**STATE OF MICHIGAN**
**DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS**
**EMPLOYMENT RELATIONS COMMISSION**

In the Matter of Act 312
Arbitration Between:

MERC Case No. D14 D-0383

CITY OF ST. CLAIR SHORES,

Respondent/Employer

and

ST. CLAIR SHORES FIRE FIGHTERS
UNION LOCAL 1744,

Petitioner/Labor Organization

## ACT 312 OPINION AND AWARD

Dennis P. Grenkowicz, Panel Chair
Michael Smith, City Delegate
Christopher Krotche, Union Delegate

APPEARANCES:

FOR THE CITY OF ST. CLAIR SHORES

Craig Lange
Kirk, Huth, Lange & Badalamenti, PLC

FOR THE ST. CLAIR SHORES FIRE FIGHTERS UNION LOCAL 1744

Michael L. O'Hearon
Michael L. O'Hearon, PLC

## Background

This matter was heard by the 312 Arbitration Panel subsequent to the filing of a petition for 312 arbitration by the Saint Clair Shores Fire Fighters Association, Local 1744 Union (hereinafter referred to as the Union) on July 3, 2014, with an answer being filed by the city of St. Clair Chores (hereinafter referred to as the Employer) on July 31, 2014. Hearings were held in the city of Detroit on December 3, 4, and 8, 2014. The parties presented a combined total of nine witnesses and several volumes of exhibits. By stipulation of the parties, the comparable communities utilized in this proceeding were: the city of Dearborn Heights, the city of Livonia, the city of Roseville, the city of Royal Oak, the city of Southfield, the city of Sterling Heights, the city of Taylor, the city of Warren, and the city of Westland.

In recent years, the city of St. Clair Shores has suffered a significant decrease in its property tax revenue. The taxable value of its real property has decreased from two billion dollars in 2009 to 1.35 billion in 2014, a 37% loss. Because of the interaction of the Headlee amendment and Proposal A, the city's property tax value will not return to its 2009 level until, it is estimated, the year 2029 (Hearing Transcript - Herrington Volume 1, Pages 28 and 29). The City's charter limitation on the millage rate for operating purposes is eight mills. Because of a Headlee adjustment, the millage has been reduced to 6.2987 mills (Hearing Transcript - Herrington Volume 1, Pages 33 and 34). The City collected 7.2 million dollars in state shared revenue in 2001. The projection for the current fiscal year is 5.2 million dollars (Hearing Transcript - Herrington Volume 1, Page 38).

The City has an Act 345 millage. Revenue from that millage can only be used for funding the police and firefighters' pension fund and retiree health care. This millage rate can be raised

by the city council without a vote of the electorate. In 2003 it was set at .88899 mills. Because of rising pension and retiree health care costs, the pension millage rate has been steadily raised. For 2015, it is 5.9761 mills (Hearing Transcript - Herrington Volume 1, Pages 49 and 50). By 2017 it is expected to exceed the city's operating millage (Hearing Transcript - Herrington Volume 1, Pages 50 and 51).

The city also has a special millage for funding its police force and fire department. That is a two mill millage that expires in 2017, unless it is renewed by the electorate (Hearing Transcript - Herrington Volume 1, Page 39). The millage requires the City to maintain 90 police employees and 50 fire department employees (Hearing Transcript - Herrington Volume 1, Page 60).

For its fiscal year ending on June 30, 2013, the City's expenditures exceeded its revenue by $818,443.00. For its fiscal year ending on June 30, 2014, the City's expenditures exceeded its revenue by $2,669,447.00.

On June 30, 2014, the Employer's unassigned fund balance was $12,018,785.00 (Employer Exhibit 93). Employer Exhibit 37 is a five year financial forecast for the City. Based on actual, budgeted, and estimated amounts it shows a steadily declining unrestricted fund balance at the beginning of each fiscal year with an unrestricted fund balance of under a million dollars in 2020.

As a cost cutting measure, the City has reduced their personnel from 414 full-time equivalent employees in 2001 to 315 in 2013 (Hearing Transcript - Herrington Volume 1, Pages 56, 57, and 59). Additionally, the City has been deferring capital expenditures for several years (Hearing Transcript - Smith Volume 1, Pages 145, 146, and 147).

The Union has previously made significant wage concessions. Effective July 1, 2010, Union employees agreed to a 5% wage reduction (Union Exhibit 18). In July 2013, they received a 2% raise (Hearing Transcript - Cook Volume 2, Page 121). Among the comparable communities, the Union ranks sixth in total compensation (Hearing Transcript - Cook Volume 2, Pages 116 and 117 and Union Exhibit R15).

As of June 30, 2013 the Employer had 202 police and firefighter retirees. The Employer has more retirees than active employees with a ration of 0.6 active employees per retiree (Hearing Transcript - Dziubek Volume 3, Pages 43 and 44). In 2003 the Police and Firefighter Pension Plan was overfunded by 7.7 million dollars or 108.2% funded. In 2013, it was 59.6 million dollars underfunded or 59.6% funded (Hearing Transcript - Dziubek Volume 1, Pages 46 and 47). The Employer retiree health care costs have risen from 2.75 million dollars per year in 2003 to over five million dollars in 2013 (Hearing Transcript - Herrington Volume 3, Pages 43 and 44).

Because all of the issues presented to this Panel are economic issues, the Panel must adopt the last best offer of settlement which, in the opinion of the Panel, more nearly complies with the applicable factors prescribed in MCL 423.239. Only applicable factors need be considered. *City of Hillsdale v Michigan State Fire Fighters Union Local 961* 164 Mich App 627 (1987).

The Panel has heard the witnesses, examined the exhibits, reviewed the hearing transcripts, and considered the arguments of counsel. Its findings are set out below.

## Applicable Statutes

These proceedings are governed by MCL 423.238 and MCL 423.239. MCL 423.238 provides as follows:

> Sec. 8.
>
> The arbitration Panel shall identify the economic issues in dispute and direct each of the parties to submit to the arbitration Panel and to each other its last offer of settlement on each economic issue before the beginning of the hearing. The determination of the arbitration Panel as to the issues in dispute and as to which of these issues are economic is conclusive. The arbitration Panel, within 30 days after the conclusion of the hearing, or within up to 60 additional days at the discretion of the chair, shall make written findings of fact and promulgate a written opinion and order. As to each economic issue, the arbitration Panel shall adopt the last offer of settlement which, in the opinion of the arbitration Panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9.

MCL 423.239 provides as follows:

> Sec. 9.
>
> (1) If the parties have no collective bargaining agreement or the parties have an agreement and have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration Panel shall base its findings, opinions, and order upon the following factors:
>
> (a) The financial ability of the unit of government to pay. All of the following shall apply to the arbitration Panel's determination of the ability of the unit of government to pay:
>
> (i) The financial impact on the community of any award made by the arbitration Panel.
>
> (ii) The interests and welfare of the public.
>
> (iii) All liabilities, whether or not they appear on the balance sheet of the unit of government.
>
> (iv) Any law of this state or any directive issued under the local financial stability and choice act, 2012 PA 436, MCL 141.1541 to 141.1575, that places limitations on a unit of government's expenditures or revenue collection.

(b) The lawful authority of the employer.

(c) Stipulations of the parties.

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

(i) Public employment in comparable communities.

(ii) Private employment in comparable communities.

(e) Comparison of the wages, hours, and conditions of employment of other employees of the unit of government outside of the bargaining unit in question.

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

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

(h) Changes in any of the foregoing circumstances while the arbitration proceedings are pending.

(i) Other factors that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration, or otherwise between the parties, in the public service, or in private employment.

(j) If applicable, a written document with supplementary information relating to the financial position of the local unit of government that is filed with the arbitration Panel by a financial review commission as authorized under the Michigan financial review commission act.

(2) The arbitration Panel shall give the financial ability of the unit of government to pay the most significance, if the determination is supported by competent, material, and substantial evidence.

## Union Issue One: Wages - Year 1

The Union's last best offer on this issue is: Effective July 1, 2014, 2.00% increase

The Employer's last best offer on this issue is: Effective upon issuance date of the Act 312 Arbitration Opinion and Award, 2.00% increase

## Findings on Union Issue One

The first issue for consideration is whether or not a wage increase can be awarded retroactively. Prior to October 15, 2014, there was a conflict between MCL 423.240 and MCL 423.215b. MCL 423.240 explicitly allowed a retroactive wage increases for Act 312 eligible employees while MCL 423.215b prohibited retroactive wage increases for public employees. On October 15, 2014, MCL 423.215b was amended to allow retroactive wage increases for Act 312 eligible employees, thus removing the conflict.

MCL 423.240 in its entirety provides:

> Sec. 10. A majority decision of the arbitration panel, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the arbitration panel in the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside. The commencement of a new municipal fiscal year after the initiation of arbitration procedures under this act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its decision. Increases in rates of compensation or other benefits may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provisions to the contrary notwithstanding. At any time the parties, by stipulation, may amend or modify an award of arbitration.

MCL 423.215b as amended provides:

Sec. 15b.

(1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased costs of maintaining those benefits that occur after the expiration date. The public employer may make payroll deductions necessary to pay the increased costs of maintaining those benefits.

(2) Except as provided in subsection (3) or (4), the parties to a collective bargaining agreement shall not agree to, and an arbitration panel shall not order, any retroactive wage or benefit levels or amounts that are greater than those in effect on the expiration date of the collective bargaining agreement.

(3) For a collective bargaining agreement that expired before June 8, 2011, the requirements of this section apply to limit wages and benefits to the levels and amounts in effect on June 8, 2011.

(4) All of the following apply to a public employee eligible to submit labor disputes to compulsory arbitration under 1969 PA 312, MCL 423.231 to 423.247:

(a) Subsection (1) does not prohibit wage or benefit increases, including step increases, expressly authorized under the expired collective bargaining agreement.

(b) The increase in employee costs for maintaining health, dental, vision, prescription, or other insurance benefits after the collective bargaining contract expiration date that the employee is required to bear under subsection (1) shall not cause the total employee costs for those benefits to exceed the amount of the employee's share under the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.561 to 15.269. If the public employer is exempt from the limitations of that act, the total employee costs for those benefits shall not exceed the higher of the minimum required employee share under section 3 or 4 of the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.563 and 15.264, calculated as if the public employer were subject to that act.

(c) Subsection (2) does not prohibit retroactive application of a wage or benefit increase if the increase is awarded in the decision of the arbitration panel under 1969 PA 312, MCL 423.231 to 423.247, or included in a negotiated bargaining agreement.

(5) As used in this section:

(a) "Expiration date" means the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.

(b) "Increased costs" in regard to insurance benefits means the difference in premiums or illustrated rates between the prior year and the current coverage year. The difference shall be calculated based on changes in costs by category of coverage and not on changes in individual employee marital or dependent status.

The Employer argues that the law in effect on September 5, 2014—the date that the parties' last best offers were submitted—should control on the issue of retroactively. If the Employer's position is accepted, the Panel would have to resolve the conflict between MCL 423.240, and MCL 423.215b, prior to its amendment. The Union responds that it is debatable whether or not the wage retroactivity prohibition of MCL 423.215b applied to 312 Arbitration Panels. In any event, it continues, the amendment to section four of that statute exempting 312 Arbitration Panels from the wage retroactivity prohibition resolves the issue in the Union's favor.

The Employer cites no authority for its position. As of the date of the hearings in this matter and as of the date of the award, retroactive wage increases were and are explicitly allowed for Act 312 eligible employees by both MCL 423.240 and MCL 423.215b.

In *Krusac v Covenant Med Ctr, Inc*, __ Mich __ ; __ NW2d __ (2015), the Michigan Supreme Court explained that the goal of statutory interpretation is to give effect to the Legislature's intent. One must first focus on the statute's plain language. When the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted.

In accordance with *Krusac*, the Panel finds that the plain language of the two statutes is unambiguous and that both statues must be enforced as written. Had the Legislature intended the

Employer's interpretation, it could have easily crafted a provision for pending 312 cases. It did not. Hence, a wage increase may be awarded retroactively.

Because this is an economic issue, the Panel must choose the last best offer—without modification—that more nearly complies with the applicable factors prescribed by MCL 423.239.

Of the statutorily mandated factors the arbitration Panel must consider, MCL 423.239(2), which requires the Panel to give the financial ability of the City to pay the most significance, if the determination is supported by competent, material, and substantial evidence.

Although it is clear that the Employer has a structural deficit that will require a long-term solution, it is also clear that it has a significant general fund balance. According to the Employer's calculation a 2% pay raise retroactive from July 1, 2014 will cost $88,800.63. (Employer Exhibit 66)

Additionally, as the Union has observed, The Publicly Funded Health Insurance Contribution Act of 2011, MCL 155.561 *et seq.*, has shifted a significant portion of the costs of the Employer's medical benefit plans from the Employer to the Union. Prior to this legislation, the Employer bore sole responsibility for the cost of its medical benefit plans. The Public Funded Health Insurance Contribution Act now limits the employer's liability for medical benefit plans to a set dollar amount established annually by the Michigan Department of Treasury. This limit is commonly referred to as the hard cap. Employees are responsible to pay all costs in excess of the hard cap. The Union has calculated the savings to the Employer in fiscal year July 1, 2014 through June 30, 2015 to be $133,803.47 (Union Exhibit 52).

Based on the Employer's strong fund balance and its savings on its medical benefit plan, the Panel finds that the Employer has the ability to pay for the Union's last best offer of a 2% wage increase, retroactive to July 1, 2014.

The Panel also finds that the comparable communities consideration mandated by MCL 423.239(1)(d)(i) weighs in the Union's favor. The Union ranks sixth among the comparable communities in total compensation (Hearing transcript - Cook Volume 2, Pages 116 and 117 and Union Exhibit R15).

The Union's last best offer on Union issue one is adopted.

**Union Issue Two: Wages - Year 2**

The Union's last best offer is: Effective July 1, 2015, 2.00% increase

The Employer's last best offer is: Effective July 1, 2015, 2.00% increase

**Finding on Union Issue Two**

With identical last best offer being submitted by the parties, the Panel adopts the 2.00% wage increase effective July 1, 2015.

**Union Issue Three: Wages - Year 3**

The Union's last best offer is: Effective July 1, 2016, 2.00% increase

The Employer's last best offer is: Effective July 1, 2016, 2.00% increase

**Finding on Union Issue Three**

With identical last best offers being submitted by the parties, the Panel adopts the 2.00% wage increase effective July 1, 2016.

**Union Issue Four: Holiday Pay**

Union's last best offer: A member working on Christmas Eve, Christmas, New Year's Eve, and/or New Year's Day will be paid at a rate double (2x) their hourly rate of pay.

Employer's last best offer: Maintain the status quo.

**Finding on Union Issue Four**

The Union employees currently receive a yearly payment every November as holiday pay. The amount of this payment is calculated by crediting the employees with 13 hours of work for 13 holidays at the employee's base pay rate. This payment is made regardless of which or how many holidays the employee actually works. This payment is in addition to the employees being paid straight time for the holidays on which they work. An average 54 hour per week employee will normally work one third of the yearly holidays. The Union proposes that double time be paid for employees who work on Christmas Eve, Christmas Day, New Year's Eve, and New Year's Day.

Six of the nine comparable communities do not provide premium pay for its firefighter who work 24 hour shifts. (Employer Exhibit 71) However, comparable communities do provide a

holiday bonus. A Union member bonus of $3,731.52 is slightly below the comparables' mean bonus of $3,940.88 (Union Exhibit R-24).

As the Employer as pointed out, the Union proposal would—for the employees who work on the above four days—amount to triple time pay: the yearly payment plus double time. Given the Employer's structural deficit, this proposal must be rejected. It would place an additional strain on the general fund and hasten the diminishment of the finite general fund.

It should be noted that the 2% wage increases as of July 1, 2014, July 1, 2015, and July 1, 2016 will increase the employee holiday bonuses.

The Panel adopts the Employer's last best offer on Union issue four.

**Union Issue Five: Vacation Accrual - 54 Hour Employees**

Union's last best offer: Add one vacation day increment to member with less than a full year's service who is hired between January 1 and March 31. Add one vacation day increment to earned vacation time for members of the Fire Fighting Division.

Employer's last best offer: Maintain the status quo.

**Finding on Union Issue Five**

This issue merits little discussion. The Union's modest proposal for a modification of the vacation accrual for 54 hour employees will bring it closer to conformity with firefighters in the comparable communities and other internal employees. Since the collective bargaining agreement prohibits the scheduling of vacation time in such a way that would cause overtime to be needed, the Union's proposal should have no economic impact on the Employer.

The Union's last best offer for Union issue five is adopted.

**Union Issue Six: Conversion to Comp Bank**

Union's last best offer: Upon written request, an employee may transfer up to a total of 48 hours per calendar year of vacation time into his/her Comp bank

Employer's last best offer: Maintain the status quo.

**Finding on Union Issue Six**

Employees may earn compensatory time in lieu of an overtime payment. It is earned at time and a half and capped at a maximum of 96 hours. Compensatory time may be used as time off in four hour increments; vacation time may only be taken in eight hour increments. Compensatory time may also converted into cash. According to the Employer's estimate, adoption of this proposal could cost the Employer $75,890.17 per year (Employer Exhibit 79). While vacation time cannot be included in a retiring employee's final average compensation calculation, compensatory time is included in that calculation. Hence, this proposal would increase the Employer's pension costs. (Employer Exhibit 78).

This Union proposal threatens the Employer's financial stability in two ways. It increases the strain on the general fund and increases its pension liability. As such, the Panel adopts the Employer's last best offer on Union issue six.

## Employer Issue One - New Hires

Employer's last best offer: For members hired after the issuance date of the Act 312 Arbitration Opinion and Award, 2.00% multiplier for the first 25 years of service, 1.00% multiplier for years of service 26 through 30. Maximum 70% of FAC. FAC includes base wages only.

Union's last best offer: Maintain the status quo.

## Findings on Employer Issue One

The Employer's financial sustainability and its ability to pay can be viewed from either a short-term or a long-term perspective. From a short-term perspective, the Employer's strong general fund balance will allow it to fund the wage increases discussed in Union issues one, two, and three. From a long-term perspective, however, the Employer's legacy costs—pension funding and retiree health care—are untenable. Major reforms to reduce these costs are not only advisable, they are essential.

As mentioned previously, as of June 30, 2013 the Employer had 202 police and firefighter retirees. The Employer has more retirees than active employees with a ration of 0.6 active employees per retiree (Hearing Transcript - Dziubek Volume 3, Pages 43 and 44). In 2003 the Police and Firefighter Pension Plan was overfunded by 7.7 million dollars or 108.2% funded. In 2013, it was 59.6 million dollars underfunded or 59.6% funded (Hearing Transcript - Dziubek Volume 1, Pages 46 and 47). The Employer retiree health care costs have risen from 2.75 million dollars per year in 2003 to over five million dollars in 2013 (Hearing Transcript - Herrington Volume 3, Pages 43 and 44).

The Panel is aware that the Employer has the benefit of an Act 345 Millage that covers legacy costs and allows an increase in taxation, as needed, without a vote of the electorate. In 2003 the rate was set at .88899 mills. Because of rising pension and retiree health care costs, the pension millage rate has been steadily raised. For 2015, it is 5.9761 mills (Hearing Transcript - Herrington Volume 1, Pages 49 and 50). By 2017 it is expected to exceed the city's operating millage (Hearing Transcript - Herrington Volume 1, Pages 50 and 51). As the Employer points out, the Act 345 millage is not a blank check. At some point, the maximum level of taxation will be reached.

In regard to internal comparables, City employees who are members of AFSCME, hired after 2008, members of the UAW, hired after 2006, or non-union employees, hired after 2005 do not have defined benefit pension plans. Instead they have defined contribution pension plans (Employer Exhibit 50).

Eight of the nine external comparable communities have tiered pension plans. Of these eight communities, two have defined contribution pension plans for new employees. The remaining six have either reduced pension multipliers or lower maximums or both for new employees (Employer Exhibit 51).

The Union also objects to the Employer's proposal on the basis of MCL 38.1140h(5). That statute requires that a supplemental actuarial analysis be provided to the decision making body that will approve a proposed pension benefit change. The analysis is to include an analysis of the long-term costs associated with any proposed pension benefit change. The Employer did submit Employer Exhibit 52 in its effort to comply with the statute. The Union argues that that exhibit is inadequate in that it does not comprehensively calculate the long-term costs of the Employer's

proposal. The Union continues that given this inadequacy the Panel may not adopt the Employer's proposal.

The Panel can find no authority for the Union's position, and the Union—beyond the statute itself—has cited none. The statute does not define the phrase "analysis of the long-term costs associated with any proposed pension benefit change." Further, the statute does not require that the analysis be reduced to a written document. It merely requires that the analysis be provided to the decision making body at least seven days before the proposed changed is adopted. In this case the adoption would be the date of the Act 312 award. After considering the Employer's Exhibit 52 in conjunction with the testimony on its author Randall Dziubek, the Panel is satisfied that there has been compliance with MCL 38.1140h.

Additionally, is debatable whether or not the Union has standing to object to an alleged violation of MCL 38.1140h. The statute appears to include its requirement for a supplemental actuarial analysis for the Employer's benefit, rather than the Union's benefit since it references "costs." In any event, Mr. Dziubek's testimony coupled with Employer Exhibit 52 amounts to compliance with the statute.

The Employer's moderate proposal is a prudent step in the direction of legacy cost reform. Accordingly, the Employer's last best offer on Employer issue one is adopted.

**Employer Issue Two - Pension Employee Contribution**

Employer's last best offer: Implement for all members a non-refundable four and one-half percent (4.50%) employee contribution to the City's Pension Plan which shall not be deposited in or become part of the member's annuity savings plan as set forth in Article XXIX, Section 2.

Union's last best offer: Maintain the status quo.

**Findings on Employer Issue Two**

Again, as with Employer issue one, the Employer's ever rising legacy costs are untenable. Its current situation demands immediate long-term reform. As with the Employer's issue one, this proposal is a prudent step in the direction of legacy cost reform. For all of the reasons stated above in the findings on Employer's issue one, the Employer's last best offer on Employer issue two is adopted.

**Employer Issue Three -Pension-Annuity Withdrawal**

Employer's Last Best Offer: Modify retiring employee's ability to withdraw in lump sums all amounts standing to the credit of the retiring bargaining unit member for employees' contributions to the City Pension Plan after the issuance date of the Act 312 Arbitration Opinion and Award. Thereafter, such withdrawals will result in a pro-rated actuarially determined reduction in the amount of the retiring employer's pension.

Union's Last Best Offer: Maintain the status quo.

**Findings on Employer Issue Three**

This issue concerns employees hired before January 1, 2010. Those employees enjoy a generous pension benefit of being allowed to withdraw their employee pension contributions with interest of 2% upon retirement. Such a withdrawal does not diminish the amount of their benefit payments under their defined benefit pension plan. Employees hired after January 1,

2010, suffer the penalty of an actuarially determined reduction in their defined benefit payments if they withdraw their employee pension contributions upon retirement. Five employees, hired before January 1, 2010, are affected by the Employer's proposal.

The Employer maintains that this modification is a necessary response to its rising legacy costs. The Union argues that the proposal violates the Michigan Constitution. The Union is correct; the proposal is unconstitutional.

Const 1963, art 9, § 24 provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

In determining the constitutionally of the Employer's proposal, one must first determine the definition of accrued financial benefits. If the retiring employee's present right to withdraw his or her employee pension contributions with interest constitutes an accrued financial benefit of a pension plan or a retirement system, then Sections 24 clearly prohibits diminishment or impairment of that right.

Guidance is found in the Michigan Supreme Court decision of *Studier v Michigan Public School Employees' Retirement Board* 472 Mich 642 (2005), which dealt with Article 9, Section 24. The holding and reasoning of *Studier* were repeatedly cited with approval by the Michigan Supreme Court in *AFT Michigan v State of Michigan*Docket No(s) 148748 __ Mich__(2015).

In the context of determining whether or not health care benefits paid to public school retirees constituted accrued financial benefits, the Court in *Studier,* at pages 652 through 655, offered the following analysis and definition of accrued financial benefits:

> In order to reach the objective of discerning the intent of the people when ratifying a constitutional provision, we apply the plain meaning of each term used therein at the time of ratification unless technical, legal terms were employed. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). In this case, the term [Page 653] "benefits" is modified by the words "financial" and "accrued." Because these adjectives are not technical, legal terms that would have been ascribed a particular meaning by those learned in the law at the time the Constitution was ratified, [7] we discern the intent of the people in ratifying art 9, § 24 by according the adjectives their plain and ordinary meanings at the time of ratification. [8]
>
> We first note that, despite specifically stating that the threshold issue in determining whether health care benefits were subject to the prefunding requirement of the second clause of art 9, § 24 is whether they constitute "accrued financial benefits" within the meaning of the first clause of art 9, § 24, [9] the majority in *Musselman I* did not address the term "accrued." At the time that our 1963 Constitution was ratified, the term "accrue" was commonly defined as "to increase, grow," "to come into existence as an enforceable claim; vest as a right," "to come by way of increase or addition: arise as a growth or result," "to be periodically accumulated in the process of time whether as an increase or a decrease," "gather, collect, accumulate," *Webster's Third New Int'l Dictionary* (1961), p 13, or "to happen or result as a natural growth; arise in due course; come or fall as an addition or increment," "to become a present and enforceable right or demand," *Random House* [Page 654]*American College Dictionary* (1964), p 9. Thus, according to these definitions, the ratifiers of our Constitution would have commonly understood "accrued" benefits to be benefits of the type that increase or grow over time—such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed. [10] Health care benefits, however, are not benefits of this sort. Simply stated, they are not accrued. Under MCL 38.1390(1), [11] which the plaintiffs in this case rely on, neither the amount of health care benefits a public school employee receives nor the amount of the premium, subscription, or membership fee that MPSERS pays increases in relation to the number of years of service the retiree has performed.
>
> That art 9, § 24 only protects those financial benefits that increase or grow over time is not only supported but, indeed, confirmed by the interaction between the first and second clauses of that provision. Specifically, the first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits . . . ." Thereafter, the second clause seeks to ensure that the state and its political subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those "[f]inancial benefits arising on account of service rendered in each fiscal year . . . ." Thus, because the second clause only requires the state and its political subdivision to set

> aside funding for "[f]inancial benefits arising on account of service ren- [Page 655] dered in each fiscal year" to fulfill their contractual obligation of paying for "accrued financial benefits," it reasonably follows that "accrued" financial benefits consist only of those "[f]inancial benefits arising on account of service rendered in each fiscal year . . . ." [12]
>
> Moreover, health care benefits do not qualify as "financial" benefits. At the time Const 1963, art 9, § 24 was ratified, the term "financial" was commonly defined as "pertaining to monetary receipts and expenditures; pertaining or relating to money matters; pecuniary," *Random House, supra,* p 453, or "relating to finance or financiers," *Webster's, supra,* p 851, and "finance" was commonly defined as "pecuniary resources, as of . . . an individual; revenues," *Random House, supra*; accord *Webster's, supra.* "Pecuniary," in turn, was commonly defined as "consisting of or given or extracted in money," or "of or pertaining to money." *Random House, supra,* p 892; accord *Webster's, supra,* p 1663. Accordingly, the ratifiers of our Constitution would have commonly understood "financial" benefits to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as health care benefits.

It is clear from the above definition that the present right to withdraw employee pension contributions upon retirement with interest constitutes an accrued financial benefit within the meaning of Section 24. That benefit is a monetary payment that increases over time with each year of service. It is an established part of the Employer's pension plan or retirement system.

Because Section 24 unambiguously prohibits the Employer from diminishing or impairing an accrued financial benefit, the employer's proposal is unconstitutional.

This holding does, as the Employer stresses, result in a windfall for certain retiring employees. Nonetheless, that observation is irrelevant. The Employer, having previously agreed to these contribution withdrawals, may not now diminish or impair them.

Accordingly, under factor MCL 423.239(1)(a)(iv), the Union's last best offer of maintaining the status quo on this issues is adopted.

## Stipulated Award

The parties stipulated to the following modification of Article XVIII - Schooling and Training:

Section 2. Cost of Books, Supplies and Tuition

b. Any funds given to an employee within two (2) years of the employee leaving the department shall be deducted from the employee's final paycheck. This provision will not apply to members who reach 25 years off service credit or in the event of death.

Accordingly, the above stipulation is made part of this opinion and award.

## Order of the Panel

A majority of the Panel votes to adopt the last best offer on each issue as set forth in this opinion.

Dennis P. Grenkowicz
Panel Chair

7/10/15
Date

Christopher Krotche
Union Delegate

7-7-15
Date

I concur regarding the awards in favor of the Union
I dissent regarding the awards in favor of the City

Michael Smith
City Delegate

7-7-15
Date

I concur regarding the awards in favor of the City
I dissent regarding the award in favor of the Union