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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
ACT 312 ARBITRATION

CITY OF PORTAGE,

Petitioner

-and-

MERC Case No. L05 I-4002

PORTAGE POLICE OFFICERS ASSOCIATION

Respondent

_____/

Panel of Arbitrators

Thomas L. Gravelle, Chairperson
Kevin M. McCarthy, City Delegate
Michael F. Ward, Association Delegate

KEVIN M. McCARTHY, ESQ.
For the City

MICHAEL F. WARD, ESQ.
For the Association

OPINION AND AWARD

JULY 1, 2005 – JUNE 30, 2007
COLLECTIVE BARGAINING AGREEMENT

Dated: April 7, 2008

INDEX

INTRODUCTION

The hearing of this matter was held in Portage, Michigan on, March 28, 29 and 30, May 4, August 8, and October 2, 2007.

The parties' 2000-2002 contract was decided by Act 312 Award.

The parties' 2002-2005 contract was negotiated by the parties.

The parties' 2005-2007 contract is the subject of the present Act 312 proceeding.

Most of the outstanding issues are economic. Under the law, the Panel is required to accept the last offer of settlement ("last best offer" or "Final offer") made by one or the other party for each economic issue. In deciding which offers to accept, the Panel has considered the applicable factors set forth in Section 9 of Act 312 PA 1969. Section 9 reads:

> 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 on the following factors, as applicable:
>
> (a) The lawful authority of the employer.
>
> (b) Stipulations of the parties.
>
> (c) The interest 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 in 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.

Each party has initiated six issues. On some issues, both parties have proposed to amend the status quo language. Issues 1 through 6 were initiated by the City. Issues 7 through 12 were initiated by the Association.

The parties have submitted much data, not all of which is in accord. However, overall it is more than sufficient to decide the issues (even though a party might have reason to quibble over a particular datum).

STIPULATIONS

The parties have stipulated that the new collective bargaining agreement will consist of the following:

(a) The new collective bargaining agreement will run from July 1, 2005 to June 30, 2007.

(b) The new agreement will consist of the parties' previous collective bargaining agreement as modified by the parties' signed tentative agreements and by this Award.

(c) The parties agree that all time limits are waived.

(d) The parties' agreed-upon comparable communities are the following local units of government:

Battle Creek	Bay City
Burton	East Lansing
Holland	Jackson
Kalamazoo	Kalamazoo County
Kalamazoo Township	Kentwood
Midland	Port Huron
Wyoming	

The Panel adopts the above stipulations.

FACTUAL BACKGROUND

The City of Portage is the Employer. It is located in southwestern Michigan and has a population of about 45,000 people.

Five separate labor organizations represent different bargaining units in the City.

1. The Portage Police Officers Association ("PPOA" or "Association") represents the employee classifications of Patrol Officer, Detective, Radio Operator and Police Service Technician (PST).

The PPOA represents about 37 Police Officers, 6 Detectives, 9 Radio Operators, and 3 PSTs.

2. The Portage Police Command Officers Association ("PPCOA") represents the City's 5 Police Sergeants, and 5 Police Lieutenants.

The City's Police Department also has 2 Deputy Chiefs and 1 Chief (who do not have Union representation).

3. The International Association of Firefighters ("IAFF") represents Firefighters, Battalion Chiefs, and Captains

4. The UAW represents hourly employees in the City's Streets and Parks Department.

5. The Technical, Office and Clerical Union has one member – a supervisor in the Streets Department.

The City also has unrepresented office and managerial employees.

ISSUE 1: MANAGEMENT RIGHTS

The City is proposing to amend the Management Rights clause (Section 1.3) to make explicit numerous management rights.

The Association is proposing that the status quo be retained.

OPINION AND AWARD

Section 1.3 currently states:

> The Association recognizes that except as specifically limited or abrogated by the terms and conditions of this Agreement, all rights to manage, direct and supervise the operations of the employees are vested solely and exclusively in the Employer.

The City is proposing to add the following language to Section 1.3:

> This means that, subject to the specific terms of this Agreement and by way of illustration and limitation, the Employer has the right to (a) manage its affairs efficiently and economically, including the determination of quantity and quality of services to be rendered, the control of materials, tools, and equipment to be used, and the discontinuance of any services or methods of operation; (b)

introduce new equipment, methods, or processes, change or eliminate existing equipment and institute technological changes, decide on materials, supplies, equipment, and tools to be purchased; (c) subcontract bargaining unit work; (d) determine the number, location, and type of facilities and installations; (e) determine the size of the work force and increase or decrease its size; (f) hire, assign, and lay off employees; (g) permit City employees other than Police Department employees to perform bargaining unit work when in the opinion of management this is necessary for the conduct of municipal services and is determined to be an emergency; (h) direct the work force, assign work and determine the number of employees assigned to operations; (i) establish, change, combine, or discontinue job classifications; (j) determine lunch, rest periods, and cleanup times, tarting and quitting times, and the number of hours to be worked; (k) establish work schedules; (l) discipline and discharge employees for cause; (m) adopt, revise, and enforce working rules and carry out cost and general improvement programs; however, no rule or regulation shall be adopted hereafter without notice to the Association; (n) transfer, promote, and demote employees form one classification, department, or shift to another; (o) select employees for promotion or transfer to supervisory or other positions and determine the qualifications and competency of employees to perform available work.

Because this is a non-economic issue, the Panel is not limited to either party's final offer in deciding this issue.

The City's proposal appears virtually identical to the East Lansing Police management rights clause. (City Ex.10). It also closely resembles the Holland Police management rights clause. (City Ex. -9).

The City argues that it is only seeking a clarification of its existing management rights and not an increase of them, and that the language is desirable because on occasion bargaining unit members have appeared to misunderstand the scope of the City's management rights.

The Association argues that change is unnecessary, and appears to primarily object to the proposed new language as to (c) subcontracting, (g) emergency work, and (i) job classifications.

These issues are often addressed in arbitration proceedings. For this reason, ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6TH Edition (BNA Books 2003), a leading treatise on labor arbitration, provides a useful reference. Its discussion of subcontracting bargaining unit work includes the following observations:

> Although management-rights clauses are common, there is no consensus as to their form or content.
>
> . . .
>
> The simpler clauses were once favored because of their clear-cut statement of the rule that the employer has all the proprietary rights of management except as restricted by the terms of the Agreement. However, as one reaction to the 1960 *Steelworkers* Trilogy, many management representatives now prefer a much more extensive and detailed clause to specify as fully as possible the matters over which management retains full discretion.
>
> . . .
>
> In the final analysis, the thinking of many arbitrators is probably reflected in the following statement:
>
> > In the absence of contractual language relating to contracting out work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. This general right to contract out may be expanded or restricted by specific contractual language.

Id. at 661, 662, 746.

As to non-bargaining unit performance of bargaining unit work in an emergency, ELKOURI & ELKOURI writes:

> Arbitrators are divided on the question of whether, in the absence of contract language to the contrary, management has the right to assign bargaining-unit work to employees outside the bargaining unit.
>
> . . .
>
> [Some] arbitrators, in the absence of a specific contract restriction, have relied on one or more of the following considerations to uphold management's actions:
>
> . . .
>
> 11. An emergency is involved.

Id. at 757-759.

As to job classifications, ELKOURI & ELKOURI writes:

> The right of management to establish new jobs or job classifications is sometimes specifically stated in the agreement, along with some provisions for union challenge of management's actions via the grievance procedure and arbitration. The right also has been recognized as being vested in management except as restricted by the agreement, and it likewise might be included within the scope of a general management-rights clause.

Id. at 680.

In considering the above citations, one proposed management right – to subcontract bargaining unit work – should not be left solely to the City's discretion. On this point, only two of the comparable communities (Holland and East Lansing) expressly contain subcontracting as a management right. Therefore, I am striking it. As to the use of non-bargaining unit employees in an "emergency," this can be challenged by the Association if the City were to rely on it absent a real "emergency." Job classifications as a management right are stated in the management rights clauses of five comparable communities (Holland, East Lansing, Burton, Kentwood and Wyoming). In addition, given the common structures of municipal police departments, it is not apparent what job classifications conceivably would be "changed" in any prejudicial way under this management right.

For the above reasons, the City's Final offer is adopted, except that "subcontract bargaining unit work" is deleted (with subsequent subsections to be relettered).

ISSUE 2: SICK LEAVE

The City is proposing to amend the sick leave language set forth in Section 8.3(c) to authorize a second medical opinion, with the option of a third medical opinion if the employee disagrees with the second medical opinion.

The Association is proposing that the status quo be retained.

OPINION AND AWARD

Section 8.3(c) currently states:

> The Employer may require medical proof of the necessity for said sick leave, in which event the involved employee shall be required to produce a statement from a medical doctor certifying to the necessity for such absence.

The City is proposing to add the following language to Section 8.3(c):

> The Employer may ask for a second opinion from a physician of the Employer's choice, paid for by the Employer, to substantiate the need for the sick leave following a period of absence that exceeds the later of 6 weeks or the period of any FMLA leave time taken by the employee. If the employee disagrees with the findings, a third doctor mutually satisfactory to the Employer and Association will be chosen to examine the employee and his/her findings will be binding on the employee, the Employer, and the Association. The fee charged by the third doctor will be paid by the Employer.

Because this is a non-economic issue, the Panel is not limited to the parties' final offers in deciding this issue.

Of the 13 comparable communities, 10 have no provision for an employer directed examination, two provide the option of employer doctor examination after three or ten day absences, and one provides for employer doctor examination if the employer has a reasonable suspicion that the employee is abusing or misusing sick leave. (City Ex. 15).

The City argues that the sole purpose of its proposal is to obtain a medical estimate of when an employee will be able to return to work "following a period of absence that exceeds the later of 6 weeks or the period of any FMLA leave time taken by the employee," and that its purpose is not to detect malingering employees.

The Association argues that the City has shown little need for such new language and that its unspoken purpose is to detect malingerers without any showing of malingering. The Association also argues that some employees might be offended by being examined by another doctor of a different sex.

Having taken into account the parties concerns, the City's proposed language is adopted except the following underlined clause is to be inserted at the beginning:

> If an employee's attending physician fails to give an estimated return to work date, the Employer may ask for a second opinion, *etc.*

and the following underlined sentence is to be added at the end:

> In either event, the employee may request a physician whose sex is the same as the sex of his or her attending physician.

ISSUE 3: COMPENSATORY TIME

The City is proposing to amend the compensatory time language set forth in Section 11.1 (and Appendix L) to require that unused accumulated compensatory time hours be paid each June 30.

The Association is proposing that the status quo be retained.

OPINION AND AWARD

The second paragraph of Section 11.1 currently states:

> Effective upon issuance of this Act 312 arbitration award bargaining unit employees may elect to receive compensatory time, at the appropriate overtime rate, in lieu of receiving payment for overtime hours. Employees shall be allowed to accumulate up to a maximum of eighty compensatory hours. (See Appendix L).

The City proposes to amend Section 11.1 by deleting the initial clause and adding the following underlined sentence:

> ~~Effective upon issuance of this Act 312 arbitration award bargaining unit~~ Employees may elect to receive compensatory time, at the appropriate overtime rate, in lieu of receiving payment for overtime hours. Employees shall be allowed to accumulate up to a maximum of eighty compensatory hours. See Appendix L). Each employee's accumulated comp time hours must be cashed out on June 30 each year.

Compensatory overtime in lieu of overtime payment was awarded by the Act 312 Panel in 2002 at the request of the Association. Previously, no provision allowed employees to elect to take compensatory time off in lieu of receiving pay for overtime hours on the next scheduled pay day. The Act 312 Panel explained:

> The Union, in its brief and reply brief, says the City's argument that it would create major cost is without merit, because management has the ability to schedule when the compensatory time would be taken and the ability to schedule non-overtime replacements if needed in most instances.
>
> . . .
>
> Given that the contract emanating from this proceeding will expire June 30, 2002, the parties have the benefit of review of other comparable community provisions on this issue to use as a guide if more clarity in its administration is desired.
>
> . . .
>
> It appears to the independent arbitrator that this provision adds to, rather than detracts from, the ability of the City to provide quality service to its citizens without extensive additional costs, if managed properly.
>
> City Ex. 2, pp. 31-33.

In 2003 (after the issuance of the 2000-2002 Act 312 Award), the parties agreed to Appendix "L" of their (most recent) 2002-2005 collective bargaining agreement. Appendix "L" provides:

> 3. Total accrued balances of Compensatory Time Off (not to exceed 80 hours) will be paid at the straight time rate of pay in the following circumstances:
>
> a. Termination or resignation.
> b. Retirement
> c. To the beneficiary, designated by the employee on the beneficiary form furnished by the city, in the event of death.
> d. Upon written request to the Chief of Police, and paid on the next regularly scheduled payroll.

The City argues that an annual June 30 overtime pay-out will be at the same rate as the overtime earned rather than at a higher future rate, and will be easier to account for and administer.

The Association argues that other fringe benefits are not paid out annually, and that because the City controls the usage of compensatory time off the effect of the City's proposal would be to curtail compensatory time off. On this point, Union President Barkley testified that a team leader (sergeant or lieutenant) controls comp time usage based on manpower needs, with requests to use one day of comp time usually being denied. Further, bargaining unit members make their vacation picks by March 1 and August 1 each year. Under the parties' most recent contract, employees have combined their vacation time and unused comp time to take time off. Cashing out comp time each June 30 would prevent its use to increase vacation time off.

Of the 13 comparable communities, three provide no comp time off; one provides that comp time must be cashed out within three months; and the rest appear

to allow the accumulation of comp time of at least 80 hours (City Ex. 17; Assn. Ex. 15). In other words, almost all of the comparable communities with comp time off are consistent with the current contractual language (including Appendix "L") allowing the accumulation of up to 80 hours of compensatory time.

The parties' voluntary adoption Appendix "L" appears reasonable; and the record does not show why this voluntary agreement should be changed.

For these reasons, the Panel adopts the Association's final offer on this issue.

ISSUE 4: LONGEVITY PAY

The City is proposing to amend the longevity pay language set forth in Section 14.1 prospectively to substitute flat money rates for percentages in the computation of longevity pay.

The Association is proposing that the status quo be retained.

OPINION AND AWARD

Section 14.1 currently states:

> All regular full-time employees shall receive longevity pay for service in accordance with the following schedule:
>
> Longevity pay shall be in accordance with the following schedule:
>
> Upon completion of 5 years – 2% of base pay
> Upon completion of 10 years – 4% of base pay.
> Upon completion of 15 years – 5-1/2% of base pay
> Upon completion of 20 years – 7-1/2% of base pay
>
> Continuous service shall accrue from the last hiring date.

The City proposes to replace the percentages in Section 14.1 by adding the following underlined flat dollar rates, and making them prospective only:

All regular full-time employees shall receive longevity pay for service in accordance with the following schedule:

Longevity pay shall be in accordance with the following schedule:

Upon completion of 5 years – $700
Upon completion of 10 years – $1,400
Upon completion of 15 years – $2,100
Upon completion of 20 years – $2,800

Continuous service shall accrue form the last hiring date. Although the change in the longevity benefit from a percentage-based system to a flat dollar amount system is effective July 1, 2005, the Employer will not pursue repayment of any longevity payments that are made to employees prior to the neutral Arbitrator's issuance of the Act 312 Award in MERC Case No. L05-4002.

The City explains that the above change also requires the following change in Section 14.3:

The above-referenced longevity payment shall be made the first pay period after the employee's anniversary date. ~~Longevity pay shall be calculated on rate of base pay on the employee's anniversary date.~~

The City argues that the present percentage formula yields longevity pay which is too high because it goes up when employees receive a step increase, a negotiated pay increase or a COLA adjustment, all of which are components of employee base salary. The City also argues that its proposal is supported by comparable communities.

The Association argues that the City's proposal would result in substantial reductions in longevity payments, and would breach "the long-standing economic parity between the Police Officers and the Command Officers" (whose recently negotiated agreement preserves the same longevity pay percentages). The Association also argues that a number of comparable communities base longevity pay on a percentage basis, and none has reduced their longevity payments.

In addition to its longevity pay proposal, the City also has proposed the elimination of COLA and raises of 2% and 2.75%. In its brief, the City has provided the following ranking of wage compensation for 20-year officers under the Association's Final offer (raises, longevity pay percentage, and retention of COLA) and the City's Final offer (raises, fixed longevity pay, and elimination of COLA) as of June 30, 2007 in comparison to parallel wage compensation of the comparable communities:

	Association Wage LBO	*City Wage LBO*
Portage	**$64,004.12**	**$61,504.18**
Kalamazoo County	$61,693.32	$61.693.32
City of Kalamazoo	$60,715.38	$60,715.38
Port Huron	$60,095.20	$60,095.20
Kalamazoo T'ship	$59,993.06	$59,993.06
Midland	$58,779.30	$58,779.30
Kentwood	$56,478.00	$56,478.00
Wyoming	$56,478.00	$56,478.00
Jackson	$55,188.00	$55,188.00
East Lansing	$53,996.80	$53,996.80
Holland	$52,749.00	$52,749.00
Bay City	$51,681.00	$51,681.00
Battle Creek	$51,203.42	$51,203.42
Burton	$50,726.60	$50,726.60
Median (w/out Portage)	$56,478.00	$56,478.00
Portage	*13.33% over median*	*8.9% over median*

Of the 13 comparable communities, five provide longevity pay (like Portage) as an uncapped percentage of wages; and seven provide either maximums or fixed amounts. Holland and Port Huron (for employees hired after 1/1/99) provide no longevity pay. (City Ex. 19).

Among the City's internal comparables, the PPCOA has the same longevity pay percentages as the Association. The UAW and Foreman's units do not receive longevity pay. The IAFF has longevity pay based on $110 per year of service.

The Association's proposal is supported by its close relationship with the PPCOA and somewhat by comparable communities. Moreover, the Panel is adopting the City's final offer on wages, COLA, and pensions, with the result that the Article 312 factor of "overall compensation" supports retention of the current longevity pay percentages (especially generous for senior employees).

Because the Panel is adopting the City's final offer on wages, if the Panel also adopted the City's final offer on longevity pay, a top paid 20-year employee in the 2004-2005 contract year would have received more in longevity pay and base wages under the current language ($56,012 + $4201 = $60,213) than he would be entitled to receive in the first year of the new contract, 2005-2006 ($57,133 + $2,800 = $59.933). Because ability to pay is not in issue in this proceeding (and reasons set forth above), the Panel believes that the City's generous longevity pay formula should be retained at least for the time being.

The Panel adopts the Association's final offer on this issue.

ISSUE 5: COLLEGE INCENTIVE

The City is proposing to eliminate the College Incentive payment program set forth in Article XV of the parties' agreement.

The Association is proposing that the status quo be retained.

OPINION AND AWARD

Article XV of the parties' agreement provides that employees will receive "$50.00 per year for each twelve (12) credit hours earned by such employee" with a cap of $650 per year. Further, "[s]uch credit hours must be job related and/or part of a job related degree program as determined by the Chief of Police." These payments are made every year irrespective of when the credit hours were earned.

The City proposes the deletion of Article XV in its entirety with the following language substituted for the deleted language:

> Although the deletion of this Article was effective July 1, 2005, the Employer will not pursue repayment of any college incentive payments that are made to employees prior to the neutral Arbitrator's issuance of the Act 312 Award in MERC Case No. L05-4002.

In the parties' 2002 Act 312 arbitration, the City sought to replace the college incentive benefit with a current tuition reimbursement benefit. The Act 312 Panel denied this request, stating:

> [T]he City's last offer of settlement does not appear reasonable in the context of other comparable communities' programs involving either other college incentive bonus or tuition reimbursement or both, nor is it comparable to the Command Officers when considering the difference in the number of employees. Perhaps the parties can negotiate something between what is and what's proposed in upcoming negotiations.

In 2006, 48 of the 55 bargaining unit members received a bonus under this program, at a total cost to the City of $19,250. (City Ex. 27).

The City now argues that because the college incentive program is no longer achieving any legitimate objectives, it should be deleted in its entirety. For example, the incentive benefit in fact provides no incentive for applicants for employment with

some college credits to accept offers of employment from the City. (Tr. 148-149). The City adds that it is often paying for classes taken many years ago, with very few bargaining unit members having taken classes in recent years. The City also argues that comparable communities and internal employee units offer support for its position.

The Association argues that the college incentive program has been in effect for 20 years; elimination of the program will reduce the parity relationship between Police Officers and Command Officers; and the City has not claimed inability to pay.

Of the 13 comparable communities, seven provide no incentives; four provide payments each year; and one provides a one-time payment for tuition reimbursement. (City Ex. 25).

Of the internal employee units, only the IAFF has a college incentive program, which pays $25 per 12 credit hours earned, with a $500 cap per year. (City Ex. 26). When the PPCOA's college incentive program was eliminated, it appears that its payment may have been added to command officers' base pay. (Tr. 180). The PPCOA has retained its tuition reimbursement program.

Based primarily on other economic dispositions in the present Act 312 Opinion and Award ("overall compensation"), the Panel adopts the Association's final offer on this issue.

ISSUE 6: COST-OF-LIVING ALLOWANCE

The City is proposing to eliminate the Cost-of-Living Allowance language set forth in Appendix B of the parties' agreement.

The Association is proposing that the status quo be retained.

Appendix B of the parties' agreement explains how the cost-of-living allowance is computed.

The City proposes to eliminate cost-of-living allowances for this bargaining unit and to delete the language of Appendix B in its entirety with the following language substituted for the deleted language:

> Notwithstanding the deletion of the former Appendix B being effective July 1, 2005, the Employer will not pursue repayment of any COLA payments that are made to employees prior to the neutral Arbitrator's issuance of the Act 312 Award to the parties' delegates in MERC Case No. L05-4002, except that COLA payments made to employees between July 1, 2005 and June 30, 2007 will, as in past contract settlements, be credited against any back pay amounts payable as a result of the Act 312 Award. However, this will not result in any employee having to make a payment to the Employer. Any COLA payments made after June 30, 2007 will be treated in the same manner in the subsequent contract, unless otherwise agreed upon by the parties. Any COLA payments made after June 30, 2007 pursuant to thw terms of the prior Agreement will not be used to adjust the pay rates set forth in Appendix A.

The City argues that the "continuation of this COLA provision is not supported by the comparable communities, internal comparables or by common sense." The City adds that COLA inhibits the collective bargaining process:

> Another negative impact of the COLA provision has become apparent during the course of these Act 312 proceedings. Once post-contract COLA adjustments have been made and added to an employee's base pay, it is difficult in ongoing negotiations or in an Act 312 proceeding to make a retroactive wage adjustment that may be lower than what the COLA adjustments have generated, even where the lower wage increase is justified by comparable community comparisons, internal comparisons, economic conditions, the overall cost of the contract, or the cost of other negotiated changes.

The Association argues the City's proposal to eliminate COLA in 1994 was rejected by an Act 312 Panel; the City recently negotiated a new agreement with its

Police Command Officers in which COLA was retained; the City's argument that COLA inhibits negotiations is speculative; subtracting post June 30, 2007 COLA payments from wage increases is "absolutely unheard of in Act 312 arbitration" because it would have the effect of reducing base pay from what it would have been if COLA had continued; and the City has not alleged inability to pay.

Under Section B.3 of Appendix B of the parties' 2002-2005 agreement, COLA payments appear to be the same irrespective of the base pay of the bargaining unit member, with the result that lower paid bargaining unit members receive higher COLA payments when considered as a percentage of base pay than higher paid bargaining unit members. Thus, if the COLA payments for a top paid bargaining unit member for the one year period ending June 30, 2006 were the equivalent of 3% of base pay, for a lower paid employee the COLA payments for this period would approach the equivalent of 5% of base pay. Because COLA payments are folded into base pay, the latter increases would be in excess of any base pay increases among internal units or comparable communities for this one year period.

Of the 13 comparable communities, 11 provide no cost of living allowance. Of the two which provide it, one – Kalamazoo County – has provided it in lieu of annual wage increases. (City Ex. 29). Kalamazoo County appears to be the first or second top wage payer among the comparable communities. The other comparable community providing COLA – Bay City – ranks 11th among the comparable communities in wages (*i.e.*, base pay, COLA and longevity).

Of the City's internal employment units, only the PPCOA has COLA. (City Ex. 30). Because PPCOA members are relatively highly paid and COLA appears to be

treated as a fixed sum, COLA – when viewed as a percentage of base pay – would not appear to have as dramatic effect as it would for junior PPOA members

In their April 2007 collective bargaining agreement, the IAFF and the City negotiated COLA out of the agreement without a specific *quid pro quo* (although there were increases in wages and in the City's retiree health contributions).

Under Act 312, "[t]he average consumer prices for goods and services, commonly known as the cost of living" is a factor to be considered in selecting final offers. By eliminating COLA as a contractual right, "the cost of living" would remain a factor in determining wages to be paid in future negotiations. Providing both automatic COLA increases and wage increases is very unusual. As explained above, only one comparable community (Bay City) provides both; however, Bay City is near the bottom in wage payments among the comparable communities. The fact that the PPCOA is the one unit receiving COLA is insufficient to overcome the above findings.

See also COLA discussion in ISSUE 12: WAGES, below.

For the above reasons, the Panel adopts the City's final offer on this issue.

ISSUE 7: DEPARTMENT INVESTIGATIONS

The Association is proposing to amend the investigation language set forth in Section 4.1(b) to require that notices of investigations and possible criminal charges to employees be "in writing," and to amend the notice of completion language set forth in Section 4.1(e) to require written notice within specified time limits at the conclusion of investigations

The City agrees with the Association's "in writing" amendments to Section 4.1(b), and is proposing to amend Section 4.1(e) somewhat differently from the Association's proposed amendment to Section 4.1(e).

OPINION AND AWARD

The Association proposes to amend the first two sentences of Section 4.1(b) and to amend Section 4.1(e) by adding the following underlined language:

> (a) The member of the department being questioned shall be informed in writing of the nature of the investigation before any interrogation commences. The employee shall be informed in writing whether any possible criminal charges or disciplinary action might result from the investigation, and the complainant and/or witnesses will be disclosed.
>
> (e) Investigations shall be initiated within ten (10) days of receipt of allegations against a member of this bargaining unit. The investigation shall be concluded within thirty (30) days from the time the employee has knowledge of the investigation and the employee shall be notified, in writing, that the complaint was sustained or unfounded within seventy-two (72) hours of the conclusion of the thirty (30) day period.

The City's proposal to amend Section 4.1(e) by deleting certain language and adding the following underlined language:

> (e) Investigations shall be initiated within ten (10) days of receipt of allegations against a member of this bargaining unit. The investigation shall be concluded within thirty (30) days from the ~~time the employee has knowledge of the investigation~~ date the employee is notified in writing of the investigation by the Chief of Police or his representative, and the employee (or the Union in the event the employee is not at work) shall be notified, in writing, that the complaint was sustained or unfounded within three (3) working days (as defined in Section 3.9) of the conclusion of the thirty (30) day period.

Because this is a non-economic issue, the Panel is not limited to the parties' final offers in deciding this issue.

The Association argues that the "change proposed by the City would expose the employee to an indefinite time period for investigation of a complaint" because it does not require the City to notify an employee that an investigation was commencing at any time: "The City could wait months or even years to notify the employee that it is commencing an investigation." The Association also argues that the City's proposal would allow the City to investigate prior to notifying the employee of an investigation.

The City argues that a written notice of an investigation and written findings of facts within contractual time limits will avoid disputes over the timeliness of the investigation: "With the current, vague language this period could begin whenever the employee hears a rumor or receives second-hand information that there is or might be an investigation involving that employee, even if the information is premature or just plain wrong."

In deciding the issue of the timeliness of notice of an investigation, there are many occasions where prompt notice to the involved employee would be expected, for example, an officer's single act of insubordination to a command officer. However, there are instances where prompt notice of an investigation would be unreasonable, for example, management's receipt of an anonymous tip that an officer is secretly engaged in an ongoing improper activity.

The City's proposed language has the virtue of providing definiteness for when the City's findings are due.

As to the Association's stated concern that under the City's proposed language the "City could wait months or even years" before notifying the employee of an investigation, a major treatise on discipline explains: "The Investigation Must be

Pursued in a Timely Manner." KOVEN & SMITH, JUST CAUSE THE SEVEN TESTS, 3rd Ed. (BNA Books 2006) 201. Because the suspected employee would be part of the investigation, it can be expected that the City would notify the employee of the investigation in a timely manner (timeliness of the notice being based on the nature of the accusation or suspicion, as explained above).

For these reasons, the Panel adopts the City's final offer on this issue.

ISSUE 8: PAID WORKERS' COMPENSATION LEAVE

The Association is proposing to amend Section 8.3(b) to extend paid workers' compensation leave coverage to Radio Operators and Police Service Technicians.

The City is proposing to maintain the status quo.

OPINION AND AWARD

As explained by the Association, "the Radio Operators and Public Service Technicians do not have any wage coverage paid by the City if they are injured on the job. Police Officers and Detectives have a twenty-six (26) week period where the Employer makes up the difference between the employee's net take home pay and payments made through the City's Workers' Compensation insurance coverage."

The Association argues that (a) all employees in the bargaining unit should receive equitable treatment; (b) in the bargaining units among the comparable communities that include non-sworn employees in their bargaining units, the non-sworn employees are eligible to receive the same workers' compensation supplement as the sworn officers; and (c) the City's non-union employees are eligible to receive the workers' compensation supplement.

The City argues that (a) although the employees in issue do not receive the supplement, they may use their sick leave credits to continue their regular pay while of work due to a workers' compensation injury; (b) few comparable communities provide the same workers' compensation supplement to both dispatchers and police officers; and (c) there are no dispatchers in 10 of the 13 police bargaining units in the comparable communities.

The parties' exhibits on comparable communities are somewhat conflicting. However, it appears that of the 13 comparable communities, only three provide this benefit to their dispatchers (Kalamazoo, Kalamazoo Township and Kalamazoo County). Five of the comparables do not even employ dispatchers; and in 10 of the comparable communities, dispatchers are not in police bargaining units. (City Ex. 35).

Among the internal comparables, the UAW and Technical units do not receive this benefit, although the non-union employees do receive it. (City Ex. 36).

In the 2002 Act 312 Arbitration, the Association proposed that Radio Operators and PSTs be included in the workers compensation supplement and that the coverage period for all bargaining unit employees be extended from 26 weeks to 52 weeks. The City proposed that the status quo be retained. In rejecting the Association's proposal, the Act 312 Panel wrote:

> The panel finds the City's last offer of settlement to be the more reasonable in this matter. While there could be some support for allowing a twenty-six (26) week supplemented pay to worker's compensation for radio operators and PST's similar to nearly all other city employees including police officers and detectives, the Union's proposal to add an additional twenty-six weeks to the current twenty-six (26) week supplement for all members is not supported by the evidence.

Because there is "some support" for treating Radio Operators and PSTs like other members of their bargaining unit because they are treated the same in many ways, and because the City's non-Union employees have this benefit, the Panel adopts the Association's final offer on this issue.

ISSUE 9: RETIREE HEALTH INSURANCE

The Association is proposing to amend Section 9.5 to require the City to pay to the Association's retiree health insurance fund $160,000 for July 1, 2005 and $170,000 for July 1, 2006.

The City is proposing to maintain the status quo, *i.e.*, it has paid to the fund $145,000 for July 1, 2005 and $145,000 for July 1, 2006.

OPINION AND AWARD

The Association administers the Retiree Health Insurance Plan, with the City's sole responsibility being to contribute funds to it.

The City's contributions for the period beginning July 1, 1992 shows an initial contribution of $55,912 in 1992, annual contributions of $86,662 for the next four years and then the following payments (City Ex. 37):

DATE	ANNUAL PAYMENT
July 1, 1997	$90,000
July 1, 1998	$100,000
July 1, 1999	$110,000
July 1, 2000	$110,000
July 1, 2001	$112,200
July 1, 2002	$125,000
July 1, 2003	$135,000
July 1, 2004	$145,000
July 1, 2005	$145,000
July 1, 2006	$145,000

In its 2007 negotiated settlement with the PPCOA, the City agreed to contribute the following sums for retiree health insurance:

7-1-2004	7-1-2005	7-1-2006
$90,000	$120,000	$140,000

The Association argues that an increase in funding is necessary if the fund is not to go negative in ten or eleven years. (Assn. Exs. 7a, 7b, 7c, and7d). It also relies on a City exhibit (City Ex. 38) which projects 5% annual increases in contributions, and an overvalued fund balance for July 1, 2007. In addition, the Association offered to turn over administration of the plan to the City; but the City refused. (Tr. 328-329).

The City argues that the Association currently provides a generous benefit to retirees by paying up to $1,550 per month, with the result that all but one current retiree (who has opted for more expensive coverage) make no contribution. In seven of the comparable communities, retirees are required to contribute in varying amounts for their health insurance. (Assn. Ex. 6). The City also argues that the long-term solvency of the Plan could be attained by the Association requiring retirees to pay part of the premium cost of coverage they choose. The City adds that the Association's projections contain inaccuracies.

In arguing that the Association can protect the solvency of the Plan by requiring co-pays by retirees, the City has not directly addressed Section 9.5 of the parties' 2003-2005 collective bargaining agreement, which states:

> 9.5 Retiree Health Insurance. Effective July 1, 1989, the City shall add retiree health insurance to its health insurance coverage provided to bargaining unit members and said coverage shall be the same as provided to regular bargaining unit employees, spouse and family. . . .

While not conclusive, this language hints that as to co-pays the retirees should not be treated too differently from active employees. In addition, the additional contributions sought by the Association are in line with the increases agreed upon by the City and the PPCOA. Also, in light of the Panel's award on pensions (ISSUE 11, below), healthily funded retiree health insurance becomes especially important so that employees contemplating retirement, but worried about the adequacy of their retirement account balances, will not be discouraged from retiring by reason of potential liability for the cost of the health insurance they will receive upon retirement.

For the above reasons, the Panel adopts the Association's final offer on this issue.

ISSUE 10: BODY ARMOR

The Association is proposing to amend Section 21.2 to delete management discretion to waive the requirement to wear body armor in warm weather and to grant such discretion to the officers.

The City is proposing to maintain the status quo.

OPINION AND AWARD

The Association's proposes to amend Section 21.2 by deleting the following language and adding the following underlined language:

~~Exceptions to the mandatory use of body armor may be granted at the discretion of the Chief of Police when the daily temperature forecast exceeds 80 degrees Fahrenheit.~~

Exceptions to the mandatory use of body armor will be granted, at the discretion of the officers, when the daily temperature exceeds 80 degrees.

Because this is a non-economic issue, the Panel is not limited to the parties' final offers in deciding this issue.

Body armor is a chest protector which deflects bullets.

The City argues that (a) comparable communities support its position; (b) the City's patrol cars are air conditioned; and (c) as a self-insurer it incurred enormous liability by reason of an officer shot in the chest whereas another officer was protected when shot because he was wearing body armor.

The Association has not proposed that an employee opting to forego body armor when the temperature exceeds 80 degrees will sign a waiver of City-provided benefits if he is then shot in the chest.

Of the 13 comparable communities, nine require the wearing of protective vests and four have no express requirement. In Midland, at the option of supervision, employees need not wear the vests if the temperature exceeds 80 degrees and there is high humidity. (City Ex. 39).

The Panel agrees with the City's final offer to preserve the status quo on this issue.

ASSOCIATION ISSUE 11: PENSION PLAN

The Association is proposing to amend Section 23.2 to provide that present and future bargaining unit employees (except for 15 named employees) transfer their defined contribution plan (DC Plan) balances to a defined benefit plan (DB Plan). The new language proposed by the Association is:

Effective as soon as reasonabl[y] possible after the effective date of this collective bargaining agreement the City of Portage shall do all acts necessary to implement and maintain the Municipal Employees' Retirement System (MERS) defined benefit plan (B4-80% Max, normal retirement Age 60, V6, F50(25), FAC-5, D2 plan described in #(1) on page 3, Union exhibit 52) for all present and future bargaining unit employees except the following officers.

1.	Buckley	6.	Dopp	11.	Clark
2.	Mottson	7.	Mayhew	12.	Bryant
3.	Taffee	8.	Seiser	13.	Bauer
4.	Myers	9.	May	14.	Stapert
5.	Lord	10.	Vesey	15.	Whisman

The above listed officers shall remain in the Portage Police Officers Association Money Purchase Pension Plan detailed at Appendix F of the collective bargaining agreement. The City shall contribute to the funding to the MERS defined benefit plan eighteen (18%) percent of each bargaining unit employee's base salary, specified in Appendix A of the collective bargaining agreement, at times and in the manner specified by MERS. Employees participating in the MERS plan shall transfer all their Money Purchase Pension Plan fund balances to MERS.

Radio Operators C. Secondi and J. Phillips shall remain in the City's defined benefit plan.

The City is proposing to maintain the status quo.

ARGUMENTS

The Association argues that ***(a)*** the DC Plan has been "catastrophic" because of the employees' inexperience in investing and the high cost of individual money management; ***(b)*** because of the inadequacy of their DC balances, employees have been required to continue working despite declining physical abilities; ***(c)*** the MERS DB Plan proposed by the Association would be over 100% funded at its inception with the City making the same 18% contribution to it as it has been making to the present DC Plan, with the City's contribution capped at 18%; ***(d)*** a MERS DB Plan is better able to provide the employee with the earliest retirement at the lowest cost because of

expert management and low (pooled) administrative costs; ***(e)*** the vast majority of the comparable communities have DB Plans; ***(f)*** "[t]he Portage Police officers are in fact contributing the eighteen (18%) from their own deferred wages;" ***(g)*** the City's testimony from Mr. Boulis raising reasons for opposing the DB Plan are without merit; ***(h)*** the City's expert testimony raising concerns of funding and predictability of cost of the DB Plan is "unfounded and unsupported" and at most is based on a "worst case scenario;" and ***(i)*** "[n]ew police and fire units coming into the [MERS DB] plan have experienced a cost or contribution rate fluctuation of less than a tenth of a percent (5/04/07 T. p 519)," whereas over the past 22 years the City's annual contributions to the DC Plan have increased from 10% of base pay to 18% of base pay, with its contribution to other internal DC Plans also increasing over the years.

The City argues that there are 13 reasons why the Association's proposal should not be adopted, summarizing these reasons as follows:

1. All other City employees participate in defined contribution plans.

2. The parties' bargaining history shows a trend toward the use of DC Plans.

3. The long-term costs of this DB Plan are unpredictable and volatile.

4. The City is being asked to pay 18% of the base salary of participating employees for a retirement plan that, according to MERS, only has a Normal Cost of either 9.72% or 11.29% of base salary, depending upon which MERS Valuation (Union Exhibit 12 or 52) is used.

5. The implementation of the new plan would result in the City having to deal with three separate retirement plans for this bargaining unit.

6. It would be more fair to bargaining unit employees to have all of them in the same retirement plan.

7. The trend among both public and private sector employers is to move from DB Plans to DC Plans.

8. The information provided by MERS about the proposed plan is so confused and contradictory that it should not be relied upon as the basis for making a major change in this critical employee benefit program.

9. The Arbitrator should not award a benefit that neither the parties nor a future Arbitrator can eliminate without a vote of the City's electorate.

10. The benefit level sought by the Union would place retirees from this group above all other retirees from the comparable communities.

11. All comparable communities with DB Plans, except one, require employee contributions toward the cost of the plan, and the Union's proposal here does not include an employee contribution.

a. The repeated representations of the Union at the hearing are contrary to the Union's LBO on this issue, as Union witnesses and its counsel on multiple occasions represented that the Union's LBO would include a provision that employees would pay any cost of the pension plan over 18% of base pay. The Union's LBO does not contain this promised clause.

12. The creation of the proposed DB Plan for existing employees would grant them a defined pension benefit for years of service before the effective date of the contract being arbitrated which their present retirement account could not pay.

13. Recently hired employees and future hires could ultimately bear the burden of having to pay for the benefits to employees retiring in the next few years.

The City provided additional rebuttal arguments in its Reply Brief, including the following:

14. The Association was the initiator of the DC Plan and sets its admininstrative rules.

15. The record shows that bargaining unit employees have voluntarily retired under the DC Plan, thereby rebutting the argument that active employees have no hope of retirement.

16. The record contains no evidence of the expenses or return of the current DC Plan.

17. It is a fiction to argue that the active employees are themselves paying the annual 18% of base pay under the DC Plan

18. Much of the MERS data is not limited to police officers (who tend to retire earlier than civilian employees).

Both parties presented skilled expert opinion, documentation, and arguments in support of their conflicting positions.

The actuarial firm of Gabriel Roeder Smith & Company ("GRS") in its February 2007 "MERS Initial Valuations – Important Comments" – wrote (Assn. Ex. 12, p. 3):

> The reader of the report understands that actuarial calculations are by their nature imprecise, as they are mathematical estimates based on current data and assumptions of future events (which may or may not materialize).

Given the prominent role of assumptions in estimating the financial effects of a transfer after 20 years from a DC plan to a DB plan (*e.g.*, when employees will retire, how long they will live, how many employees will leave employment before vesting, rate of investment return, future changes in DB Plan) , the cost issue would be daunting even if the parties had agreed in principle to a DB plan of some sort and then sought to estimate its cost over ensuing years. In an adversary proceeding (as here), determining the financial effects is far more daunting because of competing assumptions and arguments.

In reviewing the consequences of transferring to a DB plan, various figures contained in exhibits may be somewhat outdated; but they are the best information available, and provide adequate guidance.

OPINION AND AWARD

Prior to 1985, all City employees participated in DB plans. Now, only two City employees – two Radio Operators in the PPOA bargaining unit – remain in a DB plan.

In 1985, the City and the PPOA agreed to substitute for their DB plan a DC Plan to be administered by the PPOA, with the City's sole responsibility being to make agreed upon contributions to the DC Plan for the PPOA members covered by it. This change applied to police officers and detectives. Some non-sworn employees remained in the DB plan. (In ensuing years, the other employee units also switched to DC plans except for two Radio Operators.)

In the Act 312 proceeding for the parties' 2000-2002 collective bargaining agreement, the PPOA proposed that all but two Radio Operators and the PSTs be transferred from their DB plan to the Association's DC Plan. In support, the Association argued that "the City generally supports the defined contribution plan as the preferred method of administering pension benefits." (City Ex. 2, p. 51). In granting this request, the Act 312 panel majority explained: "[I]t is better for the employees and the City in the long run to have the defined contribution plan apply to as many employees as possible, particularly any new employees." *Id.*

In recent years, the City has been contributing 18% annually of each PPOA participant's base pay to the DC Plan.

Under the DC Plan, several bargaining unit members have already retired.

Of the 54 bargaining unit members in the DC Plan, 15 want to remain in it. The Association is proposing that the remaining 39 members be transferred to a new DB Plan. (Two Radio Operators in the PPOA bargaining unit will remain in a separate DB plan.)

There are 11 (or perhaps 12 now) PPOA members who have sufficient age and years of service to retire immediately with a full benefit if the proposed DB Plan were adopted.

At the hearing, both parties presented expert witnesses whose testimony and documents thoroughly addressed the issue.

The DB Plan proposed by the Association is the Municipal Employees Retirement System of Michigan ("MERS"). MERS personnel, and also pension attorney Michael J. Vanoverbeke, explained that MERS provides excellent administrative and investment expertise: Because of economies of scale, MERS is able to provide these services at a very low cost. MERS handles pensions and health care benefits for over 600 different localities. The MERS "fund had market value of $4.6 billion compared to $6.1 billion in liabilities as of December 2004. Its funding ratio was 76.7 percent." (City Ex. 44-a).

The Association's proposal is for a MERS DB Plan providing a 2.5% multiplier (MERS' highest multipler) and retirement as early as age 50 with 25 years of service.

The record shows that if the Association's proposal were adopted, there would be a substantial windfall for those employees at or near full retirement eligibility. On this point, as of February 2007, 11 employees eligible for immediate (and one employee with sufficient years worked but not yet age 50) had estimated account balances totaling $4,009,392 in the DC Plan. (City Ex. 50, Ex. 3). As of February 2007, four employees at the top of the assumed base wage scale ($59,035) had the following individual DC Plan balances:

Name	Estimated 2/07 Account Balance
Napp	$460,846
Kozminske	$320,378
Romanak	$257,619
Dylhoff	$215,652

Officer Kozminske testified at the Act 312 hearing. Under the Association's proposal, her actuarial present value under the proposed DB Plan was projected as $483,667 in February 2007. (City Ex. 50, ex. 4). Here, if the Association's proposal were adopted, the actuarial present net value of Ms. Kozminske's retirement account would increase at once by at least $163,289. (*Id*). With one possible exception, others eligible to retire immediately also would receive much higher pension valuations. (City Ex. 50, ex. 6).[1]

The City has challenged the long-term predictability and stability of the proposed DB Plan.

Viewing the issue of the initial contribution rate under the proposed DB Plan as explained by actuaries, a variety of opinion is revealed:

- The February 1, 2007 GRS analysis states that the City's initial contribution rate would be **8.82%**. (Assn. Ex. 12, p. 5).

- The August 1, 2007 GRS analysis (based on a transfer from the DC Plan of $5,773,047) states that the City's initial contribution rate would be **10.21%.** (Assn. Ex. 52, p. 3).

[1] Under the MERS plan, an employee whose DC plan balance exceeds his MERS plan present value can use his DC balance (and MERS earnings thereon) in lieu of the lower MERS plan balance.

• The September 13, 2007 GRS analysis shows that with the assumption of lower rates of separation from employment before vesting for police officers (as opposed to public sector employees generally) at inception of the DB Plan *(a)* only *91.6%* of accrued liabilities would be covered by valuation assets; and *(b)* the initial contribution rate if all eligible employees retired immediately upon adoption of the plan would be **18.15%**. (Assn. Ex. 51, p. 7). This is far higher than the **10.21%** alternative contribution rate (*Id*) if the withdrawal (non-vested) rate for public sector employees generally (*i.e.*, including civilian employees who have higher non-vested withdrawal rates than police officers) were used.

• An earlier preliminary analysis as of May 1, 2005 contained an initial contribution rate of **14.82%** based on gross pay (City Ex. 43a).[2] As explained by Michael Tackett, CLU, CEBS, Benefit Plan Advisor, MERS of Michigan:

> Three valuations have been provided as exhibits for the Portage Police Officers Association. They provide similar benefits but differ with respect to the underlying census used for calculations, assets reported, and the MERS assumptions applied.
>
> The 2005 "Preliminary Initial Valuation, (Valuation dated 5/1/05 – Exhibit 43(a)) was provided to the Portage Police Officers Association as a "preliminary" report using 31 participants. The salaries were reported using the standard MERS definition of compensation, "gross pay." Assets were reported at that time at $4,934,872. This valuation used the MERS assumptions that were in place at that time.
>
> The second valuation is an Initial Valuation provided by GRS (Valuation dated 2/1/07) for the Portage Police Officers Association using a census of 39 participants. The association had gained twelve new employees and had lost 4 senior employees. The salaries were reported using the non-standard definition of "base pay" for those participants. Assets were reported at that time

[2] Other Preliminary valuations contained in City Exhibits 42 and 43 show initial contribution rates ranging from 13.76% to 30.18%. The higher rates appear to be based on "gross pay" rather than "base pay" which is what the Association has ended up proposing.

in the amount of $5,873,678. The valuation was using the MERS assumptions that were in place at that time.

The third valuation is an Initial Valuation prepared for the Portage Police Officers Association using 39 participants (Valuation 8/1/07). The association lost 3 participants (2 senior) and gained 3 new participants. Assets were reported in the amount of $5,773,047. This valuation is using new MERS assumptions that were provided as a result of a recent system-wide experience study.

As to capping employer contributions under a DB plan, GRS explains (Assn. Ex. 51):

Employer Caps in Defined Benefit Plans

In a defined benefit plan, the employer contribution is calculated by an actuary on an annual basis using a set of actuarial assumptions. If the members also contribute to the plan, typically the member contributes are a fixed percentage of pay. This means that the employer is exposed to the risks associated with a defined benefit plan (i.e., investment risk, longevity risk, etc.). A few employers attempt to mitigate the exposure to this risk by placing a cap on the employer contributions. This means that a portion (or all) of the risk is shifted to the active employees. In these instances the member contributions may vary from one year to the next depending on the experience from one year to the next. A situation like this could expose the younger employees to volatile member contributions for a long period of time. In addition, in some situations the member contributions may become so high that it becomes difficult to hire new employees or to promote existing employees into the division. This unusual circumstance might occur if the employer contribution rate is capped, the member rate is floating, and many senior employees retire much earlier than projected.

Employer caps are not common in the public sector.

City Exhibit 54 and Association Exhibit 52, p. 3 show that as of an August 1, 2007 valuation date, total active member DC Plan account balances were estimated to be $5,773,000. Under the City's actuarial analysis, if the Association's proposal were adopted, the present actuarial value of the DB plan liability if 12 eligible employees immediately retired would be $5,026,000; and the sum of non-retiree account balances

would be reduced to $1,674,000, resulting in an immediate shortfall of about $1 million (which MERS would amortize). (City Ex. 50, ex. 6; Tr. 690-692). In other words, at inception, only *87%* of accrued liabilities would be covered by valuation assets. (*Id*; City Ex. 54).

The above review of substantial actuarial differences concerning even the ordinary cost of the proposed DB Plan at inception supports the City's argument that "the long-term costs of this DB Plan are unpredictable and volatile."

Bargaining history and internal pension coverage also support the City's position.

- The Association's proposal in the present case represents a departure from its position in the Act 312 proceedings for the parties' 2000-2002 agreement (City Ex. 2) as well as its agreement to participate in the DC Plan for over two decades.

- Among the City's internal employment units, all employees (with the exception of two Radio Operators in the PPOA bargaining unit), including the PPCOA, participate in DC Plans, and none receive a higher percentage contribution than the City's annual contribution to Association members of 18% of base pay. (City Ex. 51).

11 of the 13 comparable communities have DB plans. (Assn Ex. 11; City Ex. 40). One of these 11 – Kentwood – requires a DC plan for employees hired after July 1, 2000. The other two comparable communities with DC Plans are Kalamazoo County and Kalamazoo Township. The fact that so many comparable communities have DB Plans provides numerical support for the Association's final offer. If the issue before the panel were whether as an initial matter the Association's members should have a DC plan or a DB plan, the comparable communities would be highly persuasive. However, this is not an initial matter. Rather, the parties agreed in 1985 to depart from

the comparable communities having DB plans by agreeing to switch from a DB plan to the DC Plan; and until recently the Association favored the DC Plan.

In addition, the 11 comparable communities with DB Plans require the following employee contributions (City Ex. 40):

	Employee Contribution (% of pay)
Battle Creek	7.75%
Bay City	8.00%
Burton	3.38%
East Lansing	0.00%
Holland	3.2% maximum
Jackson	11.24%
City of Kalamazoo	6.5%
Kentwood	5.00%
Midland	8.00%
Port Huron	2.00%
Wyoming	1.59%

The Association's final offer is unique among the comparable communities because of (i) a minimal *contingent* employee contribution[3] (ii) together with its proposal that the City overfund the DB Plan and (iii) the large windfalls to employees now qualified to retire with full benefits under the DB Plan.

For the above reasons, the panel majority is not giving controlling effect to the the fact that so many comparable communities have DB plans.

The Association also has argued that it is imperative to switch to its proposed DB Plan because some of its senior members have fared poorly with their investments

[3] At the Act 312 hearing, the Association stated that members would pay any contributions above 18% of base pay. Although this pledge is not expressly contained in the Association's final offer, it may be said to be contained in the final offer by reason of the Association's pledge at the Act 312 hearing, *i.e.*, under the Association's final offer, employees are liable for contributions above the 18% cap on City contributions.

under the DC Plan with the result that they are unable to retire despite physical infirmities which make it difficult for them to discharge their duties as police officers. In other words, the DB Plan will create a humane solution to the problem of insufficient income on which to retire.

Michelle Kozminske testified on this issue. The record shows that as of a projected February 1, 2007 MERS DB Plan effective date, Ms. Kozminske was 51 years old with 29 years of service. As of this date, she had $320,378 in her DC Plan and about $100,000 in her Section 457 deferred compensation plan.[4] (City Ex. 50, p. 6; Tr. 436). It was also estimated that as of a February 1, 2007 Ms. Kozminske would have a present value of $483,667 in the DB Plan. Ms. Kozminske estimated that under the MERS DB Plan her annual pension benefit would be between $41,000 and $41,700. (Tr. pp. 412-413, 430). A pension of this amount would place Ms. Kozminske at or near the top among the comparable communities. (Assn. Ex. 16).

The point is that under her DC Plan and Section 457 Plan – together with retiree health insurance and social security benefits beginning later – it appears that Ms. Kozminske could afford to retire without the generous increase in pension payments contained in the proposed MERS DB Plan.[5]

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[4] Ms. Kozminske's Section 457 Plan contributions were deducted from her wages at her request. This does not change the fact (on the issue of sufficiency of income on which to retire) that her Section 457 account balance will be available to her as part of her retirement income. In addition, the Association has argued that in the DC Plan "[t]he Portage Police officers are in fact contributing the eighteen (18%) from their own deferred wages."

[5] When the issue is whether one can afford to retire, there are a host of issues in addition to one's retirement account balance. These include whether one is married, whether one's spouse is working, whether one has extraordinary expenses, whether one has savings or other investments, whether one has post-retirement employment prospects, *etc.*

Another factor to be considered in an Act 312 case is "[t]he lawful authority of the employer," *i.e.*, what legal effect will a proposal have on the City. As explained below, adoption of a MERS DB Plan would severely restrict the City.

- Under the parties' DC Plan, the City's contributions are not a permanent obligation, *i.e.,* the City's obligation is whatever figure is stated in the applicable collective bargaining agreement (currently 18% annually of base pay).

- Under the proposed MERS DB Plan, liability for contributions would be perpetual, absent a vote by the citizens of the City of Portage to rescind the MERS DB Plan.

- On the one hand, irrespective of a public employer's later financial condition, it does not appear that the parties or an Act 312 arbitration panel can reduce any component of a DB plan payment formula for members vested in the DB plan (without a serious legal challenge).[6] On the other hand, a labor organization can always seek to increase a DB plan formula and, in the case of police and firefighters, request increases in an Act 312 arbitration proceeding. An Association witness testified in the present Act 312 proceeding that the reason for proposing that the City make contributions of 18% of base pay rather than a lower actuarial normal cost was not only

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[6] Article 9, Section 24 of the Michigan Constitution of 1963 states:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

See *e.g.*, Seitz v Retirement System, 189 Mich App 445, 456 (1991)("the state may not reduce the pension benefit of any state employee or official, or local employee or official, once a pension right has been granted").

because the City was already contributing 18% to the DC Plan but also to overfund the proposed DB Plan so that the Association later could seek to "improve the Plan" after the present case is concluded. (Tr. 439).

For the above reasons, the Panel adopts the City's final offer on this issue.[7]

ISSUE 12: WAGES

The Association is proposing to amend Appendix A to award wage increases as follows:

1. For contract year July 1, 2005 through June 30, 2006 the bargaining unit salary increase obtained through the cost of living running from July 1, 2005 through June 30, 2006.

2. For contract year July 1, 2006 through June 30, 2007: Effective July 1, 2006 and retroactive to July 1, 2006 a two-and-one-half (2.5%) percent salary increase at each step and for each classification above the rates in effect for June 30, 2006. In addition, the quarterly cost of living increase produced each quarter since July 1, 2006 shall be calculated and added to the base salary established by adding the two-and-one-half (2.5%) percent salary increase that is made effective July 1, 2006.

The City is proposing the following (including an illustrative base salary scale):

July 1, 2005	2.0% increase over the July 1, 2004 rates
July 1, 2006	2.75% increase over the July 1, 2005 rates

BASE SALARY SCALES
(7/1/2005 and 7/1/2006)

These pay rates will not be adjusted by any COLA payments made pursuant to the terms of the 2003-2005 Agreement. COLA payments made to employees between July 1, 2005 and June 30, 2007 will, as in past contract settlements, be credited against any back pay amounts payable as a result of the Act 312 Award. However, this will not result in any employee having to make a payment to the Employer for overpayments

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[7] Because of the Panel's decision, it is unnecessary to address the City's argument concerning the jurisdiction of the Panel in 2008 to adopt a new DB Plan under a collective bargaining agreement with an end date of June 30, 2007.

made to the employee. Any COLA payments made after June 30, 2007 will be treated in the same manner in the subsequent contract, unless otherwise agreed upon by the parties.

ARGUMENTS

The Association argues that the elimination of COLA as a component of base salary would have the effect of reducing the face value of the Employer's offer for the year beginning July 1, 2006 (and by extension would to that extent reduce fringe benefits based on base salary). The Association then argues: "The *reduction* in base salary of bargaining unit members through Act 312 arbitration is virtually unheard of and the City has not offered a single comparative city that has reduced base salary in any given contract year. It is extremely important to note that the City has stipulated that ability to pay is not an issue." For these reasons, and also because the City's police officers historically have ranked in the top three in base pay among Kalamazoo County, the City of Kalamazoo, and Portage, the PPOA's LBO should be adopted.

The City argues that COLA increases are a flat sum given to all bargaining unit members irrespective of their base pay, with the result that employees with lower base pay received COLA increases for the one year period ending on June 30, 2006 as high as 4.9%. The City also argues that the Association's wage proposals would create wage increases unsupported by the comparable communities, and "would place Portage's officers far above the highest paying comparable community as of both July 2006 and June 2007." (City Brief, p. 47). Even if the City's (reduced) longevity offer were adopted, the City's officers would be the second highest paid among the

comparable communities. Salary increases given to internal employing units (especially the PPCOA) also compare favorably with the City's wage offer.

OPINION AND AWARD

The Panel majority already has rejected contractual COLA. The COLA component of the Association's final offer will be discussed below in terms of percentage increases.

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The parties agree that for the one year period ending June 30, 2005, a bargaining unit member at the top of the wage scale was paid a base salary of **$56,013.** (Assn. Ex. 13) (City Ex. 31).

Under the City's proposal of a 2% increase in base pay for the *first year* of the contract, this top paid employee's base salary for the one year period ending on June 30, 2006 would be **$57,133**.

Under the Association's proposal, this top paid employee's base salary for the one year period ending on June 30, 2006 (COLA increases only) would be **$57,698.** This is explained as follows: For the one year period beginning July 1, 2005, the COLA increases paid by the City to a top paid employee resulted in an increase in base pay of **3%** by June 30, 2006.[8] The easiest way to compute the COLA increase for the

[8] Under Section B.3 of Appendix B of the current agreement, COLA payments appear to be the same irrespective of the base salary of the bargaining unit member, with the result that lower paid bargaining unit members receive higher COLA payments when considered as a percentage of base salary than higher paid bargaining unit members. Thus, for a lower paid employee the COLA payments for the one year period ending June 30, 2006 approached the equivalent of 5% of base salary. Because COLA payments are folded into base salary, the latter increase would

one year period beginning July 1, 2005 is to subtract the beginning base salary of $56,013 from the COLA-adjusted base salary as of June 4 2006 of $57,698. The difference is $1,685. $1,685 divided by $56,013 equals 3%.[9] (Because the COLA increases were paid in July, September, December and June, this employee received less than a 3% increase for this entire one year period. The 3% increase is cumulative as of June 30, 2006.)

*

Under the City's proposal of a **2.75%** increase in base pay for the *second year* of the contract, a top paid employee's base salary for the one year period ending on June 30, 2007 would be **$58,704**.

Under the Association's proposal of a **2.50%** increase in base pay plus COLA increases for the *second year* of the contract, a top paid employee's base salary for the one year period ending on June 30, 2007 would be 59,140 plus1.0% in COLA ($564), for a total combined increase of **3.50%**. As a result, under the Association's proposal a top paid employee's base salary for one year period ending June 30, 2007 would be **$59,704.**

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For 2005, the median wage increase for the comparable communities is 2.7%. For 2006, it is 2.5%. (City Ex. 46). Further, unlike the City, eight of the 13 comparable

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be in excess of any base salary increases among internal units or comparable communities for this one year period.

[9] At the hearing, a COLA calculation of 1.87% was suggested for the one year period beginning July 1, 2005. As shown above, this was inaccurate. The correct COLA increases for this one year period is 3%.

communities do not provide federal social security coverage. (City Ex. 48; see also Exs. 22, 23).

The City wage offer contains the same percentage increases as agreed upon with the PPCOA, and a higher percentage for the second year than agreed upon with the IAFF. (City Ex. 47).

On June 30, 2005 (the day before the commencement of the agreement in issue), Portage ranked third among the comparable communities in wages, with the below the City of Kalamazoo and Kalamazoo County. (Assn. Ex. 13). Under the City's final offer on wages, the City of Portage appears to remain in third place. Under the Association's final offer the City would remain in third place or perhaps move into second place.

However, when the 7.5% longevity pay percentage (which the Panel has decided to preserve) is added to base pay, the parties' proposals for top paid bargaining unit members may be estimated as follows:

	7/1/05-6/30/06	7/1/06-6/30/07
City	$61,418	$63,107
Association	$62,025	$64,182

The City's proposal on wages, plus the Panel's retention of percentage longevity pay (which the City proposed to change to reduced fixed sums), places the PPOA at (or very near) the top among the comparable communities. One cannot reasonably expect more.

For the above reasons, the City's final offer on wages is adopted.

PANEL SIGNATURES

Dated: April 7, 2008

Thomas L. Gravelle, Chairperson

The City *concurs* on Issues 1, 2, 6, 7, 10, 11 and 12, and *dissents* on Issues 3, 4, 5, 8 and 9.

Dated: April 3, 2008

Kevin M. McCarthy, City Delegate

The Association *concurs* on Issues 3, 4, 5, 8 and 9, and *dissents* on issues 1, 2, 6, 7, 10, 11 and 12.

Dated: April , 2008

/s/

Michael F. Ward, Association Delegate

PANEL SIGNATURES

Dated: April 7, 2008

Thomas L. Gravelle, Chairperson

The City *concurs* on Issues 1, 2, 6, 7, 10, 11 and 12, and *dissents* on Issues 3, 4, 5, 8 and 9.

Dated: April , 2008

Kevin M. McCarthy, City Delegate

The Association *concurs* on Issues 3, 4, 5, 8 and 9, and *dissents* on issues 1, 2, 6, 7, 10, 11 and 12.

Dated: April 4th, 2008

Michael F. Ward, Association Delegate