2122

In the Matter of Statutory Factfinding between:

CITY OF MUSKEGON,
Employer
-and-

LOCAL 517M,
SERVICE EMPLOYEES INTERNATIONAL UNION,
Union.

MERC Case No. L05 G-7013

Hearing: March 8, 2006
City of Muskegon, Mi.

Briefs filed by: March 30, 2006

FACTFINDER BEN KERNER'S
REPORT, FINDINGS AND RECOMMENDATIONS.

Appearances:

For the Employer:	John Schrier Parmenter O'Toole
For the Union:	Terry Van Eyck Business Agent

Also present for part or all of the hearing: Garrett Anguilm, Bob Hartman, Brett Kraley, Bob Kuhn, Tim Paul, Terry Redmon, James Schoonbeck, Lee Slaughter, Randy Wells, Doug Winkle.

Dated: March 31, 2006

BACKGROUND.

The parties are signatories to a collective bargaining agreement which expired, by is terms, on December 31, 2004. They have been engaged in bargaining for a new contract since October 20, 2004, up to and including January 20, 2006. Even at the factfinding hearing held on March 8, 2006, there was bargaining in the sense that some management proposals were considered by the Union in caucus, and stipulated to. That was the case for Section 35.7 (Insurance) whereby the Union agreed to the City proposal to increase co-pays for generic drugs to $20 and brand name drugs to $40. That was also the case for Section 35.2 whereby the Union agreed to a management proposal for retirees who retire after 12/31/04, excluding duty and non-duty disability until regular retirement, limiting retiree dependents to the spouse and dependents of the retiree at the time of retirement (no other dependents to be added after retirement). The City also agreed to withdraw an issue that had been highly contentious, the issue of Recognition of the Union as bargaining agent for certain job titles and/or work.

There remained 6 issues in dispute plus three wage years (2005, 2006, and 2007). The purpose of factfinding under the Labor Mediation Act, MCL 423.25 is to have an outside neutral 3rd-party determine the facts relevant to each issue in dispute and by making his findings public, encourage the parties to resolve their differences on the basis of the factfinder's recommendation or some other basis. I was appointed by the Michigan Employment Relations Commission to be such a neutral 3rd-party by letter dated November 4, 2005. Through

correspondence and joint conference calls with the parties' representatives I have delimited the issues for hearing, and set up the details of the hearing. I have had full cooperation from both parties, and the passage of time from November 2005 until today's date has been necessitated by normal scheduling demands. There follow my findings and recommendations on each issue in dispute.

ISSUES IN DISPUTE.

LAYOFF and RECALL. [Section 15E].

The Employer proposes to modify the last sentence of Section 15.2E of the current contract to require contractual requirements, e,g., CDL licences on the date of an employee's appointment and to obtain other requirements within 6 months of appointment.

The Employer's evidence showed that there are occasions where an employee is bumped back into a previously held job in the equipment division, for instance, and has not had experience in that division for 10 or 15 years. In such a situation, the person may still have the CDL license, but lack up-dated certifications or other credentials. In such situations, says the Employer, it must have the ability to make decisions, as authorized by the language of the proposal: "A decision on the ability of the employee to do the work shall be made by the Management not less than fifteen (15) days nor more than six (6) months after the bump is effective." What the Employer proposes further is that the final sentence of the section be deleted. It reads: "However, if an employee claims a job in a classifi-

cation where she/he was previously qualified, there will be no qualification requirement."

The Union argues that an employee who bumps into a previously held job should be deemed to be qualified, by virtue of that prior service, to perform the work of the classification. The Union is opposed to removing the last-quoted final sentence of Section 15.2 E.

FINDINGS AND RECOMMENDATION.

The Factfinder is aware that the two above-quoted sentences in Section 15.2E are in conflict. The first sentence gives management the right to determine the ability (of an employee who has been bumped) to do the work required. The second sentence makes an exemption for the employee who is bumped into a previously held classification, such that he is not subject to re-qualification. The Factfinder is of the opinion that the inherent textual conflict between these sentences should be resolved by allowing management the right to make decisions on employee abilities in all cases. The reason is, as stated by Equipment Supervisor Brett Kraley, sometimes the bumped employee has no recent experience in the classification to which he is bumped, and in order to perform the work effectively, it is necessary to have a re-qualification period.

I make this recommendation with the caveat that the contract language should reflect that the burden is on management to show that an employee is not qualified. Thus, the language should read, after the second sentence of Section 15E, "Management must show by clear, convincing, and specific evidence that the employee claiming a job in a previously held classification is not able to per-

form the requirements of that classification. The employee shall be notified of such clear, convincing and specific evidence and of management's determination in writing; or alternatively, he shall be notified by management that he is considered capable of doing the work required." With this caveat, it is recommended that the final sentence of Section 15E [However, if an employee claims a job in a classification where she/he was previously qualified, there will be no qualification requirement] be deleted.

DIRECT DEPOSIT. [New Language]

This is a management proposal to amend Section 37 of the current contract. The City proposes that all bargaining unit employees receive payment of their wages through direct deposit to their designated financial institutions.. The Union is opposed to this proposal, partly on the ground that it believes the proposal is a permissive (not a mandatory) subject of bargaining.

The Employer presented Mr. Tim Paul, Finance Director of the City, to show that the mechanism of direct deposit of wages saves the City money; it reduces the chance of fraud; and, it is all around, just more efficient.

The total cost of issuing checks includes check printing costs and bank charges, including reconciliation. It amounts to an annual cost, over the entire labor force, of $7,825; whereas the cost over the entire labor force, if full direct deposit were implemented, would be $2,059, a savings of more than $5,700.

FINDINGS AND RECOMMENDATION.

The difficulty I have with the Employer's proposal is that, as the Union cited, there is a State statute directly addressing the manner in which employees are paid their wages, the Payment of Wages Act, MCL 408.471 et. seq. It identifies the frequency with which wages must be paid, the scope of fringe benefits which may be deducted pursuant to "written contract or written policy," MCL 408.873, and other allowable deductions from wages. The Payment of Wages Act contains a section on the method for payment of wages, and says therein,

> Section 6(2) Except as provided in section 283a of the management and budget act, 1984 PA 431, MCL 18.1283a, an employer or agent of an employer shall not deposit an employee's wages in a bank, credit union, or savings and loan association without the full, free, and written consent of the employee, obtained without intimidation, coercion, or fear of discharge or reprisal for refusal to permit the deposit.

The quoted provision vests individual employees with the right to determine if they want an employer to deposit their wages in a bank or other financial institution, if such option is offered. It is clear and specific. I therefore find that the provisions of State law make it illegal for the Employer to bargain collectively to do away with an individual's rights under the Payment of Wages Act. The subject matter is illegal in the same sense that the Employer cannot introduce a proposal in bargaining which would have the affect of stripping an individual employee of the right to be free from discrimination on the basis of age, or sex, or race. The Union cannot entertain such a proposal, and the Employer cannot insist upon it. It is simply an illegal subject of bargaining (not permissive, not mandatory). Thus, it is my recommendation that the Employer's proposal on direct deposit of wages be set aside.

RETIREMENT FOR NEW EMPLOYEES [Section 52].

The Employer proposes to amend Section 52 of the current contract to provide:

> Employees hired after June 1, 2005, will participate in a defined contribution retirement plan instead of the defined benefit plan. City shall contribute 3% of pay. If the employee contributes 3% of pay, the City will match that amount. Employee's contribution shall be fully vested. The City's contribution shall be 20% vested after the first year, 40% vested after the second year, 60% vested after the third year, 80% vested after the fourth year and 100 % vested after the fifth year. Current employees will be provided a one time option of rolling over from the defined benefit retirement plan to the defined contribution retirement plan.

The Employer notes that it is the trend, in both private sector and public sector employment, to move new employees into defined contribution pension plans. They give the Employer control over pension costs. They provide no nasty surprises at the end of a fiscal year, or quarterly, when actuaries' statements may be delivered. They are a mechanism for reducing overall pension costs.

In addition, the Employer presented evidence that the clerical bargaining unit provides the same choices as proposed for new hires in this bargaining unit. That is, new hires to the clerical bargaining unit are offered a choice of making no contribution to their pension plan, in which case the Employer makes a 3.0% contribution; or the option of making a 3% contribution, in which case the Employer makes a 6% contribution. The Employer showed that it has the same basic plan in effect for the non-unionized group of employees. And, there are

negotiations on-going with the police patrol officers' bargaining unit regarding the terms of the pension plan for new hires.

The Union argued that the new, proposed plan creates conflict between union members who enjoy the privileges of the old plan, and union members who will receive contributions under the new plan. In time, says the Union, a majority of the membership of the bargaining unit will receive pension contributions under the new plan, and it is "likely that the defined contribution plan could be watered down for long time employees...." [Brief p. 2]

FINDINGS AND RECOMMENDATION.

The Factfinder finds that the Employer's plan has a lot of common sense to recommend it. It provides a defined contribution, at several different levels, depending on the extent of employee contribution, such that a substantial pension benefit is built up over the years of employment. The new proposal does not suffer the vagary that the old defined benefit plan had, of not knowing the exact annual contribution required by the Employer. It fixes the Employer's liability as a percentage of payroll.

Further, I find that the plan operates prospectively only and for new employees only. Thus, none of the benefits accrued by current employees (or more accurately, employees who were employees prior to June 1, 2005) are diminished or impaired in any way. The fear, expressed in President Redmon's testimony that the new employees would outstrip the interests of older employees is ill-founded, because it is extremely unlikely that the old employees will have their pension plans diminished or impaired by the Employer. It is true that,

as time goes on, the Employer will be focusing its bargaining proposals more toward the interests of defined contribution employees, and that is only natural. But I do not see that as an impairment of the retirement opportunities of the "old guard." Thus, in sum, I endorse the Employer's proposal on Retirement for New Employees.

APPENDIX C LICENSES.

A portion of this item, relating to S-1, S-2 and S-3 licenses was tentatively agreed at the hearing. Remaining is the Employer's proposal to "Pay $1000 per year for Master ASE licences, as long as the employee is in the mechanic position."[Brief, p. 7] The City would no longer reimburse employees for obtaining and maintaining their Master ASE license."

Mr. Kraley, the equipment supervisor, testified on behalf of the Employer that the Auto Service Excellence (ASE) licence was a necessity for a few people in the garage; and that he could not retain master mechanics without some sort of incentive payment, as represented by this Employer's proposal. In other words, the collectively bargained wage, as specified at Appendix A, is not sufficient to keep qualified master mechanics, according to Mr. Kraley.. Master mechanics are required to show proficiency in 8 disciplines, and must be re-licensed every 2-4 years. This proposal is for a supplement to wages, and does not involve payment of any costs of preparing for or taking the re-licensure tests.

The Union says that the master ASE license supplement proposed by the Employer is "nice money." But it's just for one classification. The Union does not

see picking out one classification, as opposed to all the other classifications which require maintenance of a CDL, for instance, and rewarding one or two individuals in this fashion.

FINDINGS AND RECOMMENDATIONS.

The Factfinder finds that the maintenance of the master ASE license is a requirement for only one classification. If the Employer finds that the rate of pay is not attractive to current holders of the mechanics' position, it may have to re-negotiate the rate of pay for that classification pursuant to Appendix A or C. The improvement sought by the Employer is for holders of the ASE license only; thus, it makes sense to negotiate the change in Appendix C. The Union's concern doesn't really address the labor market consideration that the Employer faces in retaining qualified master ASE mechanics. Thus, I recommend the parties settle on the basis of the Employer's proposal.

RETIREMENT-MULTIPLER FOR CURRENT EMPLOYEES. [Section 52]

The Union proposes to increase the pension multiplier in the defined benefit retirement plan from 2.25% to 2.3% of final average compensation. The Employer argues that there is inadequate justification for this demand in view of the following factors:

--a higher multiplier is the norm for police and fire, but the police and fire employees do not have Social Security coverage, whereas members of the SEIU bargaining unit do have social security coverage;

--the clerical employees union has the same retirement multiplier as the current SEIU plan. Likewise, the non-union group of employees has the same retirement multiplier as the SEIU unit. In addition, the members of the SEIU bargaining unit contribute less [3% of the first $4,200 of compensation; 5% thereafter] than the clerical employees unit and the non-union group of employees [who contribute 5% of compensation.].

--the City has been investigating the possibility of having the Michigan Employees Retirement System (MERS) administer its pension program; and, under MERS options, a 2.3% multiplier does not exist, where a 2.25% multiplier is a standard benefit.

FINDINGS AND RECOMMENDATION.

The Factfinder is not persuaded to any position by the possibility that the City may have MERS administer its pension program. However, the treatment of other bargaining units within the City is instructive and helpful in establishing what is a fair outcome on this issue. The Employer has essentially shown that its non-uniform employees, including other unionized employees and the non-union group, have the same retirement benefit—a 2.25% final average compensation (as a multiplier times years of credited service). The uniformed services are not directly comparable, because they do not enjoy Social Security benefits; and the pension plan available to either police or firefighters must be sufficient to fund adequate retirement, without looking to the federal "safety net" of Social Security. Thus, in sum, I find that the valid comparison is with other employee groups of the Employer; and that this comparison indicates that the 2.25% final average

compensation component of the retirement plan is adequate. I recommend the parties settle on the basis of the Employer's proposal on the subject of pension multiplier.

APPENDIX A-- WAGES.

The parties have differing proposals for wage increases for the three years of the contract period, as follows:

The Union demands 2% effective retroactively to January 1, 2005; 2% effective retroactively to January 1, 2006, and 2% effective January 1, 2007. The Employer offers 2% for the expired 2005 contract year, plus 2.0% effective January 1, 2006 and 2% effective January 1, 2007, wage increases not to be paid for time periods before 30 days from the date the City is notified of Union ratification of this contract.

The parties' expired collective bargaining agreement (2002-2004) contains a sentence at Section 54.1 as follows: "In the event of a failure of the parties to reach an agreement upon such amendments or modifications by December 31, 2004, all subsequent agreements shall be retroactive not to exceed thirty (30) calendar days from the date of final agreement, provided that such retroactivity shall not precede the expiration date of this Agreement."

In addition, the Employer presented evidence that prior agreements going back to 1989-91 contained language identical to or similar to the quoted Section 54.1. The Employer sought to show further that the final agreement dates were generally within 30 days or at least within 60 days of the expiration of the prior agreement.

Thus, for instance, the prior agreement (2002-2004) was finally agreed on or before February 27, 2002 and was made retroactive to January 1, 2003.

The 1992-94 agreement was finalized on or before February 11, 1992 and was made retroactive to January 1, 1992.

The 1989-1991 agreement was finalized on or before March 14, 1989, and was made retroactive to January 1, 1989.

If these contracts, and their final agreements dates and retroactive dates form a pattern, the following contracts clearly break the pattern:

The 1998-2001 contract was finalized on or before July 17, 1998, and was made retroactive to January 1, 1998.

The 1995-1997 contract was finalized on or before July 25, 1995, and was made retroactive to February 12, 1995.

FINDINGS AND RECOMMENDATIONS.

Surely, the recitation of these contract completion dates (and they are only estimates, in that the date of union ratification or City Commission approval does not indicate when the parties reached full and final agreement at the bargaining table) cannot be taken to show a uniform practice of enforcing the language contained in Section 54.1. I find, in fact, that there were a number of different legitimate explanations given, for each year in which bargaining occurred, as to why that year the parties encountered delays. The specifics are not important for the finding I make herein. Rather it is the general observation that the vagaries of bargaining for a new contract to cover conditions of employment for as

large a unit as this inevitably involves vicissitudes and delays from various sources.

The evidence indicates that the parties mutually attempted to reach final agreement before March 1 of each new contract year. However, factors such as the bargaining for an alcohol and drug protocol in one year, or the demand for ceding bargaining unit recognition over a classification of employees in another year (2005), are all part of the business of bargaining. Each year entails its own idiosyncrasies; each year focuses the bargainers' attention in different ways. The net result is that it has proven hard, but not impossible to achieve a finally agreed contract by March 1st of the year in which the contract starts. More often, a later date may be regarded equally as the rule or as the exception.

Thus, I find that the language of Section 54.1 must be interpreted as a guideline, and not as a mandate. I find that the provision for retroactive pay increases is not—by the parties' own practices—to be narrowly limited by the 30 day rule apparent in Section 54.1.

On the other hand, I also find that the request of the Union for retroactive pay increases going back over 16 months as of the date of this Factfinder's Report is problematic for the reasons expressed by Mr. Paul at the hearing. The auditors are already done with their work for 2005. The overtime that was due to be paid under the 2002-04 contract has already long since been computed and paid. The fringe benefit rates applicable, including the computation of pension liability has been finalized. Although it is not impossible to over-write these

determinations and make a wage determination retroactive for a 16 or 17 or 18 month period, it is clumsy, and creates book-keeping headaches.

As an alternative, I have decided to recommend that the pay increases due under the 2005-07 contract should be concentrated in the last two years of the contract period. Thus, I am recommending a 0% increase for 2005; a 3% increase effective January 1, 2006, and a 3% increase effective January 1, 2007.

As is true of many compromise solutions, this one is not likely to make anybody happy. But it is a result which I believe accords most nearly with the evidence in the case, and with the intent of Section 54.1. I commend it to the serious consideration of the bargainers.

Benjamin A. Kerner
Factfinder

Dated: March 31, 2006.