

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
FACT FINDING

COUNTY OF BRANCH

-and-

GOVERNMENT EMPLOYEES
LABOR COUNCIL

MERC Fact Finding
Case No. L11-E1023

Report

Thomas L. Gravelle, Fact Finder

May 19, 2012

FINDINGS, RECOMMENDATIONS AND REASONS

The fact finding hearing of this matter was held on March 21, 2012 in Coldwater, Michigan.

The County is represented by Administrator Bud Norman.

The Union is represented by Thomas R. Zulch, Esq.

I have reviewed the parties' exhibits, testimony and post-hearing written arguments.

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FACT FINDING LAW AND RULES

Section 25 of the Labor Mediation Act (LMA) of 1939, 1939 PA 176, as amended, provides for fact finding as follows:

When in the course of mediation ..., it shall become apparent to the commission that matters in disagreement between the parties might be more readily settled if the facts involved in the disagreement were determined and publicly known, the commission may make written findings with respect to the matters in disagreement. The findings shall not be binding upon the parties but shall be made public.

Rule 137 of the Administrative Rules of the Employment Relations Commission, R 423.137, explains the contents of the fact finder report as follows:

Rule 137. (1) After the close of the hearing, the fact finder shall prepare a fact finding report which shall contain:

- (a) The names of the parties.
- (b) A statement of findings of fact and conclusions upon all material issues presented at the hearing.
- (c) Recommendations with respect to the issues in dispute.
- (d) Reasons and basis for the findings, conclusions and recommendations. ...

MERC has explained that "factfinding is an integral part of the bargaining process." County of Wayne, 1985 MERC Lab Op 244; 1984 MERC Lab Op 1142; *aff'd* 152 Mich App 87 (1986). The fact finder's report reinstates the bargaining obligation and should be given serious consideration. City of Dearborn, 1972 MERC Lab Op 749.

BACKGROUND

The County of Branch is the Employer (the "County").

The Government Employees Labor Council (the "Union") has replaced UAW Local 1294 as exclusive representative of the County's "general courthouse unit." Article 1, section A of the January 1, 2008–December 31, 2010 UAW/County CBA defines the bargaining unit as follows:

1. All full-time and regular part-time employees employed by the County of Branch in the following departments:

Animal Control; Building Inspection; Clerk's Office; Payroll; Drain Office; Emergency-911; Equalization; General Services; Maintenance/County Complex; Microfilm; MSU Extension Program; Prosecutor's Office; Public Works; Register of Deeds; Sheriff's Department; Treasurer's Office.
2. But excluding elected officials, the MSU Extension 4-H Program Assistants, the MSU Horticulture Program Assistant, and all executive, supervisory, professional, and confidential personnel and all employees represented by another labor organization as of May 6, 1998.

Article 1 of the CBA also states:

- E. Employer. The term "Employer" when used in this Agreement shall refer to the County of Branch and/or, where applicable, an elected official of the County of Branch as Co-Employer. Unless otherwise stated in this Agreement, the Employer shall retain all rights conferred to it by law.

The County's Board of Commissioners signed the CBA in behalf of six "Co-Employers," *i.e.*, County Clerk, Drain Commissioner, Prosecuting Attorney, Register of Deeds, Sheriff and Treasurer.

The County has a collective bargaining relationship with eight bargaining units: In addition to the GELC unit before me, these are:

UAW Supervisory; SEIU District Court; SEIU Circuit Court; SEIU Probate/Juvenile; GELC -E911; POLC; and COAM. In addition, there are non-union personnel, including assistant prosecutors who appear to have deauthorized their union as of December 2010.

The following issues have been presented to me:

1. Wages.
2. Just cause/at-will employment.

DISPUTED ISSUES

1. WAGES

The Union proposes the following wage provisions:

Effective January 1, 2011:	0.00% across the board
Effective December 1, 2012:	1.50% across the board
Effective July 1, 2013:	2.00% across the board

All full time employees hired after January 1, 2012 would be compensated at 80% of the applicable grade level as established in Appendix A of the collective bargaining agreement. This reduction shall apply to the first year of employment. After the first full year of employment the employee shall be compensated at the applicable rate as established in Appendix A of the current collective bargaining agreement.

The County proposes the following wage provisions:

Effective January 1, 2011:	0.00% across the board
Effective December 31, 2012:	Wage reopener
Effective July 1, 2013:	Wage reopener

2012: Full time employees hired on or after January 1, 2011 will be compensated at 75% of applicable grade level pay for 2012.

2013: Full time employees hired on or after January 1, 2011 will be compensated at 80% of applicable grade level pay for 2013.

Both parties have proposed "a three (3) year collective bargaining agreement effective January 1, 2011 through December 31, 2011."

A. Findings of Fact

In support of its wage proposal, the Union places primary reliance on its three proposed internal comparables: the SEIU/District Court; the SEIU/Circuit Court; and the UAW Supervisory Unit. (Ex. 4). The two SEIU court units are most pertinent of all internal comparables because the Union before me represents "general courthouse employees," *i.e.*, these three courthouse bargaining units appear to work in proximity.

- On September 6, 2011 (Ex. 7) SEIU and the County/District Court signed their January 1, 2011-December 31, 2013 CBA. As to wages, the CBA states:

Retroactive pay shall be made to those employees actively employed on the date of ratification (February 8, 2011). No retroactive pay will be issued until the contract is drafted, approved and executed by both parties.

2011 - 0% increase + full time employees hired on or after January 1, 2011 will be compensated at **70%** of applicable grade level pay for 2011.

2012 - 1.5% increase + full time employees hired on or after January 1, 2011 will be compensated at **75%** of applicable grade level pay for 2012.

2013 - 2.0% increase + full time employees hired after January 1, 2011 will be compensated at **80%** of applicable grade level pay for 2013.

- On September 9 and 13, 2011 (Ex. 8) SEIU and the County/Circuit Court signed their January 1, 2011-December 31, 2013 CBA. Its wages language is identical to the language quoted above in the SEIU/District Court CBA.

In addition, in November and December, 2011 the UAW Supervisors' Unit January 1, 2011-December 31, 2013 CBA was signed. (Ex. 9). Its wages language contains the same rates and limitations as in the above two SEIU/County CBAs.

Exhibit 13 states that four bargaining units – SEIU Probate/Juvenile, GELC-E911, POLC Corrections and COAM Deputies – received 2.50% wage increases for 2011 and wage freezes for 2012. Exhibit 13 also states that the wages of non-union personnel have been frozen for both 2011 and 2012,

Exhibit 13 also shows a practice beginning in 2005 to provide identical (or very similar) wage increases for the several units of County employees.

Exhibit 12 appears to be a summary of the County's general fund performance (actual and projected) for the years 2009-2012. A general fund balance is used for cash flow management. Its percentage is computed by dividing the fund balance by the fund's total revenue. A 10% general fund balance is often considered the minimum acceptable percentage. Exhibit 12 shows the following:

	2009	2010	2011	2012 (Budgeted)	2012 (Actual-Est.)
Total Revenue	\$12,453,601	\$12,357,234	\$11,937,601	\$12,935,588	\$12,538,804
Total Expenditures	\$12,322,297	\$12,677,471	\$13,022,732	\$12,935,588	\$12,935,588
Fund Balance	\$ 2,512,794	\$ 2,634,710	Not available	Not available	Not available
Fund Balance % (My calculations and estimates)	20.2%	21.3%	13%	13%	9.2%.

Exhibit 12 also shows that in 2011 the County's pension contributions increased by more than \$600,000 over its 2010 contributions.

Exhibit 14 contains wage changes for the years 2009-2012 of 20 counties with populations ranging from 24,733 to 70,648. For these counties, the average population (including the County's 45,248) is 50,352. This exhibit shows average wage increases for 2011 of 0.89% and for 2012 of 0.38%. The Union's and the County's wage freeze proposals for 2011 and 2012 yield less than these averages.

B. Recommendations

I recommend that (1) the across-the-board wages proposed by the Union be adopted; and (2) the County's language on reduced compensation for employees hired on or after January 1, 2011 be adopted (with the parties considering amnesty on this issue for 2011 for any bargaining unit members hired in 2011).

C. Reasons

The parties are very close on wages for the years 2011 and 2012. Both have proposed a wage freeze for 2011. For 2012, the Union has proposed that the wage freeze continue until December 1, 2012, whereas the County has proposed that the wage freeze continue until December 31, 2012.

Beginning on December 1, 2012, the Union has proposed a 1.50% wage increase, whereas the County has proposed a wage reopener effective December 31, 2012 (and again on July 1, 2013).

The Union's three proposed internal comparable bargaining units have negotiated a wage freeze for 2011, a 1.50% wage increase effective January 1, 2012

and a 2% wage increase effective January 1, 2013. These three CBAs were executed fairly recently, – between September and December 2011.

In addition to not proposing a 1.50% wage increase until December 1, 2012, the Union has proposed that the 2% wage increase not take effect until July 1, 2013.

While the 2% wage increase as of July 1, 2013 is a close question in view of the County's recent declining general fund balance, I am recommending it based on the Union's proposed internal comparables and the parties' history of wage parity (as well as the 2011 2.50% wage increase received by four other internal bargaining units).

2: JUST CAUSE/AT WILL ISSUE

The County proposes that all bargaining unit members of the County Clerk, Register of Deeds, and Prosecutor be "at will" employees; and bargaining unit members of the Sheriff, Treasurer and Drain Commission remain "just cause" employees.

The Union proposes to amend Article 5 of the former County/UAW CBA (with new proposed language italicized):

Section 1. For all employees hired on or before January 1, 2011, discipline and discharge shall be for Just Cause. Any Discipline shall be subject to the grievance procedure.

For all employees hired after January 1, 2011 who are not in the offices of Prosecuting Attorney, County Clerk, and Register of Deeds, discipline and discharge shall be for Just Cause. Any discipline and discharge shall be subject to the grievance procedure.

All employees hired after January 1, 2011 into the offices of Prosecuting Attorney, County Clerk, and Register of Deeds may be discipline[d], suspended or discharged at-will. Persons transferred from other departments into this unit and are then covered under this Collective Bargaining Agreement shall upon transfer to their new position retain their original hire date for the purpose of Discipline and Discharge under this section.

Section 2. Discipline shall be imposed if at all within thirty (30) work days following the Employer's knowledge of the incident/event giving rise to the discipline. Extensions may be mutually agreed upon in writing.

Section 3.

- C. Once discipline is six (6) years of age it will not be used by the Employer as a basis for imposing future discipline or determining the severity of future discipline.
- D. Discipline greater than six (6) years may be used to show the employee was warned regarding the conduct at issue.

Section 4

A Discipline Advisory Board shall be established and be composed of 3 members: one shall be a representative of the Union, two (2) shall be a representative of the Employer and three (3) shall be an impartial third person mutually agreed upon by both parties.

Should any at-will employee who has been discharged, disciplined, or suspended consider such discipline to be improper, he/she may request that such action be reviewed by the Disciplinary Advisory Board. The request must be made to the County Administrator and the employee's immediate supervisor in writing within 5 days of the disciplinary action.

The Discipline Advisory Board shall schedule a meeting within 15 days of the written request by the employee. The Discipline Advisory Board shall review the disciplinary action, and then render a written opinion to the Union and the employee within 5 days. The opinion of the Discipline Advisory Board is advisory only. The opinion is not binding on the employer. The opinion is not enforceable by any court.

A. Findings of Fact

Article 5 of the predecessor UAW/County CBA states: "Discipline and discharge shall be for just cause."

The County has proposed to repeal "just cause" language for bargaining unit members of the Prosecutor, Register of Deeds, and County Clerk.

The County has not proposed repeal of "just cause" language for bargaining unit members of the Drain Office, Sheriff's Department, or Treasurer's Office.

In support, the County has submitted state statutes addressing the powers of a register of deeds and county clerk to appoint and and remove deputies, and of a prosecutor to appoint and remove "assistant prosecuting attorneys and other employees appointed by said prosecuting attorney." (Ex. 6). In further support, the County has submitted the following memo from Branch County Clerk Teresa Kubasiak (Ex. 15):

An employee of the Clerk's office is required to be deputized. They are authorized to certify documents, stamp my signature and the Circuit Court Judge's signature on documents, they handle large sums of money and they are privileged to confidential information. They must be able to be trusted with information provided to them by attorneys, the general public and by me.

I want to be able [to] dismiss an employee immediately, should a serious infraction occur. Some examples are as follows: if a confidential document was made public, a document was falsified, my signature or the Judge's signature was used inappropriately or even embezzlement.

The County also has explained that the Prosecutor does not want to waive statutory prerogatives for appointing and removing employees.

The Union's response includes a memo addressing preemption by the Public Employee Relations Act ("PERA"). (Ex. 6). The Union's memo includes three cases discussed below.

As explained above, the Union has proposed three internal comparables. The two SEIU 2011-2013 CBAs contain discipline language nearly identical to the language proposed by the Union. Article 7 of the SEIU/District Court CBA (Ex. 7) states:

Section 7.0. Discipline.

- A. The Union acknowledges that under the Constitutions of the United States and the State of Michigan, the laws of the State of Michigan, and the rules and orders of the Michigan Supreme Court, District Court 3-A is responsible for the fair, impartial, and swift administration of justice for all cases coming within its jurisdiction.
- B. Therefore, the Union acknowledges that the Employer has reserved the unqualified and unlimited right to discharge, suspend and discipline employees for any reason whatsoever and any such action taken by the Employer shall not be challenged before any Court of competent jurisdiction with this exception:
 - (1) Grandfather - That all employees of the Branch County District Court as of January 1, 2008, shall be deemed as "just cause" employees for purposes of discharge.
- C. No person hired by the Court after January 1, 2008, or transferred from other departments to the Court after January 1, 2008, shall be deemed "just cause" employees.

Section 7.1 Discipline Advisory Board.

- A. Should an employee who has been discharged or suspended consider such discipline to be improper, he may ask that such action be reviewed by the Discipline Advisory Board.
- B. The Discipline Advisory Board shall be composed on one (1) representative of the Union, one (1) representative of the Court, and one (1) additional individual selected by mutual agreement of the Court and the Union.
- C. The Discipline Advisory Board shall meet to review the disciplinary action and issue an advisory opinion.
 - (1) The opinion of the Discipline Advisory Board shall meet to review the disciplinary action and issue an advisory opinion.
 - (2) The opinion of the Discipline Advisory Board shall not be enforceable by any Court.

Section 7.2. Rules. The Employer reserves the right to establish and change from time to time reasonable rules and regulations governing the conduct of its employees and to fix and determine penalties for violations of such rules.

Article 7 of the SEIU/Circuit Court CBA (Ex. 8) is virtually identical to the SEIU/District Court language except that the "grandfather" ending date is "January 1, 2002" rather than January 1, 2008.

Article 4, Section 1 C of the County/UAW supervisors 2011-2013 CBA states: "Discipline and discharge shall be for just cause."

B. Recommendations

I recommend that the just cause/at will language of the two SEIU CBAs be adopted by the parties, with the "grandfather" date being January 1, 2011 (or earlier, as negotiated by the parties). To ease concerns of the County Clerk, Prosecutor and Register of Deeds, I also recommend that the parties consider the possibility of listing in their new CBA certain misconduct (such as theft) as *per se* "just cause" for discharge, *i.e.*, the grievable issue being whether the misconduct listed in the CBA occurred.

C. Reasons

It is unusual for CBAs to treat bargaining unit members as "at will" employees absent some statutory influence to do so. ¹

¹ Over 90% of collective bargaining agreements have "cause" or "just cause" as a reason for discharge. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6th Edition (BNA Books 2003) 931 n 36. Those agreements which don't have "cause" for discipline and discharge include the many agreements in the construction industry where a union hiring hall reassigns discharged employees to different construction sites.

On this issue, there appears to be a tension between the state Public Employees Relations Act (“PERA”) and state statutes authorizing some local officials to appoint and remove employees. In *AFSCME v. County of Wayne*, 292 Mich App 68, 94 (2011), the Court of Appeals described the issue as “problematic.”²

In *Branch County Board of Commissioners v UAW*, 260 Mich App 183 (2003), lv app den’d 471 Mich 913 (2004) the Court addressed the appointing authority of the County’s Clerk, Register of Deeds and Treasurer under state enabling statutes. The Court of Appeals decided that each was a coemployer with the County. For the County Clerk, the Court of Appeals decided:

Because MCL 50.63 gives the clerk the power to appoint deputies and to revoke such appointments at the clerk’s pleasure, we find no substantial and material error of law in MERC’s conclusion that the Branch County Clerk is a coemployer of all its deputies, not just the chief deputy.

260 Mich App at 195-196.

For the County Register of Deeds, the Court of Appeals decided:

... MERC made a substantial and material error of law in its determination that the Branch County Register of Deeds is a coemployer of all its deputies, and find that the Branch County Register of Deeds is a coemployer only of the chief deputy.

Id at 200.

In *St. Clair County Prosecutor v AFSCME*, 425 Mich 204, 224-225 (1986), the Supreme Court addressed the “correctness of the [circuit court’s] finding that the prosecutor had employer rights under the appointment/tenure statute which were not

² The Court of Appeals explained that the Circuit Court could not be required to arbitrate a removal/”discharge” issue because the Circuit Court had never agreed to be bound by the CBA in issue. 292 Mich App at 79-80. Ultimately, the Court of Appeals decided the case against the Union on constitutional grounds.

extinguished by the PERA. This question involves the status of the prosecutor as coemployer, as well as the resolution of any potential conflict between the prosecutors' act and the PERA." In agreeing with the circuit court, the Supreme Court explained:

. . . The coemployer concept is especially useful in the historically fragmented power structure of county government.

Id at 233.

. . . The prosecutor does not dispute the fact that tenure is a condition of employment and subject of bargaining, he merely asserts his statutory right to retain his full authority in that regard.

Id at 236 n. 3.

We find no conflict or repugnancy between the PERA and the finding of the circuit court that, in the absence of waiver, the prosecutor is not bound by an arbitration clause to which he was, in effect, not a party.

Id at 237.

We agree with the Court of Appeals that Prosecutor Deegan did not waive his coemployer prerogatives.

Id at 242.

. . . Thus, the prosecutor retained his rights as coemployer to bargain on the issue of the tenure of his employees.

Id at 244.

. . . We accordingly reinstate the judgment of the circuit court.

Id

By reason of the above review, I am mindful of the challenge posed by state statutes which authorize appointment and removal of employees by coemployers of a county.

I am also mindful that "just cause" has been in the predecessor CBA before me, and also that "just cause" has not been challenged by the Drain Office, Sheriff and Treasurer. "Just cause" also remains in the County/UAW Supervisors CBA.

The Union is proposing virtually the same language as contained in the two recent SEIU/District Court and Circuit Court CBAs.

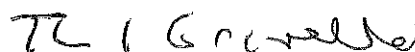
At the hearing before me, the County did not disclose any hardship to its three Coemployers seeking "at will" status by reason of "just cause" language in the predecessor CBA.

Having said this, I am mindful of the concerns raised by Branch County Clerk Kubasiak. (Ex. 15, quoted above). To address these concerns, the parties might consider adding language along the following lines:

For the following reasons for discharge, the only issue before the arbitrator will be whether the employee committed the offense. If the arbitrator finds the employee guilty as charged the arbitrator must deny the grievance and the arbitrator will have no jurisdiction to review the penalty:

- (a) Theft:
- (b) Forgery
- (c) etc.

Respectfully submitted,



Thomas L. Gravelle
Fact Finder