State of Michigan

Department of Consumer and Industry Services

Employment Relations Commission

Michigan AFSCME Council 25,

Petitioner,

And Case No. L09 A-3012

Cheboygan County Road Commission,

Respondent.

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REPORT AND RECOMMENDATIONS OF FACT FINDER

On March 12, 2010, the undersigned was appointed by the Employment Relations Commission (MERC) as Fact Finder in this matter, pursuant to 1939 PA 176. The Petition for Fact Finding was filed on December 22, 2009, and answered on February 22, 2010. After two pre-hearing conferences, a period of discovery (particularly, comparables), exchange of witness lists and exhibit copies, and various other pre-hearing matters, the fact finding hearing was held on June 22, 2010 in Indian River, Michigan, at the offices of Respondent Employer without objection. The representatives, who are both attorneys at law, were present, and provided the Fact Finder with stipulations and evidence, including sworn testimony

of witnesses. A court reporter was present by arrangement of the Respondent, for its purposes. The Fact Finder has not requested a copy of the transcript.

At the conclusion of the testimony, the representatives stipulated to filing their closing arguments solely in the form of briefs by July 20, 2010, by electronic mail, only to the Fact Finder. It was further agreed that after July 20, the Fact Finder would forward to each representative an e-mail attaching a copy of the other representative's brief received, and then would make his report. The Fact Finder approved of this arrangement. The Fact Finder did in fact receive, via electronic mail, a brief from each representative by July 20, and did on July 21, 2010 forward copies to the opposing representatives, pursuant to their agreement. The Fact Finder has read the closing briefs of both representatives, as well as the exhibits. Accordingly, the Fact Finder now issues this report with recommendations.

Findings of Fact by Stipulation

At the outset of the hearing, at the request of the Fact Finder, the representatives placed on the record any stipulations of fact that may have been arrived at prior to hearing. Each party had placed most of their exhibits into respective binder books, marked within each book by numbered tabs. It was later stipulated on the record that exhibits in Petitioner's exhibit book would be identified with a "P" followed the corresponding tab number, and similarly, exhibits in Respondent's exhibit book would be identified with an "R" followed by the corresponding tab number. The Fact Finder in this report refers to exhibits by that identification system. Further, both parties' entire books of exhibits were admitted into evidence by stipulation.

At the outset, reference was made to Exhibit R3, the Respondent's Final Offer dated December 22, 2009. It was stipulated on the record that the following proposals from that exhibit be incorporated into the Fact Finder's recommendation, and the Fact Finder so finds (with the following numbering corresponding to R3):

1. All prior tentative agreements be incorporated. These are in Exhibit R5, including contractual sections 36- Sick Leave, 11- Seniority, and 42 -Hours of Work and Overtime.
2. The health insurance plan be modified to include those listed in Exhibit R3.

3. Under the health insurance plan, employees with less than three full years of service to the Employer shall be eligible for single coverage only for the first three years of employment. Coverage for family members may be added at employee's expense during that time.

6. A step system be phased in and tiered pursuant to the figures listed in this proposal in Exhibit R3.

7. Transferred employees be paid $2.00 under the class with a $1.00 raise after 6 months and paid full scale after 12 months.

8. The contract be effective from the date of signing through May 18, 2013.

Disputed Issues

After the above stipulations of fact, the items remaining in dispute, pursuant to consensus of the representatives placed on the record, are the proposals numbered 4, 5, and 9 in Exhibit R3. Those are the items as to which further evidence was introduced at the hearing, and as to which closing briefs were filed with the Fact Finder. Again, the parties' exhibit books were also admitted into evidence by stipulation.

Therefore, following are the findings and recommendations as to those disputed items, with numbering corresponding to the items as set forth in Exhibit R3.

4. Eligibility for retirement benefits

   Proposal 4 in Exhibit R3 would make employees eligible for the retirement benefits defined therein only when they reach 60 years of age and have a minimum of 10 full years of service to the Employer at the time of retirement, OR employees would be eligible if at least 55 years of age with 25 full years of service.

Petitioner called as a witness Joseph LaHaie, a foreman for the Cheboygan County Road Commission, and chief steward for the union. He testified as to his concerns. The supervisory unit currently has three employees in it, including himself, and all have at least 10 years of service. He stated that he believes that under the current contract, supervisory employees can retire at a reduced rate even if they are under age 55, as long as they have at least 10 years service vested. The retirement plan is a MERS plan. (Respondent's closing brief is consistent with that testimony).

Mr. LaHaie testified as to the Petitioner's proposal from April 21, 2010, which is that the Respondent's proposal item 4 would only apply to employees hired on or after July 1, 2009. He believes that mirrors Article 21, section 2 of the current contract of the non-supervisory employees, in Exhibit R8, as to those employees. That section includes a third tier (in subsection 3) for employees hired on or after July 1, 2009. The witness is concerned that if that the "hired on or after July 1, 2009" provision is not included, a current supervisory employee who is "forced into retirement" before age 55 would not receive ANY retirement benefits, even reduced benefits. He testified that one or more current supervisory employees could possibly find themselves in that position in the future. On re-cross examination, he clarified that he was speaking of a retirement forced by a disability due to a health problem. That has not been expressly covered by prior contracts either, but indirectly addressed by the reduced benefit. He cited an example of a non-supervisory employee who had to retire at age 52 due to cancer, after he had over 10 years of service. Although at a rate reduced by about 18%, he received retirement benefits. But a current supervisory employee in the same situation would not, under the Employer's proposal.

The Fact Finder finds that the Respondent's proposal is as set forth in item 4 in Exhibit R3, and that the facts are as testified to by Joseph LaHaie, which testimony was not disputed by any other evidence.

Respondent argues in closing that the MERS plan is governed by statute, and determines when employees are eligible. As Respondent also argues, and consistent with the testimony of Mr. LaHaie, the Fact Finder also finds that MERS requires at least 10 years of service for vesting, and has a 55/25 rider. All of the three members of the current supervisory employees unit are vested with at least 10 years service. As Respondent argues, in terms of normal retirement, none of the three current employees would be affected by either proposal.

The facts found include the possible situation that could arise whereby a current supervisory employee, prior to age 55, could find himself faced with a health issue that causes a disability, and forces the employee to retire early. If the Respondent's proposal were to become part of a new contract prior to that time, and did not only apply to new employees hired on or after July 1, 2009, the current employee would not have retirement benefits.

The issue, then, is not one of conflicting evidence or the facts to be found, which are consistent with Petitioner's evidence, but goes to the recommendation to be made by the Fact Finder. In that regard, there is no argument by Respondent that Petitioner's proposal would be contrary to the statute governing MERS plans, or any law. To the contrary, Respondent's argument appears to acknowledge, to the contrary, that as long as a minimum 10 years of service is required for vesting, which would continue under Petitioner's proposal, that proposal would comport with law. As recognized in the testimony of Joseph LaHaie and Respondent's closing brief, a recommendation is only necessary at all due to Mr. LaHaie's testimony as to the possible prospect of a "forced retirement" of one of more current supervisory employee(s).

Respondent is correct that under the evidence, there has been no thing as a forced "disability retirement", or similar, in any of the prior contracts, nor

has there been any intent of the Employer to begin extending such a new benefit. The Fact Finder declines to expressly or strictly follow, or find he is bound by, the approach in the statute for compulsory interest arbitration (Public Act 312). However, Respondent is also correct in that most, if not all, of those statutory factors can be relevant in a fact finding matter. And, the above certainly are. Therefore, from the standpoint of being asked to recommend a new benefit in the nature of a "disability retirement", if he is indeed being asked to do that, the Fact Finder declines.

However, although not specifically argued by Petitioner, the evidence contains alternate grounds for consideration of similar recommendation, the end result of which would be the same. As stated above, Joseph LaHaie testified that he believes the current supervisory contract provides for a reduced retirement benefit before age 55 if at least 10 years of service has vested, and there was no testimony to the contrary. Neither party has referred the Fact Finder to any exhibit in this regard. The Fact Finder has reviewed both parties' exhibit books, and while Exhibit R6, the supervisory unit contract that expired in 2009, contains Article 15, section 59 as to retirement, that section incorporates by reference other documents that are not located in the exhibits. Therefore, the Fact Finder is not able to independently read and determine the current contract eligibility requirements, and accepts Mr. LaHaie's testimony as the best evidence.

A possible basis then exists for the Fact Finder to recommend Petitioner's proposal, from the "current" (last) contract for the current supervisory employees that expired in 2009, which is also one of the factors in the statute that Respondent urges the Fact Finder to follow in this approach (factor "f"). The possible impact of such a recommendation would be limited to the time it takes for the three current employees of the unit to reach age 55, which may be less than the duration of the entire new contract. The other factors in Public Act 312 are either not applicable to this issue, or marginally applicable, except financial ability of the Employer and any change in circumstances. No comparables were introduced as to this issue.

The issue for recommendation comes down to one of whether a prior provision in a now expired contract for a reduced early retirement benefit should be continued in the next contract for a small group of employees grandfathered in for a limited time until age 55. There will likely only be an impact if one or more of the three employees unfortunately experiences a health issue forcing them to retire prematurely. If an employee chose to take an early retirement at a reduced benefit, he could do so now, before signing of a new contract, and none of the three have done that. There was no evidence that the last contract for the supervisory employees required them to pay into their MERS plan from their wages, as does the current non-supervisory contract. It would surely make a difference to the Fact Finder if there were evidence that any of the current supervisory employees had paid out of their compensation for a future benefit that they would no longer receive, despite expiration of that contract. But there is no evidence found of such contribution, nor has any been argued. Although contribution may be required in one of the documents incorporated by reference into that supervisory contract, the Fact Finder does not have access to review those.

Based on the above, while it is a very close issue, the Fact Finder recommends that the Respondent/Employer's proposal item 4 be adopted without the "on or after July 1, 2009" language, due to an employer's general authority to offer reduced employment benefits from a prior contract, in a new contract.

5. Retirees' health benefits

Proposal 5 in Exhibit R3 would strike section 59(b) of the current contract, and modify section 59(b). The modified section would provide for the Employer to pay, for the retired employee and his/her spouse, all or part of costs of a medical benefit program, with coverage equivalent to active employees'. The Employer's contribution percentage would be according to

a formula taking into account date of hiring and years of service. For employees hired after March 11, 2003, contributions would cease when the retiree becomes eligible for Medicare.

Petitioner's witness Joseph LaHaie testified as to his concerns with section 59(d) of the current contract, referred to by the parties as "time to time language". The concern is that the Employer could change carriers and/or insurance after retirement. On cross examination, he acknowledged that the "time to time language" was first introduced for the supervisory unit in the 1990s, possibly 1997. That language has not since been removed. Mr. LaHaie stated that he is more concerned with change in coverage than change in carrier. Respondent is self-insured, which the witness believes has saved it money.

Petitioner's second witness was Greg Bunker, a foreman for the Cheboygan County Road Commission. He testified that supervisory employees have not received raises during an unspecified period of time, offsetting any increased insurance costs during that same time.

Luke Houlton testified that he researched the "time to time language" in Cheboygan County Road Commission contracts back to 1983. Then, the contracts allowed Respondent to change carriers if coverage did not change. About 1999, there were no retiree health benefits. That led to incorporation of "time to time language" in a letter of agreement regarding seven individuals. The subsequent contract, from 2001-2004, was the first containing "time to time language." See Exhibit R34 admitted without objection, including page 5 which subsequently extended the agreement to two additional persons. In later contracts, "time to time language" talked of a plan, not a carrier. Mr. Houlton stated Respondent's position that since 1997, it has retained the right to modify retiree health insurance, and apply the same plan as active employees, without guaranteeing that the plan would remain the same for life. The 1997 contract was ratified and approved.

On cross examination, Mr. Houlton testified that the non-supervisory unit does not have the "time to time language" in their contract.

Petitioner's closing brief terms the "time to time language" issue as the central issue in the case, upon which "settlement hinges." The other two disputed issues were characterized as "ancillary."

Before turning to the evidence and arguments on other factors such as comparables and financial ability, the Fact Finder states that he finds facts as presented in the above cited evidence. There is no significant dispute between the evidence presented by the opposing parties as to those facts.

It is also found that the Employer has lawful authority and has reserved the right to modify health insurance benefits for its retirees, which are not vested. Respondent has specifically retained that right in the contracts it has signed since 1997 with the supervisory unit. The Fact Finder also accepts the argument of Respondent that the Employer cannot be a guarantor of a certain level of coverage, especially when there are many financial, legal, political, and other circumstances that are beyond its control in the future. It is acknowledged that the members of the subject unit are concerned about future eventualities, especially in their personal finances, in the future, and seek some certainty and consistency.

Petitioner's concerns are justified – it is possible that coverage may change after retirement, affecting a retiree's finances and/or level of confidence in continuation of his plan, until Medicare eligibility.

However, the Employer does not have a legal obligation, nor even necessarily much ability, to provide such. In fact, what is sought is a level of guaranteed coverage to retirees that may well, if adopted, exceed what active employees may have at a future time. While retirees may want to cement their coverage permanently with a form of defined benefit, and not rely upon the future bargaining of active employees, that is not a basis for a recommendation.

Further, it is relevant that the Respondent's proposal 5, while worded differently (and leaving out the specific "time to time" language), is substantively the same in regard to level of coverage as the last few contracts of the supervisory unit. The Petitioner's proposal would amount to a drastic "sea change" at this point in time.

With regard to this issue, the parties presented evidence and arguments on a few additional factors.

The Respondent's exhibits contain comparables from a few other Michigan counties' road commissions as to retiree's health benefits, and a comparison chart in Exhibit R31. As acknowledged in Petitioner's closing brief, among those counties, only Otsego has limited its road commission's ability to change coverage, and that according to the contract of current active employees. Also, Emmet County restricts any change to a "comparable plan." Alpena and Mason Counties allow the road commissions to change the retirees' plan without restrictions. The latter three counties' retiree health plans are provided to be the same as for active employees. The facts are found to be as stated in the above exhibits, and this factor further supports Respondent's position.

Respondent also presented evidence on its financial status, in the form of testimony from Luke Houlton and exhibits. Exhibits R19 and R20 are comparables of Michigan Transportation Fund MTF) revenues. Exhibit P6 of Petitioner also contains a breakdown of funding sources, which varies from Exhibit R19. MTF funds are general operating funds from the state to pay fixed costs and "daily bills." Mr. Houlton testified that he examined the FY2007-2009 Audit document as to state funding sources, upon which Exhibit P6 is partially based. The amounts in Exhibit 6 include non-MTF funds, i.e., "pass through" dollars for projects that include state funding. The county road commission has no control over that money, which just flows through the road commission's books. That testimony and Exhibit R35 (admitted without objection) include numerous specific examples of MTF

and "pass through" funds, and how they were spent. When the "pass through" dollars for 2009 in the testimony are subtracted, the exhibits are close to being in agreement. However, it is also to be noted that the Respondent's exhibits used the state fiscal year (October to September), versus a calendar year in the fiscal audits underlying Exhibit P6, as a further reason for discrepancy between exhibits.

Mr. Houlton testified that Cheboygan County's MTF revenues have been declining since 2004, over 12% total, and just from October 1, 2008 to September 30, 2009, decreased 4.2% according to Exhibit R21. Respondent's unreserved balance is about 6%, whereby the auditor recommends 20%, according to Mr. Houlton. Respondent cannot budget on the basis of "pass through" dollars, only on the basis of MTF funds. Additional evidence of the negative impact of the state economy on Respondent's finances are found in Exhibits R15 through R26 inclusive. Petitioner's closing brief expressly states that it does not take issue with any of this evidence from Respondent.

The facts are found to be as stated in the above evidence, which is not conflicted. The Fact Finder sees no need to even make findings and address the additional evidence concerning various road commission projects, and determinations as to when those have been bid out to private contractors, since that evidence contains nothing of direct significance to Respondent's financial ability to entertain Petitioner's proposal here.

It is found that the Respondent does not have the financial ability to meet the Petitioner's proposal to delete the "time to time" or similar language at this time.

Petitioner's remaining evidence and argument in support of its position is that unlike all of the comparable counties except Otsego, the supervisory unit of this Employer is unionized, and further, has made concessions in other areas in order to obtain certainty of level of coverage in retirement health benefits. Specific concessions were identified in the closing brief, in

the areas of wage increase percentages, and accepting increases in medical co-pays and unreimbursed deductibles, while reducing eligibility for coverage of new hires.

The last items of concession in the foregoing paragraph are evident from the stipulations of fact, going to proposals 2 and 3 in Exhibit R3. The other, as to wages, is deferred to that issue, but is not found to be a basis for recommending the Petitioner's position to delete the "time to time" language be adopted, especially in light of all the countervailing evidence and arguments on this issue. This is not an issue of fact, since it is not in evidence. It may, however, be pertinent to the Fact Finder's recommendations. To the extent that it is established that concessions have been made in the health insurance plan, that save the Employer money, but which may be changed again in future contract negotiations, this is not found to be grounds for permanently saddling the Employer with paying for a retirement benefit, regardless of all future circumstances.

In summary as to this issue, it is found that, other than the testimony that the current supervisory employees want a permanent level of health coverage as a benefit for their own certainty and confidence until Medicare age, and for which they have made a few significant concessions stipulated to previously, virtually all of the other substantial evidence favors the Respondent's position as set forth in proposal 5 of Exhibit R3, which is recommended to be adopted.

9. Increase in compensation

Proposal 9 in Exhibit R3 would increase supervisory employee compensation as follows:

- $0.31 (1.5%) raise effective the first full payroll period after signing or implementation of Health Care plan modifications, whichever occurs later.

- $0.21 (1.0%) raise effective the first full payroll period after 5/18/2011 or twelve (12) months after signing, whichever occurs later.
- $0.21 (1.0%) raise effective the first full payroll period after 5/18/2012 or twenty-four months after signing, whichever occurs later.

Respondent, in opening statement, through its representative, said the foregoing position is based on its fiscal position. The only testimony on this issue went to that factor.

As stated previously, one of Petitioner's arguments is that concessions have been made in its wage demands in order to try to obtain deletion of the "time to time language". Although the Fact Finder did not recommend that position of Petitioner be adopted on the basis of those concessions, he believes that can be taken into account in considering this issue.

The representatives agreed in their statements and briefs that the position of Petitioner on this issue is a 2% raise upon implementation of the agreed upon modification of health benefits, then 1.5% in 2011.

Exhibit R8 is the current contract of the non-supervisory unit. Per Article 16 and Appendix A on page 33 thereof, that contract provided for one raise during the contract term, that being on January 1, 2010 at 1.5%, and it is so found.

There was no other evidence bearing upon this issue introduced, beyond the very relevant financial status evidence as to Respondent/Employer. The findings as to that issue are incorporated above and herein.

Petitioner really did not mention this issue in its closing brief other than to refer to it as an ancillary issue, and outline its current proposal. Respondent essentially argues its financial ability and the contract of the non-supervisory unit.

While the proposal of the Petitioner calls for a .5% greater raise at signing

and in 2011, it is noted that it does not request any raise in 2012. The Respondent's proposal would give another 1% raise after 5/18/2012. This offsets a considerable amount of the difference of .5% between the two proposals in the two prior years, and lessens the overall financial impact upon the Employer of the Petitioner's proposal. However, the Petitioner's proposal would still be more costly, of course, to the Respondent than its own proposal, even in the long term.

As between the two proposals, the Fact Finder finds that the evidence favors Respondent on this issue as well, from both the non-supervisory unit's current contract and the Employer's financial ability. The Respondent's proposal would provide the supervisory unit with a greater current raise than the non-supervisory unit, and then two additional raises that the non-supervisory unit will not receive, prior to 2013. There is something to be said for an Employer not giving supervisory employees too much in the way of greater increases than non-supervisory employees, for overall employee morale, especially in economic times when increases are lower. The evidence as to the economic realities, and declining revenues and funds of the Employer, also supports Respondent's proposal.

On the other hand, Petitioner's proposal is certainly very reasonable on its own terms. It does not call for any raise exceeding 2% at any time during the contract, and as stated above, no raise in 2012. In many economies, it would be considered an insufficient compensation increase, especially for employees who are being continually called upon to do more work as the size of the staff is reduced. The miles of roads and bridges in Cheboygan County to be maintained certainly do not decrease as time goes on. And, as also stated above, it is to be considered that the Petitioner has reduced its compensation proposal. Yet, ultimately this issue, like any other, must result in recommendations that reflect the issue's own merits, based on the evidence.

The Fact Finder as to this issue also recommends that proposal 9 in Exhibit R3 of the Employer be adopted.

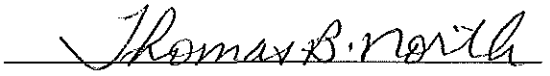
Summary of Disputed Issues

Based on the evidence and findings on the merits as to each of the three identified disputed issues (proposals 4, 5, and 9 in Exhibit R3), the Fact Finder recommends that those proposals of Respondent be adopted. This is after fully considering the remaining items that were stipulated to, and concessions that have been made by Petitioner in its negotiating positions.

However, it is found that the proposals of the Respondent on all three disputed issues are very reasonable, especially in light of current financial realities, which are expected to continue for the foreseeable future, during which the next contract would be in place. The very real lack of funds forces a continued "belt tightening" not only by the Employer, but also certainly trickles down to the personal financial situation of employees. That having been said, the Respondent's proposals as recommended, while not deleting the long-standing "time to time language" as to retiree medical benefits, and even reducing eligibility for retirement benefits, do provide for substantial compensation increases each of the three years. Therefore, they do serve to improve overall the compensation and benefit packages of supervisory employees, despite declining revenues to the Employer, at a time of a very poor economy statewide.

The Fact Finder therefore recommends adoption of the Respondent's proposals.

July 24, 2010



Thomas B. North

Fact Finder

By appointment

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