MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

BUREAU OF EMPLOYMENT RELATIONS

PETITIONING PARTY:
Village of North Branch (Employer)

-and-

RESPONDING PARTY:
International Union of Operating Engineers, Local 324, Labor Organization (Union)

MERC CASE NO.: 20-B-0242-CB (Non-Supervisors)
20-B-0243-CB (Supervisors)

Heard as Mirror Image Consolidated Cases

FACT FINDER'S REPORT

Pursuant to Michigan Labor Mediation Act (P.A.176 of 1939 as amended)
[MCL 423.1, et seq], and
Public Employment Relations Act (P.A.336 of 1947 as amended)
[MCL 423.201, et seq]

Fact Finder
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PETITION(S) FILED: May 28, 2021
PANEL CHAIR APPOINTED: June 17, 2021
SCHEDULING CONFERENCES HELD: June 29, 2021 & September 20, 2021
HEARD BY SUBMISSION OF BRIEFS: November 9, 2021 & November 19, 2021
REPORT ISSUED: December 6, 2021

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WITNESS LIST

No witness testimony taken.

1. INTRODUCTION AND BACKGROUND

Introduction

The purpose of Fact Finding is to hear testimony, consider evidence and provide factual findings and non-binding recommendations to assist public-sector parties in reaching an agreement on a collective bargaining agreement.

Despite the inclination to read the last page of this report first, the conclusions reached will be meaningless without an understanding of how this Fact Finder reached those conclusions. It is important for anyone reading this public document to have an understanding of the process Michigan has adopted in such matters.

The Process

By law, public-sector employees in Michigan are denied the right to strike or otherwise interfere with the efficient discharge of their duties through job actions, sick outs, etc. While not subject to the Federal National Labor Relations Act, or many other federal labor laws that apply to the private sector, Michigan's public-sector employees are governed by its laws under the Michigan Employment Relations Act (PERA) and when public safety related employees are involved, under Act 312 of 1969.

This dispute involves no public safety related employees and Act 312 is not a part of the following discussion.

Most proceedings conducted under PERA, such as a Fact-Finding Hearing, are controlled by Michigan's Open Meetings Act. Absent good cause the Hearing in Fact Finding is open to all of the public; and the Fact Finder's Report and Recommendations are public records.

An 'open' hearing allows the public, union members, management, and elected officials of the involved government entity to attend. In that hearing testimony is given by witnesses subject to cross-examination and documentary evidence can be offered by both sides. Witness questioning by the Fact Finder and their requests for details on documents provided are common. All of this is intended to 'educate' the neutral Fact Finder on the position of the parties and their reasoning for that position. Another benefit is that sometimes it is not until the Fact-Finding Hearing that the 'air is cleared' and the opposing point of view reasoning becomes personally known to the 'decision makers' who attend.

In sum, that open process allows all those present a better understanding of why it is the parties were unable to negotiate successfully, requiring Fact Finding.

Before Fact Finding, the parties use Mediation.

Mediation under PERA is a nonbinding process available after negotiations have broken down. A simple description of Mediation is engaging a state provided expert in "shuttle diplomacy." Typically, after a first 'familiarization session,' the parties in Mediation are kept apart, each presenting their position and reasoning to the Mediator. The Mediator then conveys those views to the other side and returns with a response. In that series of shuttling, a Mediator will often express the probability of success in reaching an accord and may offer compromises for the parties to consider in an attempt to reach an accord. The benefit in having a trained Mediator is that they will be neutral, and often bring a wealth of experience in crafting strategies to bring agreement.

Mediator Richard Ziegler was assigned by the Michigan Employment Relations Commission to Mediate this dispute. Mr. Ziegler has been a MERC Labor Mediator since 1997. He has distinguished himself in numerous assignments, successfully mediating difficult and complex bargaining disputes resulting in well-settled agreements.

The fact that even with such an esteemed Mediator's intervention, the parties did not reach an accord speaks to the distance to be covered to do so here.

It is important not to confuse the duty to bargain required under PERA, which is absolute, with a duty to agree, which does not exist. Parties can disagree to the end of their bargaining sessions. However, with the coming and going of Fact Finding, if an agreement is not reached, PERA calls for a one final bargaining session. And if that fails, the employer can unilaterally impose their last stated position on unresolved issues.

Rarely is the result of such an action favorable to employee morale. And when the union has made its case, garnering support in the court of public opinion, rarely do the employing government's officials find a favorable public reaction to that imposition.

In this case, following Mediation, the parties agreed to submit briefs in lieu of an in-person hearing. Those briefs were followed by rebuttal briefs.

The Fact Finder has considered the 230+ pages submitted by the parties in lieu of live testimony, including exhibits offered as evidence presented in this case.

2. STATUTORY CRITERIA

The grant of my ability to write this Report and Recommendation is governed by the Michigan Labor Mediation Act – P.A. 176 of 1939 as amended (MCL 423.1 *et seq*). and the Public Employment Relations Act – P.A. 336 of 1947 as amended (MCL 423.201 *et seq*). Both control the extent of and inherent limitation of my authority.

3. STIPULATIONS AND PRELIMINARY RULINGS

The parties, informing the Fact Finder of 'mirror image' issues for hearing in the two filings made, have elected to have both the Petitioner's claims and the Respondent's responses for both the Supervisory and Non-Supervisory Unions heard and reported out in a single set of findings and recommendations. The parties have also elected to have this Fact Finding conducted on submission of written briefs in lieu of an in-person testimony evidentiary hearing. Given the wealth of information each side has presented and the issues in controversy, the parties exceeded my expectations in submitting their proofs on written briefs and exhibits. The record before me is clear, focused. and well-argued by both sides. It is unlikely that live testimony would have had any additional utility.

4. COMPARABLES

Considering comparable community approaches to the issues being heard are not a necessary component in performing this Fact Finding. Ability to pay is not contested.

5. ISSUES BEFORE THE FACT FINDER

A. Health Care

The Union mentions Health Care in its Brief. That subject does not appear to contested by the Village. The Union merely cites that the expected benefit cost for Health Care will be reduced from a Village offered $1,289.40 per month premium to a $1,239.00 per month. That reduced Health Care premium does not appear at issue beyond that mention.

B. Wages

Reading the Village's Post-Hearing Brief, it proposes a 2% increase in wages effective the 3rd year of the agreement countered by the union proposing a 3% increase.

Reading the Union's proposal in its Post-Hearing Brief, it looks to a 4% increase upon ratification and a 3% increase on April 1 of 2022.

Both Party's Briefs discussed the purpose and impact from their respective perspectives of Michigan Public Act 54 of 2011. That law limits retroactive wage increases in public sector collective bargaining agreements. There can be little argument that the law was intended to encourage unions to accept reasonable attempts at settlement of new or renewed collective bargaining agreements sooner rather than later.

Substantial time has passed where employees have not received wage increases that they otherwise might have garnered. In an odd way, this agreement may have been struck some time ago in better economic times with less attention to future purchasing power.

Few can disagree that the United States economy has suffered greatly of late.[1] Our Nation is recognized by eminent economic experts to be in an inflationary state. How much further that trend may increase, or for how long, is but for conjecture. But as things stand today, I respectfully recommend a 3% increase in wages on ratification with another 3% increase on April 1, 2022, as a compromise by the Village to be accepted by the Union.

C. Signing (One-Time) Bonus

Previously "on the table" was a $1,000.00 one-time payment offered by the Village as it described, "for prompt ratification". By all accounts, that window of time has closed.

With the above wage offer made and accepted, and the complex Pension Issue(s) below brought to closure, I see no reason at this late date for a $1,000.00 payment upon ratification. I find it hard to believe that this amount of money would be needed to entice an employee or union to accept terms and conditions that provide the above recommended pay increase coupled with their retirement plan funding better confirmed to assure that they can be more certain of the expected benefit of the bargain for their years of service.

C. Pension

It appears from the record that the genesis of the 'Pension Issue" dates back to the Parties' negotiations for the 2008 – 2011 Collective Bargaining Agreement as stated in the Petitioner Village's brief. It is uncontested that the 2005 – 2008 Collective Bargaining Agreement contain the following provisions:

> *Article XIII – Pension Contribution*
>
> *For the life of this Agreement, Village will maintain the retirement plans in effect as of the date of this Agreement and shall make contribution equal to seven (7%) of an employee's payroll to the Village's 401(k) ICMA plan.*

[1] Fortune Magazine 12-3-2021 *"The cost of goods and services in October jumped 6.2% over the past year, with food prices up 5.3% over the last year and energy shooting up a whopping 30%, according to the latest U.S. Bureau of Labor Statistics report*."

It is also uncontested that in the successor to the 2005 – 2008 Agreement, the Village agreed to the Union's proposed change from that ICMA pension plan to the Union's Local 324 Pension Fund. Aside from increases in the stated percentage of the Village's contribution, the text agreed to now being debated remained the same. Today it reads and is in effect stating:

> ***Article XIII - Pension Contributions***
>
> *A. In addition to all other compensation required by the terms of this Agreement, the employer agrees to make contributions on behalf of each full-time employee into the Operating Engineers' Local 324 Pension Fund as follows:*
>
> *Effective March 1, 2017, 8%*
>
> *Part-time DPW employees shall not qualify for this benefit.*
>
> *B. Pension contributions shall be computed on the first 2080 hours paid per contract year (April 1 thru March 31). These contributions shall be deposited each month, by the fifteenth (15th) day of the following month. The contribution shall be forwarded to Operating Engineers Local 324 Fringe Benefit Funds, 500 Hulet Dr., Suite 125, Bloomfield Twp., MI 48302, on forms provided by the Fund.*
>
> *C. The pension provision of this Agreement shall remain in full force and effect for the life of this Agreement and for any successive periods agreed upon between the parties.*
>
> *D. The parties agree that the sole obligation of the Village is to make the contributions specified above. The parties further agree that the rate specified in this agreement may only be altered by an agreement in writing executed by the Village and the Union.*
>
> *E. The Village shall not be responsible for providing any level of retirement benefit. The parties agree that the entire administration of the Pension Fund, and all fiduciary duties thereto, shall be provided exclusively by the Operating Engineers' Local 324 Pension Fund, pursuant to the terms and conditions of the Engineers' Local 324 Pension Fund's plan documents, which may, in the sole discretion of the Trustees of the Pension Fund, be amended from time to time.*
>
> *F. The Village shall not be liable to the Union or to the employees by reason of any error or neglect involving the Pension Fund, other than a failure to timely pay the contributions set forth above. The Union shall indemnify and save the Village harmless from any and all claims demands, suits or any other action arising from this Article's provisions, other than a failure to timely pay the contributions set forth above.*

The record indicates that the parties have tentatively agreed to raise the percentage contribution in the successor Agreement from 8% to 9.5%.

The Village has briefed that during negotiations, the Union presented the following for addition in the Pension Contributions part of the successor Agreement:

> *The Village shall contribute $0.30/hour for all hours paid, for the length of this Agreement, to be applied under the Preferred Schedule of the Pension Rehabilitation Plan.*

The Village rejected this change.[2] The Union's reasoning for requesting change may indicate an uneasiness with what was previously written in light of a Rehabilitation Plan. The Union now demands that the Village return from the Operating Engineers Local 324 Pension Fund 'Defined Benefit Plan ', to the ICMA-RC 'Defined Contribution Retirement Savings Plan'. Some discussion on these two retirement vehicles is in order.

In Michigan public employment there are Defined Contribution (DC) plans and Defined Benefit (DB) plans. In DC plans—which include 401(k) plans—employers, employees, or both employers and employees make tax-deferred contributions to a retirement account in the employee's name. The contribution amount can be set either as a particular share of salary or a given dollar amount. At retirement, workers receive the funds that have accumulated in their accounts on a pre-arranged schedule that the plan offers.

Traditional DB plans provide workers with guaranteed lifetime annuities that begin at retirement and promise benefits that are typically expressed as a multiple of years of service and earnings received near the end of one's career (for example, 1 percent of average salary received during the final 3 years on the job, multiplied by the number of years of service). Plan participants cannot collect benefits until reaching the plan's retirement age, which varies among employers. Some plans allow workers to collect reduced benefits at specified early retirement ages.

The value of future retirement benefits from DC plans increases each year by the value of employee and employer contributions to the plan plus any investment returns earned on the account balance. As long as market returns are relatively stable and participants and their employers contribute consistently over time, account balances will increase steadily each year until retirement. Because equity returns are volatile in the long run as well as the short run, the expected income from DC retirement accounts of those reaching retirement age can vary greatly over different time periods. But the plans themselves are not designed to produce age-varying growth rates.

In contrast, the growth pattern of future benefits by design varies by age in DB plans. Pension wealth—the present discounted value of the stream of future expected benefits—grows slowly in typical DB plans for young workers, increases rapidly once workers approach the plan's retirement age, but then levels off or can even decline at older ages.

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[2] Later the Union proposed, *"The employer also agrees to be bound by the Operating Engineers Local 324 Pension fund's Rehabilitation Plan and adopts the preferred schedule."*

Pension wealth is minimal at younger ages because junior employees typically earn low wages and have completed only a few years of service. In addition, if a worker terminates employment with the firm, benefits at retirement are based only on earnings to date, and their present value is low because the worker receives them many years in the future.

The present value of DB benefits rises rapidly as workers increase tenure with their current employer, as their earnings increase through real wage growth and inflation and as they approach the time when they can collect benefits. Workers in traditional DB plans often lose pension wealth, however, if they stay on the job beyond a certain age or seniority level. Growth in promised annual retirement benefits typically slows at older ages as wage growth declines. Some plans also cap the number of years of service that workers can credit toward their pensions, and others cap the share of preretirement earnings that the plan will replace in retirement. In addition, pension wealth can decline for workers who remain on the job past the plan's retirement age if the increase in annual benefits from an additional year of work is insufficient to offset the loss caused by a reduction in the number of pension installments. As a result, traditional DB plans often create a strong disincentive to continue working for the same employer at older ages.

In Defined Benefit Plans a withdrawal of a participant (employee) before retirement age can create a vacuum in funding for the promised benefit resulting in a demand for payment of the accrued actuarial liability to fund the participant's vested retirement benefit. The experience of almost all municipal Defined Benefit Plans is the fact that they are almost always underfunded at any given point in time. For that reason, a prudent municipal employer will conduct a cost-benefit analysis when considering a withdrawal from a DB plan in favor of a DC plan.

Here, the Village indicates it has been advised that their inquiry resulted in a withdrawal liability estimated at $257,798.00 as of April 2019. A current estimate is not before me.

In January of 2019, the Operating Engineers Local 324 Pension Fund advised the Village of an "Updated Rehabilitation Plan". That "Updated Plan" appears to be explained in an Affidavit provided by a Union Business Manager that states in pertinent part:

> *Currently, the Operating Engineers Local 324 Pension Fund is underfunded and subject to a Rehabilitation Plan.*
>
> *Pursuant to the terms and conditions of the Rehabilitation Plan as adopted by the Trustees, any contract entered into between the Operating Engineers Local 324 Union and an employer is required to increase the contribution rate by 30 cents (.30) per year for the next five years. That would be as follows: Year 1 – 30 cent (.30) increase; Year 2 30 cent increase; Year 3 30 cent (.30) increase; Year 4 - 30 cent (.30) increase; and Year 5 - 30 cent (.30) increase.*
>
> Berg Affidavit of 11-9-21

Operating Engineers' Local 324 Pension Fund is a defined benefit multi-employer union pension fund based in Troy, Michigan. The fund was established in 1957, as a result of collective bargaining agreements to provide retirement, death, and disability benefits for eligible participants. The assets of the fund are administered by the joint board of trustees. Bank of New York Mellon reportedly acts as a trustee for the fund's investments.

On July 29, 2020, the plan actuary certified to the U.S. Department of the Treasury, and also to the plan sponsor, that the Operating Engineers' Local 324 Pension Fund (the "Plan") is in critical status for the plan year beginning May 1, 2020. Federal law required public notice.

Operating Engineers Local 324 Pension Plan Members were to be provided this Notice.

Operating Engineers Local 324 Pension Plans

Notice of Critical Status For
Operating Engineers' Local 324 Pension Fund

This is to inform you that on July 29, 2020, the plan actuary certified to the U.S. Department of the Treasury,and also to the plan sponsor, that the Operating Engineers' Local 324 Pension Fund (the "Plan") is in critical status for the plan year beginning May 1, 2020. Federal law requires that you receive this notice.

Critical Status
The Plan is considered to be in critical status because it has funding or liquidity problems, or both. The Plan was considered to be in critical status for the prior plan year and the Plan's actuary determined that the Plan has not met the necessary tests to emerge from critical status. More specifically, the Plan's actuary determined that the Plan is projected to have an accumulated funding deficiency for the plan year ending April 30, 2021, taking into consideration only those contributions that are included in current collective bargaining agreements. This is the eleventh year that the plan has been in critical status.

Rehabilitation Plan
Federal law requires pension plans in critical status to adopt a rehabilitation plan aimed at restoring the financial health of the Plan. The law permits pension plans to reduce, or even eliminate, benefits called "adjustable benefits" as part of a rehabilitation plan. On April 1, 2011, you were notified that the Plan reduced or eliminated adjustable benefits. On February 26, 2019, you were notified that the Plan made additional benefit changes in the updated rehabilitation plan. If the Trustees of the Plan determine that further benefit reductions are necessary, you will receive a separate notice in the future identifying and explaining the effect of those reductions. Any reduction of adjustable benefits will not reduce the level of a participant's basic benefit accrued to date and payable at normal retirement. In addition, the reductions may only apply to participants and beneficiaries whose benefit commencement date is on or after May 1, 2011.

Adjustable Benefits
The Plan offers the following adjustable benefits which may be reduced or eliminated as part of any rehabilitation plan the Plan may adopt:

- Post-retirement death benefits;
- Disability benefits (if not yet in pay status);
- Early retirement benefit or retirement-type subsidy;
- Benefit payment options other than a qualified joint-and survivor annuity (QJSA);
- Other similar benefits, rights, or features under the Plan such as the Pre-Retirement Death Benefit for Single Participants, Lump Sum Death Benefits, and Supplemental Benefit #1.

Employer Surcharge
The law requires that all contributing employers pay to the Plan a surcharge to help correct the Plan's financial situation. The amount of the surcharge is equal to a percentage of the amount an employer is otherwise required to contribute to the Plan under the applicable collective bargaining agreement. With some exceptions, a 5% surcharge is applicable in the initial critical year and a 10% surcharge is applicable for each succeeding Plan year thereafter in which the Plan is in critical status. The surcharge terminates when the bargaining parties agree to one of the schedules in the rehabilitation plan adopted by the Trustees.

Where to Get More Information
For more information about this Notice, you may contact the Pension Fund Office at 550 Hulet Drive, Suite 103, Bloomfield Twp., MI 48302, or by telephone at (248) 836-2765. You have a right to receive a copy of the rehabilitation plan from the Plan.

Of consequence in this Fact Finding is what the law says about a 'contributing employer' paying to the Plan a 'surcharge' to help correct the Plan's financial situation.

A legal analysis of the federal requirements imposed on an employer and whether that obligation can be shifted to a labor union by mutual agreement is beyond the scope of my authority to determine. But the Federal Pension Protection Act of 2006 ("PPA 2006") appears on its face to require employers to fully fund their participating employees' defined benefit plans.

Having said that, it is the 'four corners' of what the parties agreed to that I can address:

> *A. In addition to all other compensation required by the terms of this Agreement, the employer agrees to make contributions on behalf of each full-time employee into the Operating Engineers' Local 324 Pension Fund as follows:*
>
> *Effective March 1, 2017, 8%*

This says there is an 8% contribution obligation that the employer must pay. The record reflects that this has been done. Further, the parties appear to have tentatively agreed to a 1.5% increase, from 8% to 9.5% under the successor agreement being negotiated.

> *C. The pension provision of this Agreement shall remain in full force and effect for the life of this Agreement and for any successive periods agreed upon between the parties.*

I am less certain that a provision of a collective bargaining agreement can have perpetual life by predesign. As written, one could also argue that *"…the pension provision of this Agreement..."* can only be extended (as written), not changed.

> *D. The parties agree that the sole obligation of the Village is to make the contributions specified above. The parties further agree that the rate specified in this agreement may only be altered by an agreement in writing executed by the Village and the Union.* [emphasis added]

This provision appears to point to the *'8%'* amount as a '*sole obligation*' cap on the amount the Village will pay, subject to a later agreed upon '*rate*'.

> *E. The Village shall not be responsible for providing any level of retirement benefit. The parties agree that the entire administration of the Pension Fund, and all fiduciary duties thereto, shall be provided exclusively by the Operating Engineers' Local 324 Pension Fund, pursuant to the terms and conditions of the Engineers' Local 324 Pension Fund's plan documents, which may, in the sole discretion of the Trustees of the Pension Fund, be amended from time to time.*

I leave it to legal counsel for the parties to debate if the sentence, *"The Village shall not be responsible for providing any level of retirement benefit."* is an enforceable provision as a matter of law and/or public policy in a Defined Benefit Retirement Plan other than in what the city of Detroit proved possible in a Title 18 U.S. Code Chapter 9 Petition.

> *….the terms and conditions of the Engineers' Local 324 Pension Fund's plan documents, which may, in the sole discretion of the Trustees of the Pension Fund, be amended from time to time.*

It may be that it was federal law that commanded, and not the *"… discretion of the Trustees of the Pension Fund"* that enacted the change which the Village and Union claim the other must pay. The Union believes the Union Pension Fund can no longer provide a retirement for its members unless the Village surrenders.

> *"The proposed increase from 8 percent to 9.5 percent hourly gross wage and license fee contribution for the life of this contract makes participation in the Operating Engineers Local 324 Pension Fund an impossibility…*
>
> *This increase does not match the necessary increases as required by the Rehabilitation Plan."*
>
> 11-9-21 Berg Affidavit (Quoted out of order)

'Impossibility of performance' is an area of Michigan law that is best left to the parties' legal counsel to evaluate and explain in this extraordinary set of circumstances.

An unanswered question, again beyond the scope of my authority in Fact Finding, is if as the Union Brief submits, *"...the* [Local 324 Pension Fund] *Trustees will not accept a contract from any contributing employer whose contract does not have the increases required by the Rehabilitation Plan.",* then, who would be responsible for the 6-figure withdrawal liability? The Union's Rebuttal Brief states its position on that subject as one that, *"An Arbitrator, and subsequently possibly a Federal Court, will deal with…."*

To the extent that an employer is not the sole responsible party under federal law, or an arbitrator or court of competent jurisdiction rules that way, it may be the Union that is responsible for paying the Rehabilitation Plan surcharge. I say this with a concern that it appears while the Village has met what they believe to be their obligation, the Pension Fund appears to have accepted less than called for under the federally mandated Rehabilitation Plan without taking some enforcement action to collect that surcharge from either the Union or the Village. As I understand the Federal Pension Protection Act of 2006, collection of a Fund's Rehabilitation Plan surcharge is a mandate, not an option.

This Pension Issue is fraught with uncertainty and one that I sincerely hope can be successfully negotiated to a satisfactory result. It has been brought to me leaving more questions than I can answer with the limited authority I have as a Fact Finder.

6. SUMMARY OF RECOMMENDATION

ISSUE	RECOMMENDATION
Health Care	Both Parties concur with Village paying monthly premium of $1,239.00
Wages	Compromise between Parties' Positions 3% increase on signing & 3% increase on 4-1-2022
Signing Bonus	Village's Position – None Awarded
Pension	Village's Position -Village Contribution Liability Capped at 9.5% to the extent permitted by law

My respect and thanks to the attorneys who superbly represented their client's interests. I submit the foregoing as my Report and Recommendations on both Petitions. I hope this writing is useful to the Parties' respective decision makers as they choose their next step.

/s/ Ralph C Maccarone

Ralph L. Maccarone , Fact Finder

Dated: December 6, 2021