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STATE OF MICHIGAN

ARBITRATION UNDER ACT NO. 312

PUBLIC ACTS OF 1969, AS AMENDED

In the Matter of the Statutory Arbitration between

BENTON HARBOR PATROLMEN'S ASSOCIATION, FOP

-and-

CITY OF BENTON HARBOR, MICHIGAN

ARBITRATION OPINION AND ORDERS

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ARBITRATION OPINION AND ORDERS

This arbitration is pursuant to Public Act No. 312, Public Acts of 1969, as amended by Act No. 127, Public Acts of 1972, providing binding arbitration for the determination of unresolved contractual issues in municipal police and fire departments.

By letter dated August 14, 1975, the parties designated Alan Walt to serve as Chairman of a Panel of Arbitrators appointed to resolve disputed contractual issues then existing. Although the Chairman initially declined to serve because of other commitments, he agreed to do so following receipt of notification of his appointment from the Michigan Employment Relations Commission, dated August 27, 1975. Mr. Leslie Johnson and Mr. Jon Nichols were

appointed as City and Union delegate, respectively, to the Panel. Pursuant to notice, hearing was held in Benton Harbor, Michigan, on October 29, 1975, with the City represented by Gary P. Skinner, Esquire, and the Union by John E. Dewane, Esquire. Post-hearing briefs were received and the record of hearing closed November 25, 1975.

The Arbitration Panel met in executive sessions on December 16, 1975 and January 24, 1976, and also conferred by telephone.

STATUTORY STANDARDS

Section 9 of Act 312 [MCLA 423.239; MSA 17.455(39)], establishes the criteria to be applied by the Arbitration Panel in resolving disputed questions and formultating its awards:

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests 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.

ISSUES

The parties agree the following contractual issues were at impasse at the time of hearing:

1. Wages
2. Repayment of plain clothing allowance
3. Payoff on accumulated sick leave
4. Minimum shift strength
5. Retroactivity

They also agree the unresolved issues all have economic consequences and, therefore, the Arbitration Panel is bound to adopt that party's

last offer which, in the opinion of the Panel, more nearly complies with the applicable factors described in Section 9 of the Act.

FISCAL AND GENERAL BACKGROUND

Benton Harbor is a city approximately 4-3/4 miles square located in Berrien County. Its charter, adopted in 1921, provides a commission-manager form of government with nine elected commissioners who appoint a city manager. The fiscal year is July 1 through June 30. In addition to the constitutionally-allowed 20 mill maximum taxation rate, the City charter allows an additional 20 mills to be levied through special elections. The tax base of the City is 38.24% industrial, 30.45% commercial and utility, and 31.31% residential. Its state equalized valuation for 1975 was $67,186,877 and general fund revenues for 1974-75 totaled $2,866,536, with revenues projected for 1975-76 as $2,726,059. The reduced 1975-76 general fund revenue estimate results from anticipated loss of federal revenue sharing dollars based, in part, on the City's decreased population. It is anticipated such loss may be offset, at least in part, by approximately $100,000 estimated as excess of revenues over expenditures for the 1974-75 fiscal year realized through a hiring freeze placed in effect from January 1 through June 30, 1975.

The City anticipates additional revenue problems based on the poor economic climate which existed and still exists in the private sector. Unemployment is substantial -- 30.5% -- and one major employer, Benton Harbor Malleable which at one time employed 500 people, has closed. The City's population has been in decline: in 1960, it was 19,136; in 1970, 16,481; and it was estimated at 16,874 in 1973. While the tax collection rate in other cities generally ranges from 94 to 98 percent, the City also has experienced a decreasing rate in this area: 1973 - 89.8%; 1974 - 89.4%; and 1975 - 88.9%. As of September 30, 1975, the tax collection rate was 82.87%.

The City employs 271 persons, of whom 167 are non-uniformed. Of the total number, 113 are currently federally funded with 94 being underwritten through the Comprehensive Employment Training Act (CETA) while 19 positions are funded through community development programs. There are 65 employees in the police department and 39 in the fire department. The general fund budget for the police department of $1,060,071 does not include CETA-funded positions for which salaries up to $10,000 are provided by the federal government with the City paying any excess.

For 1975, the police department received 38.9% of the general fund budget, a figure that has been increasing; 29.3% was received

in 1970 and 37.7% in 1974. The current year's percentage amounts to $66.78 on a per capita basis.

Prior to 1975, patrol and command officers were members of the same bargaining unit. In 1975, a separate command officers bargaining unit consisting of 11 police officers was established. Although now in separate bargaining units, both the command and the patrol officer units are represented by the Fraternal Order of Police. There are presently 33 employees in this bargaining unit, all in the patrol classification. According to the Uniform Crime Reports prepared by the Federal Bureau of Investigation, the City has the second largest police force for its population category in the United States.

There have been collective bargaining agreements between the parties since 1968. The prior contract, effective June 1, 1973, extended for two years and expired June 30, 1975. The parties have stipulated the contract here under consideration will extend two years, from and after July 1, 1975, subject, however, to resolution of the City's contentions on retroactivity which will be discussed hereinafter.

MINIMUM SHIFT STRENGTH

The Union seeks contractual language requiring the presence of four patrol officers on each shift in addition to a dispatcher

and a sergeant (or other command officer) with the proviso that the four officers so assigned will not be used as acting command or dispatching officers. It contends the level of criminal activity in the community and the volume of complaints received by the department require such manning, since the City has one of the highest crime rates in the state among municipalities of comparable population. It is the position of the Union that four patrol officers should be available on each shift to answer complaints and calls for service; while acknowledging current normal scheduling calls for four men on the street, it submits fewer officers are available at times due to illness or absence and the City has not called in other officers on an overtime basis to maintain the scheduling at four. The Union also alludes to an instance of a major disturbance at the high school where additional police from other departments were called for assistance, contending the situation might not have arisen or such assistance might not have been necessary if the proposed minimum manning requirement had existed.

The City opposes inclusion of a minimum shift strength provision, claiming it would deprive management of necessary flexibility to accommodate to seasonal and time variances in criminal activities as well as to budgetary restraints. The City currently

adjusts manning both seasonally and in the peak crime hours to insure a sufficient number of officers on patrol and a general order permits a shift commander, at his discretion, to call in additional officers when shift strength, including the commander and the dispatcher, falls below six. Furthermore, since 11 positions in the department are currently federally funded, the only way a contract manning requirement could be met if any or all grants are terminated would be through the liberal use of overtime, thereby destroying the police department budget.

Findings and Conclusions

Under present scheduling, 8 patrolmen are allotted on each of two shifts and 7 on the third. Only 4 patrol officers are normally assigned to each shift in addition to a dispatcher and a command officer, however. Patrol vehicles are normally manned by one officer although on occasion, two men are assigned if sufficient manpower is available or when an unexperienced officer is present. Last year, the City experimented with 5 shifts and at times, with only two patrolmen on the street.

In approaching this demand, the Arbitration Panel does not find support for the position of the Union in the record evidence. While the crime rate is extremely high, there is no showing that

current scheduling is insufficient for protection of the citizenry or for the safety of bargaining unit members. This is not to say the presence of more officers on the street might not be helpful in crime control but only that the evidence submitted does not convince the Panel of the necessity to deprive the City of its right to schedule police officers as it deems necessary. There may well be instances where contractual minimum manning standards are required but the Panel believes the City has taken steps to provide additional shift strength when necessary and has provided shift commanders with authority to call in additional officers on an overtime basis when, in their discretion, such action is necessary. Under evidence contained in this record, the City and its elected officials must be responsible for assignment of an adequate number of patrol officers to meet the needs of the community and the safety of bargaining unit employees.

ORDER

The demand of the Union for a minimum shift strength provision is denied.

REPAYMENT OF PLAIN CLOTHING ALLOWANCE

The parties have redrafted the plain clothing allowance from the last labor contract and have agreed to a $350 annual figure and the manner of its payment. However, the City seeks language providing that when a bargaining unit member leaves a plainclothes assignment, any unearned portion of the plain clothing allowance previously paid will be returned to the City, either by repayment or a deduction from wages. The City submits that since it budgets for a specific number of plainclothes positions, if an officer leaves such assignment before "earning" the entire allowance and does not return the unused portion, the City must pay another officer a clothing allowance and, therefore, overspends this budget item. It further submits that without a provision for repayment, there may be instances when a bargaining unit member is retained in a plain clothing assignment when he should not be there.

The Union opposes this demand, contending that money received for plain clothing is expended by the officer for that purpose and is not available in the event he is returned to a uniform assignment. It might be more appropriate to request the return of plain clothing purchased by the officer. Furthermore, most officers dress casually in their personal and social lives and do not ordinarily purchase the type or amount of dress clothing required in plainclothes assignments.

Findings and Conclusions

At present, there are five bargaining unit members assigned to detective work. Such assignments are a management prerogative as is the decision to return an officer to a uniform assignment; bargaining unit members have no right to assignment preferences on the basis of seniority. As the contract language has been redrafted, bargaining unit members receive $100 upon assignment to plain clothing duties, $100 90 days thereafter, and $150 after an additional 180 days. In subsequent years, the clothing allowance is received in two equal payments, on July 1 and January 1 of each year.

As between the budgetary considerations of the City and those of individual bargaining unit members in plain clothing assignments, it is the opinion of the Arbitration Panel that such employees would suffer more than would the City if, at the time of their reassignment to a uniform division they are required to return part of the plain clothing allowance which may well have been previously expended. Furthermore, the designation of "unearned" is a misnomer when applied to monies expended in accordance with their intended purpose. The City can assign and reassign officers to and from plain clothing duties at will, and the Panel does not believe management will be deprived of flexibility and discretion in reaching such decision

because of the plain clothing allowance paid -- especially in view of the fact that semiannual payments are made after the first year.

ORDER

> The demand of the City that the "unearned" portion of a clothing allowance received by a bargaining unit member be repaid when that member leaves the plain clothing assignment is denied.

PAYOFF ON ACCUMULATED SICK LEAVE

Since at least 1954, officers separated from employment with the City have received accumulated sick leave on the following basis:

> 1 to 15 years - 33-1/3% of hourly rate at termination.
>
> 15 to 20 years - 50% of hourly rate at termination.
>
> 20 to 25 years - 75% of hourly rate at termination.
>
> 25 or more years - 100% of hourly rate at termination.

The City seeks inclusion of language which would limit the amount of accumulated sick leave received by a separating employee

to either 100% of the number of sick leave hours accumulated as of July 1, 1975, or 50% of the total sick hours accumulated, whichever is greater. The City submits the present sick leave payoff provision can result in economic hardships since some employees have received from $10,000 to $15,000 in this benefit upon separation and, in addition, the City is unable to fill the vacant budgeted position until an amount of time equivalent to the monetary benefit received has expired. If the existing sick leave provision continues unchanged, bargaining unit members can accumulate up to 10 days in each of the two years of the new contract. With a total of 38 officers in the department, this can amount to a potential liability of approximately $5,000 under this contract alone. The City already has implemented the provision here proposed for all unrepresented employees and, in addition, it has been accepted by the firefighters and the police command officers. Under the proposal, sick leave accrued prior to the new contract would not be eliminated since the proposal affects future accumulations only, from and after July 1, 1975.

The Union opposes modification of long established accumulated payoff provisions. This negotiated benefit can be substantial for bargaining unit members upon retirement or separation and should not be modified. The hardship alluded to by the City does not

exist for this bargaining unit since no patrolman is entitled to more than one-third of accumulated sick leave on payoff, based upon current service, and none will be entitled to more than one-third within the term of the new two year labor contract. Furthermore, the Union disputes the City's claim of substantial potential liability if the existing provision is continued under a new two year contract and contends that at most, the potential liability of the City will approximate $1,000 per contract year. The Union believes the existing provision actually benefits the City in that it encourages officers with minor illnesses or disabilities to report to work. Such officers, with legitimate illnesses, might not report -- and would be justified in not reporting -- if the present provision is eliminated.

Findings and Conclusions

A 1974 audit for all City employees disclosed that 77% of the sick leave benefit was accumulated in that year. For the Police Department, however, employees utilized 60% of their sick leave entitlement and accumulated less than 40%. As of July 1, 1974, all employees in the Police Department had accumulated 1,491 days with a value in excess of $50,000 on payoff. It should recognize, however, that such monies have already accumulated and would be paid even under the new proposal, if elected by the

affected bargaining unit member.

The Arbitration Panel is impressed by the fact that the accumulation of sick leave has long existed for members of this bargaining unit. Even before the Public Employment Relations Act authorizing collective bargaining for public employees in Michigan, one of the benefits of City employment was the receipt of accumulative sick leave at the allowable rate.

The City's desire to reduce "potential liability" in this area is understandable and it is true that among 14 cities regularly utilized by the parties for comparative purposes, none provides a payout of all sick leave accumulated without limitation on the number of accrual days. But the fact that bargaining unit members enjoy this benefit while other employees in this and other cities do not is not, in and of itself, sufficient justification to adopt the City's proposal. Unquestionably, continuation of this benefit unchanged will result in an increasing liability to the City but so will any cumulative benefit -- albeit to a lesser amount in certain instances. In concluding this benefit should continue to accrue as in the past, the Arbitration Panel is also mindful that wages received by bargaining unit members -- a matter which will subsequently be discussed -- are low in comparison to those received in the 14 comparable communities. Perhaps had an even

more substantial wage demand been advanced by the Union, reduction of this benefit to the point where bargaining unit members would receive the same payoff on accumulated sick leave as do all other City employees could be justified.

ORDER

The demand of the City for modification of the accumulated sick leave payoff provisions existing in the previous contract is hereby denied.

WAGES

The Union seeks an 8% increase effective July 1, 1975, a 4% increase effective January 1, 1976, a 7% increase effective July 1, 1976, and a 4% increase effective January 1, 1977. This would result in a full paid patrol officer receiving:

July 1, 1975	-	$11,637
January 1, 1976	-	$12,102
July 1, 1976	-	$12,949
January 1, 1977	-	$13,467

The demand amounts to a 10.32% wage increase in the first year of the contract.

The City has offered (assuming full retroactivity) 5% effective

July 1, 1975, 6% effective January 1, 1976, 5% effective July 1, 1976, 1 6% effective January 1, 1977. This would result in full paid police officers receiving:

July 1, 1975	-	$11,314
January 1, 1976	-	$11,993
July 1, 1976	-	$12,593
January 1, 1977	-	$13,349

Under the City's offer, bargaining unit members would receive an 8.3% increase in the first year of the contract.

The Union submits its wage demands are reasonable and appropriate in view of wages paid in comparable cities, the salary paid the police of chief, and the wage increments granted command officers. Of 13 cities compared, members of this bargaining unit rank 13 in salaries paid -- notwithstanding the high crime rate existing in Benton Harbor. The police chief receives an annual salary of $21,350, the highest paid by Michigan cities with populations between 10,000 and 24,999. Command officers obtained an approximate 10% wage increase effective July 1, 1975, and the Union submits comparable increases should be granted to members of this Union. The 1974 annual report for the Police Department discloses that by 1976, members of the department will be the best trained, per man, in the state. When wages paid to skilled tradesmen and other employees in private industry are considered, it is patent bargaining

unit members do not compare favorably.

The City submits its wage offer is in accord with its financial ability and that bargaining unit members will compare favorably with other City employees. Patrol officers received an 8% increase in July of 1971 and January of 1972, and a 5% increase in July, 1972. Effective July 1, 1973, they were upgraded from Pay Grade 13 to 14 and on July 1, 1974, again received a 5% increase. The City also submits that for every dollar of increased wages, an additional 33% must be added for "roll-up", i.e., benefits such as holidays, overtime, longevity, pensions, workmen's compensation, etc., and that in the first year of the new contract, the roll-up would amount to an additional 2.74% under the City's offer and with agreed-upon fringes estimated at 2.33%, the total economic increase in the first year will be 13.37%.

The City acknowledges command officers received an approximate 10% increase on July 1, 1975, but one reason therefor was that command officers, now in a separate bargaining unit, were asked to assume additional duties and were placed under a new "evaluation system". The City believes the size of its Police Department -- greater than any other in 14 comparable cities -- is a recognition of the existing high crime rate and that when its wage offer is considered with other benefits received, it should be ordered into effect.

Findings and Conclusions

At present, 20 bargaining unit members are paid at the top rate of $10,775, 10 receive the 5% special assignment supplement (plain clothes and a court officer), 8 receive $10,262 and 5 CETA-funded officers receive $8,865. On the date of the hearing, CETA-funding was expected to expire in February of 1976 and no indication had been received if such federal benefits would be continued.

The Arbitration Panel has carefully reviewed the testimony and documentary evidence, including comparative data, and concludes that neither wage offer is inherently unreasonable and that both find support in the record. Unquestionably, members of this bargaining unit have ranked low when viewed against wages paid police in those cities with which Benton Harbor normally has been compared. On the other hand, the difficult financial plight of the City cannot be ignored nor can the fact that other City employees, including represented firefighters, received an approximate 7% annual increase in 1975. The parties have reached agreement on certain fringe benefits with a total cost of $8,952, which represent a 2.33% increase over such benefits previously received. The Consumers Price Index reflects a total increase of 12.9 points, or 8.6%, between August, 1974 and August, 1975. The Arbitration Panel has concluded, therefore, that the final offer of the City

most nearly comports with the evidence considered under the statutory standards set forth in Section 9 of Act 312.

ORDER

The following wage increases shall be implemented, across the board, for all bargaining unit members:

July 1, 1975	-	5%
January 1, 1976	-	6%
July 1, 1976	-	5%
January 1, 1977	-	6%

For full paid police officers, the ordered wage increase will result in the following salaries:

July 1, 1975	-	$11,314
January 1, 1976	-	$11,993
July 1, 1976	-	$12,593
January 1, 1977	-	$13,349

RETROACTIVITY

It is the position of the City that under the provisions of Act 312, the wage order of the Panel cannot be made retroactive to July 1, 1975, because the Union failed to comply with the provisions of Section 3 thereof.

The City contends the statute requires a proper request for mediation and submission thereto before arbitration can be invoked and since the Union did not notify the City of its request for mediation until June 5, 1975, and the first mediation session was not held until June 24, 1975, the Union was not entitled to invoke arbitration on June 25, 1975, as it attempted to do. Furthermore, the City disputes the Union's claim of impasse and that "extensive negotiations and mediation" had transpired, since the first mediation session was not held until June 24, at which time the parties discussed non-economic matters only and did not even consider economic issues. Economics were first considered in mediation sessions held July 1 and thereafter, and it was only on July 21, 1975 that the state mediator declared an impasse.

The Union submits it followed proper statutory procedures in initiating arbitration. Its initial notification and submission to mediation was accomplished during the first week of February, 1975. When, after the first mediation session, the dispute remained unresolved, arbitration was initiated prior to the beginning of the current fiscal year, July 1, 1975. The Union's actions were in full compliance with statutory requirements, and wage retroactivity should be ordered.

Findings and Conclusions

The City bases its challenge to retroactivity on the language of Section 3 of Act 312 which states, in part:

> "Whenever in the course of mediation ... the dispute has not been resolved to the agreement of both parties within 30 days of the submission of the dispute to mediation and fact-finding ... the employee ... may initiate binding arbitration proceedings by prompt request therefor, in writing, to the other, with copy to the labor mediation board."

In reviewing the "jurisdictional documents", the Arbitration Panel concludes that the City was first advised in writing of the Union's intent "to utilize the services of mediation and compulsory arbitration" in the first week of February, 1975, and that on February 12, 1975, the Employment Relations Commission appointed a state mediator. However, the mediator was not requested to act until May 30, 1975, when a telegram, or mailgram, was directed to the Employment Relations Commission requesting "the services of Mediator Howard Case to assist in the negotiations." A copy of the May 30 notice was hand delivered to the City on June 5, 1975.

On June 24, a mediation session was held with the state mediator and on the following day, June 25, the Union mailed notification to the Employment Relations Commission and the City that an

"impasse has been reached ... after extensive negotiations and mediation."

Under the provisions of Section 10 of Act 312, wage increases ordered by the Panel are

> "effective only at the start of the fiscal year next commencing after the date of the arbitration award. If a new fiscal year has commenced since the initiation of arbitration procedures under this act, the foregoing limitations shall be inapplicable, and such awarded increases may be retroactive to the commencement of such fiscal year any other statute or charter provision to the contrary notwithstanding."

It is the opinion of the Panel that Section 10 is controlling in the instant case and since arbitration proceedings were initiated prior to July 1, 1975, the wage increases hereinbefore ordered are effective July 1, 1975. The Panel does not believe the provisions of Section 3 are controlling on the issue of retroactivity. The section does not extend to that question and the Panel does not believe that is its purpose. Here, notification of statutory mediation and arbitration proceedings were first accorded the City in February and while mediation with a state mediator did not occur until June 24, it is patent that mediation was properly invoked and did take place over a 30 day period, albeit that period expired

after July 1, 1975. That fact, however, did not bar the Union from initiating arbitration prior to July 1, 1975, in order to gain the right to retroactivity expressly accorded under Section 10 of the Act.

If the City's arguments are accepted, one of the parties in an Act 312 proceeding might effectively undermine the others right to invoke statutory arbitration. For example, a party could delay through adjournment various mediation sessions scheduled by a state mediator, or they might have to be delayed because of illness or the inability of necessary persons to be present. Should the party desiring to invoke arbitration under Act 312 be held to have lost its right to retroactivity under Section 10 in such case? The Panel thinks not, and believes the legislative intent encompassed in Act 312 -- including the §1 admonition that "the provisions of this Act ... shall be liberally construed" -- deems it essential that retroactivity be granted where parties have otherwise met the jurisdictional mandates of the Act by initiating arbitration in a timely manner so that the commencement of a new fiscal year thereafter will not result in the loss of retroactivity.

ORDER

The City's contention that by virtue of Section 3 of Act 312, P.A. 1969, as amended, wage increases ordered hereunder are not retroactive to July 1, 1975, is rejected.

Wage increases and all other benefits granted under these orders shall be retroactive to July 1, 1975.

THE ARBITRATION OPINION

This opinion has been prepared by the Arbitration Panel Chairman and represents his analysis of the record and exhibits. The Panel has met in executive session to discuss and review the transcript, the exhibits, and the respective arguments and positions of the parties, including the post-hearing briefs. The City and Union panelists concur or dissent in the foregoing Orders as hereinafter set forth and the signature of each is affixed to indicate such concurrence or dissent.

The Arbitration Panel Chairman and the Union panelist concur and the City panelist dissents on the following Orders: Repayment of Plain Clothing Allowance; Payoff on Accumulated Sick Leave; and Retroactivity.

The Arbitration Panel Chairman and the City panelist concur and the Union panelist dissents on the following Orders: Wages; Minimum Shift Strength.

The City panelist has prepared written dissents on the issues of Payoff on Accumulated Sick Leave and Retroactivity which are appended hereto and incorporated as part of this opinion.

Alan Walt
Arbitration Panel Chairman

Leslie Johnson
City Panelist

Jon Nichols
Union Panelist

Southfield, Michigan

January 24, 1976

DISSENTING OPINION OF LESLIE JOHNSON, CITY DELEGATE

SICK LEAVE PAYOUT

I cannot agree with the Arbitrator's conclusion on sick leave payout at termination. Such a conclusion seems to me to ignore the evidence presented.

The issue of "sick leave payout", from the arbitration documentation available, is defineable as the question of whether or not the City, upon an employee's termination; shall be required to "cash out" "total" accumulated (with unlimited accumulation) and unused "sick leave days" or a percentage thereof, said total or percentage of days to be cashed out at "daily rate of pay at termination value". The impact of this issue has been generally viewed relative to termination upon retirement and for purposes of reviewing the Arbitration opinion may be understood in this manner. For the record, it was, is, and - due to the Arbitrator's opinion - shall continue to be, the City's policy to 'cash out total accumulated and unused sick leave days upon termination". It was the Patrolmen's Association's position that the City should be required to continue the "total payout"; whereas, the City sought to reduce "payout" to fifty percent of accumulated and unused sick leave days.

The City's basic reason for this proposal was to relieve a financial hardship relative to the City's ability to operate and therefore to the interests and welfare of the Benton Harbor public. As was made clear in the Arbitration testimony, because of the City's financial

condition and the fact that when the "total payout" policy was legislated in the mid-fifties there was no funding of a reserve, the City must cash out sick leave days from operating revenues and forego hiring replacements for an equivalent number of days. Whatever the financial impact value of a given "cash-out" - whether equivalent to a day or a year's time, the City's financial inability to hire replacements within the equivalent time is clearly a factor within the contemplation of Section 9 of Act 312. The fact that the City has paid off sick leave accumulations in excess of $10,000.00 further establishes the possible operational impact of this issue relative to the interests and welfare of the Benton Harbor public.

The Patrolmen's Association in maintaining that the policy of cashing out total accumulated and unused sick leave days should continue argued essentially:

> 1. That the policy did not and would not impact upon the City's financial condition with respect to Association members within the life of the contract being arbitrated, because they did not have accumulated sick leave days.
>
> 2. That the Sick Leave policy was a benefit long held and highly valued; and
>
> 3. That the policy provided a Savings Account.

The Arbitrator in awarding the Patrolmen's Association's position justifies his award esentially on the "benefit long held" thesis. Obviously, he must so justify his award. The Arbitrator has acknowledged the City's financial plight in the award of wages and makes no effort to defend the Association's selfish contention that because the Associa-

tion's membership does not impact upon the policy, the policy's impact upon the City is not relevant. The public can breathe a sigh of relief that the Arbitrator's opinion, ostensibly, at least, does not so narrowly equate the public interest with interests within the public.

This panelist, however, can find little justification for the "benefit long held" thesis in objective labor-management relations theory, Act 312, or the facts of this Arbitration. To this panelist's understanding of labor relations theory, benefits are negotiable. As to Act 312, the Act states "as to 'each' economic issue, the arbitration panel shall adopt the last offer of settlement which, ..., more nearly complies with the applicable factors precribed in Section 9. The applicable factors of Section 9 are essentially the public interest; financial ability; comparative wages, hours, and conditions; overall compensation; and "such other factors". The Association did not make a case on public interest nor deny the City's equating the public interest with the operational impact of its financial inability to meet the costs of sick leave payout. "Financial inability" was clearly established and acknowledged in the Arbitrator's award of wages. The association did not disprove or even deny the City's claim of financial inability except to deny, with respect to sick leave payout, that the Association's membership had an impact, the selfish merit of which has been, hopefully, discredited. With respect to comparative wages, hours, and working conditions, the excessive benefit of the City of Benton Harbor's "payout" policy even as proposed, 50% of accumulation, is well established in the record and admitted by the Association. The Association suggests that the excessive benefit "makes up" for the City's financial inability to

pay better wages while at the same time claiming it does not impact on the City's financial inability to meet the costs of sick leave payout all of which is relative to the same financial inability. Overall compensation is not benefited by a sick leave policy except as "cash-out" occurs, to which potential realization of benefit the Association denies having claim. As for "such other factors" which Act 312 does not list, the Arbitrator should list any such factors and justify their application. The facts of this Arbitration clearly show that "sick leave payout" is not a benefit, either "long held" or "highly valued" by the Patrolmen's Association. By their own admission they do not accumulate sick leave, they use it, which ability and the unlimited accumulation of useable days the City in no way proposed to change. There is no benefit in a savings account to which the owner makes no deposits. Finally, it is again emphasized that the Firefighters and the Command Police Officers gave up "sick leave payout" for other benefits. Sick leave payout is the Patrol Association's straw man and the Arbitrator should have burned it. In such light, the implication of the Arbitrator's award, if not the rationale of his opinion, is that of a division of the issues.

To the suggestion within his opinion that the arbitration procedure is intended to be like that of the negotiation process, one responds that such a proposition is incongruous with the need for an arbitration procedure. Act 312 reads "... each of the parties (are) to submit ... its last offer of settlement on 'each' economic issue. The arbitration panel, ..., shall make ... findings of fact ... which, ... more nearly complies (with the merits of the issue)."

To this panelist, the merits of the "sick leave payout" issue are clear. Sick leave is a personnel management policy which arose out of the recognition that is was unjust to deny a laborer wages for a day's absence from his labors due to causes out of his control. Sick leave "payout" originated as the practical solution to the tendency of employees to take sick leave when they weren't really sick. As such the principle of sick leave payout is a practical policy. However, this panelist submits that management should pay only the cash value of sick leave necessary to prevent the unnecessary use of sick leave. However, no panelist can absolutely determine that cash value. Therefore, it would seem that the most practical solution to the arbitration of this issue is comparisons of the administration of sick leave payout. Such a comparison as evidenced in the record clearly demonstrates that the City of Benton Harbor's administration of "sick leave payout" is clearly excessive and that the Arbitration Panel, to restore parity to the administration of "sick leave payout" in Benton Harbor should award the City's, the Firefighters, and the Police Command Officers resolution of the issue of sick leave payout.

DISSENTING OPINION OF LESLIE JOHNSON, CITY DELEGATE

RETROACTIVITY

I cannot agree with the Arbitrator's conclusion on retroactivity. Such conclusion ignores the clear statutory language of the so-called Compulsory Arbitration Act. Section 3 of that Act provides in its entirety as follows:

> "Whenever in the course of mediation of a public police or fire department employee's dispute, the dispute has not been resolved to the agreement of both parties within 30 days of the submission of the dispute to mediation and fact-finding, or within such further additional periods to which the parties may agree, the employees or employer may initiate binding arbitration proceedings by prompt request therefor, in writing, to the other, with copy to the labor mediation board."

Section 10 of that Act provides, in relevant part, as follows:

> "***The commencement of a new municipal fiscal year after the initiation of arbitration procedures under this act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its decision. Increases in rates of compensation awareded by the arbitration panel under section 10 may be effective only at the start of the fiscal year next commencing after the date of the arbitration award. If a new fiscal year has commenced since the initiation of arbitration procedures under this act, the foregoing limitation shall be inapplicable, and such awarded increases may be retroactive to the commencement of such fiscal year any other statute or charter provisions to the contrary notwithstanding. At any time the parties, by stipulation, may amend or modify an award of arbitration."

Thus, if arbitration procedures have been initiated after the start of a new fiscal year, any increases in rates of compensation

may only go into effect at the start of the fiscal year beginning after the date of the arbitration award. If arbitration procedures have been initiated before a new fiscal year has begun, then increases in rates of compensation may be made retroactive to the start of that fiscal year.

It should be noted that even where arbitration has been timely initiated before the start of a fiscal year, Section 10 does not require retroactivity of wage increases since the word may rather than shall has been used. Although I believe the evidence submitted at the hearing would justify the denial of retroactivity for the awarded wage increases even if arbitration had been properly initiated before the start of the City's fiscal year, July 1, 1975, I will not dwell on that point. Rather, my quarrel is with the Arbitrator's conclusion that arbitration was property initiated before July 1, 1975.

Section 3 of the Act sets forth the procedure a party must follow before arbitration may be initiated. The Association did not comply with that procedure. Under Section 3, there first must be a dispute between the parties. Second, this dispute must have been submitted to mediation. Third, some active intervention by a third person (i.e., mediation) must have occurred. Fourth, the dispute has not been resolved within 30 days of its submission to mediation. Then, and only then, may arbitration procedures be initiated.

I think it is clear that Section 3 of the Act requires some action on the part of the mediator assigned to the case before arbitration may be commenced. Section 3 gives a mediator a minimum of 30 days to see if he can resolve the dispute. If he is not able to reconcile the parties or persuade them to adjust or settle their dispute in this 30 day period, then arbitration procedures may be invoked by either party. Thus, when Section 3 begins "whenever in the course of mediation of a public police of fire department employee's dispute," I believe it contemplates some active participation by a State Mediator having occurred before arbitration may be invoked. The word "mediation" itself contemplates the act of a third person who, in effect, interferes between two contending parties.

An examination of the facts in our case can lead to only one conclusion. In February of 1975, the Michigan Employment Relations Commission was notified by the Association that the Association intended to utilize the services of mediation and compulsory arbitration. At the time this letter was sent, collective bargaining negotiations had not yet begun. I think it important to note that the letter did not request the services of a mediator and also to note that since collective bargaining negotiations had not yet begun, there was then no dispute.

A mediator was not requested until a mailgram dated May 30, 1975 was sent by the Association to the Michigan Employment Relations Commission, a copy of which the City received on June

5, 1975. Even though the parties were then not at impasse, as the mailgram alleged, I cannot argue that mediation was not then requested. However, I do not believe that a dispute may be submitted to mediation until the other party has received notice that it has in fact been so submitted. Accordingly, the earliest possible date that the "dispute" between the parties was submitted to mediation was June 5, 1975, the date the City received the hand delivered mailgram requesting the services of a mediator.

The first mediation session was held on June 24, 1975. Negotiations were thereafter held on July 1, 3 and 21, 1975. It was not until July 21, 1975, that the State Mediator declared that the parties were then at impasse. The City did not disagree.

In my view, arbitration proceedings could not be properly initiated by the Association until 30 days after the expiration of June 5, 1975 (the date the City was notified of the Association's request for a mediator) or 30 days after June 24, 1975 (the date the first mediation session was held). In either case, arbitration procedures could not have been initiated until after the start of a new fiscal year for the City which began on July 1, 1975.

If Section 3 of the Act contemplated that a party could submit a dispute to mediation by simply giving notice of its intention to utilize the services of a mediator (or by simply requesting a mediator without the requirement that mediation must have actually occurred), then the statute could have been easily drafted to so provide. I believe the Arbitrator should have recognized the

underlying policy considerations behind Section 3 of the Act which clearly include giving a State Mediator 30 days to attempt to resolve a dispute before the compulsory arbitration process is initiated.

In this case, the City stipulated that any increases in rates of compensation could be made effective from the date of the arbitration award, rather than July 1, 1976, in the event its position on retroactivity was upheld. I think this offer of the City was extremely generous. At the very least, it should have enabled the Arbitrator to decide the issue of retroactivity without the possible consideration that if he had ruled in favor of the City on retroactivity, he would have been imposing an extremely harsh result on the Association.

Finally, I noted earlier that at the time the Association requested a mediator by mailgram dated May 30, 1975, the parties were not at impasse. In fact, economic issues had not yet been discussed. I thus do not think that there was yet a "dispute", a necessary prerequisite before arbitration procedures may be initiated. While I am not necessarily equating the word dispute with impasse, I believe Section 3 requires the parties to timely begin and continue negotiations so that a final position on the issues is reached more than 30 days before the start of a new fiscal year if a party desires to avoid the Section 10 limitation on retroactivity. In our case, through no fault of the City, negotiations did not timely begin or continue. It was not until

three weeks after the start of the City's fiscal year that the parties reached an impasse. A municipality must be able to properly budget for a new fiscal year. The delays in this use rendered that task impossible. The Arbitrator's ruling against the City's position on retroactivity defeats this important policy consideration underlying Section 3's framework for the timely initiation of arbitration procedures.