11/3/85
MRB

STATE OF MICHIGAN
DEPARTMENT OF LABOR
EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration between:

CITY OF MUSKEGON

and

MUSKEGON FIRE FIGHTERS UNION LOCAL NO. 370, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

MERC Act 312 Case No. G83 J-1644

SECOND SUPPLEMENTAL AWARD OF ARBITRATION PANEL

Muskegon, City of

A p p e a r a n c e s:

For the City:

Michael M. Knowlton,
Attorney

For the Union:

Randall D. Fielstra,
Attorney

Panel Members:

Robert G. Howlett, Chairman
Michael M. Knowlton, for the City
Randall D. Fielstra, for the Union

On June 18, 1985 the Panel issued its Opinion and Award in the above-entitled case. The award reserved jurisdiction for a period of sixty (60) days to clarify and interpret any provisions of the opinion and award at the request of either the City of Muskegon or Muskegon Fire Fighters Union Local No. 370, International Association of Fire Fighters, and for a period of sixty (60) days in the event the City of Muskegon or Muskegon Fire Fighters Union Local 370, International Association of Fire Fighters were unable to resolve language to be included in the contract with respect to Cost-of-Living Allowance, Vacation, Residency and Probationary Period.

At the request of the Counsel for the City and the Union, the Panel reconvened to discuss clarification and language with respect to some of the issues.

Pursuant to agreement of all members of the Panel, a Supplemental Opinion and Award was issued on September 20, 1984 with respect to the Table Allowance and the Work Schedules.

Union counsel raised a question with respect to Item 5 of the Award of June 18, 1985 which reads:

> 5. Pension Plan and Retirement. The Union proposal that the Muskegon Fire Fighters may accumulate pension benefits up to 70% instead of the current cap of 50% with 25 years of service (language quoted in the text above) is denied.

Counsel for the Union noted that the opinion of June 20, 1985 stated that "The only evidence in support of the Union Proposal was Company [sic] Exhibit 27, which provides data from six (6) . . . of the ten (10) comparison cities." Counsel for the Union pointed out that Union Exhibit 1 also included data with respect to "Retirement." The Exhibit listed information concerning amounts paid to retirees in twelve Michigan cities, ten of which were comparison cities.

Counsel for the Union also noted that (1) on page 32 of the Opinion of June 18, 1985, there is a sentence which reads "The police do not have the 2% formula," (2) the contract between the Command Officers and the City which commenced January 1, 1983 provides for a pension "equal to 2.0% of his final average compensation multiplied by his credited service, not to exceed thirty-five (35) years," and (3) the Command Officers' contract provides that the pension shall not exceed 70% of the lesser of the patrolmen or pipemen's compensation as fixed in the City budget

for the fiscal year in which the Command Officer retires.

The reference to "police" on page 32 of the Opinion of June 18, 1985 referred to the "rank and file" police contract; i.e., the patrolmen-pipemen not to the Command Officer contract. The Opinion is correct that the police officers (patrolmen-pipemen) do not have the plan which the Union sought to secure in this case. The police officers have the same retirement program as the fire fighters represented by the Union.

The City avers that the Panel did not retain jurisdiction with respect to the Pension Plan and Retirement issue, consequently it may not consider the claim of the Union that the Union last offer should have been adopted.

The City post hearing brief cites Section 10 of the Police/Fire Fighter Arbitration Act (Act 312 [MCLA 423.240; MSA 17.455(40)] . . .):

> A majority decision of the Arbitration Panel, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the Arbitration Panel in the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside.(emphasis in City brief)

The City notes that the Union does not claim that the Award is not based on competent, material and substantial evidence "but rather that the arbitrator (panel chairman) either ignored or placed no weight on certain evidence which the Union submitted." The statute does not, the City avers, provide that an "award shall not be final simply because the arbitration panel overlooks

or places no weight on certain evidence."

The Union avers:

1. There is no law in Michigan which permits or prohibits an arbitrator or panel from revising an Opinion and Award as to those matters upon which jurisdiction was not explicitly reserved.

2. When a mistake has been made with respect to existence of a fact or evidence which was submitted "reasonable minds may acknowledge that fact and revise considerations and opinions in accordance with the true facts then existing."

3. The Opinion and Award should be revised "because evidence simply was overlooked and believed not to have been made part of the record."

Act 312 does not include a provision authorizing a panel to reopen an award adopted by a majority of the arbitration panel.[1]

A search of the Michigan cases involving Act 312 fails to reveal any case in which an arbitration panel decided an issue on which it had not reserved jurisdiction. A number of cases have discussed court review of awards under Act 312.[2] But none of the cases have addressed the question of reconsidering an

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[1] The Opinion and Award of June 18, 1985 was unanimous.

[2] Examples are: City of Alpena v Alpena Fire Fighters Association, 56 Mich App 568 (1974); Genesee County Prosecuting Attorney v City of Flint, 64 Mich App 569 (1975); Dearborn Fire Fighter Union Local No. 412 v City of Dearborn, 42 Mich App 51 (1972); aff'd 394 Mich 229 (1975); City of Detroit v Detroit Police Officers Association, 408 Mich 410 (1980) app dis 450 US 903 (1981); Metropolitan Council 23 and Local 1277, AFSCME v City of Center Line, 414 Mich 642 (1982); Detroit Fire Fighters Association v City of Detroit, 127 Mich App 673 (1983).

issue on which a panel did not reserve jurisdiction.

The cases involving grievance arbitration recognize a limited right to reopen cases absent an arbitrator exceeding his/her jurisdiction or because of engagement in some improper activity.

The question of reopening a grievance arbitration award was extensively discussed in Tripp Excavating Contractor Inc v Jackson County, 60 Mich App 221, p 251 (1975).

The Court summarized the widely recognized general rule;

> Defendant's contention that the arbitrators made errors of law and fact and that they used legally incorrect measures of damages is not sustainable. In Werner v Travelers Indemnity Co, 55 Mich App 390, 394; 222 NW2d 254, 257 (1974), we recognized that 'an award will not be held invalid under the common law merely because it is unjust, inadequate, excessive, or contrary to law'. Since the arbitrators are authorized to determine both facts and law, the law will not inquire as to whether the determinations are right or wrong. 6 CJS, Arbitration and Award, § 95, pp 240-241; 5 Am Jur 2d, Arbitration and Award, § 167, pp 643-644.
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> The sole claim of defendant warranting further discussion is that the arbitrators exceeded the scope of the agreement.

Later in the opinion the Court quoted from 6 Corpus Juris Secundum, Arbitration and Award, 113(b) p 264:

> Awards have accordingly been held subject to recommittal for more specific findings, or to allow the arbitrators to find separately upon the matters submitted where such findings are necessary to the justice of the case, or to pass upon matters embraced in the submission but omitted from the award.

I note the conclusion of the CJS authors that an award may be recommitted "to allow the arbitrators to find separately upon matters submitted where such findings are necessary for the

justice of the case."

The courts have recognized that an arbitrator has power to reopen an award on his own motion where he fails to pass on all matters submitted, thus has not exhausted his authority.[3]

Courts have resubmitted cases to arbitrators when an award is incomplete, to correct defects in an award, "to find separately upon the matter submitted where such finding is necessary, but not for rehearing upon the merits . . .," to perform "ministerial acts or arithmetical calculations," to clarify an award, or failure of the arbitrators to pass on all matters submitted.[4]

37 ALR3d 200 discusses the resubmission of awards to arbitrators by courts in non-labor cases. The courts hold under varying fact situations that a court may resubmit a case to arbitrators under statutory arbitration if the statute has not been followed, or if the award is incomplete, or there has been a patent error or miscalculation. In labor cases, the annotation discusses decisions where courts have submitted labor arbitration awards to arbitrators for "correction or clarification or where an award is patently ambiguous, indefinite, unclear, or self-contradictory," or where it is "incomplete."

5 Am Jur2d, Arbitration and Award, ¶ 169 cites cases which authorize impeachment of an award from a mistake clearly

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3 36 ALR3d 939,942.

4 Id., p 947 et seq

appearing on its face or, because of a "gross miscalculation of figures apparent from the award," the authors noting that "the mistake must be one considering a material matter."

The Chairman is in doubt as to the Panel's power to reopen the award to reconsider the Pension Plan and Retirement issue. However, the Chairman, relying on the Court of Appeals quotation from 6 CJS with respect to the "justice of the case," and because the two Panel members appointed by the parties did not have adequate time to study the draft opinion, has decided that he should review the exhibit (Union Exhibit 1) not referred to in the Opinion.[5] The Opinion noted on page 31 that City Exhibit 27 provided data from six (Battle Creek, Bay City, East Lansing, Jackson, Portage and Port Huron) of the ten comparison cities. Lansing, Midland, Grand Rapids and Saginaw were included in Union Exhibit 1.[6]

The Chairman has studied the information included on Union Exhibit 1. The information is presented in abbreviated form, hence, detail as to the Pension Plan provisions is lacking. The Chairman has reached the conclusion that the additional information, when considered under the Section 9 standards, does not warrant a reversal of Item 5 of the Award of June 18, 1985.

Factor (c) of Section 9 requires that the Panel consider the interest and welfare of the public and the financial ability

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[5] The Panel met to review the draft opinion prepared by the Chairman, but had not had copies of the draft opinion prior to the meeting.

[6] Union Exhibit 1 also presents data from Ann Arbor and Flint which are not comparison cities.

of the unit of government to meet the costs.

Factor (d) requires a comparison of the conditions of employment of the fire fighters with conditions of employment of other "employees performing similar services." This includes employees in the City of Muskegon as well as other employees in public employment in comparable communities.

Factor (f) requires consideration of the overall compensation presently received by the fire fighters including fringe benefits and also "the continuity and stability of employment."

According to Union Exhibit 1 fire fighters in Midland received "2.2% x 25 years" and 1% each year thereafter. This is some support for a 1% payment after 25 years, but not for a 2% per year of service.

The exhibit discloses that in Grand Rapids fire fighters may retire at 50 years of age and receive "2.2% x years of service." Presumably, although there is no evidence except the exhibit itself, the employees receive an additional 2.2% per year if they remain on duty after 50 years.

The exhibit discloses that Lansing fire fighters may retire at 50 years of age. They receive "2.5% x 25 years" and "1/2% after 25 years." As in the case of Midland and the Cities of Portage and Port Huron, which were mentioned in the original opinion, this is some support for payment of 1 and 1/2%, but not for 2%.

In Saginaw, fire fighters may retire at age 50. According to the exhibit they receive "2.5% x years of service."[7]

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[7] The exhibit discloses that Saginaw fire fighters have "w/esc." which presumably refers to some kind of escalation in payment based on unspecified conditions.

As in the case of Grand Rapids, presumably (although the only evidence is the exhibit) the fire fighters continue to receive increased pensions if they remained in service after 50 years of age.

While the Command Officers in Muskegon are entitled, as discussed in the text above, to have final average compensation multiplied by credited service up to 35 years, the patrolmen and pipemen are subject to the same formula as now exists for the fire fighters. While the fire fighters' bargaining unit, because of a specific provision of Act 312, includes classifications which in the police department must be covered by a separate contract, the comparison of patrolmen/pipemen and fire fighters has more weight than the comparison of the fire fighters with the Command Officers.

The Chairman has again reviewed the evidence with respect to the cost which the City would be required to pay in the event the Union last offer were adopted. This is a factor to be considered, particularly as the City has had severe financial problems.

In summary: consideration of Union Exhibit 1 does not furnish sufficient evidence to warrant the Panel's reversal of Item 5 of the Award of June 18, 1985.

Any change in the present formula <u>should</u> be adopted

by the City and the two unions representing the fire fighters and the patrolmen/pipmen.

Date:

Robert G. Howlett, Panel Chairman

Michael M. Knowlton, Panel Member for the City

Randall D. Fielstra, Panel Member for the Union