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MICHIGAN EMPLOYMENT RELATIONS COMMISSION

ACT 312 ARBITRATION

PUBLIC ACTS OF 1969 AS AMENDED

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STATE OF MICHIGAN
BUR. OF EMPLOYMENT RELATIONS
DETROIT OFFICE

In the Matter of the Arbitration Between

COUNTY OF KALAMAZOO and the
SHERIFF OF THE COUNTY OF KALAMAZOO

-and-

KALAMAZOO COUNTY SHERIFF'S DEPARTMENT
SUPERVISORS' ASSOCIATION

MERC Case No. G87 C 351

OPINION AND AWARD

Chairman of Arbitration Panel	:	ELLIOT I. BEITNER
Employers Delegate	:	BRAD RAYLE
Labor Organization Delegate	:	DENNIS MC CUNE
Representing Employers	:	JOHN MANSKE
Representing Labor Organization	:	DENNIS MC CUNE
Pre-Hearing Conference	:	August 12, 1987; Kalamazoo
Hearings Held	:	October 26, and October 27, 1987; Kalamazoo
Executive Session of Panel	:	January 28, 1988
Opinion and Order Issued	:	February 23, 1988

BACKGROUND:

The Association was certified on or about November 24, 1983 and negotiated its first collective bargaining agreement with the Employer effective October 22, 1984 and expiring March 31, 1986. The Kalamazoo County

Sheriff's Department Supervisors' Association is made up of four Captains and three Lieutenants. These seven employees are:

1. Captain of the Jail Division
2. Captain of the Patrol Division
3. Captain of Criminal Investigation (Detective Bureau)
4. Captain of Administration
5. Lieutenant Jail
6. Lieutenant Patrol
7. Lieutenant Detective Bureau

The pertinent contract language in Article XIX, Duration, provides for automatic yearly renewals unless either party serves written notice sixty calendar days before the first day of March 1986, or sixty days prior to the expiration of any subsequent automatic renewal period. Neither party acted to amend, modify, or terminate the agreement, and its terms were continued until March 31, 1987, after which date the Association provided timely notice to terminate the automatic renewal period. This arbitration award covers the period from April 1, 1987 to March 31, 1988.

The parties engaged in collective bargaining but were unable to agree on a new contract; therefore, the Association filed a Petition for Arbitration under Act 312, Public Acts of 1969 As Amended. At the Pre-Hearing Conference on August 12, 1987, the parties agreed to waive any time requirements of Act 312.

At the Executive Session of January 28, 1987, the delegates agreed

that the Association could file an amended "final offer" as to the issue of overtime. It was further agreed that the language of the Association's final offer would be exactly the same as that of the Employers' final offer on that issue except for the deletion of the last sentence. A formal filing of that final offer was not necessary; the delegates crossed off the last sentence of the Employers' offer, and the Association agreed to submit that version with-out actually having it filed formally as its final offer. The final offers of the Employers and the Association were discussed at the Executive Sessions, and certain issues contained in the petition and mentioned at the Pre-Trial were withdrawn by the parties. Specifically, the Association withdrew the following issues: life insurance, vacations, health and/or life insurance, and one of two issues relating to the grievance procedure. The issue that was withdrawn proposed that "written reprimands" be added to Article IX, Second Step, so that this discipline could be submitted to arbitration. The unresolved issues are:

Economic:

- I. Overtime
- II. Longevity
- III. Salary Spread
- IV. Retroactivity
- V. Sick Leave

Non-economic issues:

- VI. Agency Shop
- VII. Grievance Procedure
- VIII. Seniority
- IX. Department Investigations

With regard to the economic issues, the Panel is required to select only one of the last offers of settlement. No compromise between the two offers can be drafted. With regard to the non-economic issues, the Panel is not required to accept either final offer.

The Panel considered each issue in accordance with the factors listed in Section 9 of Act 312 PA 1969 As Amended. That section reads:

Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

- (a) The lawful authority of the employer.
- (b) Stipulations of the parties.
- (c) The interest and welfare of the public and the financial ability of the unit of government to meet those costs.
- (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - (i) In public employment in comparable communities.
 - (ii) In private employment in comparable communities.
- (e) The average consumer prices for goods and services, commonly known as the cost of living.

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

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

ECONOMIC ISSUES:

I. OVERTIME:

Employers' Final Offer:

The salaries set forth in Appendix A of this Agreement compensate bargaining unit members for the performance of their normal duties and responsibilities. Therefore, no unit member shall be eligible for the payment of overtime compensation for the performance of such normal duties and responsibilities.

The parties to this Agreement recognize that, on occasion, a unit member will be required to perform duties and/or responsibilities not normally expected. The Sheriff will have the discretion to determine whether an assignment is calling for the performance of other than a unit member's normal duties and responsibilities. If the Sheriff so determines, the unit member shall be entitled to receive compensation at the rate of one and one-half (1 1/2) times his/her normal hourly rate. In such situations, the Sheriff will gain approval from the

Personnel Manager prior to informing the unit member. All decisions by the Sheriff relative to whether the performance of certain assignments will be eligible for such overtime compensation will not be subject to the grievance procedure contained within this Agreement.

Association's Final Offer:

Same as the Employers' final offer except that the last sentence of the above language would be deleted.

The Association's initial final offer was to require time and a half pay for all hours worked over forty hours. At the Executive Session, the delegates agreed to allow the Association to file an amended final offer identical to the Employers' final offer, except for the deletion of the last sentence, which language would preclude the submission of any disputes with regard to overtime to the grievance procedure of the contract.

None of the managers employed by the County are paid overtime. Therefore, the Employers were quite reluctant to agree during negotiations to allowing for overtime to supervisors. The Association was concerned with the issue and pointed out that Deputies are paid overtime for work over forty hours while their supervisors are required to work overtime and receive only compensatory time. Often, the Association said, work schedules do not allow for taking all the compensatory time accrued.

Testimony indicated that in addition to the regular duties performed by supervisors in the Sheriff's Department, other assignments required

overtime. These included planning for the Air Show and planning for the Lafayette Street party of Western Michigan University students at the beginning of the school year. Traditionally, this party is held on the first Friday of the school year, and problems have developed in the past because a large number of students gather and because problems occur with drinking and rowdiness. The Sheriff's Department provides backup assistance to the police, and supervisors are required to work overtime on advanced planning. In addition, overtime is required for the County Fair, where the reserves and the posse are involved, and for community activities such as alcohol awareness projects.

The thrust of the Employers' proposal is to allow for a system to pay overtime for these types of activities with the approval of the Sheriff and the Personnel Manager. There is no logical reason, however, to preclude from the grievance procedure disputes that arise about entitlement to such overtime. Both parties expressed great confidence in the judgment and integrity of the Sheriff. Therefore, it is doubtful, at least initially, that any disputes for entitlement will arise. The Panel did recognize, however, that language negotiated in this contract may very well be continued into future contracts, and problems could arise in the future under a different Sheriff. The Panel concluded that it would be inequitable to exclude such disputes from resolution through the grievance procedure. Therefore, the Association's final offer is adopted. That offer, as indicated previously, is

identical to the Employers' final offer, except for the deletion of the last sentence, which language would have excluded overtime disputes from the grievance procedure. The question of retroactivity will be discussed under the retroactivity issue.

II. LONGEVITY:

Employers' Final Offer:

The Employers' final offer with regard to longevity reads:

Section 1: Employees who, as of October 1 of any year, are on active pay status and have completed five (5) or more years of continuous service with the Employers since their last hiring date shall be eligible for the following Longevity Plan:

A. After five (5) years of full-time continuous service, 1.25% of regular base salary as modified during the year.

B. After ten (10) years of full-time continuous service, 1.75% of regular base salary as modified during the year.

Section 2: For the purpose of the above plan, regular wages will be defined as regular base salary as modified during the year by COLA adjustments actually received excluding any and all premium compensation. It is further agreed relative to such longevity plan that any and all future increases attributable to such plan as the result of subsequent increases in wage rates will be charged to future contracts as new costs.

Association's Final Offer:

The Association's final offer includes the benefits listed by the Employers

but includes additional entitlements for greater service. The Association's proposal is identical to that contained in the F.O.P. Deputies' contract (Joint 3). The additional entitlements in the Deputies' contract and sought by the Association in its last final offer are:

(c) After fifteen (15) years of full-time continuous service, 2.25% of regular base salary as modified during the year by COLA adjustments.

(d) After twenty (20) years of full-time continuous service, 2.75% of regular base salary as modified during the year by COLA adjustments.

The Employers' objection to granting the Association the additional entitlements at 15 and 20 years is predicated on cost considerations. No compelling arguments were presented, however, to exclude the Supervisors' Association from obtaining the same longevity pay entitlement as that of the Deputies. Therefore, the Association's final offer is accepted. The question of retroactivity of these benefits will be considered under the retroactivity issue.

III. SALARY SPREAD:

Employers' Final Offer:

The offer is to continue the contract language covering the salary "spread" as contained in Section 1 of Appendix A of the old contract.

Association's Final Offer:

The Association's proposal is that the "spread" from the F.O.P. Shift Sergeant's rate be increased from 11% to 12% and from 22% to 23% for Lieutenants and Captains respectively.

Currently, there is a spread between the rate of the most highly paid F.O.P. Shift Sergeant and the Lieutenant's rate of 11% and a spread from the Shift Sergeant's highest rate to the Captain's rate of 22%. The Association proposes to increase the spread to 12% and 23% respectively while the Employers propose to continue the spreads as they are.

Although this bargaining unit has received no formal wage increase, it has benefited from the collective bargaining agreement executed with the Deputies. This is because the spreads of 11% and 22% have continued, and because this bargaining unit is entitled to the identical cost of living increases awarded the Deputies' Association.

Comparability:

It is generally acknowledged, at least where wages are concerned, that a key factor -- perhaps the most important factor listed in Section 9 of Act 312 -- is that of ascertaining "comparable communities in public employment." Unlike the typical 312 arbitration, there is no dispute here between the Employers and the Association as to the relevant comparable communities to be considered. The Association listed in its pre-hearing brief the following allegedly comparable employers:

- A. City of Portage Command Officers
- B. City of Kalamazoo Command Officers
- C. Kalamazoo County Sheriff's Department represented by the F.O.P.

The problem with the Association's reliance upon these comparables is that the evidence clearly shows that this bargaining unit earns higher wages than those paid in either Portage or Kalamazoo and also enjoys a higher spread between the rates prior to Sergeants and Command Officers. During recross examination of Lieutenant JOHN WOODS by Attorney MANSKE, the following exchange took place:

ARBITRATOR BEITNER: Tell me exactly what you're saying about 5%, that the spread is 5% in their [Portage Police Departemnt] contract?

A. That's right, 5% above what we have as comparable to our spread, is what I'm saying. Our spread is basically 11%, okay, 22% from a lieutenant and so forth. What I'm saying is that the City, for example, instead of theirs being 11% at the lieutenant level, theirs is, I believe, 15%, 16%, somewhere in that area, above our 11% spread.

Q. (By Mr. Manske, continuing) Well, let's look at Portage because Sergeant Blodgett testified that at the start of July 1, '87, these were the rates, and they will get adjusted by the COLA, but on July 1, '87, those were the rates. If I take 10% of the sergeant's pay or \$3,494, I'm going to come up with \$38,000 for the lieutenant, so that spread is below 10%, isn't it?

A. True.

Q. So your spread, your pay, as compared to Portage is greater, is it not?

A. That's correct.

Q. And the spread that you enjoy out here, compared to Portage, is greater?

A. The spread isn't; the pay is.

Q. The spread is not?

A. Well, you're looking at it from the standpoint of that cost of living adjustment.

Q. I'll compare their July 1, '87 salary with your July 1, '87 salary. Your July 1, '87 salary was \$40,800?

A. That's correct.

Q. And you were receiving approximately \$3,300 more in salary than they were in Portage on July 1?

A. That's correct.

Q. And their spread was less than 10% when your spread was 11%?

ARBITRATOR BEITNER: Do you understand that math?

A. Yes.

Q. (By Mr. Manske, continuing) Is that correct?

A. Right, that's true.

Q. Let's take a look at the City of Kalamazoo. If I take a look at the police lieutenant and take their top rate of \$18.04 an hour, that equals \$37,523.

A. But I recall, I think this is based on their '85-86 contract.

Q. Do you have any personal knowledge; have they yet received an increase for 1987?

A. I do not know.

Q. At the start of 1986 you, as a lieutenant, were receiving \$38,884?

A. I would assume so. I don't recall. As of when?

Q. At the start of January 1, 1986?

A. I'm sure that's accurate, yes.

Q. And the lieutenants at the City of Kalamazoo were making \$37,523?

A. Okay, but were those cross-trained lieutenants, or were they just straight up police lieutenants?

Q. Straight up police lieutenants, like yourself; you're not a cross-trained lieutenant, are you?

A. No, sir, I'm not.

Q. You're a police lieutenant?

A. That's correct.

[TR, Vol. II, pp. 68-70]

The comparable communities relied on by the Association have lower salaries and salary spreads than Kalamazoo County.

In negotiating with the Deputies' Association, and with all the other collective bargaining units, the County adhered to the position that no increases in benefits could be greater than 5%. The Association argues, firstly, that the 5% figure should be considered as applying not only to the amount of wages paid to an officer, but should also include the cost of benefits. For example, if an officer receives \$30,000 a year in wages and \$10,000 in benefits, the officer should be entitled, by this reasoning, to an increase of 5% of \$40,000 (\$2,000) and not 5% of \$30,000 (\$1,500). The fall-

acy in the Association's argument is that the County has clearly always considered only wages in determining the amount of any percentage increase.

The Association correctly points out that some of the benefits received by the Sheriff's Department did not total 5% for the year of entitlement. This is, of course, because the entitlements -- COLA benefits for example -- did not commence at the beginning of the contract year. In other words, the 5% entitlement might not actually be a 5% cost to the County until the end of the contract year. While the Association is then correct in its calculations, its error in arguing that it should be entitled to 5% of wages plus benefits is that the County has always done its calculations based on wages, and that the bargaining units have understood that a given percentage increase might not actually total that percentage during the first year of a contract.

It is concluded that no convincing evidence was developed as to why Command Officers' should be entitled to a larger spread. The comparables do not argue for a larger spread. In addition, there were no compelling reasons presented as to why this bargaining unit should be entitled to greater equity than that of all the other bargaining units that settled with the County. The Employers' final offer to continue the existing spreads of 11% and 12% is accepted.

IV. RETROACTIVITY:

Employers' Final Offer:

No retroactivity relative to any wage or benefit adjustment.

Association's Final Offer:

Any and all wage or benefit increase to be retroactive to the beginning of the contract year, March 31, 1987.

The Employers point out that the Association has received a 3.61% pay increase based on the application of Section 1 of Appendix A. Because the Deputies' contract has increased wages to Shift Sergeants, and, because of the "spread" set out in that provision, this bargaining unit has already received the benefit of the increases awarded to the Deputies' Association. The Employers also argue that only if the Panel grants a spread increase, would the issue of retroactivity be relevant. This position is not completely correct, however. There is a retroactivity issue with regard to the entitlement to overtime and to longevity pay.

The County asserts that it has been its policy never to apply increases retroactively. Certainly, the way the County has always done business is an important factor to consider in issuing our award. The Panel is not insensitive to the way the County has done business before, but it is not convinced that this is a valid reason to avoid retroactivity. In effect, such a policy could vitiate the purpose underlying the Act 312 legislation. In the instant matter, the prior contract expired March 31, 1987. A new

contract will be expiring very shortly after this award is issued. It could make a mockery of the Act 312 process if a bargaining unit received no benefits during the life of a contract established by Act 312.

In the instant case there is no issue of retroactivity for increased wages because the spread has not been increased. With regard to longevity, the Deputies' Association received the new longevity entitlement the first pay period in December of 1987. There is no logic to or rationale for denying this bargaining unit the same entitlement. It is entitled to retroactive longevity pay as of the first pay period in December of 1987.

The issue of retroactivity with regard to overtime is somewhat more complicated. The Association did not present testimony with regard to the cost of this item. There was only the approximation of the overtime hours worked by one officer in the unit. It would be irresponsible for this Panel to provide for retroactive overtime without any awareness of the cost involved. The principle of entitlement to overtime has been established in this Act 312 award. Furthermore, this award has held that there is nothing per se sacred about non-retroactivity. With regard to the retroactivity of overtime, the Association's position is rejected because of the lack of data as to the cost of such a benefit. There shall be no retroactivity for overtime.

V. SICK LEAVE - VACATIONS:

Employers' Final Offer:

Article V, Section 1; Article V, Section 7; Article VII, Section 2; Appendix C.

The Employers continue to propose that the Supervisors' Association participate in the County's Long-Term Disability Program. This will result in the utilization of the departmental sick leave bank being restricted to six (6) months by a bargaining unit member. It would also result in the accumulation of sick leave days being reduced from four (4) hours per pay period to three (3) hours per pay period.

Association's Final Offer:

Continue the language contained in the current sick leave provision.

This Association and the Deputies' Association, participate together in a sick leave bank. Officers elect to bank a certain number of sick hours on a regular basis. If a bargaining unit member becomes disabled, he must first use the hours in his own sick bank, and then he is entitled to use hours from the general sick bank. Thus, a Command Officer would, in effect, be entitled to full pay for the entire period of his disability no matter how long it lasted. The F.O.P. contract provided for the identical benefits. For its current contract, the Deputies agreed to restrict sick bank entitlement to six months and thereafter to convert to a long-term disability plan providing for sixty percent of salary. The Deputies' contractual provision also provides that the accumulation of sick leave time be reduced from four hours per pay to three hours per pay.

The initial articulated purpose for the Supervisors' Association organizing a Union and bargaining with the County was to seek benefit parity with the Deputies' Association. There is no logical reason for the Supervisors' Association to have a plan different from the Deputies' plan, with a Command Officer receiving full disability pay no matter how long he is disabled. Furthermore, it is inequitable to continue such a plan because, in essence, it is funded primarily by the hours accumulated in the sick bank by Deputies, whose Association has many, many times more members than that of Command Officers. It was pointed out, moreover, that the Deputies' Association would bargain to remove the Supervisors' Association from its sick bank if its members' entitlement to the sick bank remained unrestricted. For these reasons, it is determined that the Employers' final offer that the Supervisors' Association adopt the identical sick leave plan as that contained in the Deputies' contract is accepted.

NON-ECONOMIC ISSUES:

VI. AGENCY SHOP:

Employers' Final Offer:

No objection to Association proposal.

Association's Final Offer:

Delete Article I, Section 3a.

The Association requests the deletion of Article I, Section 3a, which reads:

All present employees who are not now presently members, nor have never been members of the Union, shall be excluded from the provisions of the Agency Shop clause above.

The Employers have indicated no objection to this provision and, therefore, the Association's final offer is adopted.

VII. GRIEVANCE PROCEDURE:

The Association has requested the addition of a new Section 7 to Article IX, to read: "Supervisors shall not be a part of the decision making process re suspensions or discharge of a member of this supervisory unit." The Employers' final offer objects to this new language. The Employers point out that it is important, even essential, that the Sheriff have input from the Captains who supervise the Lieutenants and that the Captains make recommendations as to the appropriate discipline. The Association's reason for putting forward this proposal is understandable. The Association prefers not to be in the position of having one bargaining unit member discipline another. Clearly, however, it is essential for there to be input from bargaining unit members who are responsible for day-to-day activities. Since this is a non-economic issue, it is permissible for the Panel not to select either final offer and instead to redraft the language. The proposed new

Section 7 of Article IX is redrafted as follows:

Supervisors shall be part of the decision making process in that they shall make recommendations concerning suspension and discharge of members of this supervisory unit, but the final decision with regard to suspension or discharge shall not be made by such supervisors.

VIII. SENIORITY:

The Association's Final Offer:

Supervisors shall have departmental seniority in the event a supervisor is transferred into a bargaining unit (F.O.P.) position.

Employers' Final Offer:

The County objects to this provision.

The Association's proposal is of doubtful legality. In effect, it attempts to compromise the contractual entitlement of the F.O.P. unit. The County, in all likelihood, cannot grant this bargaining unit rights that infringe on the rights granted another bargaining unit without that latter bargaining unit's concurrence. To adopt this provision would be to invite conflict and possible litigation with another bargaining unit. The Association's final offer with regard to this issue is rejected and the Employers' accepted.

IX. DEPARTMENT INVESTIGATIONS:

Employers' Final Offer:

The Employers propose to delete all reference in Article X to criminal investigations.

Association's Final Offer:

The Association does not oppose the Employers' proposal on this item.

The Employers' final offer is accepted; all references to criminal investigations are to be deleted from Article X.

CONCLUSION:

The Panel orders the following:

ISSUE I - OVERTIME:

Association's Final Offer

ISSUE II - LONGEVITY:

Association's Final Offer

ISSUE III - SALARY SPREAD:

Employers' Final Offer

ISSUE IV - RETOACTIVITY *:

Association's Final Offer with regard to longevity.
Employers' Final Offer with regard to overtime.

* Not applicable to issue of increased wages.

ISSUE V - SICK LEAVE-VACATIONS:

Employers' Final Offer

ISSUE VI - AGENCY SHOP:

Association's Final Offer

ISSUE VII - GRIEVANCE PROCEDURE:

Neither Final Offer was accepted. The language of the new Article X, Section 7, is redrafted to read:

Supervisors shall be part of the decision making process in that they shall make recommendations concerning suspension and discharge of members of this supervisory unit, but the final decision with regard to suspension or discharge shall not be made by such supervisors.

ISSUE VIII - SENIORITY:

Employers' Final Offer

ISSUE IX - DEPARTMENT INVESTIGATIONS:

Employers' Final Offer

Elliot I. Beitner

ELLIOT I. BEITNER, Chairman
Panel of Arbitrators



DENNIS MC CUNE

Labor Delegate concurring on

Issue(s) I, II, VI, VII, IX;

Dissenting on Issue(s) III, IV, X, VIII,



BRAD RAYLE

Employers' Delegate concurring on

Issue(s) I, II, III, IV, V, VI, VII, VIII, IX

Dissenting on issue(s) X