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STATE OF MICHIGAN  
DEPARTMENT OF LABOR & ECONOMIC GROWTH  
EMPLOYMENT RELATIONS COMMISSION

*In the Matter of the  
Fact Finding Between:*

CITY OF HOLLAND BOARD OF  
PUBLIC WORKS

and

MERC Fact Finding  
Case No. L04 D-7036

SEIU, LOCAL 517M

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**FACT FINDER'S FINDINGS OF FACT,  
REPORT AND RECOMMENDATIONS**

**APPEARANCES:**

FOR CITY OF HOLLAND BOARD OF  
PUBLIC WORKS:

Michael A. Snapper, Attorney  
M. "Clyde" Robinson, Director of Human  
Resources  
Abel Rodriguez, Human Resources  
Becky Lehman, Finance

FOR SEIU, LOCAL 517M:

Christine Fahl, Labor Relations Specialist  
Marsha Wentzel, W/WW Scheduler  
Marie Licata, Customer Acct. Rep.  
Gracie Longoria, Customer Service

**Background**

The Holland Board of Public Works is a part of the City of Holland. The SEIU, Local 517M represents two bargaining units of employees of the HBPW, namely, approximately 110 public utility employees in one bargaining unit and approximately 17 clerical employees in a second bargaining unit. In addition, the HBPW has about 60 employees, *i.e.*, managers and professional employees, who are non-represented.

The public utility workers unit has a Collective Bargaining Agreement that expires in

March 2006. That Agreement provides for a \$5.00 and \$10.00 drug co-pay. The non-represented employees have a \$10.00 and \$20.00 drug co-pay, namely, \$10.00 for generic and \$20.00 for brand drugs, since January 2004.

### The Negotiations

The Collective Bargaining Agreement between the HBPW and SEIU Local 517M representing the clerical employees expired on June 30, 2004. In that Agreement, there was a provision for a \$2.00 drug co-pay. The parties began negotiating for a successive Collective Bargaining Agreement in the spring of 2004. The parties were unable to reach a successive agreement by the time the contract expired on June 30, 2004. As a result, the *status quo* remained. The parties continued to negotiate.

It was represented that the parties had three sessions with a mediator and were able to resolve most of their issues; that by November 2004, the parties resolved all issues, including wages, except the issue of drug co-pay.

The Employer sought an increased drug co-pay from the \$2.00 drug co-pay to a \$10.00 and \$20.00 drug co-pay, namely, \$10.00 for generic and \$20.00 for brand drugs, as was being paid by the non-represented employees. In addition, the Employer sought language in connection with the drug co-pay. Introduced as Union Exhibit 1 was a statement referenced as the "Employer's last table position on insurance prescription co-pay," which read:

Employees will be covered by the same prescription drug plan, with the same co-pays, as applies to BPW non-union employees, as that plan exists on July 1, 2004, and as it may change from time to time thereafter.

The Union introduced Union Exhibit 7, which was a more detailed Employer proposal on the point:

### Section 19.3

The cost of the premium for the present health insurance plan, the Master Medical Rider, Option II, the Prescription Drug Program, with semi-private room, and the FAE-RC rider, shall be paid in full by the employer for the duration of this agreement subject to the Wellness Program, Schedule E. In addition, the prescription drug program will change as follows; Effective January 1, 2005, the Prescription Drug Program, including co-pays, for all members of the bargaining unit will be the same as the program and co-pays that applies to BPW non-union employees, as that plan may change from time to time.

In other words, the Employer was proposing that the insurance prescription co-pay (referred to herein as drug co-pay) would be tied in to the amount of prescription co-pay paid by the non-represented employees. Union Exhibit 1 referred to the "Union's last table position on insurance prescription co-pay" as follows:

2004	-	\$2.00 co-pay
2005	-	10/20 co-pay
2006	-	20/20 co-pay

The Union represented that, early in negotiations, it had offered to agree to a \$10.00/\$20.00 co-pay, namely, a \$10.00 generic and \$20.00 brand name co-pay, but rejected the Employer's proposal to tie any further increase in the co-pay to the co-pays of the non-represented employees.

It was represented to the Fact Finder that the only issue holding up ratification of the contract is not the \$10.00/\$20.00 drug co-pay, but the language tying further changes in drug co-pays, if any, to the drug co-pay of the non-represented employees.

### The Issue

Based upon the negotiation history, there is only one issue for the Fact Finder to make findings of fact and recommendations, namely, the issue of tying future drug co-pays to the drug co-pay of the BPW non-represented employees. The parties agree that the contract should be a three year contract commencing July 1, 2004 and ending June 30, 2007.

### The Criteria

The recommendations of the Fact Finder are not made in a vacuum. They are based upon certain recognized criteria which serve as guides to fact finders when formulating recommendations.

The statute providing for fact finding does not set forth the criteria. However, when the legislature enacted the provisions for binding arbitration of police and fire disputes, namely, Act 312 of Public Acts of 1969, the legislature provided in Section 9 (MCLA 423.239) the list of criteria that arbitrators under that Act were to apply, namely:

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 proceedings.
- (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, fact finding, arbitration or otherwise between the parties, in the public service or in private employment.

Though these criteria were adopted specifically dealing with interest arbitration of police and fire disputes, the criteria represents common sense guidelines that should be followed by fact finders when making recommendations.

Essentially, the Act 312 criteria address the cost of living, the financial ability of the employer to fund the award, and comparables, both internal and with other similarly situated public and private employees in the geographical area involved.

Seemingly to recognize the correlation between the enumerated statutory guidelines under Act 312 to be followed by arbitrators and guidelines followed by fact finders, the legislature, in 9(h) refers to criteria used by fact finders not otherwise enumerated in section 9. This means that in addition to the enumerated Section 9 criteria this Fact Finder has focused upon, other criteria used by fact finders can be considered. It also recognizes that the application of a particular criteria depends upon the circumstances.

Among the criteria utilized by fact finders is the bargaining history of the parties, both past and current, as well as the "art of the possible," namely, what is a possible settlement between the parties recognizing the give-and-take of negotiations. The "art of the possible" in concept means that if the parties were left to their own devices and the public employees involved had the right to strike, as a strike deadline loomed the parties would attempt to

compromise in order to avoid a disruption in public service and loss of employee income. The concept is that, in compromising, the parties would review their respective positions and attempt to reach a resolution based on the art of the possible, as the art of the possible is the essence of compromise.

In addition, fact finders do use the bargaining history of the parties, both the bargaining history in the past and the bargaining history during the current negotiations, in an attempt to ascertain, along with the art of the possible, what the parties may have settled upon on their own when faced with outside deadlines.

As enumerated in Section 9, there is the comparables criteria. This comparables criteria would include external comparables as well as internal comparables. The function of the comparable criteria is to ascertain the value the marketplace in the geographical area for similarly-situated employees has placed on the type of employment involved.

Although there are a number of criteria set forth in Section 9 and used by fact finders, it seems that both the internal and external comparables, the bargaining history, as well as the art of the possible, are the key criteria in addressing this one-issue dispute. For this reason, the Fact Finder will rely on these specific criteria.

### **The Facts**

Internally, one bargaining unit has had a \$5.00 and \$10.00 co-pay, namely, the utility workers, with a contract expiring in 2006. The non-represented group has had a \$10.00/\$20.00 co-pay. During this same period, the clerical bargaining unit represented by Local 517M has had a \$2.00 co-pay. These internal comparables suggest that the drug co-pay for Local 517M should be increased. Likewise, the external comparables for the West Michigan employers would

support an increase in the co-pays at Holland Board of Public Works. A 2005 Policies and Benefits Survey Health Care Cost of private and public sector employers from Holland and the adjacent "Lakeshore" area with 60 participants revealed the following facts as to employee co-pay:

**Employee co-pay for generic drugs:**

Dollar Amount	Percentage
5 - 9	7%
10 - 14	41%
15 - 19	27%
20 - 24	7%
25 or more	0%

**Employee co-pay for non-generic/non-formulary drugs:**

Dollar Amount	Percentage
5 - 9	2%
10 - 14	4%
15 - 19	0%
20 - 24	9%
25 or more	60%

Another survey representing 50% to 60% of the West Michigan employer suggests that 60% to 70% of the employers require their employees to pay a co-pay ranging from \$10.00 for generic to \$40.00 for brand name. These external co-pays seem to support a higher co-pay for Local 517M. In addition, there was evidence that the City of Holland Fire Department on January 1, 2004 was paying a \$5.00 generic and \$10.00 brand co-pay; that by April 7, 2004, was paying a \$10.00 generic and \$20.00 brand co-pay. The police apparently were paying a \$10.00 generic and \$20.00 brand co-pay.

These internal and external comparables do support a \$10.00/\$20.00 co-pay. As noted, Local 517M has offered to increase the insurance prescription co-pay to a \$10.00 generic and \$20.00 brand co-pay.

The significance of the co-pay issue to the Holland Board of Public Works is revealed by the following chart:

Holland Board of Public Works  
Traditional Health Care Plan Monthly Premiums  
Effective Jan. 1, 2005 to Dec. 31, 2005

	One Person	Two Person	Family
With \$2 Drug Co-pay	359.08	791.58	931.35
With \$10/\$20 Drug Co-pay	<u>315.51</u>	<u>700.08</u>	<u>828.96</u>
Difference per month	43.57	91.50	102.39
Annual Incremental Cost	522.84	1,098.00	1,228.68

In other words, the \$10.00/\$20.00 co-pay will be less costly to the HBPW than the \$2.00 drug co-pay. Though it is less costly now, with continued increases in health care costs, it is possible that during the life of this Agreement, even with a \$10.00/\$20.00 co-pay, the Employer could still end up paying premiums very near what it is paying now. The change in co-pay in such a case would serve as cost containment and not necessarily cost savings. But, if there is not an increase in drug co-pays, the health care costs for the Employer will escalate at a more rapid pace.

Another factor to recognize in this situation is the breakdown of the health insurance programs opted by the 17 members of the bargaining unit. Two of the 17 employees have opted out of the health plan. One only participates in the dental program. This leaves 14 employees participating in the Holland Board of Public Works provided health care program. Five are in a Point of Service program. It was represented that, as such, these five "are already paying co-pays for prescription drugs which are tied to the co-pay levels that are for the non-union employees." This means that these five employees are now paying the \$10.00 for generic and \$20.00 for brand



name. Thus, it seems that the dispute at issue here affects approximately one-half of the bargaining unit, namely, nine members.

The Union also noted that, along with its offer to go to \$10.00/\$20.00 prescription premium co-pay, it has also agreed to a 30% increase in the Wellness Program amount. However, the Employer has suggested that all employees of the Board are paying the same in the Wellness Program and that the 30% is just a cap. The Wellness Program is designed to encourage employees to adopt a healthy lifestyle. And those who do not participate apparently bear some additional insurance expense.

Based upon the representation that all employees are treated the same as to the Wellness Program, the argument about the increase of 30% put forward by Local 517M is not particularly helpful in analyzing the issue now before the Fact Finder.

In opposing a tie-in of the drug co-pay to that paid by the non-represented employees, the Union suggested that the non-represented employees receive extra compensation by way of a bonus which Local 517M members do not receive. For this reason, the Union argued that Local 517M members should not be compared with the non-represented employees.

Such an argument brought forth a rebuttal from the Employer that there is a bifurcated pay scale among the clericals; that in previous negotiations the Union rejected the bonus system but instead adopted the bifurcated pay scale in order to continue paying certain clerical employees who have been with the Employer for some time a wage scale that is above the local market. The Employer does make a point. For this reason, the bonus system for non-represented employees is not a basis for differentiating between Local 517M members and the non-represented employees. Local 517M members have a bifurcated pay scale system. The non-

represented employees have a bonus system. This seems to be a reasonable balance between the two.

It also should be noted that the contract expired on June 30, 2004; that the parties have agreed to retroactive wages. Yet, by the delay in coming to an agreement on the drug co-pay, the Employer has not been able to realize the cost containment that would have been forthcoming in going from a \$2.00 co-pay to a \$10.00 and \$20.00 co-pay if the contract had been settled by July 1, 2004. And, yet, when the contract is ratified, the retroactive pay calculations are approximately as follows:

I. July 1, 2004 - June 30, 2005

Job Classification	June 30, 2004 Hourly Rate	3.1% Increase	Retro Dollar Amount
Y5	\$15.89	0.49%	\$1,025
Y6	\$16.87	0.52%	\$1,088
Z3	\$15.29	0.47%	\$ 986

II. July 1, 2005 - December 31, 2005

Job Classification	June 30, 2005 Hourly Rate	2.8% Increase	Retro Dollar Amount
Y5	\$16.38	0.46%	\$477.06
Y6	\$17.39	0.49%	\$506.48
Z3	\$15.76	0.44%	\$459.05

The point is this dispute on the one issue certainly requires a balancing of the parties' two interests. The Union is seeking retroactive pay and its members stand to get the retroactive pay as suggested above. Yet, during the same period of time, nine members of the Union have had an advantage as to drug co-pay that was not contemplated by the Employer when agreeing to the

wage package and to retroactivity. Thus, there must be, to repeat, a balance or an art of the possible to come to an agreement.

### **The Balance – The Art of the Possible**

Recognizing that Local 517M clerical members have received the benefit of the \$2.00 co-pay longer than was expected by the Employer and have received this benefit during a period when other employees have had higher drug co-pays and then stand to receive retroactive pay, the query is, where is the balance between the positions of the parties? In a post-hearing submission, the Employer sets forth its final position on the issue as follows:

The non-union employees currently pay prescription drug co-pays of \$10.00/\$20.00. The employer is willing to agree that the co-pay for members and of the bargaining unit will not exceed this \$10.00/\$20.00 cap through calendar year 2006, and that bargaining unit co-pays will not exceed \$20.00/\$30.00 over the last six (6) months of the Contract, from January 1, 2007 through June 30, 2007. However, this proposal is within the context of the general provision that, subject to these dollar limits, members of this bargaining unit will pay the same co-pays as the non-union employees. Specifically, this means that when this Contract expires on June 30, 2007, thereafter, starting July 1, 2007, the members of this bargaining unit will pay whatever prescription drug co-pays are being paid by non-union employees, regardless of whether a new collective bargaining agreement has been ratified. Any resolution which does not link co-pays for this bargaining unit to the non-union group will simply place the parties back in the situation in which they find themselves at present. These parties participated in numerous negotiation and mediation sessions, and managed to resolve all other issues, including several difficult issues. This prescription drug co-pay issue, however, with this particular bargaining unit, has taken on a life of its own.

In support of the above position, the Board's Advocate at pages 3-5 of his post-hearing submission writes:

The employer's specific arguments in support of its position are summarized as follows:

1. The employer's proposal removes the likelihood of a

repetition of the current scenario, in which the prescription drug co-pay has significantly prolonged the negotiations, and the related scenario of members of the bargaining unit falling far behind the co-pays of other employees for an extended period of time. At the present time, the non-union employees have been paying at the \$10.00/\$20.00 rate since 2004. The cost of the difference in benefits for the employer actually approaches the value of the retroactive pay increase for the employees, based on a comparison of Employer Exhibit 1 and Employer Exhibit 6, with respect to the employees who participate in the health plan.

2. The employer's position does not eliminate the union's opportunity to bargain in the future on this issue. In negotiations for the next contract, the union can propose changes, including future caps on contributions. But, what will be eliminated is the opportunity for this bargaining unit to pay lower co-pays for an extended period of time, long after the employer's other employees have been paying at higher, more competitive rates.

3. The overall health insurance plan at this employer is already identical for bargaining unit and non-bargaining unit employees in all other respects. The only difference is with respect to this issue of prescription drug co-pays.

4. Eight of the 17 members of the bargaining unit will not be affected by adoption of the employer's proposal. Five of those eight, who have elected the "point of service" health plan, are already paying co-pays for prescription drugs which are tied to the co-pay levels for the non-union employees. Three of the bargaining unit members do not participate in any health plans and therefore will not be affected by any change in prescription co-pays.

5. The risk for the nine bargaining unit employees who will be affected is negligible. Any future increase in prescription drug co-pays, which would apply to those nine employees, also would be applied to all of the managerial supervisory and professional employees of the employer. In other words, any change that management places on the bargaining unit they will be imposing on themselves as well. And the employer's track record reflects that co-pay rates for non-union employees have been set at reasonable levels. The current \$10.00 co-pay for generic drugs is slightly less than the median and average from the comparables. And the \$20 co-pay for non-generic prescriptions is much less than the median or average for the comparables. (Employer Exhibits 4 and 5). Finally, the employer is willing to agree to negotiated caps on co-pays through June 30, 2007.

6. The nine employees who pay the \$2.00 co-pay have benefitted greatly from the delay in resolution of this issue. Those

savings can be viewed as a "cushion" against future increases.

In summary, these are the reasons why this employer is fixed and firm on its position that prescription drug co-pays for this bargaining unit should be the same as prescription drug co-pays for the non-union employee group.

The Advocate for the Union repeated that the Union has indicated a willingness to go from a \$2.00 co-pay to a \$10.00/\$20.00 co-pay; that the Union was willing to do this as early as November 2004, beginning in 2005; that any delay was not the responsibility of the Union, but rather the Employer by not accepting the Union's offer. The holdup in coming to an agreement that could be ratified by both parties is the dispute over the tie-in of the prescription drug co-pays with those being paid by the non-represented employees. As already indicated, when faced with a situation like this, a fact finder considers the art of the possible. Or, to put it another way, balancing the interests of both parties. The question is, what is the art of the possible in this situation?

The Fact Finder has set forth the latest positions of the parties as revealed by the Board's Advocate in his post-hearing submission and as stated by the Union's Advocate. The problem with the approach proffered by the Employer's Advocate is that this approach has been floated to the Union and the Union representatives have rejected same. A recommendation that repeats this offer will not be accepted by the Union.

On the other hand, unless there is some tie-in with the non-represented employees, the Employer will not accept a settlement, continuing the stalemate, thereby jeopardizing the accomplishments that both parties have made in these contract negotiations. Without a ratified, signed contract, the wages and other provisions are not a "done deal." Local 517M members should recognize this, as should management.

Therefore, it would seem that the art of the possible, whereby a contract can be reached, is somewhere between the two points of view.

The jugular vein of the Employer's position is that the Employer, faced with rising health care costs, does not wish in the future to be engaged in prolonged negotiations over the issue as was the case here. On the other hand, Local 517M members are concerned about further increases in drug co-pays without having input into the negotiation concerning same at the time such increases take effect.

Where is the art of the possible between these two points? The Employer has made two proposals in its post-hearing submission, namely, that any increase over the \$10.00/\$20.00 co-pay not take effect until the last six months of the contract – January 1, 2007 to June 30, 2007 – “subject to these dollar limits (*i.e.*, \$20/\$30), members of this bargaining unit will pay the same co-pays as the non-union employees.”

It would seem, pursuing the art of the possible and balancing the interests of both parties, that the \$10.00/\$20.00 co-pay shall continue in existence until the last one month of the contract, namely, June 1, 2007; that the \$10.00/\$20.00 co-pay will take effect upon ratification, but the recommendation is on the assumption that the ratification will take place within two weeks of this Report; that until June 1, 2007, there will be a \$10.00/\$20.00 co-pay; that commencing June 1, 2007, if the non-represented employees' co-pay is increased, then the co-pays of Local 517M clerical members shall be increased to the same drug co-pays paid by the non-represented employees in effect as of June 1, 2007.

The Recommendation is also coupled with the recommendation that the contract provide language that the parties begin bargaining for a successor contract to the contract expiring on

June 30, 2007 no later than one hundred twenty (120) days before June 30, 2007 so that the parties can reach mediation prior to the expiration of the contract and, if necessary, fact finding either before the expiration or shortly thereafter, so that from both parties' perspective, they can avoid a repeat of the current delayed situation. The motivation for this provision is to enable Local 517M to negotiate any economic issues with dispatch, if any, after there has been an increase, if any, of the \$10/\$20 co-pay. It may be that the non-represented group may have received economic adjustments at the time of a change in that group's drug co-pay. Since the contract between Local 517M and the Holland Board of Public Works will have incorporated any drug co-pay increase for the last month of the 2004-2007 contract, Local 517M should be able to address with dispatch in the then ongoing negotiations for the successor to the 2004-2007 contract possible economic issues if same were a factor in the change in the drug co-pays for the non-represented employees.

The Fact Finder will not recommend any particular cap on the drug co-pay because, to adopt the Employer's proposal as to a cap might suggest the nature of the future co-pay. This, the Fact Finder is not willing to do. Furthermore, as noted, if there is not a change in the non-represented drug co-pay, then there would be no change as of June 1, 2007 in the 517M co-pay over the \$10/\$20 co-pay.

This seems to be a reasonable compromise and is consistent with the art of the possible. The fact is there is a pattern at the BPW. When Local 517M agreed to the \$10/\$20 co-pay, the clerical members were agreeing to the pattern set by the non-represented employees in January 2004. This pattern seemed to be consistent with the ongoing pattern being adopted elsewhere in the City of Holland. If the non-represented employees again have a change in drug co-pay, it

would seem, consistent with the pattern, that Local 517M members should be subject to the same co-pay, particularly when some of the members will be, by virtue of being in the POS.

In other words, the Board gets the tie-in at the very end of this contract with the non-represented employees in the last month of the 517M contract. But, in return for assuring that the pattern continues, Local 517M members, if faced with an increased drug co-pay, are in a position at the time to bargain as to any economic issues to be addressed in the successor contract. This is the reason the Fact Finder has emphasized the need for an expedited method of negotiating the successor contract. Both positions are accommodated by this Recommendation and are consistent with the bargaining pattern within the Board of Public Works and within the City itself. And the reason any change in co-pay does not take effect until the last month of this contract is to provide Local 517M with the opportunity to address any economic issues, if any, with dispatch when addressing the successor contract.

#### **A Word To The Parties**

This has been a long negotiations. There comes a time when a contract must be arrived at. The Recommendation discussed above is consistent with the art of the possible. The Union gets the benefit of the \$10.00/\$20.00 for almost the full time of the contract. The Employer may get an increase in the drug co-pay during the life of this contract in the last month of the contract if it institutes such an increase with the non-represented employees. During the last month, the parties will be in bargaining and can address any economic issues in the successor contract that may arise because of any co-pay change. But the concept is that the parties will be on track to resolve their successor contract expeditiously. Nine employees are involved. It may be that the \$10.00/\$20.00 may not be increased during the life of this contract.



But what is clear is that the parties do not seem able to reach a 2004-2007 contract until they reach some compromise. The parties have asked a third party his views based upon their facts.

The Fact Finder has been very careful not to suggest what any additional co-pay might be. All the Fact Finder has done is provide for a possible change in the co-pay near the end of this contract at a time when the parties would be bargaining for a new contract. Any economic issues that might develop following a changed drug co-pay can be addressed at that time with dispatch in negotiating the successor contract. This is the reason the Recommendation is coupled with a provision providing for an early commencement of negotiations for a successor contract.

Neither party might be satisfied with this Report. But that is the whole idea of the art of the possible. Putting aside rigid positions, or even modified positions, and attempting to find common grounds in a dispute that has been going on approaching a year and one-half, the time has come to bring this matter to a head.

### **RECOMMENDATION**

It is recommended that within two weeks of this Report, the contract be ratified, at which time the insurance prescription drug co-pay of \$10.00 for generic drugs and \$20.00 for brand name drugs will take effect; that the \$10.00/\$20.00 insurance prescription drug co-pay shall remain in effect until June 1, 2007, at which time the insurance prescription drug co-pay shall be whatever the insurance prescription drug co-pay is with the Employer's non-represented group of employees as of June 1, 2007. This Recommendation is based upon a contract commencing July 1, 2004 and expiring June 30, 2007.

In addition, it is recommended that negotiations for the successor to the 2004-2007

contract commence no later than one hundred twenty (120) days prior to June 30, 2007.

  
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GEORGE T. ROUMELL, JR.  
Fact Finder

November 23, 2005