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STATE OF MICHIGAN

DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES

EMPLOYMENT RELATIONS COMMISSION

IN THE MATTER OF THE ARBITRATION ARISING PURSUANT TO ACT 312, PUBLIC ACTS OF 1969, AS AMENDED BETWEEN:

OTTAWA COUNTY AND OTTAWA COUNTY SHERIFF (Employer)(County)

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN (Union)(Association)

_____/

MERC Case #L02 E-8007

FINDINGS OF FACT, OPINION AND ORDERS
REGARDING TWO REMAINING ISSUES

APPEARANCES:

ARBITRATION PANEL:	Mario Chiesa, Impartial Chairperson
	Richard Schurkamp, Employer Delegate
	James DeVries, Union Delegate
FOR THE UNION:	Frank A. Guido, Esq. Counsel, POAM 27056 Joy Road Redford, MI 48239-1949
FOR THE EMPLOYER:	Nantz, Litowich, Smith & Girard, P.C. By: John H. Gretzinger 2025 East Beltline, S.E. Suite 600 Grand Rapids, MI 49546
TESTIFYING:	James DeVries, Business Agent POAM
	Richard Schurkamp, Ottawa County Human Resources Director

ALSO PRESENT: Michael Roelofs
Shawn James
Travis Parsons

INTRODUCTION

On October 5, 2004 this arbitration panel issued very extensive Findings of Fact, Opinion and Orders in the above-mentioned matter. Two preliminary issues dealt with by the panel related to the question of whether two aspects of the dispute were properly before the arbitration panel. Both issues were characterized as non-economic. In general terms, one dealt with retroactivity of grievance arbitration and the other dealt with continuation of contract provisions beyond the termination date of the agreement.

The arbitration panel found that both issues were properly before it.

It is incumbent that anyone reading these Findings of Fact, Opinion and Orders carefully review the October 5, 2004 panel submissions, most particularly the first 23 pages. For the sake of judicial economy, the entire compilation of Findings of Fact, Opinion and Orders previously issued by the panel are incorporated herein without being duplicated.

The hearing involving the two issues now under consideration was conducted on June 20, 2005 at the Employer's facilities. Testimony was taken from two witnesses, several documents were received into the record and ultimately the parties filed post-hearing briefs which were exchanged through the Chairman's office on August 4, 2005. All executive discussions took place at the

hearing and these Findings of Fact, Opinion and Orders are being issued as soon thereafter as possible consistent with a complete and thorough analysis of the record. While not every item in the record will be mentioned, nothing was ignored.

RETROACTIVITY ISSUE

The Union seeks the addition of the following language:

"UNION ISSUE #8

"GRIEVANCE PROCEDURE - RETROACTIVITY OF ARBITRATION

"PRESENT:

No language currently exists.

"PROPOSED:

Add language to contract:

Retroactivity of Arbitration. The right to arbitrate grievances shall be retroactive to January 1, 2003 for any pending grievances, including those filed on or after January 1, 2003."

The Employer seeks the continuation of the status quo which is the Collective Bargaining Agreement absent the language proposed by the Union.

As previously indicated, this issue arose when, after the termination of the prior Collective Bargaining Agreement, the Employer took the position that arbitration would not be available as the last step of the grievance procedure.

There have been prior disputes dealing with this particular issue and in at least one case a bargaining unit member was terminated subsequent to the termination of the contract and the Employer took the position that arbitration wasn't available. The dispute ended up in court with the Employer taking the position

that after the termination of the agreement, members of the bargaining unit became "at will" employees. Nonetheless, it appears that the matter was scheduled for trial, but then subsequently settled.

DeVries testified that he doesn't recall any of the employers in the 60 units he represents or, for that matter, any in the 400 that POAM represents that take the position that once an agreement is terminated, the arbitration provision no longer affects it.

Schurkamp related that the Employer does indeed take the position that once a Collective Bargaining Agreement terminates, arbitration is no longer available. However, he did explain that on occasion the Employer has allowed arbitration under those circumstances. He related that in order to make that decision, the Employer analyzes the bargaining environment, the progress being made at the table, etc. Schurkamp related that if bargaining was going well, the Employer may very well choose to arbitrate. He did suggest that the historical position taken by the Employer is that when the Collective Bargaining Agreement terminates, employees become "at will."

Of course, the ultimate question is whether the Union's proposal should be adopted and the right to arbitrate grievances made retroactive to January 1, 2003. This is an important issue made more intense by the fact that a bargaining unit member was discharged subsequent to the termination of the prior Collective Bargaining Agreement and during the period in which the Employer indicates arbitration is not available.

It should be noted that the Employer has relied heavily on the case of Ottawa County v Jaklinski, 423 Mich 1 (1985) to support its position. However, as pointed out in prior analyses, the facts in this case are different than those existing in Jaklinski. In this case the Petition for Interest Arbitration was filed before the termination date of the contract. However, apparently the Union had made the decision not to challenge this action based on that difference.

Be that as it may, and keeping in mind the conclusions reached in the prior Findings of Fact, Opinion and Orders, the panel finds that the Union's position in this case regarding the first issue should be adopted.

First of all, when applying the Section 9 standards it is noted that it seems apparent that the interests and welfare of the public would be better served by utilizing arbitration as a last step of the grievance procedure rather than parties resorting to litigation. Generally, although not always, arbitration is faster, less expensive and conducted by individuals who are especially knowledgeable in employment management affairs. Additionally, morale in the unit could possibly suffer and thus affect the public if members of the unit were treated as "at will" employees or forced to sue in order to realize rights preserved by statute.

Furthermore, it seems clear that the overwhelming evidence establishes that other employers have not taken the position that the current Employer has. If any have, it is certainly a limited number, but apparently the others have concluded that it would be

appropriate to maintain arbitration as the last step of the grievance procedure even if the Collective Bargaining Agreement from which it arises has terminated.

Additionally, I note that Section 1 of Act 312, 1969 as amended, reads as follows:

> "423.231 Compulsory arbitration in police and fire departments; policy.
>
> "Sec. 1. It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed."

The above language contains some very significant observations. About 35 years ago the United States Supreme Court in the case of Boys Market, Inc. v Retail Clerks Local 770, 398 US 235 (1970), found that in the private sector federal courts could issue an injunction to prohibit a strike when an existing contract contained both a no-strike cause and a provision for grievance arbitration. In essence, the court found that the no-strike clause was the quid pro quo for arbitration. The point is that absent a no-strike clause, unions in the private sector are free to utilize the strike as leverage in securing what they may believe to be a reasonable or appropriate grievance settlement. In Michigan public employees are expressly prohibited from striking. That is certainly understandable and especially significant in the area of law enforcement. However, without the ability to arbitrate

disputes during the periods in question in this dispute and without the ability to strike, the public employees are left in a lesser effective position than their private sector counterparts. That doesn't seem to be the intent of the statute.

The Employer certainly makes some provocative points when it suggests that Act 312, as utilized in many circumstances, does nothing more than allow some bargaining units to refuse to bargain and merely go to arbitration. However, that observation is just as valid in relation to an employer's conduct as it is a labor organization's conduct. Furthermore, contrary to the Employer's claims, the panel does not perceive that requiring the Employer to arbitrate grievances during the hiatus period between contracts takes away the only collective bargaining leverage it has. Indeed, there are other items which, at least up to this point, are still available under the current status of the law which provide the Employer with leverage in the bargaining process.

Lastly, there is the recent decision in Police Officers Association of Michigan v Ottawa County Sheriff, Ottawa County and Ottawa County Board of Commissioners, Michigan Court of Appeals case #244919, Ottawa Circuit Court LC #02-042460-CZ, which, while dealing with other related issues, found that under the circumstances of that case an arbitration panel was in error in failing to consider the POAM's last best offer on the issue of Retroactive Arbitration of Grievances.

The panel finds that the Union's proposal must be adopted.

AWARD

The Union's proposal regarding the Retroactivity of Grievance Arbitration is adopted.

Mario Chiesa, Chairman

/s/
Association Delegate

Rich Schurkamp (dissent)
Employer Delegate

ISSUE #2 - DURATION

The Union has submitted the following proposal:

"DURATION

"PRESENT:

"ARTICLE XXVI DURATION

"26.1 (ii) This Agreement shall be effective for employees in the classifications of Detective and Road Patrol Deputy February 5, 2002, and shall remain in full force and effect 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 (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 Deputy **January 1, 2003**, and shall remain in full force and effect until **December 31, 2005**. This Agreement shall become automatically renewable from year to year thereafter, unless either party wishes to modify or change the 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 the Agreement, or any anniversary

AWARD

The Union's proposal regarding the Retroactivity of Grievance Arbitration is adopted.

Mario Chiesa, Chairman

Association Delegate Concur

Employer Delegate

ISSUE #2 - DURATION

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"PRESENT:

"ARTICLE XXVI DURATION

"26.1 (ii) This Agreement shall be effective for employees in the classifications of Detective and Road Patrol Deputy February 5, 2002, and shall remain in full force and effect 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 (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 Deputy **January 1, 2003**, and shall remain in full force and effect until **December 31, 2005**. This Agreement shall become automatically renewable from year to year thereafter, unless either party wishes to modify or change the 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 the Agreement, or any anniversary

thereof. **Upon transmittal of such notice, this Agreement shall remain in full force and effect until the earlier of: execution of a successor agreement through negotiated settlement (or compulsory arbitration), or December 31st of the year next following the year in which such notice is given; provided that continuation of the Agreement shall not constitute a waiver or bar to any claim for retroactive application of wages and/or benefits in any successor agreement.**

"Duration - to be effective the earlier of the date of award or October 1, 2005."

The Employer's position is that the language should not be adopted.

The Union characterizes this language as a long-term remedy for the arbitration issue which the prior decision dealt with on a short-term basis. However, the panel views this proposal somewhat differently.

In analyzing this language it is noted that currently the parties have a duration provision which does not state the effective date of the contract as January 1, 2003, but rather indicates that it is September 21, 2004. At the hearing it was established that the difference really isn't significant except to point out that there is a current agreement regarding duration. The current language does indicate that there is language which will be determined later. This is an obvious reference to the second issue currently under consideration.

There is little evidence establishing that such a provision sought by the Union exists in any other Collective Bargaining Agreements. Of course, one could argue that such language is not common because other employers do not take a position regarding

arbitration or other factors, such as agency shop and check-off, similar or identical to the position taken by Ottawa County. It could be speculated that other parties, both unions and employers, rely upon Section 13 of Act 312 to maintain wages, hours and other conditions of employment during the period of pendency of the interest arbitration.

As proposed by the Union, the language covers the entire Collective Bargaining Agreement. This obviously means that even those items which the Employer may have the right to change, which in the Employer's view would include at least check-off and agency shop, would have to continue.

While the panel has previously ruled that grievance arbitration shall be retroactively applied, that does not mean that the panel is willing to conclude that <u>all</u> the provisions in the Collective Bargaining Agreement shall continue, by contract, independent of Section 13 of the statute. There are just too many questions. What about permissive items which under the current state of the law are beyond Act 312 mandates?

Indeed, after carefully analyzing this record, the panel concludes that the Union's proposal should not be adopted. First, there is only a couple months left in this bargaining agreement and the parties should be presently negotiating for a successor agreement. This means they should be dealing with the issues that are sought to be dealt with by this proposal.

Secondly, the prior order preserves arbitration during the hiatus period between contracts. It deals only with arbitration

and has nothing to do with other considerations, such as check-off, agency shop, permissive subjects of bargaining, if any, etc. It is much easier for the panel to conclude that the best interests of the public and the description of how the statute should be applied by its own language is better served by ordering retroactive arbitration of grievances than it would be by ordering that the entire Collective Bargaining Agreement be continued in full force and effect until the execution of a successor agreement or December 31 of the year next following the year in which such notice is given.

While it is understood that the Union may be caused to experience some difficulty in collecting dues during the hiatus period between contracts, or that perhaps permissive items may be changed, that does not seem to be the same type of concern that the lack of grievance arbitration presents.

Furthermore, it would be very enlightening to discover what the court's position would be in a case wherein, unlike Jaklinski, the 312 petition was filed before the prior contract had terminated, which is the status of this dispute.

Thus, even though at least the Chairman of the panel doesn't believe that the Union's proposal is a so-called Evergreen agreement, nevertheless, the panel believes that the appropriate resolution is to accept the Employer's proposal and continue with the status quo.

AWARD

The status quo shall continue. The Union's proposal is not adopted.

Mario Chiesa, Chairman

Employer Delegate

Union Delegate

Dated: September 29, 2005

AWARD

The status quo shall continue. The Union's proposal is not adopted.

Mario Chiesa, Chairman

Employer Delegate

Union Delegate

Dated: September 29, 2005