shift". Apparently this problem has arisen only in Vehicle Maintenance. The Union seems willing to accept this requirement on midnight and day shifts on Fridays and Saturdays because these evidently were the shifts on which the problem arose. It objects, however, to extending the requirement to all shifts.

There are perfectly sensible reasons for this requirement. Late report-offs may cause supervisors on duty to be held over onto the following shift against their will. Late report-offs limit the time available to management to secure a replacement. And certainly a 1-hour requirement should not be burdensome for a supervisor who has to report off. The discipline fears of ACODS may be overstated. For the failure to satisfy this requirement would not prompt discipline where the supervisor had a sensible explanation for his late report-off. I recommend that the proposal be adopted.

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- Disciplinary Procedure (Article 7, Section D)

The City urges that the 14-month limitation on the use of "prior infractions" in imposing discipline be extended to 18 months -

> ...where the current charge is a repetition of prior infractions involving workplace violence, sexual harassment, theft or willful destruction of City property or being under the influence of alcohol or controlled substances at work.

It asserts that supervisors should be held to a higher standard. ACODS insists the City has failed to show a single instance where the 14-month limitation prevented appropriate discipline for a repeat offender.

The "infractions" in question are among the most serious workplace offenses. Employees who engage in such misconduct are, in many collective bargaining relationships, discharged for the first such offense. The City's proposal assumes a situation where a supervisor is not discharged for the first such offense. It asks only that management be allowed to rely on the earlier offense and penalty for 18 months, rather than 14, in the event the offense is repeated. That is a perfectly reasonable request. The fact that the City cited no instance where it was disadvantaged by the 14-month restriction does not detract from the legitimacy of its proposal. I recommend the proposal be adopted.

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- Protection Clause (Article 30)

The City seeks to eliminate the "protection clause" from the CBA. That clause guarantees supervisors in this bargaining unit that their "total compensation package... will not be economically disadvantaged as a result of subsequent settlements with other Unions". And the clause goes on to recognize that "special wage adjustments for particular classifications within other bargaining units" for certain stated reasons "shall not require an equivalent increase for th[is particular] unit at large..."

The City alleges that a great many other bargaining units, particularly other supervisory units, have surrendered this "protection clause". It asserts that because ACODS has always been among the last units, if not

the very last, to arrive at a new CBA, ACODS has no reason to fear the results of any "subsequent settlement". It believes ACODS should now "stand on its own". ACODS insists that most of the bargaining units cited by the City did not voluntarily give up the "protection clause". It stresses that it has had such a clause in its CBA since the inception of bargaining in 1986. It believes that supervisors would be disadvantaged without it, that the clause is needed to insure these supervisors are treated properly.

The City's argument has much appeal apart from one critical point. ACODS claims it is unhappy about being the last bargaining unit to settle with the City. So long as it remains in that position, the "protection clause" has little, if any, meaning. There are no "subsequent settlements". But should ACODS reach agreement with the City before AFSCME, or before the Teamsters, it would certainly need the "protection clause" to insure equivalent treatment. In short, this clause should remain in effect at least to cover the possibility of an ACODS early settlement with the City. I so recommend.

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- Rates for New Positions (Article 35)

The City urges that this provision remain "as is" in the new CBA. ACODS asks that it be deleted and suggests, at the hearing at least, that the pay rate for any "new position" established by the City be negotiated by the parties.

Article 35 presently provides for the kind of negotiation mentioned by ACODS. However, it permits the City to "implement its last offer" when the parties fail to reach agreement. ACODS presumably wants such a dispute to be subject to arbitration. Such disagreements are, in the private sector, routinely subject to arbitration. But, absent any proof that such deadlocks have occurred in the past or indeed that any "new positions" have been established, there is no compelling reason to delete or rewrite Article 35. I recommend that Article 35 remain "as is".

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- Memorandum of Understanding (Temporary Placement in Other Duties/Departments)

The City urges that this provision remain "as is" in the new CBA. ACODS asks that this Memorandum be deleted because no supervisor has ever been subject to such "temporary placement", because this is never going to happen.

The fact that this Memorandum has never been invoked by the City does not mean it is pointless. The Memorandum provides management with a limited flexibility in work assignments and provides supervisors with the possibility of additional work opportunities. I recommend that it remain "as is".

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- Memorandum of Understanding (Performance Evaluations)

This Memorandum simply recognizes management's authority "to express and record evaluations of the performance of all employees at all levels..." and "to utilize such [evaluations] in the running of the government ..." The City wishes to retain the Memorandum "as is". ACODS asks that it be deleted.

This provision is little more than a recognition of a management right to make "evaluations" of supervisory "performance". There is no sound reason for removing the Memorandum. I recommend it remain "as is".

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- Sick Leave Accrual Schedule (Exhibit III)

This Schedule simply shows when (that is, the day on which) a supervisor gets sick pay credited on his/her pay stub. The City once used Exhibit III for payroll purposes

but the Accrual Schedule is now programmed into City computers. The City asks that the Schedule be deleted. ACODS does not really object. I recommend deletion.

Richard Mittenthal
Fact Finder

Dated: August 23, 2005