IN THE MATTER OF THE
ARBITRATION BETWEEN:

City of Rochester Hills

And MERC Case No. D 11 G-0791

Rochester Hills Firefighters Association, IAFF
_____/

COMPULSORY ARBITRATION

Pursuant to Act 312,

Michigan Public Act of 1969, as amended

Interim Opinion and Award

(Addressing the Issues of external comparable communities, economic& non-economic designation of issues, & whether an issue is appropriately before the Panel)

Arbitration Panel

Arbitrator/Chair
William E. Long

Employer Delegate:
Dennis DuBay, Attorney

Union Delegate:
Alison Paton, Attorney

Appearances
Dennis DuBay, Attorney
City of Rochester Hills

Alison Paton, Attorney
Rochester Hills Firefighters Assoc. IAFF

Date of Award: March 18, 2013

INTRODUCTION

The Rochester Hills Fire Fighters Association, IAFF (referred to as the Union in this Opinion and Award) is recognized as the exclusive representative for collective bargaining for all full time fire department employees except the Fire Chief, Deputy Chief and clerical staff of the City of Rochester Hills (referred to as the Employer in this Opinion and Award). The Union and the Employer entered into a Collective Bargaining Agreement (CBA), which expired December 31, 2010. The parties participated in negotiations and mediation meetings, but these efforts did not result in reaching an agreement on a successor agreement. The Union petitioned for Act 312 Arbitration on October 23, 2012. As required by Section 13 of Act 312, unless otherwise agreed to by the parties, the current agreement has continued in effect. This impartial Arbitrator was appointed by the Michigan Employment Relations Commission (MERC) November 14, 2012. [*1]

A pre-hearing conference was held November 30 and December 7, 2012. Among the procedures agreed to by the parties at the pre-hearing conference was:

- **On or before December 28, 2012** each party will submit to the other party and the independent arbitrator by electronic mail:

a) The external comparable communities they propose be considered by the panel. If the parties are *not able to agree upon all external comparable communities* - a list of external comparable communities they have agreed upon and those they have not agreed upon;

b) The issues and positions on each issue it proposes be presented to the panel for decision.

c) Indicate for each issue whether they propose that issue be considered an economic or non-economic issue.

The parties have agreed upon the duration of the proposed CBA. The duration of the CBA will be from 01/01/11 to 12/31/13.

The parties have agreed that the issue of wages will be addressed separately for each year of the proposed agreement.

[1] Throughout this Opinion references will be made to Exhibits as (Exhibit U, E - #,) and Transcripts as (Tr., pg#).

The parties also agreed that in the event they were unable to agree on one or more of the following issues: a) the economic/non- economic designation for each issue; b) the external comparables; or c) whether an issue is properly before the panel, i.e. is it or is it not a mandatory subject of bargaining, they would request a separate hearing be held on those issues and that the Independent Arbitrator would issue an Interim Order ruling on those issues prior to a hearing on the remaining issues.

The parties were unable to agree on those issues and a hearing was held February 13, 2013 at Rochester Hills City Hall to receive testimony and exhibits on those issues. The parties submitted post-hearing briefs addressing the issues presented at the hearing. Those briefs were submitted to and exchanged through the Independent Arbitrator on March 4, 2013.

This Interim Opinion and Award will address the following issues the parties were unable to reach agreement on:

1) The selection of comparable communities (external comparables) for which a comparison of wages, hours and conditions of employment will be made between employees involved in this proceeding with other employees performing similar services in public employment pursuant to Section 9(d) (i) of Act 312.

2) Whether Union issue (U-7) is properly before the panel (mandatory or non-mandatory bargaining issue).

3) Whether Union issues (U-18, U-30, U-31, U-34, U-35) are properly before the panel (i.e. were they timely presented.

4) The economic/non-economic designation of issue U-24.

EXTERNAL COMPERABLE COMMUNITIES

Section 9(d) of Act 312 directs the Panel to consider a comparison of 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 in public and private employment in comparable communities. As noted in the introduction, the parties have not fully agreed upon comparable communities. They have agreed that the following community is comparable to the community of Rochester Hills:

- The City of Farmington Hills

In addition, the Employer and the Union propose the following cities be considered comparable communities:

- Employer proposes: the City of Auburn Hills, Commerce Township, Independence Township, the City of Novi, Oakland Township, Orion

Township.

- Union proposes: the City of Birmingham, Harrison Township, the City of Royal Oak, Shelby Township, the City of Southfield, and the City of Sterling Heights.

Employer Position

The Employer's position is that the communities proposed by the Employer should be adopted by the Panel and the communities proposed by the Union should be rejected. The Employer used general criteria in selection of its comparable communities that consisted of selecting communities within Oakland County with a 2011 population of 15,000 or more and which had both full time and paid-on-call personnel. The Employer points out that its proposed communities are in close proximity to Rochester Hills. The Employer says it is important that all of the Employer's proposed comparable communities' fire departments consist of both full time and paid-on-call personnel as does the Employer, whereas only one of the Union's proposed comparables include paid-on-call employees. The Employer, in its post hearing brief, points out that the Union argued in a previous case that it is inappropriate to compare departments consisting only of full time personnel with those who employ both full time and paid-on-call personnel.

The Employer acknowledges population is a comparative factor to be considered but urges special attention to the per capita comparisons, i.e., how the communities compare socio-economically. The Employer points out that the Union has argued this point in previous Act 312 proceedings. The Employer says these socio-economic factors within the Employer's proposed comparable communities are closer in comparison on average to Farmington Hills than for those comparable communities proposed by the Union.

Other reasons the Employer advances in support of adopting its proposed comparable communities, rather than the Union's, is that each of the Employer's proposed comparable communities is a member of the County Mutual Aid Association, whereas only one of the Union's comparable's is. And the square mile area and population density of Rochester Hills is closer in comparison on average to those of the Employer's proposed comparable communities than those of the Union's proposed comparable communities (E-9). The Employer also notes that Rochester Hills has 34 full-time personnel compared to an average of 21 in its proposed comparables, whereas the Union's proposed comparable communities have an average of 63 full time personnel.

In support of its position that the Union's proposed comparables should be rejected, the Employer says the Union's proposed population criteria of a +/- 25% or+/- 50% range of population in comparable communities was not strictly followed by the Union in selection of its comparable communities because some communities within that range were not selected. The Employer also argues that communities should not be rejected, as the Union suggests, just because the composition of their fire departments contains both Advanced Life Support (ALS) and Basic Life Support (BLS) certified personnel. The Employer notes that all of the Employer's proposed comparables provide some level of medical service.

The Employer also says the Union's position that all comparative communities must have unionized bargaining units should be rejected as criteria. The Employer refers to previous Act 312 awards where the impartial Arbitrator rejected that as criteria (E-37)(E-36). The Employer also argues that the composition of the departments of its proposed comparables, consisting of both full time and paid-on-call personnel, is more appropriate than the composition of the Union's proposed comparables, which contain only full time paid personnel with much larger numbers of paid full time employees than Rochester Hills (E-6).

The Employer, based on a variety of reasons, argues that all of the Employer's proposed comparables should be accepted and all of the Union's proposed comparables should be rejected.

Union Position

The Union sites geographic proximity, population, the type of services provided, taxable value per capita and whether the employees are organized and represented by a union as important factors to consider when selecting comparable communities. The Union notes that all of the proposed comparable communities of both the Union and the Employer are in close proximity to Rochester Hills. It urges the panel to reject the Employer's position that all comparable communities must be within Oakland County. The Union points out that Rochester Hills shares a boarder with Macomb County.

The Union argues that when considering comparative community populations, the populations of comparable communities should not vary greater than +/- 25% of the Rochester Hills population. The Union provided exhibits (U-1, U-2) which displayed the population of each of the communities proposed as comparables by the parties and distinguishing those with populations +/- 25% and +/- 50% of Rochester Hills population. The Union, in its post hearing brief, says when a community is more than 50% different in population or any other criteria, it is more unlike than like the subject

community. It notes that the Employer has proposed four communities having a population more than 50% divergent from Rochester Hills and these should not be considered comparable communities. The Union acknowledges that the Employer does have one community with a population within +/- 25% of Rochester Hills, but says that community, (Novi), should be excluded because its fire fighters do not perform and provide ALS level medical service as do fire fighters in Rochester Hills.

The Union points out that Section 9(d) of Act 312 criteria require the Panel to consider "employees performing similar services - in comparable communities." The Union says it is therefore important to compare only those communities whose fire fighters provide ALS/paramedic level emergency medical service, as the members in this bargaining unit do. The Union argues that the training needed for an ALS paramedic is much more extensive than that needed for a BLS or basic EMT. Union witness Paul Wright testified to the differences in training and scope of authorized medical care and treatment between a Paramedic/ALS level and Basic EMT level service (Tr 119-126). The Union says to accept communities as comparables who do not have employees performing ALS/Paramedic level emergency medical response would be contrary to selecting those performing "similar services" and would also result in skewed wage data because those departments with ALS/Paramedic employees pay those performing this level of service at a higher wage level than those not having that certification. The Union says it would be unfair to compare wages of those in this unit with others who do not have Paramedic certification.

The Union acknowledges that taxable value of a community is often considered a factor because it relates to the financial ability of the municipality to compensate its employees. But the Union says taxable value per capita is an even better measurement of comparables. It notes that three of the Union's proposed comparables are +/- 25% of Rochester Hills taxable value per capita and population. The Union says these should be selected as comparable communities for this reason. On the other hand, the Union notes that two of the Employer's proposed comparables, Orion Township and Independence Township, have less than half the population of Rochester Hills and Commerce Township is barely within the 50% population range of Rochester Hills and neither Commerce or Orion Township has personnel that perform Paramedic/ALS emergency medical service. The Union argues that these communities should be rejected as comparables.

The Union also argues in its post hearing brief that those communities whose employees are not organized and represented by a union should not be considered

comparable. It acknowledges that the law does not automatically require their exclusion, but says they should be excluded in order to permit a fair procedure that allows equal access by both parties to information necessary to present a fair and balanced record upon which the panel can make decisions. It says, if other communities do not have an organized union it is extremely difficult for the Union to obtain adequate information from other communities to balance information more readily available to the Employer or to check on the veracity of the information obtained by the Employer from other non-organized communities. With organized communities, there are collective bargaining agreements accessible by both the Employer and the Union. The Union says a process that gives the Employer access to information not easily available to the Union is unfair and prejudicial to the Union and does not provide sufficient reliability of the evidence presented. The Union says if any of the Employer's non-organized communities are selected as comparables the Panel Chair should issue subpoenas compelling information and witnesses requested by the Union.

The Union challenges the Employer's position that only communities having departments using both full time and paid-on-call employees should be deemed comparable. The Union says since members of this bargaining unit are all full time employees, the only proper comparable communities should be those whose bargaining units are only full time employees. The Union argues that if the use of non-bargaining unit paid-on-call employees were to be considered relevant (required) then why not consider other fire department chacteristics of fire departments such as the number of fire engines or stations as relevant.

The Union also challenges the Employer's position on the importance of selecting communities who are signatures to the Oakland County Mutual Aid agreement. It notes that communities may or may not participate in mutual aid agreements at certain times as evidenced by the last page of (E-26), but that alone should not determine whether the community is comparable or not. The Union also notes that Union President Paul Wright testified that the Rochester Hills Fire Department also has agreements with other communities involving a Mutual Aid Box Alarm system and some of those communities are located outside Oakland County (U-12) (Tr 115-119).

The Union also argues that a comparison of the frequency of activity in responding to medical runs, structure fires and total fires of the comparable communities with Rochester Hills, as displayed in (E-23), should not be considered a relevant factor. It says the number of runs is generally related to the size of the community's population and whether the service includes or excludes some level of

emergency medical service. But, the Union says even then, the number of runs can vary greatly from year to year so a one year measurement is not very reliable.

The Union, similar to the Employer, argues for a variety of reasons, that the Union's proposed comparables should be accepted and the Employer's proposed comparables should be rejected.

DISCUSSION AND FINDINGS

Discussion

Section 9(b) of Act 312 requires the panel to adopt the last offer of settlement which more nearly complies with the wages, hours and conditions of employment of the community involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with employees generally in public and private employment in comparable communities. Act 312 and the rules governing the Act do not prescribe specific factors the panel must consider when determining comparability. Generally, factors commonly considered include the population of the community to be served, form of government, SEV and other economic factors, scope of duties, the location of the comparable communities as they relate to the local labor market and other community demographics. In short, the parties advancing proposed comparable communities have the responsibility to make the case for comparability.

It is not uncommon that the parties will identify communities and argue for consideration of factors that support their selections. The parties were able to agree on one comparable community in this proceeding, which gave some guidance in comparing communities proposed by each of the parties.

I have taken into consideration the arguments of the parties. But I also have assembled and developed my own data to help guide my decision in this matter. "Attachment A" is a summary of that data. The data in Attachment A was extracted from exhibits entered in to the case file by the parties.

I realize there is no precise science when considering factors or the weight given to particular factors in determining comparable communities and the services provided by employees performing similar services and employees generally in public and private employment in the comparable communities. Those I have chosen are among those generally considered and, I believe, suitable for comparing when considering the balance between an ability of a unit of government to pay for and provide essential services and the need to maintain adequate compensation and benefits for its

employees. When considering the "range" of variance in the comparisons I have chosen a range of plus or minus 45% below or above the factor for Rochester Hills. The 45% range was chosen in part because I have chosen it in other Act 312 proceedings and in this case the Union pointed out in its post hearing brief that when a community is more than 50% different in population or any other criteria, it is more unlike than like the subject community. The +/- 45% range might seem too great by some, but I find that it gives a broader range to compare multiple factors. I have not listed in Attachment A every factor advanced and argued by the parties in this proceeding, but will address several of those not listed.

As can be seen by review of Attachment A, I have placed an * in each of the boxes within the chart which factor falls within +/- 45% of that factor for Rochester Hills. In the far right column I have noted the number of times those factors, among the 12 listed, fall within +/- 45% of those same factors for Rochester Hills. It is noted that Farmington Hills, which was mutually agreed upon by the parties, has 11 factors that fall within +/- 45% of Rochester Hills. The City of Novi has 12; Shelby Township has 11; and Royal Oak, Southfield and Commerce Township each have 9 factors within +/- 45% of Rochester Hills. I believe these communities are acceptable comparable communities to the community of Rochester Hills.

I will first comment on the factors that are identified in Attachment A and then on some of the other factors not identified in Attachment A, but spoken to in the parties post hearing briefs. As for the factors identified in Attachment A, it is noted that the population of each of the communities selected, with the exception of Commerce Township, has a population within +/- 45% of Rochester Hills. And Commerce Township's population is only slightly below (3,239) that of being 45% less than that of Rochester Hills. None of the other proposed comparables that were not selected are near the +/- 45% mark. Similarly, all of the communities selected, with the exception of Royal Oak, have a population density within +/- 45% of the population density of Rochester Hills while only two communities not selected, Harrison Township and Auburn Hills, have a population density within +/- 45% of Rochester Hills.

All of the communities that have been selected as comparables have both taxable value and taxable value per capita within +/- 45% of Rochester Hills taxable value and per capita taxable value, a factor the Employer argues is important. I will not address each of the other socio-economic factors listed in Attachment A individually, but will note that the majority of those factors fall within the range of +/- 45% of the similar factors for Rochester Hills. The data describing the medical runs, structure fires and

total fires were considered, but not given as much weight as the other factors. The Union, in its post hearing brief, pointed out the weaknesses of relying to heavily on only one year of that type of data. However, it is valuable, I believe, to at least consider the medical runs comparisons and it is noted that 4 of the 6 comparable communities selected had medical runs within +/- 45% of those of Rochester Hills and one of those who didn't had medical runs in excess of 45% more than Rochester Hills.

I will now address some of the factors focused on by the parties that were not identified in Attachment A. Geographic proximity was one of those factors. The Employer chose only those communities within Oakland County and the Union chose some in Oakland and Macomb County. I do not believe the County boundary should be a limitation to identifying potential comparable communities. Employer Exhibit (E-4) provides a map of the area. It demonstrates that Shelby Township is contiguous to Rochester Hills. And it is noteworthy that Southfield and Royal Oak are just about as near to Rochester Hills as is Farmington Hills, which was agreed upon by the parties and Commerce Township and Novi, which were proposed by the Employer.

With respect to the Mutual Aid Agreements, both parties have demonstrated that Farmington Hills has agreements with a number of communities, both within and outside of the County. And as pointed out by the Union, these can change from time to time. While this is helpful information to know relative to the services available to and potentially provided by the Employer and other communities, it is not a major determiner of comparable communities.

Both parties addressed the "similar services" or "similar qualifications" of personnel or the organizational structure of those providing the service. The Employer points out that (E-6) reveals that Rochester Hills has 34 full-time personnel compared to an average of 21 in its proposed comparables, whereas, the Union's proposed comparables have an average of 63 full time personnel. At the same time however, the Employer argues that the composition of the departments, to be comparable, should consist of both full time and paid-on-call personnel. The Union on the other hand, takes the position that the composition of the comparables should only consist of full time paid personnel. I believe it is more appropriate to view the organizational structure as including both full time and paid-on-call personnel while recognizing that some communities may use both and others may use only full time paid personnel. A review of (E-6) reveals that when total personnel are considered, the average total personnel of the 6 communities selected as comparables is 82.5 as compared to the total personnel of Rochester Hills, both full time paid and paid-on-call of 95. I believe that is a reasonable

comparison.

Another organizational structure issue is the Union's position that only communities having organized fire departments should be deemed comparable. The Union acknowledged that Act 312 does not mandate that and I will not repeat here the arguments I noted from the Union in favor of its position. I also need not address the issue of fairness of the procedure in this case because the two communities which do not have full time organized union employees have not, because of various factors, been selected as comparable communities in this case.

The Union argues that comparing members of this bargaining unit, all of whom are ALS level certified, with other communities whose members are not ALS level certified results in not comparing employees providing "similar services" and, therefore, such comparisons should not be made. The Union says only those communities whose members have this certification should be comparable. That of course would limit the "eligible" Employer proposed communities to be considered to Auburn Hills, Independence Township and Oakland Township. But the Union would also exclude those for other reasons. As noted, I have already concluded that those communities to not meet what I would consider the proper criteria as comparable communities, whereas, the communities of Commerce Township and Novi do. I recognize Commerce Township and Novi provide only Basic EMT service (U-2) contrary to the Union's position. The Employer points out that that has never been determined to be a dispositive test and Commerce Township and Novi provide EMS by means other than the fire fighter units (E-22). The Union argues that to accept communities as comparables who do not have employees performing ALS/Paramedic level emergency medical response would result in skewed wage data because those departments with ALS/Paramedic employees pay those performing this level of service at a higher wage level than those not having that certification. The Union says it would be unfair to compare wages of those in this unit with others who do not have Paramedic certification. As indicated previously, I believe the selection of comparable communities should be made by considering and weighing multiple factors. Doing that in this case results in including the communities of Commerce Township and Novi as comparable communities. The fact that those communities' personnel in the bargaining units being compared in this proceeding do not provide ALS level medical service need not go unnoticed when comparing wages and other benefits. If the wages and benefits differ greatly from those of other comparable communities whose personnel do provide ALS level medical service that can be taken into consideration.

Based on what I believe to be an objective analysis and selection of the comparable characteristics of the communities proposed by the parties, in addition to the one community agreed to by both parties, 3 of the 6 communities proposed by the Union and 2 of the 6 communities proposed by the Employer have been selected as comparable communities. This, I believe, provides an adequate and balanced number of communities for comparison to Rochester Hills.

Findings

After a review of all of the evidence, and based on the applicable factors prescribed in section 9 of Act 312, I have concluded that the cities of Birmingham, Sterling Heights, Auburn Hills and the townships of Harrison, Independence, Oakland and Orion should not be included as comparable communities in this proceeding.

Therefore, the Panel chooses the following communities as comparable to the City of Rochester Hills in this proceeding: The cities of Farmington Hills, Royal Oak, Southfield and Novi and Shelby Township and Commerce Township.

ISSUES PROPERLY OR IMPROPERLY BEFORE THE PANEL

1) Whether Union Issue (#-7) is properly before the Panel (mandatory or non-mandatory bargaining issue).

Union Position

The Union has proposed, in its issue #7, that a new Article be added providing as follows:

> "For any periods of time that the City chooses to opt out of the provisions of P.A. 152 of 2011 for any other City employees outside the IAFF bargaining unit, the City shall also opt out for the IAFF bargaining unit. Otherwise, the form of compliance with P.A. 152 for the members of the IAFF bargaining unit shall be the Hard Cap provisions of P.A. 152."

Section 3 of P.A. 152 of 2011 requires a public employer that offers or contributes to a medical benefit plan for its employees for a medical benefit plan coverage year beginning on or after January 1, 2012 to pay not more of the annual costs or illustrative rate and payments for reimbursement of co-pays, deductibles, or payments into health saving accounts or similar accounts used for health care costs in excess of specified hard cap amounts. A public employer may allocate its payments for medical benefit plan costs among its employees and elected public officials as it sees fit.

Section 4 of P.A. 152 of 2011 authorizes a public employer, by a majority vote of its governing body, to choose another method specified in Section 4, other than that specified in Section 3 to comply with the Act. The method in Section 4(2) specifies that

for medical benefit plan coverage years beginning on or after January 1, 2012, a public employer shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials. The public employer may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit.

Section 5(1) of P.A. 152 delays implementation where an existing CBA was in place when the Act was implemented and "until the contract expires."

Section 8(1) of P.A. 152 of 2011 states: "By a 2/3 vote of its governing body each year, a local unit of government may exempt itself from the requirements of this act for the next succeeding year."

The parties stipulated that the Employer chose to "opt out" or exempt itself from the requirements of P.A. 152 pursuant to Section 8 for non-union employees through December 31, 2013 and that all Employer bargaining units, other than this bargaining unit, have signed contracts that took effect before P.A. 152 took effect and run through December 21, 2013 or later (Tr. 136-137).

The Union says issue #7 is a mandatory subject of bargaining. It says health insurance is certainly a benefit and condition of employment that is encompassed by Section 9 of Act 312. It says issue # 7 is intended to do two things: 1) insure compliance with the language of P.A. 152 by providing contractual language requiring that these IAFF members also be opted out of P.A. 152 for any periods that the Employer opts out other City employees; and 2) should there be no opt out, allow these members to know for the duration of the contract, what is expected of them for purposes of complying with P.A. 152, which, as proposed by the Union, would be the hard cap provision. The Union notes that the choice of the hard cap provision or the application of 20% by the Employer can have a differing impact on bargaining unit members.

In its post hearing brief, the Union acknowledges that there is little case law decided yet involving P.A. 152 of 2011, but sites a recent (December 20, 2012) decision from ALJ O'Conner at MERC in (Decatur Public Schools) holding that the method of compliance with P.A. 152 of 2011 is a mandatory subject of bargaining. The issue before the ALJ involved a challenge by the Unions alleging that the Employer violated its duty to bargain in good faith by imposing "hard caps" upon the expiration of the CBA. The Union acknowledges that the ALJ Decision and Recommended Order recognized that an employer is required to comply with P.A. 152 and can unilaterally implement the provisions of P.A.152 to impose a hard cap after a contract expires. But the Union notes

that the ALJ also found that the Employer is still subject to the duty to bargain with those employee groups for whom the Employer has a bargaining obligation under PERA in general over the nature of health insurance options and the mechanism by which P.A. 152's mandate would be accomplished, notwithstanding the passage of P.A. 152. Therefore, the Union argues, all indications from MERC at this time are that the method of compliance with P.A. 152 is a mandatory subject of bargaining.

The ALJ indicated that under the circumstances presented, the parties had a continuing duty to bargain and during that bargaining could reach agreement to switch from hard caps to an 80-20 option. The Union argues this supports its position that the method of compliance with P.A 152, which includes the employer's option to switch from the hard cap to the 80-20 option, is a mandatory subject of bargaining. The Union says unless and until there is a final appellate court ruling holding the method of compliance under P.A.152 is not a mandatory subject of bargaining, it should be deemed a mandatory subject of bargaining for purposes of Act 312 arbitration.

The Union, in its post hearing brief, also suggests that the appropriate time to rule on whether Union Issue #7 is a mandatory or non-mandatory subject of bargaining should be after last best offers are exchanged, since the final form of what the Union may be proposing will not be known until then.

Employer Position

The Employer's position is that Union Issue #7 is not a mandatory subject of bargaining. It argues that P.A. 152 of 2011 compelled the Employer to make one (1) choice from the options the statue authorizes the Employer to choose from and that one (1) choice is applicable to all of its employees. The Employer says the P.A. 152 statutory requirement is inconsistent with the duty to bargain that choice with individual bargaining units. The Employer poses the question: "If such a bargaining obligation existed (and if the public employer is statutorily obligated to make only one (1) choice that applies to every employee), which Union is afforded the opportunity to bargain this choice? How can one Union negotiate for other Unions or bind other Unions?"

The Employer also notes that Section 4(1) of P.A. 152, which allows for the election of the 80/20 option, states that "by a majority vote of its governing body, a public employer may elect to comply with this section [meaning adoption of the 80/20 option] for a medical benefit plan coverage year instead of the requirements in section 3." And Section 8(1) states, that "by a 2/3 vote of its governing body each year, a local unit of government may exempt itself from the requirements of this act for the next

succeeding year." The Employer says there is nothing in the statute saying these decisions by the governing body are to be made only by way of the collective bargaining process.

The Employer also notes that Section 3 of P.A. 152 specifies that the Department of Treasury will set the hard cap limit for each subsequent year after December 31, 2012. The Employer says following the Department of Treasury determination each year, if the choice between a hard cap and the 80/20 option is a mandatory subject of bargaining the Employer could not unilaterally make that choice and would be in violation of P.A. 152. And the Employer points out that Section 3 states, "A public employer may allocate its payments for medical benefit plan costs among its employees and elected public officials as it sees fit." And section 4(2) states, "The public employer may allocate the employee's share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit." The Employer says the use of the words "as it sees fit" voids the premise that such decisions can be effectuated only after the exhaustion of the bargaining process.

The Employer, in its post hearing brief, acknowledges the December 20, 2012 decision and recommended order from ALJ O'Conner at MERC in (Decatur Public Schools), but notes that that case is on exceptions before MERC and no decision has been rendered. The Employer says that case is not the same as this case. The Employer says that if the implementation choices specified in P.A. 150 are mandatory subjects of bargaining, the Employer would be placed in the position of having to bargain different choices with different unions when the statute requires that the Employer make one (1) choice with respect to all employees of the City. The city says separate choices applicable to separate unions would be in violation of P.A. 150.

DISCUSSION AND FINDINGS

Discussion

First, it should be noted that I acknowledge the December 20, 2012 decision and recommended order from ALJ O'Conner at MERC in (Decatur Public Schools) is not a final decision from MERC and not binding in this matter. But it has been reviewed and was helpful in focusing the relationship between P.A. 150 and the PERA. The decision and recommended order in Decatur Public Schools provides an excellent resource in its discussion of how to reconcile the two acts in an effort to determine which issues relating to health care may be subject to binding arbitration and which ones may not be as a result of the statutory provisions of P.A. 150.

I agree that it is appropriate to attempt to analyze the two acts to determine if some of the issues are to remain a subject of collective bargaining and some are not. There are several statements in the Decatur Public Schools decision and recommended order that I will note that have led me to the conclusions and findings in this issue.

- Pg. 8 – In referring to P.A. 150, ALJ O'Conner stated, "Here, the legislative enactment was focused on health care costs." "PERA also concerns itself with conditions of employment, including the nature and cost of health insurance provided to employees. As the two statutes have overlapping purposes, they must be read in pari material, and both statutes must be given effect to the fullest extent possible." I agree.
- Pgs 10 & 11 contains some of "ALJ O'Conner's findings. 1) "There is no duty under PERA for an Employer to propose or demand bargaining over how it would comply with the P.A. 152 mandate of health insurance cost shifting upon expiration of a preexisting collective bargaining agreement where both parties were aware of the statutory mandate and the ensuing deadline." I agree. 2) There is no obligation for an Employer to secure agreement with the Union prior to taking steps to comply with P.A.152 by imposing the statutorily mandated hard caps upon contract expiration." I agree. 3) "There is no duty under PERA to maintain conditions of employment as to health insurance issues upon expiration of a collective bargaining agreement, [with that duty excused] only to the extent necessary to implement those changes required by P.A.152." I agree.

It is ALJ O'Conner's findings in 4) and 5) that I disagree with relative to the issue in this matter. His findings may have been applicable and appropriate to the matter before him but I do not find them applicable in this issue. His 4th finding was, "There is a duty to bargain in general over the nature of health insurance options, notwithstanding the passage of P.A. 152." I believe a more appropriate wording would be "There is a duty to bargain in general over the nature of health insurance options not precluded by the provisions of P.A. 152." And his 5th finding was, "There is a duty by an employer to bargain in good faith, where a timely demand is made, regarding the mechanism by which P.A. 152's mandate would be accomplished." I disagree. I believe the provisions of P.A. 152 give the Employer the unilateral authority to decide which of the options provided in Sections 3 and 4 and 8 of P.A. 152 it chooses in order to comply with provisions of the Act. Section 3 says, "except as otherwise provided in this act -- a public Employer shall -- etc." The Employer must abide by the provisions of Section 3 unless it chooses to adopt the option specified in Section 4 by a majority vote of its

governing body. The language doesn't say that the Employer must negotiate this choice with its employees, whether they are in a bargaining unit or not. And the Employer must choose between either the Section 3 or the Section 4 option. And of course it can also chose the Section 8 option by a 2/3 vote of its governing body, but again, there is no language that states that choice can only be made after negotiations with the Union.

Perhaps more importantly, in the issue presented here, is the argument made by the Employer that the Employer is compelled to make one (1) choice applicable to all employees. I agree. In looking at P.A. 152 amendments in their entirety, I believe the legislature intended that the choices it provided the Employer are to apply to all employees uniformly. So, in this case, when the Employer chose to "opt out" or exempt itself from the requirements of P.A. 152 pursuant to Section 8 for non-union employees through December 31, 2013, as the parties in this case have stipulated occurred, the Employer, in effect, chose to "opt out" members of this bargaining unit also because its action had to apply to all employees.

Therefore, returning to the question of whether Union issue #7 is or is not a mandatory subject of bargaining, I find the first sentence of Union issue # 7 is moot because the Employer has already acted to "opt out" all City employees through December 31, 2013. And since the parties have agreed that the duration of this CBA will be 01/01/11 – 12/31/13 there is no issue to be decided. As for the second sentence of Union Issue #7, as stated previously, I believe the provisions of P.A. 152 give authority to the Employer to determine unilaterally, which of the provisions specified in Sections 3 or 4 or 8 it chooses within P.A. 150 to be in compliance with the Act. Therefore, the Union's proposed language which would require the Employer to choose the Hard Cap is not a subject of collective bargaining because P.A. 150 specifies that the Employer may make a unilateral decision whether to apply the Hard Cap or the 80/20 provision provided that when it does decide it must apply it to all employees.

One might ask then, what other provisions of health care are left to consider under PERA which concerns itself with conditions of employment, including the nature and cost of health insurance provided to employees? Examples of such issues may be, what services will actually be covered by the health care plan, the extent of coverage for family members, the sharing of costs between the employer and employee for certain services or prescriptions, whether employees can opt out of coverage, are just a few examples. As stated above, I think the provisions of P.A. 150 dealt primarily with the overall sharing of the "cost" of health care between the Employer and employees.

Much of the other matters can still remain within the subject of bargaining under

PERA. I believe the language in P.A. 150 stating, "The public employer may allocate the employee's share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit." is a recognition that the types of plans and coverage may vary between employee groups, provided that the cost of health insurance provided by the Employer is shared by all employees, as an aggregate, as specified in P.A. 150.

As for the Union's suggestion that the appropriate time to rule on whether Union issue #7 is a mandatory of non-mandatory subject of bargaining, as noted above, I believe the language of P.A. 150 provides sufficient basis to rule on the language that has been proposed in its issue # 7 and it is more appropriate to rule on it at this time than to wait for last best offers. If the parties feel there is value in negotiating health issues that are not precluded from mandatory bargaining by P.A. 150 they are free to do so.

Findings

After a review of all of the evidence, and upon consideration of the positions of the parties in their post hearing briefs, I find that the subject matter of the Union's proposal in Union issue # 7 is not a subject that can be addressed by this panel because it is prescribed by P.A. 152. Therefore, it is not properly before the panel because it is a non-mandatory subject of bargaining.

2. Whether Union issues (U-18, U-30, U-31, U-34, U-35) are properly before the panel (i.e. were they timely presented.)

Employer Position

The Employer objects to the inclusion of Union issues 18, 30, 31, 34 and 35 on the basis that they were not issues that had been discussed during negotiations and were presented only after the initiation of this Act 312 proceeding. The Employer says adding issues during the Act 312 proceeding is inefficient and can result in a constant repositioning of offers on other related issues. The Employer argues that the definition of issues in dispute should be treated as a "Stipulations of the Parties" pursuant to Section 9(b) of Act 312.

The Employer acknowledges that *Police Officers Association of Michigan v. Ottawa County Sheriff*, 264 Mich 133, 694 NW2d 757 (2004) ruled that Act 312 does not preclude the addition of a new issue at a hearing, but argues that this case differs from that case because in that case the court found that the parties had discussed the issue and were on notice that it was in dispute, whereas in this case the issues in question were not

discussed by the parties during negotiations and, therefore, there was no notice that they were in dispute.

Union Position

The Union also sites *Police Officers Association of Michigan v. Ottawa County Sheriff,* 264 Mich 133, 694 NW2d 757 (2004) and argues that it supports the Union's position that these issues are properly before the panel. It notes that the question in that case was whether an issue that had not been listed on the Act 312 petition was properly before the panel. The Union, in its post hearing brief, sites the following language from the court in *Police Officers Association of Michigan v. Ottawa County Sheriff, 264* Mich 133, 694 NW2d 757 (2004): "There is no language in MCL 423.238 that... precludes the consideration of new issues at the hearing... Nothing in the plain language of MCL 423.238 precludes a party from identifying a disputed issue at the arbitration hearing."

The Union notes in its post hearing brief that, unlike the situation in the *Ottawa* Case sited above, in this case the Union has listed these issues on the Act 312 Petition. Therefore the Employer knew from the date of the filing that the Union sought to include these issues in the Act 312 proceeding. The Union says the Employer could have requested bargaining negotiations on them at any time and can still do so. The Union argues that in addition to the legal basis, there is also a practical reason for supporting the Union's position. It says that during the time period between bargaining, mediation and initiating and following initiation of Act 312 proceedings there is often a change in circumstances that may cause either party to see the need to present an issue in an Act 312 proceeding. The Union says it is costly to engage in Act 312 proceedings and it is important to try to address all of the issues the parties may want to be addressed.

DISCUSSION AND FINDINGS

Discussion

The transcript of the February 13, 2013 hearing on these matters focuses the issue quite well (Tr. Pg 131,132).

> "Mr. DuBay: The City's indicated to the Chairperson that there were five Union issues listed in the Union's position statement that we challenge because these issues had not been proposed to the City in either contract negotiations or mediation."
> "Ms. Paton: Yes, we don't dispute that there was no written Union proposal presented in negotiations mediation. We do think we still have the right to have them be issues in this proceeding".
> "Mr. Long: One of the – as I understand ruling by the courts or MERC, I'm not sure which, is that – and I think it was the courts that indicated that in

essence there was really no time limit for raising issues, but on the other hand, the fact is that we've asked for submission of issues in this process. The issues were submitted. There's also – and as Alison has just stated, if they were not discussed and really presented during negotiations, then there comes a point in time in proceedings like this that you have to say, fine, these are the issues we're going to deal with and these are the ones that we will not deal with."

Upon review of *Police Officers Association of Michigan v. Ottawa County Sheriff*, 264 Mich 133, 694 NW2d 757 (2004) I conclude that the Court ruled in that case that the absence of an issue being identified on the petition for hearing did not preclude it from being an issue in an Act 312 proceeding. The facts in this case are that the Union did identify each of these contested issues in its petition for Act 312.

The next question is should the issues be excluded because they were not presented during negotiations or mediation. To answer that question I rely on the language in *Police Officers Association of Michigan v. Ottawa County Sheriff*, 264 Mich 133, 694 NW2d 757 (2004) which states: "Nothing in the plain language of MCL 423.238 precludes a party from identifying a disputed issue at the arbitration hearing." I conclude that a party can identify an issue for presentation to an Act 312 Panel even though that issue may not have been presented during negotiations or mediation.

That leaves the question of, at what point in time in an Act 312 proceeding is it appropriate and necessary to rule which issues will and will not be the issues before the panel. To answer that question I turn to the General Rules for conducting MERC proceedings and for administering Act 312 proceedings.

- General Rule 423.172 (1) gives the ALJ or fact finder the power to (a) hold pretrial conferences for the settlement or clarification of issues, and (b) dispose of procedural requests, motions or similar matters.
- Rule 423.509(2) (e) applicable to Act 312 proceedings gives the Arbitrator the power to dispose of procedural requests or other similar matters.
- Rule 423.509(2) (g) applicable to Act 312 proceedings gives the Arbitrator the power to remand the parties to further bargaining with a mediator if the arbitrator believes it will be conducive to an agreement.
- Rule 423.507(2) applicable to Act 312 proceedings requires the Arbitrator to conduct a prehearing conference to discuss matters relating to the proceeding, including: (a) issues raised in the petition for binding arbitration submitted to the commission; (b) issues that the parties have resolved; (k) other matters the panel considers appropriate.

In this case, a prehearing conference was held November 30 and December 7, 2012. Among the procedures agreed to by the parties at the pre-hearing conference was:

> - **On or before December 28, 2012 each party will submit to the other party and the independent arbitrator by electronic mail:**
> a) The external comparable communities they propose be considered by the panel. If the parties are *not able to agree upon all external comparable communities* - a list of external comparable communities they have agreed upon and those they have not agreed upon;
> **b) The issues and positions on each issue it proposes be presented to the panel for decision. [Emphasis added]**
> c) Indicate for each issue whether they propose that issue be considered an economic or non-economic issue.

I conclude that the General Rules and Act 312 rules governing these proceedings give the Arbitrator the authority to determine the point in time during the proceeding when issues must be identified by the parties as issues to be presented to the Panel. In this case that date was on or before December 28, 2012. The Union did present Union issues 18, 30, 31, 34 and 35 on or before that date. Therefore, I conclude the issues are properly before the Panel.

I also believe an Act 312 proceeding should not substitute for negotiations if and when the parties are able to resolve disputes through negotiations or mediation. There is always the opportunity for the parties to negotiate issues during the course of the proceedings and, as noted above, the Arbitrator has the power to remand the parties to further bargaining with a mediator if the arbitrator believes it will be conducive to an agreement. In this case, I encourage the parties to discuss these issues, and other issues they feel appropriate, prior to or during further hearings on these issues, and indicate to the Arbitrator if they feel remanding the parties to mediation would be conducive to an agreement on some if not all of the issues before the panel.

Findings

I find Union issues (U-18, U-30, U-31, U-34, U-35) are properly before the panel (i.e. were they timely presented.)

ECONOMIC/NON-ECONOMIC DESIGNATION OF ISSUES

The parties have agreed to the economic/non-economic status of the issues with the exception of one issue. That is: Union Issue 24 – Layoffs, the Union proposes to amend Art 13 F by modifying the current language to read as follows: "No non-

bargaining unit personnel of any kind shall be utilized to perform any type of work currently performed by bargaining unit members while there are bargaining unit members on layoff."

It is noteworthy in considering this matter that the Employer's issue #6 proposes to delete Article 13 F current language which states: "The Employer will not exceed ten (10) paid on call fire fighters per station when any fire fighter covered by this Agreement is on layoff."

Employer Position

The Employer points to the testimony of Fire Chief Crowell during the February 13, 2013 hearing in support of its position. Chief Crowell testified that there is a significant difference in the pay of full time fire personnel and paid on call fire personnel. He stated that if the Union's proposal were to be adopted and the Employer had a full time employee on layoff, it would have to recall the full time employee before it could allow the paid on call personnel to staff the fire stations and therefore cost the city more to adequately staff the fire stations than under the current language which permits the Employer to have up to ten (10) paid on call fire fighters per station when any fire fighter is on layoff (Tr. 135,136). The Employer says requiring all unit employees be working before using paid on call employees will have a direct impact on labor costs. Therefore, the issue is economic.

Union Position

The Union, in its post hearing brief, describes the history of the differing views among Act 312 practitioners with respect to whether an issue is economic or non-economic. One view places the focus on whether the issue impacts the pocketbook of the Union members and considers it to be economic if it does but not economic if it has an economic impact on the Employer. The argument for this position is that to consider the economic impact on the Employer as qualifying as an economic issue would result in almost every issue being considered economic. On the other hand, the Employer argues, and some Arbitrators have held, that the economic impact on the Employer is just as important as it is for Union members and, therefore, if the proposal will have an economic impact on the Employer it should be considered economic.

The Union says the essence of its proposal is that it protects the bargaining unit from being eroded through the Employer's use of non-bargaining persons to do bargaining work should the Employer institute layoffs of bargaining unit personnel. The Union acknowledges that its proposal may have an economic cost to the Employer,

but says that does not necessarily make it an economic issue. The Union argues that the essence of the Union's proposal is not to confer a direct economic benefit on the membership, but rather to protect the bargaining unit from being eroded by layoffs. The Union argues that unlike a true economic issue, this issue involves the construction of language that strikes a proper balance between the interests of the parties and therefore is better suited to being treated as non-economic so as to allow the Panel Chair freedom to craft language as the Chair deems warranted.

DISCUSSION AND FINDINGS

Discussion

I consider this issue to be more appropriately classified as an economic issue than a non-economic issue for several reasons. First, I must acknowledge that I tend to favor the view that an issue can be considered economic if it has a significant economic impact on either the Union members or the Employer. In this case, there is evidence that it could have an economic impact on both.

I disagree with the Union's position that the essence of the proposal is not to confer a direct economic benefit on the membership. If either the Union's proposal or the Employer's proposal to amend Article 13 were to be adopted it would have an economic impact on both the Union members and the Employer. It is noted that the Employer issue (#6) proposes to revise Article 13, Section F by deleting the current language: "The Employer will not exceed ten (10) paid on call fire fighters per station when any fire fighter covered by this Agreement is on layoff." The Union has not objected to Employer issue (#6) being considered an economic issue. I agree that this is an economic issue because if the Employer is allowed to place more than ten paid on call fire fighters per station it could impact the number of full time fire fighters needed and, therefore, have an economic impact on both the Employer and the Union members. It is hard to understand how (E-6) can be an economic issue and (U-24) not be an economic issue. If non-bargaining unit personnel are currently or potentially could be performing any kind of work currently performed by bargaining unit members when a bargaining unit member is on layoff, adoption of this proposal would require either the work be performed by bargaining unit members (possibly requiring overtime) or the re-call of the laid off bargaining unit member. This would have an economic impact on both the employer and the union members.

As to the Union's argument that this type of issue is better left to Panel Chair to craft language, I believe the better course is for the parties to continue to attempt to craft

language satisfactory to both if possible but if not, then present language in their last best offers that they believe the majority of the panel might consider reasonable in the normal give and take process of negotiation and that more nearly complies with the applicable factors prescribed in Section 9 of Act 312 , as is required by Section 8 of Act 312.

Findings

After considering the positions of each party the Arbitrator finds Union Issue #24 is an economic issue.

SUMMARY

This concludes the Interim Opinion and Award of the Panel.

Re: The City of Rochester Hills and Rochester Hills Firefighters Association IAFF MERC Case No. D11 G-0791 (Act 312)

Date: March 18, 2013 William E. Long

William E. Long
Arbitrator/Chair

City of Rochester Hills Rochester Hills Fire Fighters, IAFF
MERC Case No. D11 6-0791 (Act 312)

Attachment A

	Population 2011 Est (E-8) (U-4)	Popluation Density 2011 (E-9)	Taxable Value 2012 (E-10)(E-11)	Taxable Value Per Capita 2012 (E-11) (U-5)	% Change in Taxable Value 2008-12 (E-16)	Median Housing Value 2008-12 (E-18)	Median Household Income 2009-11 (E-19)	Median Family Income 2009-11 (E-20)	Per Capita Income 2009-11 (E-21)	Medical Runs 2012 (E-23)	Structure Fires 2012 (E-23)	Total Fires 2012 (E-23)	
Rochester Hills	71,542*	2178*	2,972,809,776*	41,606*	-20.57*	$208,000*	$73,773*	$93,888*	$37,661*	4,739*	89*	171*	12
Farmington Hills	80,258*	2,410*	3,080,204,340*	38,379*	-30.18	$203,300*	$67,772*	$85,738*	$37,250*	5,274*	59*	159*	11
Birmingham	20,235	4216	1,791,720,590*	88,546	-14.70*	$318,000	$92,717*	$118,525*	$62,892	1,064	24	42	4
Harrison Twp	24,622	1,722*	842,934,173	34,235*	-18.22*	$167,300*	$51,691*	$68,904*	$29,823*	1,951	Included in total fires	415	7
Royal Oak	57,607*	4882	2,196,356,290*	38,127*	-10.55	$151,900*	$59,817*	$80,398*	$36,925*	3,937*	Included in total fires	133*	9
Shelby Twp	73,906*	2130*	2,753,017,924*	37,250*	-20.74*	$183,100*	$61,658*	$71,874*	$29,479*	3,958*	47	192*	11
Southfield	72,201*	2,756*	2,522,981,550*	34,944*	-32.77	$114,700*	$49,008*	$62,839*	$28,355*	10,608	110*	2,023	9
Sterling Heights	129,880	3459	3,957,035,500*	30,467*	-22.35*	$150,700*	$53,879*	$65,347*	$25,308*	8,991	146	301	7
Auburn Hills	21,543	1,298*	1,669,896,835*	77,515	-27.10*	$119,000*	$52,731*	$64,511*	$26,133*	2,034	29	-	7
Commerce Twp	36,109	1,308*	1,685,348,770*	46,674*	-22.14*	$185,800*	$77,416*	$85,866*	$35,146*	1,621	40	159*	9
Independence Twp	34,906	992	1,330,915,740	38,129*	-22.06*	$188,200*	$68,754*	$76,250*	$32,075*	1,975	16	82	6
Novi	55,583*	1,834*	2,920,333,650*	52,540*	-18.48*	$235,100*	$76,296*	$106,583*	$42,512*	3,313*	54*	125*	12
Oakland Twp	16,888	464	1,016,227,290	60,175	-20.90*	$322,900	$113,449	$130,425*	$51,351*	396	2	25	3
Orion Twp	32,632	977	1,324,772,740	40,597*	-28.94*	$181,100*	$70,645*	$85,104*	$32,258*	1,339	2	61	6

City of Rochester Hills Rochester Hills Fire Fighters, IAFF
MERC Case No. D11 6-0791 (Act 312)

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