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In the Matter of Statutory Interest Arbitration between:

WAYNE COUNTY AIRPORT AUTHORITY,
Employer,

-and-

AFSCME, LOCAL 3317
Union (supervisory), and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 502,
Union (patrol officers)

MERC Case No. D04 A-0123 (Supervisory) 0110
MERC Case No. D04 A-0109 (Patrol)

Hearings: March 22 and 28, 2007

ARBITRATION PANELS' PRELIMINARY FINDINGS, OPINION, AND ORDER (ELIGIBILITY)

BEFORE TWO PANELS BOTH CONSISTING OF:

Benjamin A. Kerner, Chair
Joseph Martinico, Employer Delegate
Jamil Akhtar, Unions' Delegate

Appearances:

For the Employer: Gary R Danielson and Kenneth M. Gonko
The Danielson Group

For the Unions: Jamil Akhtar
Akhtar, Webb and Abel

Present for part or all of the proceedings: Russell Arney, Timothy Calhoun, Nancy Ciccone, Michelle Farmer, Gerard J. Grysko, Richard Johnson, Aram T. Kaloian, Patrick Melton, Kurt Metzger, Tom Naughton, Lynda Racey, Mike Royal, Michael Wasiuranis.

Dated: May 9, 2007

BACKGROUND AND RELEVANT STATUTORY SECTIONS.

This interest arbitration case was initiated by the Petitioners' filing of a petition to have Act 312 proceedings. It was filed on January 21, 2005. Thereafter, the parties were engaged in bargaining, and had the assistance of one of the mediators from the staff of the Employment Relations Commission. The parties were also engaged in litigation before the Commission. When it appeared that no further progress could be made in bargaining / mediation, the undersigned Neutral Chair convened a pre-hearing conference on December 1, 2006. At that conference a number of details relevant to the conduct of hearings were worked out; of significance here is the fact that both parties signed a Waiver of Compliance with Requirement for Timely Commencement of Hearing. In addition, the parties set forth their positions on issues in dispute and the Employer particularly set forth its position regarding the eligibility of employees in both bargaining units to engage in Act 312 arbitration.

The Employer has preserved the issue of the eligibility of employees in both bargaining units to participate in Act 312 proceedings. The Employment Relations Commission considered a similar issue in its Decision and Order of April 17, 2007 in Case No. C05 H-187 and H-196, specifically whether the Respondent therein, Wayne County Airport Authority (W.C.A.A.) had committed an unfair labor practice by "proposing to eliminate Act 312 arbitration for Charging Parties' bargaining units." (D & O, p. 3). (Charging Parties are the Unions herein). Holding first that the subject of Act 312 eligibility is a non-mandatory subject of bargaining, the Commission went on to find that eliminating the pro-

posals for Act 312 eligibility from the bargaining agreements was not contrary to Respondent's duty to bargain; and, insofar as there is a statutory right, the Commission concluded, "Based on the record before us, we are not willing to say that this language [Section 119(2) of 2002 P.A. 90, MCL 259.119(2)] preserves the right of all members of both bargaining units to invoke Act 312 unalterably and forever." [D & O, p. 4]; and further, "[O]n the record before us, we cannot determine which bargaining unit classifications retain Act 312 eligibility as a statutory right." Finally, the Commission noted that the matter of Act 312 eligibility can be determined by the arbitration panel, subject to judicial review, if a party believes that the arbitration panel has exceeded its jurisdiction. [D & O, p. 4]. Thus, the Commission has invited– indeed, has required– this Panel to make a determination on the issue of whether the bargaining unit employees who are the subject of these Act 312 petitions are entitled to Act 312 procedures for the resolution of their contract disputes. As to the concurrent jurisdiction of the Act 312 panel and the Employment Relations Commission, *see City of Detroit (Fire Department)*, 1990 MERC Lab. Op. 859[1]. A majority of the panel for the reasons outlined below, have determined that the employees in both bargaining units have Act 312 rights or had Act 312 rights as of the date these two petitions were filed on January 21, 2005.

The enabling statute creating the Wayne County Airport Authority, the Public Airport Authority Act of 2002, MCL 259.108 et. seq. contains a provision going to the eligibility rights asserted here:

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[1] Where identical issues are presented to both an Act 312 panel and the Employment Relations Commission, both bodies have jurisdiction to determine what is a mandatory subject of bargaining and to determine which employees are eligible for Act 312 arbitration.

> ...The rights and benefits protected by this subsection may be altered by a future collective bargaining agreement except that any employee who as of the effective date of this chapter has the right, by contract or statute, to submit any unresolved disputes to the procedures set forth in 1969 PA 312, MCL 423.231 to 423.247, shall continue to have that right....
> MCL 259.119(2)

The enabling statute also contains the following provision:

> Except as otherwise provided in this chapter, an authority created under or pursuant to this section shall be a political subdivision and instrumentality of the local government that owns the airport and shall be considered a public agency of the local government for purposes of state and federal law. An authority created under or pursuant to this section also shall be the airport owner for purposes of appointing and designating an airport manager under this act. An authority shall not levy a tax or special assessment.
> MLC 259.110(1)

Also relevant, of course, are the initial sections of 1969 P.A. 312:

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

> Section 2(1).Public police and fire departments means any department of a city, county, village, or township having employees engaged as policemen, or in firefighting or subject to the hazards thereof, emergency medical service personnel employed by a police or fire department, or an emergency telephone operator employed by a police or fire department.
> MCL 423.232

This Panel has had the benefit of an independent record [taken on 3/22/07 and 3/28/07] as well as the record created before AJL Roulhac in the combined Commission cases cited above. That is, the parties herein stipulated that the record taken before ALJ Roulhac in Case Nos. C05 H-187 and H-196 should be adopted, *in toto*, as part of the record in these Act 312 proceedings. The Chair

has had access to that record through the kind auspices of the Commission's Court Reporter.

POSITIONS OF THE PARTIES.

The Employer, Wayne County Airport Authority, takes the position that the language of Section 119(2), MCL 239.119(2), attempts to amend Act 312 by implication. Absent such amendment, the employer of the airport police officers, corporals, detectives, police sergeants, and police lieutenants does not meet the requirements of Metropolitan *Council No. 23, AFSCME* v. *Oakland County Prosecutor*, 409 Mich 299 (1980). That case sets forth two specific conditions required for Act 312 coverage. First, the particular employee must be subject to the hazards of police or fire fighting work. Second, the interested department / employer must be a "critical service...department engaging such employees and having as its principal function the promotion of public safety, order and welfare so that a work stoppage in that department would threaten community safety." 409 Mich 299 at 335. While the Employer stipulates that the employees at issue here are engaged as policemen or subject to the hazard thereof, it takes the position that W.C.A.A. is not a critical service department, as defined in *Metropolitan Council, No. 23, AFSCME, supra.*

The attempt to grandfather a number of employees, who would have enjoyed the benefit of Act 312 procedures in their former employment into Act

312-eligible employees in their current employment, says the Employer, also runs squarely into the prohibition of 1963 CONST., Art. 4, Section 25.[2]

Interpreting Act 312 as the predominant law, because it is adjunct to and *in pari materia* with the Public Employment Relations Act, the Employer would find that the terms of Act 312 prevail; that those terms are definitively interpreted by *Metropolitan Council No. 23, AFSCME*, *supra*, and that Section 119(2) of the Public Airport Authority Act, MCL 259.119(2), cannot effectively give jurisdiction to the 312 Panel to cover these petitioned-for employees, where they are not susceptible of such treatment under the terms of Act 312.

The Unions take the position that the officers for whom they petition--patrol officers, corporals, and detectives (in the case of Local 502, SEIU) and police sergeants and police lieutenants (in the case of AFSCME, Local 3317) -- are all working "for a public police department of a county." [Brief, p. 12 and 13]. The Unions cite Section 110 of the Public Airport Authority Act for the authority that the W.C.A.A. is a constituent part of County government and should for the purposes of Act 312 be regarded as a "department" of Wayne County. Thus, the W.C.A.A. is a covered employer under Act 312, according to the Unions.

Secondly , the Unions argue that "the airport police department" is a critical-service department. That is because, in the Union's view, the airport police department is a Category X airport under FAA regulations, which means that it has "heightened duties and responsibilities as it relates to flights being diverted to the Airport to handle emergency situations" [Brief p. 15]; and further that the

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[2] "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length."

manner of filling vacancies in the event of a work stoppage would necessitate calling in other law enforcement agencies, but that such filling would not be sufficient to fulfill the duties of police and command officers.

The Unions take the position that the terms of Section 119(2) are mandatory and require recognition of the rights of its members to Act 312 procedures. "The Legislature in the case at bar, in unequivocal language, stated that the police and command officers 'shall' continue to have said right....When the word 'shall' is used in a command to a public official, it excludes the idea of discretion." [Brief, pp.7-8]

Finally, the Unions take the position that ALJ Roulhac, for the Commission, entered a decision and recommended order in Wayne County Airport Authority and Wayne County Law Enforcement Supervisory Local 3317, MERC Case No. C05 A-014 (concerning transfer rights of individual employees from W.C.A.A. to Wayne County) which is *res judicata*. In the course of his determination, Judge Roulhac determined that "Section 119 only confers rights and benefits to employees who transferred to WCAA, a separate and distinct employer, and obligates the WCAA to assume and to be bound by their existing collective bargaining agreements." The short answer to this view is that the Charging Party voluntarily, after full litigation moved the Commission to "withdraw" the unfair labor practice charge and the Commission accepted that request, thus obviating the need for any exceptions to be filed by the respondent, if in fact it disagreed with Judge Roulhac's holding.

ANALYSIS AND CONCLUSIONS ON ACT 312 ELIGIBILITY.

The Michigan Supreme Court has given a definitive interpretation of the requirements for eligibility for Act 312 procedures in *Metropolitan Council No.23, AFSCME, supra*. I find that the Legislature in passing the Public Airport Authority Act, in particular Section 119(2) must have been aware of the terms of the Michigan Supreme Court's opinion in *Metropolitan Council No. 23, AFSCME, supra*, and must have deemed that the employees it invested with Act 312 rights fit the requirements of *Metropolitan Council, No. 23, AFSCME, supra*. In general, the Legislature is deemed to be aware of the pronouncements of the Supreme Court interpreting prior legislation. In view of this presumption, I need not specifically resolve whether the employees here subject to petition are currently employees of a "critical service employer" as that term is used in *Metropolitan Council No. 23, AFSCME, supra.*

The Employer stipulates that the employees were, on the date of devolution, subject to the hazards of police work; in other words, were "critical service employees."

Based on the record made before him, ALJ Roulhac determined that all the employees subject of the Unions' two petitions had been "employed by the Wayne County Sheriffs Department, a critical-service department whose function is to promote public safety, order and welfare so that a work stoppage would threaten community safety." [ALJ D & RO, p. 3 middle] I have the benefit of Mr. Roulhac's record plus an independent record made before this Panel. The inescapable conclusions from the expanded record are that (i) generally, the employ-

ees (or more accurately, employee classifications) subject to both these Act 312 petitions were employees of the Wayne County Sheriff Department on the date of their devolution into employees of the W.C.A.A., and (ii) the Wayne County Sheriff's Department at the time in question was a critical-service department, as defined by *Metropolitan Council, supra*. The further conclusion is equally inescapable that the employees who devolved from Wayne County Sheriff Department employees to W.C.A.A. employees were, at the last date of their employment at Wayne County Sheriff's Department, eligible for Act 312 procedures in their employment at Wayne County Sheriff's Department.

The inquiry thus concludes by observing that the terms of the Public Airport Authority Act at Section 119(2), appears to be designed specifically to protect those employees whose employment preceding their devolution into employees of the W.C.A.A. afforded them Act 312 rights. The relevant section, MCL 259.119(2), recognizes that the employees' collective bargaining contractual rights may change and evolve, but says in clear unambiguous language, that such employees who, "as of the effective date of this chapter" enjoy Act 312 rights "by contract or statute" shall continue to have such rights. The language of Section 119(2) cannot be read in any other way than to recognize that the exception was intended to protect the Act 312 rights of those employees who had such rights "by contract or statute" prior to their devolution into W.C.A.A. employees. Thus, the employees in the classifications of police officer, corporal, detective, police sergeant, and police lieutenant appear by operation of 2002 P.A. 90

to have rights to have their contract disputes resolved by the procedures of Act 312.

Benjamin A. Kerner
Panel Chair of both panels.

Jamil Akhtar I concur.
Unions' Delegate in Case No. D04 A-0123 and D04 A-0109

Joseph Martinico I dissent.
Unions' Delegate in Case No. D04 A-0123 and D04 A-0109

Dated: May 9, 2007
Detroit, Michigan.