STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the matter of Fact Finding between:

THIRD JUDICIAL CIRCUIT,

Employer

MERC Case No.: D108 H-1134
Fact Finder: Jerold Lax

and

LOCALS 3309 AND 1905,
AFSCME COUNCIL 25,

Union.

Appearances:

For the Employer - Bruce A. Campbell, Attorney

For the Union - Bruce A. Miller, Attorney

REPORT OF FACT FINDER

Procedural Background

Upon expiration of a collective bargaining agreement for the period October 1, 2004 – September 30, 2007 covering some 400 clerical and professional employees of the Employer, the Third Judicial Circuit Court, the parties failed to reach agreement concerning a subsequent contract, and numerous mediation sessions, while successful in producing tentative agreements concerning a number of issues, failed to resolve all issues, whereupon the Union filed for fact finding on September 29, 2008. An initial hearing was held June 23, 2009 and six further hearings were held, the final hearing on December 5, 2009. Mediation and negotiation

continued, but two principal issues remained unresolved and became the focus of the fact-finding hearings: the Employer's proposal that future funding of health insurance involve contribution by employees to premium costs, and the Union's response that if employees were required to bear a portion of the cost of health insurance, those employees should receive a 4% wage increase over the wage levels in the expired agreement. The parties also disagreed regarding the duration of any subsequent agreement, the Employer contending that such an agreement should expire in 2009, and the Union ultimately contending that the agreement expire in 2011.

It should be noted that related litigation has been pending during the course of these fact find proceedings which provides some context for dealing with the issues involved in the fact finding. The Third Judicial Circuit is a part of the State's constitutionally-based judicial system, and its principal source of funding is Wayne County. The Michigan Supreme Court has recognized that disputes may arise between Courts and their funding entities as to whether adequate funding has been provided for the operation of a particular Court, and through Administrative Order 1998-5 the state Supreme Court has promulgated a procedure by which such disputes may be addressed. This procedure ultimately allows for litigation to resolve the dispute. In the present case, while the parties are in apparent agreement that the County has been in a deficit situation for several years, vigorous debate has occurred as to the extent that deficit may be attributed to the activities of the Third Judicial Circuit. The aforementioned litigation deals principally with the Court's contention that the 2008-9 budget adopted by the County for operation of the Court does not provide adequate resources for the Court, reducing personnel available to the Court for security, clerical, and other services. While this may to an extent be viewed as a dispute concerning the magnitude of the Court's deficit, it appears fundamentally a

dispute concerning allocation of overall County resources. Preliminary orders of the Court in the pending litigation have maintained funding for the Third Circuit at preexisting levels.

With regard to the pending litigation, it should further be noted that the Michigan Supreme Court had determined in *46th Circuit Trial Court v Crawford and Crawford County Board of Commissioners, 476 Mich 131 (2006)* that the litigation authorized to determine disputes between Courts and their funding units is to focus on the question of whether the level of funding proposed by the funding unit undermines the ability of the Court to fulfill critical judicial needs and to serviceably perform the Court's functions. While in any particular collective bargaining situation relating to a court, one or another party may contend that adoption of its proposals is crucial to the fulfillment of critical judicial needs, it would appear that the issues involved in this fact finding, while of obvious importance to the parties and of potential overlap with issues involved in litigation, are not of the sort being considered, and presumably to be resolved, in the pending litigation concerning the ability of the Employee to provide its basic services, nor have the parties argued that the issues are identical. Hence, the issues involved in the fact finding are more appropriately evaluated by considering factors typically relied upon by fact finders which generally include, though not by statutory compulsion, factors considered by arbitration panels under Section 9 of Act 312 (MCL 423.239):

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

  (i) In public employment in comparable communities.

(ii) In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Considering such factors, any resulting potential collective bargaining agreement may contain terms which would differ from the basic levels as issue in the pending litigation.

Position of the Parties

With regard to the duration of any agreement succeeding the expired 2004-2007 agreement, the Employer takes the position that such an agreement should expire no later than 2009, principally to preserve the flexibility to negotiate further, for subsequent periods based on conditions which may have changed and, assumedly, had not already been dealt with sufficiently during the course of the negotiations leading to this fact finding. The Union ultimately took the position that the agreement should extend through 2011, principally to accommodate its schedule for implementing the 4% pay increase which it seeks if cost-sharing is recommended regarding medical insurance coverage: a 2% increase effective October 1, 2008, a 1% increase effective October 1, 2009, and a 1% increase effective October 1, 2010.

With regard to the related issues of cost-sharing for medical insurance and wage increases, the Employer's position is clear that cost-sharing is appropriate, but that no corresponding increase in wages is supportable. This position appears to be based principally on

the overall financial condition of the funding agency. The Union takes alternative positions. First, it contends that the Court, as contrasted to its principal funding unit, is not in fact in a deficit position, or at least not one so serious as attributed to it by the County, and that cost-sharing with regard to medical insurance is therefore unnecessary. Further, if cost-sharing is recommended, the Union contends that its requested wage increase should also be recommended based on several grounds, which include the fact that employees of the Probate Court and the County also received such an increase when health insurance cost-sharing for those units was introduced in collective bargaining agreements covering the period 2004-2008, that the cost of living has steadily increased though union members have not received a pay increase for 5 years, and that unit members are paid less than employees holding comparable positions with the County and Probate Court.

Discussion

(1) Health Insurance Cost-Sharing.

During the course of bargaining subsequent to expiration of the 2004-2007 collective bargaining agreement, both the Employer and the Union advanced proposals dealing with employees bearing a portion of the cost of health insurance, with contributions specified for coverage through PPO and HMO plans and higher contributions for more traditional Blue Cross-Blue Shield coverage. In the fact finding hearings, the parties indicated that if cost-sharing were to be included in any subsequent agreement, either party's proposal would provide an acceptable approach, and the fundamental issue was whether cost-sharing should be included without a concomitant increase in wages for Union employees.

The Employer's rationale for cost sharing appears to rest less on the proportion of the County's deficit allegedly attributable to the Third Judicial Circuit than on the overall County

deficit, which Employer testimony suggested had been adversely impacted largely as a result of declining property tax revenues based in particular on a decline in property values since 2008. The Employer submitted documentation during the hearing and as exhibits to its post-hearing brief indicating that the state equalized value of property in the County has declined 3.64% in 2008, 10% in 2009, and was estimated to decline further by 13.74% in 2010. The Union suggested during the fact finding proceedings that in asserting this position, the Employer was pressing the position of its principal source of funding rather than an independent position of the Court, but it remains the case that the County is the Court's principal source of funding, and former Chief Judge Giovan's letter which preceded commencement of the above-described litigation (UE 1), while highly critical of the calculation by the County of the portion the County deficit attributable to the Court, also indicated a willingness of the Court to reduce expenditures, including some layoffs and a reduction in health care benefits, and his testimony and correspondence are consistent with the view that the Court can appropriately take overall economic conditions into account in arriving at a position in collective bargaining. This is not inconsistent with the Court exercising its authority under Administrative Order 1998-5 to question, and indeed to litigate over, the issue of whether County budgetary decisions in the absence of a collective bargaining agreement have undermined the ability of the Court to perform its essential functions.

As both parties have acknowledged, the Wayne County Probate Court, which the Union views as the employment unit most comparable to the Third Judicial Circuit, as well as the unit consisting of the County's non-supervisory employees, agreed as a term of their collective bargaining agreements covering the period 2004-2008 (UE 6, UE 20, UE 21) that the cost of medical insurance be shared between employer and employees, and evidence and testimony at

the fact finding hearing indicated that at least one other Court-related unit involving the Government Administrators Association had for the 2004-2008 period also agreed to a collective bargaining agreement which provided for sharing of medical insurance costs. (UE 7). These specific examples aside, it has become increasingly well-accepted by arbitrators and fact finders who address this issue that rising health care costs are often appropriately dealt with by considering some form of cost-sharing. (As Arbitrator George Roumell noted in his 2007 Act 312 decision in County of Wayne and Wayne County Sheriff and Wayne County Sheriffs, Sergeants and Lieutenants, "The trend of premium co-pay has arrived in Southeastern Michigan.") The Union, as previously noted, has argued that in the case of the Third Judicial Circuit, the health care costs attributed by the County the Court have been overstated, resulting at least in part from the pooling of Court and County plans in the same system, and the inclusion of at least some retiree health coverage in insurance costs attributed to the Court. Testimony elicited by the Union at the hearing by Pamela Griffin indicated that this may well be the case. As also earlier noted, however, the Employer's argument, for purposes of this fact finding, is not based on the extent to which any County deficit can be attributed to the Court but rather on the existence of that deficit and rising health care costs as a contributing factor. Exhibits introduced at the hearing (UE 13, UE 31, UE 32) support the generally-accepted proposition that health care costs have been steadily increasing with corresponding pressure on governmental budgets, and if cost-sharing proposals are geared to the premiums paid by each employee, costs for employees more properly attributable to another unit would be dealt with within those units.

The Union notes that at one point in the negotiations following the expiration of the 2004-2007 collective bargaining agreement (in 2008, according to the testimony), the Employer had suggested that it desired to save $836,465 as a result of the negotiations (UE 14) and that

several approaches to cost savings were apparently discussed, including cost-sharing for health care premiums and a wage reduction. The Union further indicated that in 2009, several Court employees principally in the Information Technology Service Bureau were laid off or displaced, and Union witness Patrice Miller testified that these layoffs or displacements resulted in savings to the Employer of approximately $771,000. From this evidence the Union concludes that any cost savings the Employer hoped to obtain during negotiations had in fact been largely achieved, and that cost-sharing for medical insurance is therefore now unwarranted.

While the Union's argument that cost savings originally sought in negotiations may have been significantly achieved through means other than cost-sharing of medical expenses is not without force, additional time has passed since the occurrence of those discussions, and it remains the case that the Employer's position is consistent with the pattern which has become prevalent in the area, as demonstrated not only by the Probate Court contract and other County contracts, but by contracts in other governmental units within this geographical region. See, e.g., the June 30, 2006 decision of fact finder Michael Long in the matter of *AFSCME Council 25 and the City of Detroit*. In the present case, I would recommend that cost-sharing be included in the successor agreement to the expired 2004-2007 agreement, subject to the further conditions discussed below. The parties have indicated that if cost-sharing is included, the proposal of either party would be acceptable, and the parties, if agreement is reached on a contract, should determine which proposal is included, also being free to adopt some variant of either proposal.

(2) Wage Increases.

As noted, it is the Union's position that in the event cost-sharing for medical insurance is included in any agreement, the covered employees should also be granted the 4% wage increase included in the 2004-2008 contracts of the Probate Court and the County non-supervisory

employees in which such cost-sharing was introduced. (It appears that a similar wage increase was included in the 2004-2008 agreement of the Government Administrators Association). Union witness Danny Craig testified that at least with regard to the Probate Court contract, the 4% increase was specifically a quid pro quo for health care cost sharing. The Union's position is based primarily on comparability among County-financed units both in terms of benefits granted in exchange for cost-sharing and in terms of greater equalization of pay between Court and other County and Probate Court employees, which the Union contends to have been historically unequal. The Employer contends that the same revenue conditions upon which it relies is seeking cost-sharing, which the Employer contends have worsened since 2008, militate against any wage increase, noting that in the case of County units now engaged in bargaining, wage reductions are being sought either directly or by means of such mechanisms as furloughs. The Employer offered testimony indicating that six or seven units have already agreed to such concessions, including three represented by AFSCME, and that others have agreed to maintain wages at their present levels. (Union witness Danny Craig denied knowledge of acceptance of such condition by AFSCME supervisors). While it is not apparent whether these agreements involved the introduction of health insurance cost-sharing, the Employer has asserted that the Judicial Attorneys Association has tentatively accepted an agreement involving cost-sharing and no wage increase. The Employer has further asserted that a 10% wage reduction is being sought from the County non-supervisory employees who constitute one of the Union's comparables, though the results of this effort cannot presently be known.

The Employer's position is essentially an argument based on ability to pay, resting in significant part on recent declines in property values and state revenue sharing, as well as an argument based on what it contends are more relevant internal comparables presently involved in

collective bargaining. The Union argues, in partial response to the Employer's position regarding its ability to pay, that at the time of unit layoffs in 2009, the supervisory staff was left largely intact despite the smaller number of employees to supervise and, moreover, that an additional deputy court administrator was hired at a salary of $115,000. Further, while the Union does not dispute that State revenue sharing has been declining, it argues that the $44,000,000 in projected 2010 revenue sharing (UE 39) is nonetheless a substantial amount which could accommodate a wage increase. While not emphasized by the Union, the Employer had also estimated that annual savings from the adoption of Court employee contribution to health care premiums is anticipated to be $2.2 million annually. (County Executive's May 13, 2009 Deficit Elimination Plan Request).

The Union's contention regarding ability to pay based on the Employer's retention of supervisors and hiring another deputy Court administrator despite the occurrence of layoffs is of some persuasive force, though since no explanation was provided for these management decisions it is difficult to assess their possible justification. This argument, as well as the Union's contention regarding revenue sharing, do indicate in a general sense that funds are available for a variety of purposes which potentially include employee wages, but do not answer the specific question of how those funds should be allocated during any particular period.

Aside from its position that Employer expenditures for supervisory personnel demonstrate that the Employer accommodate a wage increase, the Union offered evidence that the cost of living has steadily risen without any pay increase since 2005, and that pay for unit members has been consistently lower than pay for similar positions in Probate Court and County units. (UE 18). The comparison offered by the Union includes the following:

Wayne County Probate Court		Differential	Third Judicial Circuit Court	
Cashier	39,583	6% (2,322)	Payment Clerk	37,261
Typist	39,583	17% (5,784)	Typist II	33,799
Court Clerk V	48,602	10% (4,396)	Clerk V	44,209
Wayne County Local 1659 (General Fund)				
Senior Accountant	66,788	30% (15,390)	Senior Accountant	51,398
Purchaser	66,788	40% (19, 071)	Purchaser	47,717
Investigator	50,177	5% (2,460)	DRS	47,717
Psychologist	63,721	16% (7,698)	Psychologist	55,060
Account Clerk 1	41,497	23% (7,698)	Account Clerk 1	33,799
Clerk	34,229	21% (5,899)	Clerk	28,330
Social Worker	66,788	40% (19, 071)	Social Worker	47,717
Store Keeper	39,586	6% (2,325)	Store Clerk	37,261

The Union's position with regard to comparison of wages of unit employees with wages of employees in arguably comparable positions is, in a general sense, supportive of a potential wage increase, although, while the job titles to which reference is made are clearly similar, there is no further evidence as to the specific job responsibilities involved or the reasons, if any, for the seeming discrepancies. Similarly, the Union's position with regard to having had no wage increase since 2005 despite cost of living increases may also be generally supportive of a wage increase, although it should be noted that the expired 2004-07 collective bargaining agreement contained a provision which contemplated seeking an additional 3% increase for 2006-07, which would have caused wages under the agreement to exceed the wages in the 2004-2008 agreements the Union suggests as comparable; this increase was requested by the Employer but not granted through the County budget process, and a grievance seeking award of the additional 3% was denied. Further, there is a scarcity of evidence as to the intervals between pay increases for other

comparable public or private employers, and therefore difficult to assess whether the interval in the present case is unusual.

In determining whether a wage increase should be recommended as a condition of health insurance cost-sharing, it might be noted that while 4% wage increases were included in the 2004-2008 agreements upon which the Union relies, it is also the case, as previously indicated, that the 2004-2007 agreement whose expiration motivated this fact finding resulted in a 3% wage increase in 2005, and further, that the agreement contained no provision for sharing of medical insurance costs. These conditions at present remain in effect as a result of the pending litigation. Hence, the differential between the wage increases most recently accorded the instant bargaining unit and the units proposed by the Union as comparables is effectively 1% rather than 4%; an increase of 4% does not appear supportable under these circumstances, but a case might be made for a lesser increase. It might also be noted that the projected Employer savings from cost-sharing of health care premiums and corresponding costs to employees would be substantially in excess of a 1% increase; the annual salary of the highest paid bargaining union member under the expired contract is $66,598, 1% of which is $666; the Employer's cost sharing proposal provides for biweekly employee contribution for HMO and PPO coverage of $50.39 and $130.49 for Blue Cross-Blue Shield traditional coverage. If cost sharing is introduced, it will have an adverse impact on employee wages but, by the same token, the absence of cost-sharing has been an advantage to employees both under the 2004-2007 agreement and during the pendency of these proceedings.

I find that the sources of revenue available to the Employer, particularly in terms of property value, have declined since the negotiation of the 2004-2008 agreements which the Union offers as comparables. It also appears that wage increases have not been offered or

included in more recent County-financed collective bargaining agreements, and that, as evidenced by the 2009 ITSB example, as well as matters at issue in the pending litigation, layoffs have not been uncommon, particularly with no collective bargaining agreement in place. While the Union's concerns with health care cost-sharing and pay equity are entirely legitimate, and while some pay increase at this time, even if not of the magnitude sought, would to some extent address those concerns, the diminution of available revenue sources would support a recommendation that no further wage increase be included in the successor to the 2004-2007 agreement at this time, with the further recommendation that this wage provision be subject to renegotiation in the event agreements are reached with the Judicial Attorneys Association or the County non-supervisory employees during the period described below. I would, however, also recommend that the parties consider a 1% wage increase, to commence simultaneously with cost-sharing, to bring the Union's situation into closer alignment with the Probate Court and the County's non-supervisory employees. Such an approach need create no broader precedent, since it would relate specifically to the introduction of cost-sharing, and may facilitate agreement between the parties.

(3) Duration of Agreement.

The Employer has proposed an agreement expiring in 2009, to preserve flexibility for further negotiations based on changed conditions, but also necessitating that if such an agreement were adopted, bargaining would immediately become necessary concerning a period which has expired and concerning which the practicalities of implementing any contractual changes recommended through fact finding would be difficult. The Union has proposed an agreement terminating in 2011 in part to accommodate the scheduling of the wage increase it seeks. In light of the fact that the parties are now into the 2010 fiscal year, and in light of the foregoing

recommendations concerning health insurance and wages, it would be my recommendation that an agreement be adopted extending through September 30, 2010, with cost-sharing provisions to take effect as soon as practicable at or prior to the termination of the agreement. To the extent that further bargaining is required concerning the specific terms of cost-sharing or other contractual provisions not dealt with herein, such bargaining should occur expeditiously.

Date: May 17, 2010

Jerold Lax
Fact Finder