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11/5/81 ARB

IN THE MATTER

OF

ACT 312 ARBITRATION

Between

Grand Rapids Lodge 97,
Fraternal Order of Police

-and-

City of Grand Rapids, Michigan

Michigan Employment
Relations Commission

No. C 80 D 815

Grand Rapids, City of

Representing the Lodge:

Dan E. Hankins - Hankins & Kluck P.C.
2277 Science Parkway
Okemos, Michigan 48864

Representing the City:

Eugene Alkema and
Barbara Etheridge - Varner, Reddering,
Wierengo, and Christenson
666 Old Kent Building
Grand Rapids, Michigan 49503

Act 312 Arbitration Panel:

C. Barry Ott, Delegate of the City
M. R. Kluck, Delegate of the Lodge
A. Hoogerheide, Alternate Delegate of the Lodge
S. Eugene Bychinsky, Chairman

C. Barry Ott

S. Eugene Bychinsky

A. Hoogerheide Jr.

OPINION AND AWARD

This Arbitration was conducted pursuant to Act 312 Michigan Public Acts of 1969, as amended. The required conditions of collective bargaining, mediation, and application for an Act 312 proceeding, having been met, an arbitration panel was convened, and held an organization meeting on December 17, 1980. Subsequently, hearings were held on February 11, 1981; February 12, 1981; February 19, 1981; March 16, 1981; March 26, 1981; April 7, 1981; June 4, 1981; June 11, 1981; June 18, 1981; July 2, 1981; July 3, 1981. An executive session was held on October 13, 1981, at which time all non-economic issues were reviewed and final conclusions as to all such issues were resolved. The last best offer was submitted by the parties on July 16, 1981, and Briefs were filed on September 28, 1981.

There were 48 issues presented to the panel, which initially included Mr. Kluck as a panel member. Mr. Adrian Hoogerheide then replaced Mr. Kluck, as an alternate panel member, and served for the balance of the hearings. Mr. Hoogerheide also served as a panel member on Tuesday, October 13, 1981, when the panel met in executive session to consider the non-economic issues, at which time decisions relative to these issues were made.

The opinion rendered herein does not necessarily reflect the views of the panelists. Rather, it is the opinion of the writer, and where a conclusion is stated, that conclusion is supported by at least one of the other panel members, in addition to the writer.

There were 48 separate issues presented to this panel. Several of them were stipulated as being resolved by the two parties, during the hearing - these resolved issues will be identified as this opinion progresses.

The basic mission of this Panel was to evolve the terms of a successor contract to a previous collective bargaining agreement that had expired. Accordingly, it is basic to the conclusions reached in this Opinion and Award, that, except as modified hereby, or as previously agreed upon by the parties, the language of that expired contract will continue and be applicable, for the period designated herein. In reaching its conclusions on all of the issues presented to it, the Panel was particularly mindfull of the criteria that Michigan Public Act 312 sets forth as being applicable. Of particular significance, and basic to many of the issues herein, is the mandate of Act 312, that specifies that these findings be based, inter alia, on a comparison of wages, hours and conditions of employment in comparable communities. During the hearings on these matters, data and arguments were presented as to what constituted "comparable" communities. The City argued that the following communities were comparable to Grand Rapids (Population 185,416) (Police Force 266).

Flint (Population 164,003)(Police Force 328)

Lansing (Population 125,976)(Police Force 225)

Saginaw (Population 82,361)(Police Force 133)

Kalamazoo (Population 79,275)(Police Force 126)

Muskegon (Population 43,869)(Police Force 57)

Wyoming (Population 58,335)(Police Force 60)

Battle Creek (Population 41,388)(Police Force 58)

East Lansing (Population 50,916)(Police Force 41)

The Lodge, on the other hand agreed that all of the above, except East Lansing, were comparable, but added the following communities to the list of comparable Cities:

City	Population	
Ann Arbor	50,000	(Police 143)
Dearborn	48,000	(Police 71)
Detroit	1,500,000	(Police 5,376)
Jackson	48,000	(Police 78)
Pontiac	48,000	(Police 200)
Royal Oak	48,000	(Police 91)
Warren	48,000	(Police 211)
-and-		
Michigan State Police		(Police 1,833)
Kent County Sheriffs Department		(Deputies 267)
Kalamazoo County Sheriffs Department		(Deputies 89)

Data and arguments were presented on both sides as to the factors that made one community comparable, and another not comparable. These factors included not only population comparisons, but also comparisons of State Equalized Valuation, Size of Police Department, Crime Index, Crimes per officer, Geographic Proximity, Geographic area and Per Capita Income. In terms of population, alone, the Lodge list of Comparable Cities ranges from Battle Creek (Population 41,328), to Detroit (Population, around one and one-half million).

The problem at hand is to apply this tremendously diverse factual information relating to Municipalities having a population variance of from 41,000 to 1,500,000 and determine an economic package for the Grand Rapids Police Force that is in some fashion, based on comparability. Battle Creek is about a fourth the size of Grand Rapids. Detroit is about eight times as large as Grand Rapids.

Still, Grand Rapids, is second only to Detroit in terms of population, in the State of Michigan. In that sense, it is comparable, (in some of the facets of that complex word) to both Detroit, and to Battle Creek. In one sense, or another, about any City is comparable to any other City. The problems are not to lose sight of why we are comparing. In the first place the purpose of making any comparison of Cities, in an Act 312 case, is to <u>aid</u> in reaching some conclusion as to the economic, and other issues that are in dispute between the City and the collective bargaining unit. It would be ideal and simple if we were able to take some sort of "weighting" mechanism for each of the offered Cities and evolve a formula for settling these matters. In a highly regarded opinion, rendered in an Act 312 Arbitration, involving the City of Lansing and Capitol City Lodge 141 (1977), T.J. St. Antoine, Panel Chairman, found such mechanism to be useful, but not conclusive. Cities that the

parties in that case agreed upon as being comparables were afforded a weighting of "1." Those that "seemed" next closest were weighted "2/3;" and those that were considered less similar, but still reasonably comparable, were assigned a weight of "one-third (1/3)." A significant problem with weighting, in the case at hand, is the fact that it would obscure the reasoned, but non the less, subjective, judgment that must be made in ascribing numbers for the weighting process. Should Detroit, which has eight times the population of Grand Rapids be weighted one-eighth (1/8th)? Should Battle Creek a weighting of one-fourth (1/4th), being one-fourth (1/4th) of the population size of Grand Rapids? If such a system were evolved for the instant case - should it be carried out for each of the other factors that have been presented, by the Lodge, as having a bearing on comparability? If police work is to be weighted, one must first define police work in the two communities, establish some system of measurement that can be weighted, and then apply the weighting factor. The same problem applies to size of police departments, to State equalized value, median family income, geographical location, etc., etc. Then, how are these factors to be weighted as against each other?

Furthermore, how did local problems affect what ever factor of the other City it is that we are comparing? For example, it is generally known that a recent Act 312 decision in Detroit, has had a substantial effect on that City's finances. If we are to use Detroit as a comparable City, should we not consider this aspect of circumstances in our weighting process?

All in all, one can reasonably conclude that Cities that are less than half as large, or that are more than twice as large, would have minimal effect in any weighting process. Whether numbers are ascribed

or whether raw judgment is applied to the level of concern that would be accorded the data a large amount of subjective judgment is involved. It is particularly significant to remember that under Act 312, when all the comparable data is judged and weighted, the conclusions that are reached must consider all of the relevant and material factors that the Act requires an Arbitration panel consider.

It must be conceded that while the Cities of Detroit, and of Battle Creek are considered to bear relatively less weight, in the final analysis, than a more comparable City such as Lansing, even this weighting could change in time. Detroit, as mentioned previously, is undergoing a multiple of, hopefully, unique circumstances. These include the mentioned 312 award that has been sharply contested, as well as a financial crisis of sorts that was alleviated by a change in local tax levels. It is also noted that while the Lodge, in the instant case,has requested that this panel determine and announce which Cities are comparable, such an announcement would have no binding effect on future Act 312 Panels.

In summary then, on the matter of comparable Cities definition, this Panel is not disposed to ignore any of the Cities that have been presented by the parties to this case. Nor is this Panel disposed to ascribe a weighting to each of the Cities for each of the factors (such as size of police force, State equalized value, etc.) that have been presented in addition to population size. Inevitably, a judgment must be rendered, and in this case at least, that judgment is going to take all of these factors into consideration and that judgment will be the basis for the conclusions reached.

If the parties, in some future case, want to stipulate relative weighting, or stipulate which Cities are comparable, or ask a panel for an

interim ruling on comparability of cities, and obtain such interim judgment from the panel, it would quite likely assist in reducing the duration of the hearing and reducing the preparation of exhibits for submission at the hearings.

As alluded to above, primary weight will be given to those offered cities that are not larger than twice as large as Grand Rapids, and not less than half as large as Grand Rapids. All other cities that appeared will be accorded secondary significance. This approach greatly simplifies comparisons in the instant case.

As against the various factors that were urged by the Lodge as representing significance in establishing comparability, population is deemed to be the most significant factor. Crime rate, and size of police force, secondary factors, not because they are not significant factors, but because they seem to be related somewhat to population, and hence to some degree are duplicative.

An issue that was raised by the City of Grand Rapids that is basic to each issue presented that deals with economic issues, is the question of ability to pay. As will become evident in this report the City and the Lodge are separated in the basic demand of the Lodge, by two percent (2%). That is, the City, in its last best offer, has proposed a ten percent (10%) increase in the major cost item - the basic Salary of the Bargaining Unit Members. The Lodge, on the other hand has set its last best offer at twelve percent (12%).

The ability to pay issue permeates each and every economic issue presented in this case. It will be dealt with in depth in the treatment of the issue hereinafter that involves the basic salary scale of the bargaining unit members.

Throughout the following Opinion and Award, reference to either City position or to Union position will mean to the City or Union positions as set forth in the City or to the Union Brief. Thus, those portions of the respective briefs are incorporated as though set forth herein.

Throughout this Opinion and Award, reference is made to the specific evidence that the prevailing side has set forth in its brief, as supporting the conclusion reached herein. In essence, the data thusly cited, issue by issue, by the prevailing side, is to be considered as an integral part of this Opinion and Award. However, additional editorial comment stated in the prevailing side's brief and intermingled with the data is not to be considered part of this award. This procedure is adopted by the Panel in order to avoid the extensive duplication that would otherwise be necessary.

ISSUE NO. 1 (Non-Economic) (Article 3)
MANAGEMENT SECURITY

Reference is made to the prior contract between the parties that expired in 1980. In that contract, the "Management Security" provision is identical to the language offered by the City, with the sole exception that in the prior contract, the F.O.P. Lodge is referred to as a "Lodge," and in the language now offered, the word "Union" is substituted for the word "Lodge."

It is the position of the Union, that the State of Michigan has pre-empted this entire area of labor disputes and that, lacking conflict with the law, in the Union's proposed language, that language should prevail.

Basically, it is the claim of the City that the difference in the two positions can best be characterized by the fact that the Union would, with its proposed language, limit violations of the Management Rights Clause to the Grievance procedure. This would, the City believes preclude the City from the use of Courts to secure its rights under the law. The language proposed by the Union is as follows:

> "Section 1. It is the intent of the parties of this Agreement that the grievance procedure herein shall serve as the means for the peaceable settlement of all disputes that may arise between them concerning the terms of this Agreement. Recognizing this fact, the Union agrees that during the life of this Agreement, the Union shall not cause nor shall any member of the Union take part in any strike or refusal to work. For purposes of this Agreement, the term "strike" shall mean any concerted activity resulting in a failure to report for duty, willful absence from a position or a stoppage or abstinence in whole or in part from the full and proper performance of lawful duties as a police officer.
>
> "Section 2. The Union agrees that it will take prompt, responsible action to prevent or stop any strike or refusal to work of any kind on the part of its members by notifying the employees that it disavows these actions.

Section 3. During the life of this Agreement, the Union shall not cause its members nor shall any member of the union engage in any strike because of a labor dispute between Management and any labor organization.

Section 4. The Employer agrees that during the life of this Agreement there will be no lockout."

The prior contract, with the change in designation from "Lodge" to"Union"and as proposed by the City is as follows:

"Section 1. The Union and employees agree that during the life of this Agreement they shall not cause, encourage, participate in or support any strike or picketing against Management or any slow down or other interruption of or interference with the normal functions of Management concerning any matter which is subject to the grievance procedure or to the jurisdiction of the civil service board. Violation of this paragraph shall be grounds for disciplinary action up to and including discharge without recourse to the grievance procedure. However, any employee who is accused of violating this provision and denies such alleged violation may appeal. Upon a finding of fact that the employee did violate the provision(s) of this Article, disciplinary action imposed by the Employer shall not be disturbed."

It is apparent that to limit the rights of the City to the grievance procedure, for infractions of the identified nature, could be a new factor in the relationship of the parties. As pointed out by the City, there is no conflict with the Public Employee Relations Act and the language that has been in prior contracts since the parties entered into collective bargaining agreements. Further, in the relationship that has been in existance between the parties, no particular problem has been introduced in evidence which would be solved by the Union's proposed language. In essence, the Union would now tie the issue of strikes to the Grievance procedure. This, in turn would subject the City to the ruling of an Arbitrator, if the Union's proposed language were to prevail. Under the past and proposed language the City is not so limited. It is argued by the Union that precluding the right to go to an Arbitrator, in,

say, informational picketing, places a "chill" on First Amendment rights. This is not seen as convincing. The First Amendment rights of a Union member are not adversely affected by denying that member recourse to an Arbitrator, but rather directs him to a different tribunal. Nor can this Panel agree with the contention of the Union that the language of the City is in conflict with PERA. This contention, while made, is not supported by either argument or testimony.

CONCLUSION

ISSUE NO. 1 - City position is adopted.

ISSUE NO. 2 (Non-Economic)

MANAGEMENT RIGHTS (Article 4)

There are two changes that the Union would effect in the language of Article 4 of the "Management Rights" language.

First, the Union would insert the word "reasonable" in qualifying the City's right to determine "---methods, processes and manner of performing work----."

It goes without need for the citing of authority, but in such matters the word reasonable, has been universally implied. Consequently, the Union's position in adding the word "reasonable" to Section 1 of Article 4, is adopted.

With respect to the need to insert the requirement of prior consultation in Section 2 of Article 4, the Union, on the other hand would have the Panel adopt its proposed language, which would require that the City "negotiate" on proposed changes. The problem with "negotiate" is that if it is a requirement some system must be set up to handle an impasse. No system has been suggested. Usual practice, which is adopted by this Panel, is to require only that there be prior consultation about changes in, or additions to rules and regulations. Therefore,on this issue,it is the determination of this Panel that in Article 4:

-Rule making must be "reasonable" (Section 1). (Union position is supported).

-The City need not "negotiate," but must consult with the Union prior to installation of changed or modified rules (City position is supported).

The Union has also proposed that new language be adopted, as Section 3 of Article 4., which would require that the City "negotiate" with it in order to change, combine, or discontinue any job classification. It is not seen as practical to add this requirement to the obligation of the City. The City is mandated to negotiate rates for new job classifications if those new job classifications are in this Bargaining Unit. No useful purpose can be seen for including the proposed new Section 3 in the contract. The subject matter is not in issue and is covered elsewhere in already agreed upon language in Article XV.

CONCLUSION

ISSUE NO. 2

Union position adopted, i.e., change Section 1 by adding requirement of "reasonable." City position adopted i.e. Section 2, City position adopted i.e. Section 3, i.e. Union's proposed new Section 3 not adopted.

-Union position re. addition of "reasonable," to Section 1 of Article 4, adopted.

-City position re. declining Union request to negotiate new rules, etc., adopted.

-City position re. declining Union request to negotiate job content, adopted.

ISSUE NO. 3 (Non-economic)

LODGE REPRESENTATION (Article 7).

The essence of this issue is the demand by the City that members of the unit be required to obtain a pass when conducting Union business on City paid time. The City did not support their demand for a grievance pass form. Currently and for some time past, there does not appear to have been any abuses of the contractual requirement that Union members who conduct grievance investigations check in and out with their supervisor. There is nothing to prevent that supervisor from noting time of departure and arrival, if abuse is suspected.

CONCLUSION

ITEM NO. 3 - Union position is adopted.

ISSUE NO. 4 (Non-Economic)

GRIEVANCE PROCEDURE (Article 8).

This issue deals with the so-called "Election of Remedies" between the established procedure whereby an employee in this Bargaining Unit may select a route that would take him to the Civil Service Board, or to utilize the grievance procedure provided for elsewhere in the collective bargaining agreement. It is contended by the Union that it is an unfair labor practice by either the City or the Union to bargain to impasse on a permissive subject, it is not the work of the Panel to judge the merits of this claim. Rather, it is concluded that the aggrieved party has a right to file a grievance under the contract, or operate within the rules of the Civil Service Board. This Panel agrees that it would be inherently unfair to allow two different concurrent procedures for the resolution of a grievance. While this is the conclusion of this Panel, it is noted that there is pending a case, before the Michigan Supreme Court, involving the two parties to this matter. It agrees with the City that this Panel should not, and indeed cannot, finally determine the resolution of this issue. What the Panel does decide is that, unless the Michigan Supreme Court, in City of Grand Rapids v. Grand Rapids Lodge No. 97 F.O.P. declares that the election of remedies provision, as proposed by the City, is illegal, that language as proposed by the City shall be included in the contract.

There is, however, one element of the City proposal that is not adopted by the Panel. That part deals with the Union proposal that provides:

"The Union president or his designeee shall attend all arbitration proceedings without loss of compensation in any manner."

The Panel adopts this sentence in addition to the City's proposed language. The Panel recognizes that this portion of this issue is an economic issue. Consequently, the City position and the Union position, as stated in their briefs, is taken as the last best offer, and treated accordingly.

CONCLUSION

ISSUE NO. 4 - City position adopted, except that the Union President is to attend arbitration proceedings without loss of pay.

ISSUE NO. 5 (Economic)

PAYMENT OF BACK PAY CLAIMS (Article 9).

The previous contracts between these parties has provided a clause that states:

> "Section 2. No claim for back pay or wages shall exceed the amount of pay or wages the employee would otherwise have earned at his regular wage or pay rate. Any claims for back pay shall be reduced by interim earnings and/or unemployment compensation, if directed by the Arbitrator or Civil Service Board."

It is particularly noted that this clause does not determine whether a back pay award is lessened, but it does point out to the Civil Service Board, or to an Arbitrator, that consideration of such a lessening of an award is up to them. This Panel knows of no law or regulation that would deprive an Arbitrator of the right to fashion an award that would take into account such items as interim employment, or unemployment compensation, etc, unless the parties to the contract, in fact, dissallowed such deductions. Having been in the prior contracts, this Panel is not disposed to eliminate the clause because to do so would raise a possible implication that the removal of this clause raised a presumption that the parties no longer wanted a deciding tribunal to consider such matters.

CONCLUSION

Retain Article 9; Section 2.

ISSUE NO. 6 (Non-economic)

DISCHARGE AND DISCIPLINE (Article 10; Sec. 1.)

In this issue, the Union seeks language in the contract that would require that the City "encourage" Union members to request the presence of a Union representative in meetings which may result in a disciplinary action. It is noted that the Union, under contractual language, will be notified of disciplinary action against its members that result in discipline and discharge. It is the position of the Panel that the City should not be required to encourage, or "sell" the service of the Union to Union members. As stated above, the sole issue is whether the City should be given the burden of "encouraging" a Union member to seek Union representation - not whether that member is entitled to representation. This matter of "encouraging" Union representation is a matter that should be within the exclusive responsibility of the Union.

CONCLUSION

Proposed Union language rejected.

ISSUE NO. 7 (Non-economic)

DISCHARGE AND DISCIPLINE (Article 10; Sec. 2).

Under the terms of the previous contract, notice of discipline and discharge are required to be sent to the Union. Under the Union proposal that is before this Panel, copies of letters of warning that may be given to a Union member by the City must be given to the Union. The hearing did not develope any reason why the prior practice as contained in the prior contract was not satisfactory. The Union in its brief alleges that failure to provide the Union with copies of warning letters would be to disregard PERA, as well as the "Right to Know" Act. Such an allegation has no support in fact.

CONCLUSION

The Union's proposed language is rejected.

ISSUE NO. 8 (Non-economic)

SENIORITY (Article 11; Sec. 2b).

Both the Union and the City seek to modify the language of the old contract that dealt with the probationary period of original and promotional appointments. Both the Union and the City agree to confine the language of this Section 2b. to "original appointments of newly-hired employees." At issue, therefore is the second sentence of the City proposal, and the third sentence of the City proposal which has no counterpart in the Union proposal.

Union 2nd Sentence:

> "At any time during the probationary period, the City Manager may remove an employee whose performance does not meet the required work standard.

City 2nd Sentence:

> "At any time during the probationary period, the City Manager may discharge the probationary employee."

The significance of the two proposals is that in the Union proposal, challenges could be made as to whether or not a work standard had been met. In the City position the right to discharge is not qualified. The City's position is supported as representing better practice. Interviewing techniques, are at best, indicative of only limited views of an applicant. Despite all of the studies that have been made on the subject, the best way to evaluate potential is to observe a person on the job. Limitation such as proposed by the Union, would place an added constraint on the City to ensure that someone who simply does not fit, is not hired in the first place. There are

other constraints that the City must observe with respect to prohibited discrimination practices. It is for these reasons that the Panel supports the City's Second sentence of Section 2.b.

The third sentence proposed by the City states

> "Any employee so discharged during the probationary period should have no recourse to the grievance procedure or the Civil Service Board."

While the proposed sentence excepting the phrase "or the Civil Service Board," is consistant with the right of the City to discharge probationary employees, the denial of recourse to the Civil Service Board, is not. The rights of any employee to whatever recourse he may have to the Civil Service Board should not, in the opinion of the Panel, be limited by this contract.

CONCLUSION

ISSUE NO. 8 - City position adopted, except "or the Civil Service Board."

ISSUE NO. 9 (Non-economic)

SENIORITY (Article 11; Sec. 5).

The prior contract contained language in Article 11; Sec. 5 as follows:

> "Section 5. Application of Seniority. Seniority shall apply to shift assignment, vacations, lay off and recall as provided in this Agreement."

The City would like to leave this language alone. The Union wants the application of seniority to also apply to promotions. Currently, the City has an evaluation system that is one factor in determining promotion, along with written examinations, and seniority. It is noted that the Civil Service rules of the City do not bar the use of evaluations, as presently being employed by the City. Further, the City has acknowledged that the evaluation system is in the process of being improved upon. Evaluation systems as employed by the City have not been shown to be misused or deficient. No valid or compelling reason has been shown that would support their abandonment. Consequently, their continued use and effort for the improvement of the evaluation system is supported. In making its decision, however, the Panel acknowledges the arguments set forth in the Union brief that particularly point up the need to differentiate between evaluation of an officer in presently assigned duties, and the determination of a fair and equitable evaluation system that would be a significant indication of the potential of an officer to perform a different combination and differing responsibilities, than was used in evaluating performance as an officer.

CONCLUSION

ISSUE NO. 9 - City position is adopted.

ISSUE NO. 10 (Non-economic)

SENIORITY (Article 11; Sec. 6).

In this issue, the Union has proposed language to be added to Article 11, Section 6, as sub-paragraphs d., e., f., g., and h., that would implement their position under Section 5 of Article 11, which was discussed as Item No. 9 herein. In view of the decision of the Panel to support the position of the City in Issue No. 9, the language that the Union proposes as Issue No. 10 is not appropriate. However, a new sub-section d. is to be added to Section 6 of Article 11. It shall read as follows:

> "Present policy and practices of the Grand Rapids Civil Service Board with respect to the application of Seniority points on promotion shall be preserved for the life of this contract."

CONCLUSION

> ISSUE NO. 10 - The sub-sections proposed by the Union to be added to Article 11, Sec. 6, are rejected. A new statement is added to provide for continuance of present Civil Service Board practice.

ISSUE NO. 11 (Economic)

OVERTIME (Article 14; Sec. 3).

It has been the practice in Grand Rapids, to not provide officers assigned to the Investigative and Service Divisions (about half of the police force) with a paid lunch period. Uniformed officers - the other 50% - are on a four day work week, ten hours per day, and their work day of ten hours includes a paid for lunch period. The officers in the Investigative and Services Divisions work, for the most part, from 8:00 a.m. - 12:00 noon and 1:00 p.m. - 5:00 p.m. five days a week. If it is necessary for these officers to work during their regularly scheduled lunch period, they either take their lunch period at a different time, or are paid on an overtime basis.

In terms of cost, to pay for lunch periods (the Union wants a 25-minute paid for lunch period) would cost the City just under $150,000 per year in loss of services. This would represent what could be considered a five percent (5%) increase in salary for the 50% of the police force that are in the two Divisions that are now on an 8-hour day, five day per week, schedule.

In considering this Issue, the Panel is also mindful that to grant this demand, would, in effect, place the Divisions that are now on an 8:00 a.m. - 5:00 p.m. basis, on an 8:00 a.m. - 4:35 p.m. basis. It is also noted that all but one City that are agreed by both sides as comparable, have a paid for lunch period.

At this stage of the opinion and award, it is necessary to note that in considering the economic issues, each issue cannot be taken

separately, but rather this Panel must determine which of the last best offer of the Union or the City it will adopt on each issue, while keeping well in mind the total effect on the City of the sum of all individual issues that are granted to the Union that are of an economic nature. This is particularly true of the situation which we have in this case, where ability to pay is an issue. Furthermore, as will be dealt with subsequently herein, the City has presented a substantial case on this issue of ability to pay, and the conclusions reached on that issue obviously affect all of the economic decisions that must be considered by this Panel. In other words, in this case, ability to pay is recognized as a possible limiting factor in each economic issue, hence even if each economic demand found support in evidence of comparability, (which, as will be developed, has not been proven in this 312 hearing) it still would be necessary to determine priority of those economic issues that can be granted. Accordingly, this issue, which presents a demand for a shorter daily work period (shortened by 25-minutes per day), is accorded a low priority relative to other economic issues, and the demand is not supported by this Panel.

A second issue, also presented as Issue No. 11, is the Union proposal that would change the pay-for-overtime practice which the City is presently employing. In the current system overtime payment does not commence until the 20th minute after the normal work day. Thus, an officer who works 19-minutes of overtime is not paid overtime, but one who works 21-minutes receives overtime pay for 30-minutes. Likewise, an officer who works 46-minutes receives overtime pay for a full hour.

In this system it is particularly noted that an officer does not have to stay the full hour, or full half hour in order to obtain overtime pay for time not worked. It is not possible from the evidence on record, to determine whether a change in the system, as desired by the Union, would yield more money to its members or less money. It is noted that the officers do not punch time cards, but turn in their overtime. It is also noted that the Union's proposed comparables, provide for overtime to commence and be accounted for by the minute. Of compelling force, however, is the fact that the current system has been in use for some time, and there is no compelling evidence to show that this current system, which certainly is a good deal simpler to administer, and in all probability, tends to balance out in an equitable manner, should be changed. Furthermore, it is the opinion of this Panel that the current system tends to deal with the officers on a more professional basis than would a system that requires a minute by minute accounting of such overtime.

CONCLUSION

ISSUE NO. 11 - The City's position is sustained on both segments of this issue.

ISSUE NO. 12 (Economic)

OVERTIME (Article 14; Sec. 4).

Current practice for call-in pay for Court appearances, in the City of Grand Rapids, provides for the payment of a minimum of one hour's pay, at overtime rate. If an officer spends less than one hour, in such Court appearances, then the payment is for one hour at the overtime rate. Time spent over one hour receives payment at whatever that time is, at one and one-half times the base rate. It is the Union's position that comparable Cities data introduced supports the Union position in their demand for a two hour minimum call-in period at premium time. However, once again, while comparables must be considered, they cannot be isolated. The Uniformed Officers in Grand Rapids are on a four day - ten hours per day, work week. This is not the case in all of the comparable Cities. The four day - ten hour per day plan does tend to accent the liklihood of a call-in at premium rates for appearances on the fifth day. Furthermore, as pointed out in the hearing, many of these appearances are in fact scheduled for the day when a substantial number of officers are on their day off duty. Also noted is the fact that if witness fees are involved, the officer would also receive that fee.

It is argued by the Union that even though time and one-half is involved in the single hour minimum, the time spent in getting into town to make an appearance on behalf of the City is inordinately high. It is further argued that where more than one hour is spent in testifying, there is no problem, because the officer is paid for whatever time over that one hour minimum that is involved.

In its brief, the City has also pointed out that the prior contract provided that the four day - ten hour work week was not intended to increase the City's salary or labor costs. However, the Union proposal for a two hour minimum for appearances would not, in the view of the Panel, be of significant cost as to materially affect that agreement.

Accordingly, it is the position of the Panel, that the minimum call-in time for off duty officers be changed from one hour to two hours.

In its Final Offer, the City agreed to a portion of the Union's demands on this issue. The City agreed to modify the language of the prior contract to reflect existing practice, and provide call-in pay for appearances at various administrative hearings.

CONCLUSION

ISSUE NO. 12 - Minimum call-in time raised from one to two hours. Appearances at administrative hearings included.

ISSUE NO. 13 (Economic)

COMPENSATORY OVERTIME (Article 14; Sec. 5).

In this matter, the Union seeks to change existing practice whereby an officer's supervisor has the determination of whether or not an officer will be given compensatory time off in lieu of overtime, to give that determination, or option, to the officers. There was no particular support presented in the evidence to support a reason for this requested change. Furthermore, specific language already agreed upon deals with appearances before the Accident Review Board, and if the Union request was granted, treatment of such matters would not be properly provided for.

CONCLUSION

ISSUE NO. 13 - City last best offer is adopted.

ISSUE NO. 14 (Economic)

LONGEVITY (Article 18; Sec. 2)

The Union proposal is for longevity payments to be based on a percent of base pay, up to the first $10,000 of salary, rather than the fixed amount as was provided for in the previous contract.

Basically, the Panel considers longevity pay as a part of base pay and as representing a mechanism for the recognition of added value to the City based purely on added experience. Longevity payments cannot be considered as a separate and distinct issue, it must be considered as a part of the entire compensation package. It must also recognize the entire classification system and be used as a tool to afford those more delicate adjustments in compensation, once the base pay has been determined. In view of the fact that 90% of the officers who are in the bargaining unit receive longevity compensation, it is the decision of this Panel that change in longevity payment is not justified at this time, either in changing to a percentage base, or in altering the dollar amount of the payment.

CONCLUSION

ISSUE NO. 14 - City position is adopted.

ISSUE NO. 15 (Economic)

VACATIONS (Article 19; Sec. 2).

Basically, this issue is directed at the Union demand to increase vacation allowances, for officers with over 20-years of service, from 5-weeks to 6-weeks.

Once again, this item is one part of the economic package, that must be considered in viewing the entire economic package. It is argued, by the Union,that officers in this bargaining unit should receive this added benefit and that the total of vacation days and holidays is of no useful value because officers have to work on such days. It is also noted by the Panel that when officers do work on such days - they receive appropriate premium pay.

Noting that the increased cost of this demand would be just under a half percent of payroll, this demand is rejected, as the need for it was not sustained by the evidence.

CONCLUSION

ISSUE NO. 15 - City position is adopted.

ISSUE NO. 16

VACATION (Article 19).

The parties reached agreement on this issue at the hearing. See Transcript, Page 131, dated March 26, 1981.

ISSUE NO. 17 (Economic)

VACATION (Article 19; Sec. 3f).

The language of Section 3f is no longer in dispute as the parties agreed upon specific language during the hearing (Transcript, Page 3, dated April 7, 1981).

As the City position was adopted by this Panel with respect to Issue No. 15, the Panel agrees that there should be no change in cash payment for unused vacation.

CONCLUSION

ISSUE NO. 17 - City Position is adopted.

ISSUE NO. 18 (Economic)

HOLIDAYS (Article 20; Sec. 2a).

Currently, the officers in this bargaining unit receive 11 paid holidays. Among the City's comparables, Grand Rapids ranks second only to Battle Creek and Wyoming in this respect. It is noted that while the City position is to maintain the Status Quo, the Union demand is to add two full days of Holiday. This two day addition would take this Union to a position out of line with the clericals represented by Local 1061. Accordingly, it is the position of this Panel, that this particular issue must be considered, again, in the light of the award that is to be made herein on base salary, and the City position is adopted.

CONCLUSION

ISSUE NO. 18 - City position is adopted.

ISSUE NO. 19 (Economic)

SICK LEAVE (Article 21; Sec. 4b).

Currently, officers can take up to five days, with pay, for funeral leave purposes, three of these days are charged to sick leave, and two days are not charged. Also, extensions of such leave are granted in exceptional cases. The Union demand is to enlarge the paid leave from two days to five days, in specified relationship cases, and up to three days, in other specified relationship cases. Also, in the Union demand is a provision to allow the use of up to three days of sick leave for illness or injury to family members, as approved by the Chief of Police.

It is acknowledged that similar provisions do appear in the contracts of Cities that are, to some degree at least, comparable to Grand Rapids. What does not appear, however, is that existing language, in this respect, is adequate for the officers of Grand Rapids. Further, in Grand Rapids, all other collective bargaining units receive identical funeral leave allowances. For these reasons, the City position is adopted.

CONCLUSION

ISSUE NO. 19 - City position is supported.

ISSUE NO. 20 (Economic)

SICK LEAVE (Article 21; Sec. 9).

The Union demand, in the matter of pay for Unused Sick Leave, is for employees who resign or retire with ten years or more of continuous service, to receive a maximum of 120 days at:

a) $1.00 per day times the number of years of continuous service, for employees who retire

or

b) $.50 per day times the number of years of continuous service for employees who resign.

The City, on the other hand, offers a maximum of 80 days, with provisions of a) and b) above the same as in the Union demand. The City position is a continuance of the prior contract provision dealing with this matter.

In Grand Rapids, all other organized units are dealt with in the identical manner as reflected by the City position.

As noted previously in this opinion, 90% of the officers of this unit now have over 5-years of service. In the period of this contract, the number of officers who approach the 10-year level of service will increase, and in three more years, that figure will approach the 90% figure. While payment for unused sick leave to members who retire is certainly acceptable and a recognized benefit for service rendered, this Panel cannot encourage the payment of such a benefit to those who resign. As a matter of fact, it would seem, rather pointedly, that such a payout that might encourage resignation is really contra-productive. It is for this compelling reason that the City position is adopted by this Panel. In adopting this position, the Panel would hope that in future negotiation, the Union would seek

improvement in the level of payout per unused sick leave for retiring officers, and not for resigning officers.

CONCLUSION

ISSUE NO. 20 - City position is adopted.

ISSUE NO. 21 (Economic)

SICK LEAVE (Article 21)

Settled by the parties.

ISSUE NO. 22 (Economic)

LEAVE FOR UNION BUSINESS (Article 22; Sec. 1).

Currently, the Union has an allowance of up to 23-days of leave with pay (as allowed by the contract) for Lodge Conventions. The Lodge would like to increase this allowance to 33-days. The City would like to leave the 23-day allowance as a cap.

The Union presents comparable data showing that various other Cities have proportionatly greater allowances per size of bargaining unit then does Grand Rapids, even at the higher rate of off days as requested by the Union. This correlation, while accurate, is not a compelling factor. It is not seen that size of Police Department has a direct bearing on the days that have been, or should be allowed to attend a Union business or Union Convention meeting. Accordingly, the City position is supported. Basis for change is not supported by the evidence.

CONCLUSION

ISSUE NO. 22 - City position is adopted.

ISSUE NO. 23 (Economic)

LEAVE FOR UNION BUSINESS (Article 22).

The Union, in this Issue, seeks to have the City pay for Executive Board members to attend Executive Board meetings, regularly scheduled, or special meetings once a month, for those members who are scheduled to work.

The City opposes this demand.

The previous contracts contained no provision of this nature. The City supported its position by showing that many of the comparable Cities do not have such a provision, and only Lansing pays for such Executive Board meetings.

The Panel agrees with the City in recognizing the speculative nature of forecasting this cost factor, and additionally, would point out that previous Issue No. 22, provided for leave for Union business.

CONCLUSION

ISSUE NO. 23 - City position adopted.

ISSUE NO. 24

Settled by the parties.

ISSUE NO. 25

Settled by the parties.

ISSUE NO. 26 (Economic)

INSURANCE (Article 24).

Both parties, in this matter, are proposing that the life insurance for each officer be increased from the current $15,000 level, for non-work related deaths. The Union demand is for $20,000, and the City's last best offer is $15,000, plus a sum equal to one-half of that portion of the salary that is over $15,000.

Comparables on both sides of this issue indicate that the City position should be sustained. A further factor is found in the fact that other bargaining units in the City of Grand Rapids have a comparable plan to that proposed by the City.

CONCLUSION

ISSUE NO. 26 - City position is adopted.

ISSUE NO. 27 (Economic)

INSURANCE (Article 24; Sec. 2f)

The Union, in this issue, seeks to have the City establish an Income Maintenance Plan that would provide 75% of salary for Union members for one full year after the exhaustion of sick and vacation leave benefits, in the event of an illness or disability. The proposed Union plan, is then comparable to that provided to supervisory and management employees of the City. In forwarding this proposal, the Union places emphasis upon the hazardous nature of police work, and of the continuing stress that an officer undergoes in the regular course of his duties. The Panel cannot argue with the reality of this argument. Stress and hazard are ever present factors involved in police work.

The City, however, points out that neither firefighters nor any of the other City unions have this benefit. Nor, the City points out, is this a benefit that is found in any of its comparable communities. Further, the Panel is cognizant of other factors that differentiate in the benefits between the police officers and the Management and Supervisory employees. These differences include not only difference in salary levels, but differences in responsibilities, needed training on entry and many other factors.

CONCLUSION

ISSUE NO. 27 - City position is adopted.

ISSUE NO. 28 (Economic)

INSURANCE (Article 24; Sec. 3).

Currently, police officers have available to them legal counsel for acts in the course of employment which give rise to a cause of action , except for:

-Ultra Vires or unauthorized acts
-Intentional injuries
-Gross negligence or willful misconduct
-Actions taken while under the influence of intoxicating liquor or controlled substances, or
-Workers Compensation claims, grievance or other claims against the City itself.

The Union in this issue has proposed language which would substantially broaden the responsibility of the City to provide legal counsel to officers who may be engaged in these areas that are now specifically excluded from the responsibility of the City to provide legal counsel.

The City in its final proposal has agreed to eliminate the exception of "intentional injuries."

The Panel viewed that the extension of coverage as requested by the Union would be inappropriate, primarily, for the reason that the acts that they seek to obtain legal counsel for are acts that the officers should be ever mindful of their individual responsibility with respect to those acts. In other words, this is a delicate area in which each officer should be aware of his personal liability if he commits such an act, and not lessen that awareness by the ready availability of legal counsel, or indemnity.

While the figures cited by the Union are quite impressive, expecially insofar as the growing involvement of officers in litigation, perhaps these figures highlight the need for better training in

this area. Provision of legal counsel and or indemnification would not necessarily lessen the possibility of litigation, and would, in this Panel's view, have neglible effect at lessening the possibility of eliminating the unwise act in the first place.

CONCLUSION

ISSUE NO. 28 - City position adopted.

ISSUE NO. 29 (Economic)

INSURANCE (Article 24; Sec. 4).

The Union seeks new language which would reimburse Police Officers for personal property damaged or lost while in the performance of duty. The City pointed out that the City currently has reimbursement procedures for damaged or lost personal property. The procedure is to handle each claim on an individual basis. While a few of the other comparable Cities have a more extensive personal reimbursement policy and procedure, need for such a procedure was not shown in the hearing, for the officers of Grand Rapids.

CONCLUSION

ISSUE NO. 29 - City position adopted.

ISSUE NO. 30 (Non-economic)

UNIFORMS (Article 25; Sec. 3).

The essence of this issue was that the City initially had proposed that officers be required to wear a crew neck T-shirt during the months in which they are not required to wear ties. At the executive session of the Panel, the nature of this City requirement was discussed, and it was resolved that when uniformed officers do not have to wear ties, the regulation may state that shirts may be unbuttoned no more than 4 inches at the neck, but that crew neck T-shirts are not required.

CONCLUSION

ISSUE NO. 30 - Parties agreed to new language in the contract which would limit open shirt collars, during the period when ties are not required, to 4 inches at the neck. (The requirement for T-shirts is not adopted.)

ISSUE NO. 31 (Non-economic)

UNIFORMS (Article 25; Sec. 4)

At present, the City issues various uniform items to each uniformed police officer, and other items to non-uniformed officers. The City seeks to have this Panel adopt new language that would require the return of City owned uniform or other items prior to the issuance of an officer's final pay check upon termination.

It is acknowledged by the Union that the requested language reflects the practice that the City has had for the past twelve years.

This Panel recognizes this matter as a marginal matter. Neither side has shown any problem with the existing procedure. The only question, then is, should the language of the procedure be stated in the contract?

About the only argument weighting in favor of its inclusion is the City's argument that uniforms reflect an ever increasing cost to the City, and that the Officers should be ever mindful that these uniforms are the property of the City, and on termination must be returned, and that inclusion of this language in the contract would serve to remind the officers of that fact.

CONCLUSION

ISSUE NO. 31 - City position is adopted.

ISSUE NO. 32 (Economic)

UNIFORMS (Article 25; Sec. 5).

The City has offered a sum of money up to $150.00 for the cleaning of uniforms. The Union has, as its last best offer, the requirement that the City pay for all laundry and dry cleaning of uniforms.

The uncontrollable, "open check" aspect of the Union demand dictates that this demand be rejected. The City offer of $150.00 is recognized as fair and reasonable.

CONCLUSION

ISSUE NO. 32 - City position is adopted.

ISSUE NO. 33 (Economic)

WORKERS COMPENSATION (Article 27; Sec. 1).

In this issue, the City has proposed specific changes in the prior contract which provided for 26-weeks of salary supplementation (without charge to sick leave) for Officers receiving Workers Compensation Benefits. The problem that the City has identified, and as stated in the City brief is that:

> "a.---Officers who allegedly experience a reoccurrence of an initial injury have received almost double the intended benefit, or almost 52 weeks of salary supplementation. (6-4-81 Transcript, pp. 110-111).
>
> b. For example, an Officer is, perhaps, disabled for 24 weeks during which he receives full Worker Compensation benefits and the supplemental salary. He then returns to work for a short period of time, claims a recurrence of the prior injury, and is off on disability for perhaps an additional 24 weeks receiving full compensation and supplemental salary. ---"

It is the City's claim that this is not what was originally intended in this supplemental salary plan. At the hearing on this issue, the City modified its proposal to that contained in its final offer, to recognize that an officer involved in two consecutive, but separate injuries in one year would still be entitled to a second supplementary salary benefit.

The current language has been in the contract for some number of years. It is the application of the language that concerns the City. No evidence was produced at the hearing that would contradict the City's contention of what was intended by the language of the prior contracts. Rather, the Union's argument tended to recognize that the City was right

in its contention that the language proposed by the City could prevent a substantial extension of what the City claimed was the original intention of the language. Rather than accept the Union's proposal for no change in prior language, in this matter, this Panel recognizes that, to so rule would, in fact, permit the possibility of the practice that the City claims is a real possibility, and thusly, the Panel would endorse and support a practice, which the only evidence of record is presented by the argument that the possibility of the practice should not be reinforced by accepting a continuation of the old language. In other words, one purpose of this Panel's existance is to resolve all issues in conflict. The parties to this issue claim a conflict in possible interpretation of existing language. It is the role of this Panel to either support the Union position, which could result in further contention as to what was intended by the language that was evolved a number of years ago, or to support the City's proposal that would clarify the rights of the officers who are to receive the benefit. The City's argument is found to represent the more plausible alternative. This Panel must reject the Union's contention that to accept the City's language would do the officers a disservice in that it would be contrary to the interests of the officers to limit their ability to recover under this clause. If their ability to recover is contrary to the uncontroverted intent of the clause, then that limitation should be spelled out in that clause.

CONCLUSION

ISSUE NO. 33 - City position is adopted.

ISSUE NO. 34 (Non-economic)

VALIDITY (Article 33; Sec. 3).

The Union, in this Issue has proposed new contract language which provides as follows:

> "Section 3. It is intended that this Agreement and its Supplements shall be an implementation of the provisions of Act 379 of the Public Acts of 1965, as amended, and the provisions of the Grand Rapids Civil Service Board Rules and Regulations."

The City is against the adoption of this new language.

It is the claim of the Union that unless there is something written in the collective bargaining agreement, the City can claim that the matter is not controlled by that agreement, thereby subverting the Civil Service Board and PERA rights.

The Panel takes particular note that the parties to this matter have negotiated for a particularly long time. At the outset of these hearings, there were 48 issues presented to this Panel to resolve the difference that still existed between the parties. But a handful of these issues have been settled, either by the demand being withdrawn, or the parties mutual agreement on the acceptance of some sort of alternative or compromise situation. To now make this agreement provide that it is the "intention" of the parties to make this agreement supplementary to both PERA, and the Civil Service Board Rules, in effect would mean that this Panel would have to review all of those rules and applications to determine their effect on the clause that the Union now proposes. This Panel is not disposed to do this. It is particularly noted that Article 33; Sec. 1. states that:

"---the Provisions of this Agreement shall supersede any existing rules and regulations of the City, and/or any of its Boards or agencies which may be in conflict therewith."

As to the Union's claim that the City must implement the provisions of PERA (Act 379), it is not shown that the City has failed, in any respect to observe the mandates of that law.

CONCLUSION

ISSUE NO. 34 - City position is adopted.

ISSUE NO. 35 (Non-economic)

ENTIRE AGREEMENT (Article 34).

It is the Union demand to eliminate the so-called "Zipper" clause of the previous contracts.

The argument forwarded by the Union that a "Zipper" clause is in any way contrary to the requirements of the City to bargain is rejected as being without foundation. As pointed out in respect to the prior Issue herein, the City and the Union have had ample time to negotiate on each and every issue that they desired. This Panel is not aware of any ruling that says that negotiations must continue endlessly. What is provided for is that negotiations must be conducted within certain parameters and that when an impasse is reached, in Michigan at least, a 312 Panel will render a final and binding decision on all issues that remain unresolved. This Panel has held eleven days of hearings, had two executive sessions, and has spent many, many days considering all of the evidence and arguments that would support each and every issue that has been presented. There comes a time when the parties must stop negotiations and commence to observe the contract as evolved by this Panel.

CONCLUSION

ISSUE NO. 35 - City position adopted.

ISSUE NO. 36 (Economic)

PENSIONS (Article 38; Sec. 1).

In this Issue, both the City and the Union are agreed upon as to the Union demand of an increase in pension benefits from a 2.0 multiplier to a 2.2 multiplier, but the Union asks that this multiplier become effective on June 20, 1980, and the City asks for a July 1, 1981 effective date. However, the City position is conditioned on the increase being tied into a City proposal in Issue No. 47, to a total wage and pension cost of 7.88%.

In the first place, the Panel accepts the City's final offer, though it is in an alternative form. It, that offer, is clear and unambiguous, and is capable of immediate and precise computation.

It is the considered opinion of this Panel that the alternative last best offer of the City regarding Pensions must be considered in determining the overall wage package. Further, it is noted that comparable City data indicates that pension multipliers range from 2.0 through 3.0, with Grand Rapids being at the low end of comparability. Further, in respect to other units of the City, the 2.2 multiplier is the prevalent multiplier. However, the Panel also notes that, in negotiations with other units within the City, this multiplier was a factor in coming to some conclusion in the overall wage package that was evolved for each unit.

It is the considered opinion of this Panel that it would be wise to have a degree of comparability in fringe benefits, unit to unit, within the City of Grand Rapids. However, comparability need not be identical pension plans.

Specifically, this Panel has the problem of either accepting the Union last best offer, or the City's last best offer on this issue. In its last best offer, the Union has asked that the pension benefit be increased effective June 20, 1980. This Panel cannot change the effective date of the called for Pension increase. It must either accept the June 20, 1980 date, or accept one or the other of the City's offer of:

a) 2.0%

b) 2.2% effective July 1, 1981 if salary is maintained at 5%.

In view of the already implemented 10% increase that the City has enacted for this unit to further increase the Cost of the Wage package by the demanded pension increase would limit the Panel to a choice of salary levels that it does not support.

Consequently, the first alternative of the City position is in greater harmony with the salary schedule adopted hereinafter.

CONCLUSION

ISSUE NO. 36 - City position in alternative No. 1 is adopted. (i.e. maintain 2.0% pension benefit)

ISSUE NO. 37 (Ecomic)

PENSIONS (Article 41; Sec. 2).

In this issue, the Union seeks to alter the prior contract to provide for retirement at age 50, with 10 or more years of service, - with no reduction in benefits because of age. The City opposes this demand.

It is the argument of the Union that a retired police officer cannot live on his pension. But the record is devoid of any ruling showing why a Police Officer should be allowed to retire at age 50. While it is recognized that the Union seeks to effect this demand in only the last six months of the contract, it is noted that this demand if supported, would in all liklihood be in effect for all subsequent years.

Additionally, the Union argues that many of the comparable Cities offer a 2.2 multiplier and retirement at age 50. Lacking, though is the data that would indicate retirement at age 50 without an actual reduction in benefits. The data submitted by the Union does not, in the opinion of this Panel, support this demand, where as the data submitted by the City supports the City position.

CONCLUSION

ISSUE NO. 37 - City position is adopted.

ISSUE NO. 38

PENSIONS (Article 41).

WITHDRAWN.

ISSUE NO. 39 (Economic)

TERMINATION AND MODIFICATION (Article 40)

Both parties have agreed to a two year award. The Union has asked that this contract commence on June 1, 1980. The City has proposed that the contract commence on July 1, 1980.

The problem here is that neither the City nor the Union provide for continuity with the last contract. The Panel must choose between an overlap of one day with the prior contract in the Union position, or a void of 30-days in the City position. While neither of these alternatives is desireable, the lesser problem of the two choices lies with accepting the Union position - this being an economic issue.

CONCLUSION

ISSUE NO. 39 - Union position is adopted.

ISSUE NO. 40 (Economic)

SHIFT PAY DIFFERENTIAL (New Article).

The Union, in this Issue is asking for the commencement of a Shift Differential, to apply to each officer working a shift other than between 6:30 a.m. and 5:00 p.m.

It is noted that the cost of this differential is in excess of 1% for the City. Based primarily on its decision regarding base salary, the Panel rejects the idea of a shift differential at this time.

CONCLUSION

ISSUN NO. 40 - City position adopted.

ISSUE NO. 41 (Economic)

TRAINING SESSIONS (New Article)

In this new Article, which the Union proposes and the City rejects, the Union seeks to have the officers who attend training sessions in off duty hours, compensated for such attendance in hours at straight time rate. It is noted that, in the current contract, officers who attend such training sessions may use their compensatory time at straight time rate. Also, if an officer is required to attend a training course on a scheduled day off, the officer is given another day off at another time. At the hearing on this matter, there was a lack of compelling evidence to dictate that current practice should be altered. Accordingly, it is the judgment of the Panel that the contract not include the language as proposed by the Union.

CONCLUSION

ISSUE NO. 41 · City position adopted.

ISSUE NO. 42

COST OF LIVING PROGRAM

CONCLUSION

ISSUEN NO. 42 - WITHDRAWN

ISSUE NO. 43 (Non-economic)

SAFETY (Article 37)

This proposed new language offered by the Union on this subject, was thoroughly discussed by this Panel in one of its executive sessions. At that session the following language was adopted. This Panel agreed that this procedure was appropriate under Act 312, as they did not regard this matter as an economic issue:

> "Section 1. The parties to this Agreement shall cooperate in the establishment of safety rules and regulations. Two employees of the bargaining unit shall be members of the Safety Committee.
>
> Section 2. The Employer shall meet Safety responsibilities under the Michigan Occupational Safety and Health Act (MIOSHA) and that is to furnish to each employee a place of employment free from recognized hazards, to maintain certain records and reports and to supply safety equipment as it deems necessary to meet its requirements under applicable State or Federal Safety Acts.
>
> Section 3. It is the responsibility of every employee under this Agreement to follow all established department safety regulations. Further, it will be the responsibility of every employee to follow all new safety regulations which may be established through local, State or Federal law.
>
> Section 4. If equipment shall be regarded as defective by a Bargaining Unit Member, he shall immediately inform his immediate supervisor of the fact and present him with a list of the defects. The City shall assess the condition of the equipment and if found unsafe shall not require employees to utilize that equipment.

CONCLUSION

ISSUE NO. 43 - Union position (as modified) adopted by the Panel.

ISSUE NO. 44 (Economic)

E-UNIT COMPENSATION (New Article)

The Union position in this Issue is to provide so-called "E-Unit" officers with an additional 3% compensation in their base pay. By "E-Unit" is meant those officers who are assigned to the Emergency Medical Technician Unit. The hearing received ample evidence to substantiate the worth of this specialized Unit, all the members of which have undergone specialized training at City expense and on City time.

This is a difficult problem to solve because it is a problem that is mixed somewhat with emotional reactions. These emotional reactions stem from a recognition that officers with EMT training provide a service for which the recipients, and the community, are deeply grateful. They, the E-Unit officers, in fact save lives.

The Union in its brief sets forth some 15 reasons why it believes that "E-Unit" officers should receive this extra compensation. Among those 15 reasons are many reasons that are applicable to all other - non "E-Unit" officers, hence must be disregarded. Some of the offered reasons are debatable. For example, reason number 9 claims that these officers are subject to a greater stress level then those who are not trained. There is support on the other side of this issue, that claims that a non-EMT trained officer has a greater stress level, because he may be thrust into a position for which he is not trained, and as a consequence undergo an even greater stress level, induced by his frustration in wanting to help but not knowing the proper procedures. There can be no doubt but that the E-Unit have brought a new dimension to the public service of the City of Grand Rapids. However, other specially

trained officers within the City police force also have brought new concepts of service to the City. The only question is,should this particular effort, as laudible as it is, receive more than other efforts of important specialties on the police force.

It is the Panel's considered judgment that such extra compensation should not be afforded this group, over any other group, at this time.

CONCLUSION

ISSUE NO. 44 - City position adopted.

ISSUE NO. 45 (Economic)

FOUR DAY WORK WEEK FOR DETECTIVE BUREAU PERSONNEL

(New Article)

The Union in this Issue proposes that the Detective Bureau Personnel be placed on a four day - 10-hour per day work week rather than the current 5-day; eight hours per day work week. The City opposes this plan, even on the "trial" basis as contained in the Union last best offer, to be placed in effect no later than June of 1982.

Among other items that form the City's objection to this plan is the cost in lost hours, due to the inclusion of the lunch period in the 4-10 plan, whereas in the current 5-day plan lunch periods are on the officer's own time. Further, the City introduced evidence that tended to show that a previous trial of a 4-10 plan resulted in lost man hours without any compensating improvement in the number of investigative contacts. While the Union claimed, in its brief, that greater efficiency would result, that manpower would be placed where needed, and the morale would be greatly improved, none of these points were supported by the evidence, except the Panel did recognize that the 4-10 plan might yield an improvement in morale. By using the word "might" there was no evidence that the Detective Bureaus as a whole, or even a substantial number of them, would have their morale improved by the adoption of the plan, but it can be assumed that the adoption of the plan would be liked by some of the officers, if not by all. However, this possibility, in and of itself is not sufficient reason to support the proposal.

CONCLUSION

ITEM NO. 45 - City position adopted.

ISSUE NO. 46 (Economic)

SALARIES, APPENDIX A

The Union has asked that Grand Rapids Police Sergeants receive a percentage difference increase from 8.52% to 10%, between their pay and the pay of the Police Officers classification, effective July 1, 1980. The City agrees to the 10% figure, but, in its last best offer, wants to make the effective date, July 1, 1981.

Basically, the City agrees that the 10% differential is correct, but that the conditions that evolved it were due to the Union's historical demands for a series of flat dollar, across the board wage increases which have distorted and contracted that differential. Whatever caused its occurance, both parties agree that the condition should be rectified. No valid reason for delaying its implementation has been offered. Therefore, delay in implementation should not be supported.

CONCLUSION

ITEM NO. 46 - Union position adopted.

ISSUE NO. 47 (Economic)

SALARIES, APPENDIX A

The parties to this Act 312 matter have chosen to combine the matter of salaries for the two year period of the contract as a single issue. The Union demand is for a 12% across the board increase in the first year, and a 10% across the board increase in the second year of the contract. The City offer is for 10% for the first year (and has already implemented this sum) and a 7.88% across the board increase for the second year. The alternate offer of the City of a pension increase coupled with a lower (5%) across the board increase in the second year, is not considered, as the pension increase has been denied earlier herein (See Issue No. 36).

It is particularly noted by this Panel that the entire matter of economic demands has been made much more difficult in this case because of the great multitude of demands that have an economic consequence that has been made by the Union. It is also paramount, in this Panel's judgment, that out of the multitude of demands of an economic nature that have been rejected, in this matter, many of those demands had some basis in comparable Cities, but not sufficient support to warrant the Panel adopting the Union position in any more of these areas than has been in fact adopted. In all other economic issues, the City position has been supported for the reasons given in the discussion of each of the issues.

Considering only issue by issue can be quite misleading and can lead to injustices in evolving overall equity in the setting of the compensation of the officers in this collective bargaining unit. Nor can the Panel be mislead by the sheer number of economic demands, nor

of the cost consequence of those demands, that have been made by the Union. Frankly, there is support, and adequate support, to go either way in the single issue of the across the board salary matter. Comparable Cities, however defined, could lend credence to both positions because those factors that tend to highlight differences in alleged comparability are so numerous as to ultimately enable a Panel to rationalize about any conclusion. For example, Grand Rapids is second in size in Michigan to Detroit, the largest City in the State. So it can be said that its police force should therefore receive the second highest level of compensation, because there is some evidence to support the fact that crime escolates as Cities grow larger.

From Attachment No. 1 it can be seen that the evidence of comparable Cities is indeed limiting and of little help in reaching any rational conclusion. For example, Detroit, the largest City in Michigan is about eight times the size of Grand Rapids. The only comparable sized Cities in Michigan are Flint (without a 1980 salary level at this writing), and Lansing, with a population of 125,976. All other Cities are around half the size of Grand Rapids. Lansing has a top of rate of $21,894, though is about two-thirds the size of Grand Rapids.

Taking all of these factors into account it is the determination of the Panel that the 2-year Union proposal of twelve percent (12%) the first year and ten percent (10%) the second year, comes closest to providing the officers of Grand Rapids a salary level, that is higher than the Cities proposed comparable City's average, but closer to a figure that recognizes its status as the second largest City in the State, and more comparable to the few Cities that are any-

where near a comparable size to Grand Rapids.

What this Panel has tried to do is to consider all of the factors that have been presented, and consider all of the arguments that have been presented, and, in view of the conclusions reached on each of the previously herein considered conclusions announced on the economic issues, render a judgment that supports the Union demand on this present issue as it more nearly completes a package of economic benefits that is supported by the total evidence.

CONCLUSION

ISSUE NO. 47 - Union position is adopted.

(See attachment No. 1 ((Page 71A))

ATTACHMENT NO. 1

Agreed Upon as Comparable:	Maximum Salaries as of July 1, 1980
Flint	--
East Lansing	$20,259
Lansing	21,894
Saginaw	21,250
Kalamazoo	21,432
Muskegon	19,450
Wyoming	20,103
Battle Creek	20,911
City Comparable Average	$20,757
Additional Union Comparables:	
Ann Arbor	23,144
Dearborn	21,707
Detroit	26,296
Jackson	22,353
Pontiac	21,039
Royal Oak	23,117
Warren	23,233
Kalamazoo County	22,042
Kent County	20,240
Michigan State Troopers	20,713
Union Additional Compensation Average	$22,388
Average of all Union Comparables (Including East Lansing)	$21,716

Grand Rapids at 10%	$21,660	City Last Best offer
at 12%	22,053	Union Last Best offer

ISSUE NO. 48 (Economic)

LETTER OF UNDERSTANDING NO. 1.

In this Issue the Union seeks to obtain an award for officers in the Investigative Division, of additional compensation, or premium pay of 3% more than the compensation received by the other 180 officers in the other two divisions.

Stated in summary fashion, the Union simply has not made a case to support their demand. In managing its police department, the City has historically maintained a generalist type of organization.

In this type of organization, officers are required to have many different skills and assignments that recognize individual skills and capabilities, and training is made by those in charge. The fact that other Cities, that may be comparable, have a different type of specialty classification does not present compelling reasons for altering the type of organization that the City of Grand Rapids has evolved.

This decision to not support this particular demand of the Union should not be interpreted to prevent the City, from evolving into a different type of basic organization. If such a change is desired, the City can undertake the establishment of whatever classification that it wants, then must negotiate for the establishment of wages for that combination of elements. This Panel felt with respect to Issue No. 45 (the 4-day work week proposal) that a case has not been made for compelling the City to effect the wage differential as requested by the Union. The overwhelming comparables, lacking a comparison of the basis of the system of organization in these other departments in other Cities, ceases to be convincing.

CONCLUSION

ISSUE NO. 48 - City position adopted.

ABILITY TO PAY (Continued from P.7)

Having determined each of the economic issues that have been presented for the Panel's decision, it now is appropriate to consider the claim of the City that it does not have the ability to pay the demands of the Union. By the decisions announced herein, the issue of ability to pay is confined to those few economic demands that have been granted by this Panel. Of course, of greatest significance is the decision of this Panel to award the Union demand with respect to wages, which represents a 2% base salary differential from the City offer in the first year, and a 2.2% base salary differential in the second year. Further, the Panel is mindful that Grand Rapids has had a history of living with position vacancies, which in any budget crunch, represents one way in which an employer can effectuate actual savings and attain budgeted balances.

In this matter, this Panel is initially concerned about determining that grouping of <u>all</u> economic benefits, by selecting the last best offer of one side or the other, that will, in composite form, most nearly establish total comparability with all factors that have been presented. In evolving its decisions, this Panel has, in effect, stated that when the entire package of economic benefits is added together, it will most closely approximate what the City of Grand Rapids must pay their officers, that the determined levels of benefits are the levels that should be paid. The Panel has not dealt with, nor was it asked to deal with an item that is within the responsibility of the City - namely, how many police officers should the City have. It is noted that the City has the right to determine the level of staffing of officers, in the event that City finances require such determination.

This Panel, in its determination of an equitably comparable total compensation package, has firstly, established that level that, in its judgment, comes within the meaning of the dictates of Act 312. Once having established the economic portions of this opinion and award, it then considered the ability of the City to pay this level of compensation. As stated earlier, the difference between what the City proffered, and the Union requested was, essentially, 2%, in the first year, and 2.2% in the second year.

From a consideration of all factors, it is this Panel's judgment that this 2% and 2.2% difference can be secured from City resources, which include appropriate staffing levels, which is under the City's control.

As noted previously herein, the decision on each issue is supported by at least two of the undersigned Panel Members.

C. Barry Ott

For the City of Grand Rapids
Barry Ott

G. J. Hoogerheide Jr.

For the Lodge No. 97, F.O.P.
Adrian Hoogerheide

S. Eugene Bychinsky

Chairman
S. Eugene Bychinsky

11-5-81
mmd

278

12/17/81
ARB
Dissent to
Arbitrators
Decision

STATE OF MICHIGAN
ARBITRATION UNDER ACT NO. 312
PUBLIC ACTS OF 1969, AS AMENDED
S. EUGENE BYCHINSKY
IMPARTIAL ARBITRATOR

IN THE MATTER OF THE STATUTORY ARBITRATION BETWEEN:

CITY OF GRAND RAPIDS,

-AND-

LODGE NO. 97, FRATERNAL ORDER OF POLICE.

Grand Rapids, City of

DISSENT

Michigan State University
LABOR AND INDUSTRIAL
RELATIONS LIBRARY

December 17, 1981

By: Adrian Hoogerheide
Delegate to the Arbitration Panel
on Behalf of the Fraternal Order
of Police, Grand Rapids Lodge No. 97

DISSENT

BY ADRIAN HOOGERHEIDE
DELEGATE TO THE ARBITRATION PANEL
ON BEHALF OF THE FRATERNAL ORDER OF POLICE
GRAND RAPIDS LODGE NO. 97

"There comes a time when the parties must stop negotiations," according to S. Eugene Bychinsky, impartial chairman of this panel. For Mr. Bychinsky claims that "[t]his Panel is not aware of any ruling that says negotiations must continue endlessly."

The determination to end collective bargaining, or in the alternative to limit collective bargaining between the parties to those periods when the agreement between the parties has expired, permeates this Act 312 award. It is the Panel's determination to make this an anti-collective bargaining agreement which compels this dissent.

I.

Whatever power this Panel has to make an award in this case is power delegated to it by the State Legislature by means of Act 312 of 1969, as amended, being MCLA § 423.-231 et seq.; MSA § 17.455(31) et seq. City of Detroit v Detroit Police Officers Association, 408 Mich 410, 294 NW 2d 68 (1980); Dearborn Fire Fighters v City of Dearborn, 394 Mich 229, 231 NW 2d 226 (1975). But the Legislature in Michigan can not delegate legislative power. Const, 1963, Art. 4, § 1. "It must promulgate, not abdicate." City of Detroit v Detroit Police Officers Association, supra, 408 Mich at 458, quoting Osius v St. Clair Shores, 344 Mich 693, 698, 75 NW 2d 25 (1956). The constitutional prescription on delegation of legislative power has led one panel of the

Court of Appeals to opine that Michigan's "delegation doctrine" is in reality a "nondelegation" doctrine, for the Legislature constitutionally cannot confer power to make law nor policy; the Legislature only can confer power to carry out the Legislative policy which already has been enacted into law in the delegating statute. West Ottawa Public Schools v Babcock, 107 Mich App 237, 242, 309 NW 2d 220 (1981). See also G. F. Redmond & Co. v Michigan Securities Bureau, 222 Mich 1, 5, 192 NW 688 (1923). As formulated and enforced by the Supreme Court of Michigan, the "nondelegation" doctrine serves three important functions. First, it ensures that the important choices of social policy are made by the Legislature, the branch of government most responsive to the electorate. Department of Natural Resources v Seaman, 396 Mich 299, 308-309, 240 NW 2d 206 (1976). Second, the doctrine guarantees that, to the extent the Legislature finds it necessary to delegate authority, it requires the recipient of the authority to act "within specified limitations (standards) established by the Legislature and * * * not * * * in accordance with its own will." Westervelt v Natural Resources Commission, 402 Mich 412, 441, 263 NW 2d 564 (1978). (Emphasis in original.) Third, and derivative of the second, the doctrine ensures that the courts charged with reviewing the exercise of delegated discretion will be able to test that exercise against ascertainable standards. City of Detroit v Detroit Police Officers Association, supra. Our award therefore is issued by this Panel pursuant to the statute in order to carry out the policy enacted in the statute and declared in the statute.

This Panel has recognized its duty to consider the factors set forth in Section 9 of Act 312 in reaching its

decision. However, this Panel has ignored the equally important limitation contained in Section 14 of Act 312:

> "This act shall be deemed as supplementary to Act No. 336 of the Public Acts of 1947, as amended, [the Public Employment Relations Act] being sections 423.201 to 423.216 of the Compiled Laws of 1948, and does not amend or repeal any of its provisions * * * *."

By making this an anti-collective bargaining agreement, this Panel purports to do what the Legislature in clear and unambiguous language has declared it does not intend to permit: this Panel purports to amend or repeal the provisions of PERA insofar as PERA relates to the rights and duties of the parties hereto. Such a purpose clearly is in conflict with the purpose of Act 312 and is beyond the powers delegated this Panel by the Legislature. And it is elementary that a contract provision contrary to law in unenforceable and does not bind the parties. 6A Corbin, Contracts §§ 1373-5; Fairweather, Practice and Procedure in Labor Arbitration, p. 117.

II.

PERA is a collective bargaining statute. While not identical to the National Labor Relations Act or the Railway Labor Act, PERA is broadly modeled after Federal labor law. Abood v Detroit Board of Education, 431 US 209, 97 S Ct 1782, 52 L Ed 2d 261 (1977). The Supreme Court of Michigan has approved the use of Federal precedents to interpret the similiar provisions of PERA. Detroit Police Officers Association v City of Detroit, 391 Mich 44, 53, 214 NW 2d (1972). The United States Supreme Court, interpreting the

similiar provisions of the NLRA, has held that "the obligation to bargain collectively is crucial to the statutory scheme." NLRB v American National Insurance Co., 343 US 395, 402, 72 S Ct 824, 96 L Ed 1027 (1952). Cf., the thoughtful opinion of Judge Danhof in City of Escanaba v MLMB, 19 Mich App 273, 280-281, 172 NW 2d 836 (1969). The United States Supreme Court has rejected the notion that the union's rights and duties

> "come to an abrupt an with the making of an agreement between the union and the employer. Collective bargaining is a continuous process involving both matters not covered by the agreement and the protection of employee rights already secured by the contract." Conley v Gibson, 355 US 41, 45, 78 S Ct 99, 2 L Ed 2d 80 (1957).

Indeed, PERA defines "collective bargaining" as

> "the performance of the mutual obligation of the employer and the representative of the employees [1] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or [2] the negotiation of an agreement, or [3] any questions arising thereunder * * * *." MCLA § 423.215; MSA § 17.455(15).

Notwithstanding the statutory definition of collective bargaining, the Impartial Chairman has included the following language in the contract resulting from these proceedings:

> "During negotiations each party had the right to make proposals with respect to all bargainable matters. This sets forth the basic and full agreement between the parties. During its life. neither party will require the other to engage in collective bargaining as to any matter, whether mentioned herein or not, except as such bargaining is provided herein." (Issue No. 34, "Entire Agreement," Article 34.) (Emphasis added.)

Over union objection, the Impartial Chairman has, at Issue No. 2., "Management Rights," given the employer apparent

authority to institute new jobs, or to combine or eliminate existing jobs, without negotiations with the union. Further, the Impartial Chairman, at the same issue, has determined that the City may change the conditions of employment in the bargainng unit without negotiating with the union by the device of issuing new work rules and regulations. Thus, the award purports to deny the union the right and duty to engage in collective bargaining during the life of the contract, while it purports to give the City power unilaterally to change virtually every aspect of the employment relationship except the wages and benefits provided in the award.

The Impartial Chairman's reasoning for suspending the duty to bargain during the life of the contract is that bargaining would be a futile gesture during the life of the agreement because the statutory impasse procedure--Act 312--is available only when the agreement has expired. But Michigan does not limit collective bargaining to those public employees who have access to a statutory impasse procedure. Section § 9 of PERA extends the right to collective bargaining to all public employees in Michigan except those in state civil service. Act 312 extends the right to interest arbitration only to police, fire and emergency dispatch employees. A rule which would deny the right to collective bargaining in the absence of an impasse procedure is contrary to the public policy of Michigan as expressed in PERA.

Further, the Impartial Chairman overlooks the grievance procedure in the instant agreement. While it appears from the Impartial Chairman's award that the Impartial Chairman foresees a grievance procedure only conditionally open to the union, the final step in the contractual grievance procedure is binding arbitration. Voila. An impasse procedure.

Instead of negotiations during the life of the agreement, the Impartial Chairman would have the City "consult" with the union. The Impartial Chairman gives us no guidance on the parameters of "consultation." But the requirement to consult would seem to provide little more than an announcement to the union of the City's determinations. PERA requires more. PERA provides that the public employer must "engage in the bargaining process with an open mind and a sincere desire to reach an agreement." Detroit Police Officers Association v City of Detroit, supra, 391 Mich at

III.

The City complains in its brief submitted at the close of this Panel's deliberations, that "[t]he structure of the Compulsory Arbitration process stacks the deck against the employer." According to the City:

> "The statutory framework guarantees that the Union will receive everything it is offered during pre-arbitration collective bargaining, and then, by allowing the submission of a plethora of unresolved issues to a Panel, the Union has a statistically good change of getting something further because of a Penal's natural tendency to 'give them something,' for reasons of compromise if nothing else. An employer, on the other hand, has nothing to gain unless it too plays the same game and tosses its own 40 issues to the Panel (year after year.)" See the City's final brief, page 2.

The City's strategy to combat what it sees as the "stacked deck" of interest arbitration is to "begin at zero" with any union with the temerity to assert its right to Act 312 arbitration. Thus this employer witheld from the members of this union's bargaining unit the improved pen-

sion package it already had instituted for police commanders, who are not members of this bargaining unit, and for fire fighters, whose union waived its right to go to Act 312 arbitration. The employer's stubborn refusal to extend the pension improvements to the members of this bargaining unit clearly is "punitive action" by the City against members of a union which asserts its rights under PERA and Act 312. It is discrimination against employees on the basis of their exercise of lawful concerted activity.

But the City's refusal to extend the pension improvements to members of this bargaining unit is something more. Coupled with the complaint in the City's brief against the "stacked deck" of Act 312 arbitration, it is evidence of bad faith bargaining on the part of the City.

Implicit in the City's complaint that Act 312 arbitration is a "stacked deck" is the assumption that the employer holds--and rightfully should hold--all the cards. The corallary to this assumption is that the employer is within its rights to deal its cards as favors to cooperative employees, while refusing to deal at all with uncooperative employees. Thus, during the negotiations with this union prior to the institution of the Act 312 proceedings, the City went through the motions of collective bargaining as part of an elaborate pretence. There was no desire to reach an agreement with this union; there would be no agreement as long as this union continued to insist on its right to proceed to interest arbitration.

When the parties reached Act 312 arbitration, the City's "anal retentive" style of negotiations continued. The City continuously opposed extending the pension improvements to the members of this bargaining unit. The Impartial

Chairman was told he could give the union the wages it sought, or he could give the union the improved pension plan. But, the City argued, the Impartial Chairman could not give the union both. In effect, consideration of improved pensions is conditioned upon waiver of the union's wage demands.

The obligation imposed by Section 15 of PERA is mutual. The obligation to bargain collectively runs to the employer and to the representative of the employees. And the right to bargain collectively extends to both the employer and the representative of the employees. By insisting that the City retains the right to determine which of the cards shall be dealt, and by conditioning the deal upon the waiver of the right to bargain over other issues, the City eliminated the "mutual give and take" that is supposed to characterize the collective bargaining process, and effectively cut the union out of the process. The union is faced with an employer which insists on the unilateral right to determine the scope of the negotiations. That is why the parties ended up in Act 312.

Unfortunately, the Impartial Chairman accepted the City's conditions for collective bargaining. While the Impartial Chairman recognized that "comparability begins at home," he held that "comparability cannot mean identical pension plans." The Impartial Chairman noted that he was granting the union's last best offer on wages, and said he could not "increase the cost" of the contract by giving the union pensions too.

No explanation is offered. The Impartial Chairman does not find that the City is unable to pay both the union's wage demand and the improved pension package. The

Impartial Chairman does not find that the comparable cities have pension plans more comparable to that required by the City. Nor does the Impartial Chairman find his duty to choose the union's last best offer or wages or on pensions impelled by consideration of any of the other Section 9 factors. He simply accepts the City's conditions.

We believe that the Impartial's Chairman's ruling on this action is the essence of arbitrariness. The Supreme Court of Michigan has stated that "Arbitrary is: '[w]ithout adequate determining principle * * *. Fixed or arrived at through an exercise of the will or by caprice, without consideration or adjustment with reference to principles, circumstances or significence, * * * decisive but unreasoned.'" Bundo v City of Walled Lake, 395 Mich 679, 703, n 17, 238 NW 2d 165 (1976).

IV.

The source of the Impartial Chairman's problems with respect to findings is that he failed to go about findings in the proper manner. Consistently, throughout the award, the Impartial Chairman jumps to conclusions, labels his conclusions findings, and goes on to the next subject. It is not possible, based on his opinion, to follow his train of thought. In Michigan, the courts under the "nondelegation" doctrine discussed above, require not merely conclusions but a statement of the basis for the findings set forth in factual detail. Tireman Improvement Association v Chernick, 361 Mich 211, 218, 105 NW 2d 57 (1960).

We are told that the Impartial Chairman's award, on both economic and non-economic issues, is based on "com-

parables." The Impartial Chairman notes--and rejects--the suggestion that he make findings on what cities are comparable to Grand Rapids. Then he proceeds to draw his conclusions.

It is axiomatic that administrative agency, in reaching its conclusions, necessarily must proceed through at least four steps:

> "(1) evidence must be taken and weighed, both as to its accuracy and credibility;
>
> "(2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached;
>
> "(3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be;
>
> "(4) from this finding a decision will follow by application of the statutory criterion." Saginaw Broadcasting Co. v FCC, 96 F 2d 554, 559 (DC Cir 193*), cert. den. 305 US 613, 59 S Ct 72, 83 L Ed 391 (1938).

Unfortunately, this Panel skipped from the first step to the fourth.

Without knowing what cities if any the Impartial Chairman has determined are comparable to Grand Rapids, we cannot follow why he selected certain positions of the City and/or certain positions of the FOP.

V.

The issue of whether the City has the "ability to pay" the economic award proposed by the union offers an excellent example of what is lacking in the Panel's opinion. While

the City agreed it was able to pay the union's economic demand, the City argued it suffered from a prospective inability to pay which would result from implementation of the union's offer. In support of its theory of prospective ability to pay, the city offered evidence in the form of testimony of an assistant city manager, Robert White.

Mr. White's testimony was based upon estimates. Mr. White testified he did not know:

a. How his estimates compared with actual revenues and expenses during Fiscal Year (FY) '81. (T, 31)

b. Whether, despite the financial woes he described, the City had been able to hire 18 new police officers in 1981. (T, 38)

c. Which city employees got raises in excess of 9%. (T, 40)

d. The City's State Equalized Valuation (SEV). (T, 45)

e. What interest the City earned on the moneys the City had budgeted for police pay raises but witheld when the FOP demanded Act 312 arbitration. (T, 47)

f. What "salary savings" the City realized during FY '81 by allowing personnel vacancies in the police department to remain empty. (T, 50)

When Mr. White was asked:

> "Bob, setting all of the details aside, are you satisfied that in Fiscal '81, the City spent more money than it received?" (T, 54)

Mr. White avoided the question. He answered:

> "I believe the books will show that." (T, 54) (Emphasis added.)

The union contested the City's theory of prospective inability to pay. The union introduced testimony of a

Certified Public Accountant, Stephen Plumb. Mr. Plumb testified he did what Mr. White could not bring himself to do. He compared Mr. White's estimates with the City's actual experience in FY '77, '78, '79, '80 and '81. (T, 61) Mr. Plumb testified he obtained his information from the City's published audits, prepared by independent CPA's. Mr. Plumb's analysis of the City's actual financial condition over the past five years is set forth in union's exhibit No. 127. Mr. Plumb concluded as follows:

> "In reviewing the budget and actual revenues and expenditures of the General Operating Fund for the City of Grand Rapids for the fiscal years ending June 30, 1977, 1978, 1979, and 1980, it appears that the City has a tendency to be conservative in its estimates of revenues. For the above years the City has underestimated its revenues by an average of 3.01% * * * *.
>
> "Also, this analysis shows that the City has a tendency to overstate its expenditures. For the above years, expenditures have been overstated by an average 4.75%."

Further, Mr. Plumb testified that he found that the City overestimated its personnel costs by 4.04%. "When this variance is applied to the current budget for personal services it would appear that an amount of $1,519,933 that is budgeted will not be used."

It would appear there is a conflict between the testimony of Mr. White and Mr. Plumb. In weighing the testimony of the two, it appears that Mr. Plumb's evidence is more accurate, since it is based on published audits performed by independent CPA's while Mr. White's testimony is based only on estimates. Further, Mr. Plumb's testimony is more credible. His conclusions are the product of a careful analysis of the independently produced figures. On the

other hand, when Mr. White was asked whether he was satisfied with the conclusions drawn by his testimony, he avoided the question. Clearly, the evidence presented by Mr. Plumb is both more accurate and more credible than that presented by Mr. White.

From the evidence presented by Mr. Plumb and Mr. White--the only evidence presented to the Panel on the ability of the City to pay--the Panel is constrained to conclude that the City has a $1,500,000 surplus in its personnel budget, and that the city generally has 7.76% more funds (the 3.01 underestimate of income added to the 4.75 overestimate of expenses) than appears in its budgets. From this basic fact, the Panel is constrained to find the ultimate fact: the City can well afford the union's last best economic offers--each and every one of them. And from this finding should follow the Panel's award: The union's last best offers on economic issues--each and every one of them--should be adopted unless some reason other than ability to pay prevents adoption of them.

That is how the Panel should have approached the problem. It did not. But we believe that if it had approached the problem in this more careful and attentive manner, the union would have fared better in these proceedings.

VI.

In his discussion of some issues, the Impartial Chairman referred to comparables. At Issue No. 19, "Sick leave," the Impartial Chairman "acknowledged that similiar provisions" to that sought by the union "do appear in the

contracts of cities that are, to some degree at least, comparable to Grand Rapids." What the union sought was three days leave to attend a funeral, instead of the current two. The days so taken, under the union proposal, would be deducted from sick leave.

Indeed, similiar provisions do appear in the contracts of cities that are, to some degree at least, comparable to Grand Rapids. Such three-day sick leave provisions are found in police contracts in the cities of Battle Creek, Saginaw, Flint, East Lansing,Wyoming, Kalamazoo, Lansing and Muskegon, the cities which the employer argued were comparable to Grand Rapids. Among the list of the city's comparables, Grand Rapids was dead last on this issue.

But when the Impartial Chairman found the comparables stacked against him, he excused reliance on the statutory criteria. His reasoning: "[It] does not appear * * * that existing language, in this respect, is not adequate for Grand Rapids." But "adequate for the employer" is not what the Legislature ordered.

The Impartial Chairman admitted at Issue No. 22, "Leave for Union Business," that the evidence demonstrates proportionately larger allowances for leave for union business in the comparable cities than in Grand Rapids. The Impartial Chairman excused reliance on the statutory standards on this issue for the reason that "[i]t is not seen that size of Police Department has a direct bearing on the days that have been, or should be allowed to attend a Union business or Union Convention meeting." His award leaves us with the information that neither comparables nor size of the Police Department should be considered. What his opinion does not leave us with is any indication of what should be considered.

The Union at Issue No. 27, "Insurance," pointed out that the City has installed income maintenance protection for supervisory and management employees, which would provide 75% of current income in the event of extended illness or disability. The union claimed that police officers are subjected to higher risk of injury than the City's "chair-borne rangers," and the Impartial Chairman admitted as much. The Impartial Chairman noted that the City had not chosen to extend this benefit to the other City unions.

> "Further, the Panel is cognizant of other factors that differentiate in the benefits between the police officers and the Mahagement and Supervisory employees. These differences include not only difference in salary levels, but difference in responsibilities, needed training on entry and many other factors." (See Issue No. 27.)

What is lacking from the Impartial Chairman's opinion is why these other factors have more bearing on this issue than the fact that police officers are more exposed to risk of injury. The complaint is not that the Impartial Chairman's observation is untrue, the complaint simply is that it is not relevant. The Impartial Chairman does not give us any indication why we should consider his factors persuasive.

At Issue No. 26, "Insurance," a glimmer of hope appears. "Comparables on both sides of this issue indicate that the City position should be sustained," the Impartial Chairman opines. The trouble is--they don't.

What the union sought in this issue was a $20,000 cash payment on the death of a member of the bargaining unit. (In the past, the members of this union had a life insurance policy. But the City of Grand Rapids has determined it should become a self-insurer in the life insurance field.) The

City countered with a plan to pay $15,000 in cash plus half the late employee's annual salary above $15,000 a year, but with a $20,000 cap. The comparables in fact are as follows:

Battle Creek--$17,000 plus double indemnity

Flint--$15,000 plus accidental death/dismemberment

Kalamazoo--$15,000 plus double indemnity

Lansing--$20,000 plus double indemnity

East Lansing--$20,000 plus double indemnity

Saginaw--benefit equal to annual salary.

These are the comparables suggested by the City. There stands Grand Rapids, at $15,000 without double indemnity, again the lowest employer in the City's own list of comparables. So much for this Panel's attention to the statutory factors.

The Impartial Chairman runs into the same problem with comparables on Issues No. 16 and 18, vacations and holidays. Under the comparables suggested by the City, the Union's offer would be 26.3 percent below the average of the comparables. Grand Rapids police officers have fewer holidays than officers employed by Ann Arbor, Battle Creek, Dearborn, East Lansing, Flint, Kalamazoo County and Pontiac. At Issues No. 17 and 20, the Union proposed pay for unused vacation time and unused sick leave. The cities of Ann Arbor, Dearborn, Detroit, Flint, Jackson, Kalamazoo, Lansing, Muskegon, Royal Oak, Saginaw, Warren, Wyoming and Kalamazoo County and the Michigan State Police all have benefits with respect to this issue in excess of the Union proposal. But instead of discussing the comparables, as required by the statute, the Impartial Chairman discusses the level of seniority in the bargaining unit. It is no wonder that his award runs against the command of the statute.

Unfortunately, this careless attitude with respect to comparables is the result of the failure on the part of this Panel to go through the self-discipline of making the basic findings with respect to which communities are comparable to Grand Rapids. Had the Panel made this determination, it would have been a simple matter to compare the City's and the Union's last best offers to the list of comparables. The Panel then could have determined which came closer. Having failed to make these basic determinations, the Panel is lost when it must reach its ultimate determinations. The Panel wanders from its port like a ship without an anchor, drifting aimlessly from its harbor out into the hazards of the open sea. That is no way to sail a ship and it is no way to run an administrative board. Failure on the part of the Panel to make these basic findings infects this entire award and divorces it from the requirements of the statute and the intent of the Legislature.

V.

Want of skill in quasi-judicial decision-making also infects the Panel's decision with respect to the Grievance Procedure at Issue No. 4. This employer literally wants to exclude the Union from the contractual grievance procedure. Evidently, the city's position is based on the assumption that it can strike a better bargain if it can cut the members of the bargaining unit out of the group and deal with them individually. It is asknowledged that PERA was adopted with the specific purpose of improving the bargaining power of public employees by permitting and requiring them to close ranks and to bargain as a group rather than as individuals. See Detroit Federation of Teachers v Board of Education, 396 Mich 220, 225, 240 NW 2d 225 (1976). As the

United States Supreme COurt has noted:

> "The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." NLRB v Allis-Chalmers Mfg. Co., 388 US 175, 180, 87 S Ct 2001, 18 L Ed 2d 1123 (1967).

As the Third Circuit has observed, the Union has the right to bargain for each and every member of the bargaining unit "not because of the consensual acts of the employer and the employee, but because the law says so no matter how these parties feel about the matter." Association of Westinghouse Salaried Employees v Westinghouse Electric Corp., 210 F 2d 623, 626-627 (CA 3, 1954), rev. other grounds, 348 US 437, 75 S Ct 489, 99 L Ed 510 (1955).

Notwithstanding this impressive authority against the City's position in this case, the most important authority on this issue is the case of City of Grand Rapids, 1975 MERC Lab Op 102. For in that case, the Michigan Employment Relations Commission, upon hearing and rehearing, unanimously rejected this employer's argument that this employer can exclude the union from the contractual grievance procedure whenever any individual employee determines to accept the City's standing offer to bargain directly with the individual.

This Panel is a subordinate agency of MERC. It is unacceptable for a subordinate agency of MERC to reject MERC's clear decision on an issue.

It is no excuse that the City, having failed to appeal MERC's decision in City of Grand Rapids, supra, nevertheless has obtained leave to appeal from the Court of Appeals' decision in City of Grand Rapids v Grand Rapids Lodge 97, Fraternal Order of Police, 96 Mich App 226, 292 NW 2d 529 (1980), lv. grntd, 409 Mich 924 (1980). The Court of Appeals

decision does not overrule MERC: on the contrary, it decides this precise issue the same way. The grant of leave to appeal is no excuse for this Panel to refuse to follow the explicit rule and policy of MERC. The determination of this Panel to ignore the rule and policy adopted by MERC is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgement but defiance thereof, not the exercise of reason but rather of passion or bias," Spaulding v Spaulding, 335 Mich 382, 384-385, 94 NW 2d 810 (1959), and constitutes abuse of discretion not matter how high the test for abuse.

In view of this employer's adamant insistence upon its proferred but repeatedly rejected right to bargain directly with individual members of the bargaining unit, it is incomprehensible that the Panel would reject this Union's offer on advice of rights. At Issue No. 6, because of this employer's approach to grievances, the Union sought language which would have required the city to advise the employee of his rights under NLRB v Jay Weingarten Inc., 420 US 251, 95 S Ct 959, 43 L Ed 2d 2171 (1975), to have a Union representative present for disciplinary interviews. As the United States Supreme Court observed:

> "A single employee confronted by an employer investigation whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." NLRB v Weingarten, 420 US at 262-3.

Absence of a contractual advice of rights to this employer's

targets of discipline virtually assures the employer will take advantage of its opportunity to pressure the individual employee to waive his right to the protection of the bargaining agent. Indeed, this Panel at Issue No. 7 purports to withdraw the Union's right to be informed that the City is taking disciplinary action against an employee. This assures the City that it will have no interference from the union when it begins to lean on the individual. This employer's history is a history of cutting the individual out of the group to take advantage of its then-overpowering bargaining position. Its history also is a history of attempting to deprive the bargaining agent of the information necessary to permit the bargaining agent to function as a bargaining agent. To ignore this employer's history is to ignore the facts. And for an administrative agency to ignore the facts is to ignore the law.

The City protests at Issue No. 8, "Seniority," and the Impartial Chairman agrees, the the City has a right to discipline and discharge probationary employees without recourse to the grievance procedure. Effectively, the City insists that it has the right to be arbitrary with respect to the discharge and discipline of probationary employees, while the Union expects the City's action to be reasonable. The Panel overlooks the fact that this employer is a public employer, regulated by the law of Michigan and the due process clause of the Fourteenth Amendment. This employer's status as a public employer denies it the right to be arbitrary or unreasonable with respect to any one who is a citizen. The employer's decision to discharge or discipline a public employee must have some basis in reason, whatever the rule may be in private employment. See Banerjee v Board

of Trustees of Smith College, 648 F 2d 61, 62-64 (CA 1, 1981); Munro v Elk Rapids Schools, 383 Mich 661, 178 NW 2d 450 (1970), on reh., 385 Mich 618, 189 NW 2d 224 (1971).

VI.

The willingness of the City and the Panel to ignore the basic requirements of the United States and Michigan Constitutions is underscored by the Panel's position on Issue No. 1, "Management Security." At this issue, the City sought the right to discharge for informational picketing. No precedent or authority is offered to support such a result. Nevertheless, the Panel adopted the City's offer. Under the language offered by the Panel, the City also has the right to discharge picketers who protest unfair labor practices on the part of the employer. It is interesting to note that the language proffered by the City and adopted by the Panel would give the City the right to deal directly with employees accused of picketing without the intervention of the union.

The Union, at this issue, had proposed to follow the law. Throughout these proceedings, the union has attempted to tie the issue of strikes to the issue of arbitration, just as Act 312 provides. Justice Ryan, in his opinion in Detroit Fire Fighters v City of Detroit, 408 Mich 663, 684-685, n 17, 293 NW 2d 278 (1980), explained:

> "The right of private sector employees to strike has a significent role in private sector collective bargaining. The union is normally willing to give up the right in exchange for the employer's agreement to acceptable methods of grievance resolution. See, e. g., Alexander v Gardner-Denver Co., 415 US 36, 54-55, 94 S Ct

"1011, 39 L Ed 2d 147 (1974).

"The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike. As the Court stated in Boys Markets v Retail Clerks Union, 389 US [235, 248, 90 S Ct 1583, 26 L Ed 2d 199 (1970)], 'a no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration.'

"We would seem warrented, then, in concluding that PERA's important procedural guarantees were intended to offset the bargaining detriment to public employees which results from PERA's prohibition of public employee strikes."

But what would seem warranted to the Supreme Court of Michigan does not seem warranted to this Panel. On this issue, see also the decision of the United States Supreme Court in Gateway Coal Co. v United Mine Workers, 414 US 368, 382, 94 S Ct 629, 38 L Ed 2d 583 (1974). On the right of unfair labor practice strikers to be rehired even if replaced, see Mastro Plastics Corp. v NLRB, 350 US 270,278 76 S Ct 349, 100 L Ed 309 (1956).

At this point in our nation's history, it is hornbook law that the right to public employment may not be conditioned upon the surrender of constitutional rights. Keyishian v Regents, 385 US 589, 605, 87 S Ct 675, 17 LEd 2d 629 (1967). No compelling governmental interest is advanced which would justify restrictions on the rights of the members of this bargaining unit to engage in peaceful informational picketing. See Pickering v Board of Education, 391 US 563, 88 S Ct 1731, 20 L Ed 2d 811 (1968). No time, place and manner restrictions are offered. See City of Madison v Wisconsin Employment Relations Commission, 429 US 167, 97 S Ct 421, 50 L Ed 2d 376 (1976). In short, no attempt is made to justify this

restriction on the First Amendment rights of the members of the bargaining unit. Indeed, none can be. The Constitution simply is ignored, just as the facts of the case are ignored and Act 312 is ignored.

VII.

Despite its protests of a "stacked deck," the City was on the march in this Act 312 proceeding. The law of Michigan provides that the public employer has a duty to bargain over its decision to subcontract before implementing any decisions to subcontract. Van Buren Public Schools v Wayne Circuit Judge, 61 Mich App 6, 232 NW 2d 278 (1975). This Panel purports to restore to the City the right to subcontract without first bargaining with the Union. See Issue No. 2, "Management Rights." The City has a duty to bargain over wages and hours; yet this Panel purports to give the City the right unilaterally to determine whether an employee required to work overtime will be paid for his overtime work. See Issue No. 13, "Compensatory Time." The Wage & Hour statute requires that employees must be paid for their time at work, MCLA 408,381 et seq.; MSA 17.255(1) et seq.; yet this Panel says that employees of the Grand Rapids police department need not be paid for attending training sessions held when the officer normally is off-duty. Consistently, this Panel takes the position that the facts may be ignored, the law may be ingored, but the demands of the City however unreasonable must be given their full force and effect.

On the other hand, the demands of the union may be ingored altogether or dealt with in a summary fashion. Thus, when the Union at Issue No. 40 asks for a shift differential, common among the comparable departments, the Impartial Chairman simply "rejects the idea of a shift differential at this time." When the Union asks for proficiency pay for dectectives at Issue No. 48, the Impartial Chairman notes that in the City's organization of the police department "officers are required to have many different skills and assignments that recognize individual skills and capabilities and training are made by those in charge." (See the opinion at page 71.) "The fact that other cities, that may be comparable," provide proficiency pay to their detectives is held to be irrelevant under Act 312. Besides, the Impartial Chairman notes, he has given the City the right to take unilateral action in this regard.

Proficiency pay for Emergency-unit paramedics is handled in the same perfunctory manner, even though the Impartial Chairman recognizes the strength of the Union position. The Impartial Chairman's decision on this issue, Issue No. 44, is that he has held against proficiency pay for detectives, so he might as well hold against proficiency pay for paramedics. On a related issue, Issue No. 46, the Impartial Chairman recognizes the need for a differential between patrol officers and sergeants, but determines to institute the differential he determines is necessary only half way through the contract. No explanation is offered as to why.

Similiarly, the Union's offer with respect to promotions, at Issues No. 9 and 10, "Seniority," are dispatched with great haste. What the Union wanted was contractual confirmation that the City would follow its own rules in selecting personnel for promotions. The fire fighters won just such a confirmation in their contract with the City. What the City wanted was contractual surcease from its duty to apply the impartial yardsticks of its Civil Service commission.

Now why would both the fire fighters and the police want contractual confirmation that the City is going to follow its own rules on promotions? The Impartial Chairman acknowledges that they want the contractual confirmation because the City is using subjective evaluations to tip the balence in favor of favored employees. Thus the impartial yardsticks of the Civil Service system are subverted.

The Impartial Chairman's reasoning is as follows: The Civil Service rules do not prohibit the use of subjective evaluations; and the City currently is using subjective evaluations to defeat the intent of the Civil Service rules. Therefore, it should be allowed to continue. Is the spoils system thus to be revived in Grand Rapids?

We think not. A union does not waive a right by failing to obtain contractual confirmation thereof. Timken Roller Bearing Co. v NLRB, 325 F 2d 746, 750-751 (CA 6, 1963), cert. den., 376 US 971, 84 S Ct 1135, 12 L Ed 2d 85 (1964).

When the Panel turned its attention to the issue of a paid lunch period for detectives, Issne No. 11, "Overtime," the Impartial Chairman complained of the cost; he ignored the comparables. Each of the Cities the City claims is comparable to Grand Rapids pays detectives for lunch periods. Yte by implication at least, this Panel has ruled that

"ability to pay" the entire Union economic award is not an issue, for the City has ample funds to pay this award. What then justifies deviating from the statute?

The Panel again ignores the comparables at Issue No. 32, "Uniforms." The City wanted a $150 cap on its duty to reimburse officers for the cost of dry cleaning their uniforms. Judged by the City's list of proffered comparable communities, the City of Grand Rapids is dead last on this issue. Dead last Grand Rapids is to remain. With no explanation, the Impartial Chairman has determined to ignore the comparables.

At Issue No. 31, "Uniforms," and Issue No. 29, "Insurance," the Impartial Chairman would make police officers the insurers of property provided them by the City to do their jobs. Cost of lost property is to be borne by the officer, except when property is lost by a favored employee. This is contrary to law. See Schwall v City of Dearborn, 31 Mich App 169, 187 NW 2d 542 (1971).

The Impartial Chairman acknowledges that police work is more hazardous than that of other City employees. The corallary of that finding of fact is that police employees have a higher need for income insurance to cover officers during periods of extended disability. In keeping with the City's fervent desire to remain a self-insurer, the City has itself borne the cost of a supplement for a period of 26 weeks to workers compensation insurance. With the supplement in place, the injured officer receives his entire base pay; what the workers comp award does not pay, the City does. At least that has been the practice in the past, and that remains the practice in all City departments but the police department.

The problem is that two Grand Rapids police officers recently were shot in the line of duty. Extensive periods of recovery are expected. One officer may never resume a full and normal life. That is to say, the City had to make good on its self-insurance contract. In these proceedings, the City's solution was to deny coverage to those employees most likely to present a claim.

The Impartial Chairman's reasoning in support of denial of workers comp supplement coverage to police officers is that despite the clear and unambiguous language of the contract, the City had in the past succeeded in evading its duty to supplement. This, according to the Impartial Chairman, constitutes a past practice. Therefore, the Impartial Chairman has orded the contract to be changed to cover what he finds was a past practice.

Unfortunately for the Chairman, the finding of the past practice is based not on the evidence but on the argument of counsel. It is axiomatic that arguments of counsel are not evidence. Hirshfield v Waldron, 83 Mich 116, 47 NW 239.

The Impartial Chairman also inexplicably departs from the evidence at Issue No. 45, the Four-day Work Week for Detectives. The only evidence presented on this issue was that presented by the Union. A Union witness, Loris Paffhausen, testified that the morale of detectives would be imrpoved if they could work the same 10-hour, 4-day week that everyone else works. Paffhausen testified that not much work ever is accomplished on Fridays because detective work is concentrated at the beginning of the week. He testified that there are no trial scheduled in Kent County courts on Fridays. He also testified that the amount of overtime

would be reduced if the detectices hours continued beyond the normal quitting time of civilian victims and witnesses to crime.

The City attacked Paffhausen's testimony on cross-examination, challenging almost all of his conclusions, but without succeeding in obtaining any concessions. At the conclusion of these proceedings, the City argues that Paffhausen's testimony was unreliable. It is this alleged unreliability of Paffhausen's testimony which the City offers as evidence that the 4/10 plan does not work well in practice. However, MERC's rule is that "it is impermissible and improper to rely on the untruthfulness of the testimony of a witness as establishing the truthfulness of an inverse factual proposition." MERC v Cafana Cleaners, 73 Mich App 752, 761, 252 NW 2d 536 (1977).

Throughout the history of collective bargaining between these parties, the City has recognized its duty to reimburse police officers civilly sued as a result of actions the City requires the officers to take. Naturally, the City has permitted officers substantial discretion in the exercise of their duties. The City has recognized that decisions must be made quickly by police officers, often under intense pressure. The City's policy has been to encourage the officer to act to protect the people of the City of Grand Rapids and to support the officer when the discharge of his duties leads to civil lawsuits. In practice, the City has not quibbled with officers who arguably were more zealous than necessary. This is in keeping with the law of Michigan, which recognizes that officers should be encouraged and not discouraged by the courts and their superiors in the exercise of their duties.

The City is self-insured in this area, and as in the other areas in which the City is self-insured, the City has sought to limit claims. In this area, the City has seized on ambiguous language in the contract which heretofore has given no problems. The City now seeks to interpret this language expansively so as to permit it to determine on a case-by-case basis whether it will honor its duty to protect officers sued civilly.

Stripped of its rhetoric, the City seeks to review the actions of the police officer, taken under the stress of the rapidly changing and often unpredictable activity on the street, from the perspective of a legal scholar or Monday morning quarterback. If, on review of the officer's action, the City determines that the officer has made the wrong decision, the City has a right to refuse coverage. This is contrary to the law of Michigan. See People v Harper, 365 Mich 494, 501, 113 NW 2d 808 (1962), cert. den. 371 US 930, 83 S Ct 302, 9 L Ed 2d 237 (1963).

The Impartial Chairman explains that the City must remain free to deny coverage, despite the past practice of the parties, to keep the individual officers ever mindful of their responsibility. "In other words, this is a delicate area in which each officer should be aware of his personal liability if he commits such an act, and not lessen that awareness by the ready availability of legal counsel, or indemnity." In our opinion, the thought that an officer faced with the need to make a split second decision in the rapidly unfolding drama of the street, is in a position to reflect on his personal liability in a civil court, is at best naieve. Such naievete has no place in an Act 312 opinion or award.

VIII.

In its latest ruling on the subject, the Supreme Court of Michigan has held:

> "It is the collective-negotiation system that the Legislature has detemined to be the appropriate method for public employers and their employees to develop and specify the terms and conditions of employment. Collective negotiation is the proper procedure for changing employment conditions once the exclusive representative of the employees has been selected." Local 1383, IAFF v City of Warren, 411 Mich 642, 654, ___ NW 2d ___ (1981).

This agreement purports to put an end to the collective negotiation system in the Grand Rapids police department. Consistently, the Panel's award attempts to give the City the right to determine conditions of employment unilaterally, perhaps with consultation from the interested union, perhaps not. This award seeks to change the law for the Grand Rapids police department, and to revoke the protections of PERA. For the reasons set forth above, we believe that this attempt to remove the members of this bargaining unit from the protections of PERA is ineffective.

/S/

ADRIAN HOOGERHEIDE
Delegate to the Arbitration Panel
On Behalf of the Fraternal Order
of Police, Grand Rapids Lodge 97