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STATE OF MICHIGAN
COMPULSORY ARBITRATION

In the Matter of:

CITY OF RIVERVIEW,

Employer,

-and-

MICHIGAN FRATERNAL ORDER OF POLICE, State Lodge of Michigan, LABOR COUNCIL,

Union.

Arising pursuant to Act # 312, Public Acts of 1969, as amended.

Case No. D-84-B-473
DECISION & ORDER

Riverview, City of

APPEARANCES:

FOR THE COMPULSORY ARBITRATION PANEL

JACK G. BURWELL, ESQ., Impartial Chairman
RALPH LESKO, ESQ., Employer designee
CHARLES W. WITHERS, ESQ., Union Designee

CHARLES E. WYCOFF, ESQ.,
Logan, Huchla & Wycoff, P.C.
13900 Sibley Road
Riverview, MI. 48192
(Appearing on behalf of the City Employer)

BERNARD FELDMAN, ESQ.
6735 Telegraph Road, Suite #330
Birmingham, MI. 48010
(Appearing on behalf of the Union, Command Officers)

Maria E. Greenough, Court Reporter

I. STATEMENT OF THE CASE.

The Union, by and through its Attorney, JOHN A. LYONS, filed its Petition For Arbitration under Act # 312, P.A. 1969 as amended, on or about 2/14/84, alleging that after good faith bargaining and several attempts at mediation under the auspices of the Michigan Employment Relations Commission, the Union and the City of Riverview remained unable to resolve their continuing dispute, as to what should be included and/or excluded from the definition of "Final Average Compensation (earnings)"; or "F.A.E.", so as to properly compute retirement pay under the City's retirement plan for the command officers of the Riverview Police Department. Currently, the command officers are a unit of approximately 8 employees [11 including the three who precipitated the dispute and who are already retired], some of whom were and are eligible for retirement.

II. PRELIMINARY FACTS, HISTORY, AND RULINGS.

Historically, because of changing City Council members, Retirement Board Members, and City officials, with consequent differences in practice, gaps in communication and attention to documentation; in 1978, there was confusion as to what was the specific intention, if any, of the parties as to what portions of payroll should be subject to deduction and employee wage contrib-

ution toward the retirement plan, and what portions of payroll should be considered "earnings", for the purpose of computation of "final average earnings", to determine retirement pay.

According to the decision in M.E.R.C. case No. C 78 J-280 dated April 26, 1979, pursuant to a charge alleging violation of Section 10 (refusal to bargain),of Act 336, P.A. 1947 as amended, Public Employment Relations Act (PERA), M.C.L.A. 423.210, the City on or about 7/2/78, unilaterally and without notice or bargaining with the Lieutenants' and Sergeants' Association, Seaway Lodge 154, Fraternal Order of Police, changed a former practice by not making a payroll deduction for, or including (accumulated) vacation and sick time in computation of final average earnings and retirement pay, with respect to at least two employees (Lts. Adam Molnar and Floyd Fountain whose retirement pay was computed with exclusion of accumulated sick pay, vacation pay or bonus), pursuant to an opinion requested by one Paul Kraft, then City Manager, by the City Attorney, adopted by the Retirement Board on or about August 29, 1978.

The Administrative Law Judge, the Hon. Joseph B. Bixler, found that as a matter of fact, since 1961 some 12 employees had retired (exclusive of the three mentioned above), and some had vacation and sick pay included; and some excluded, from computation of final average earnings: some had acumulated time, and some did not; and, some had a pension deduction from that portion of

their payroll, and some did not. He concluded: 1). that alterations in the pension plan are a mandatory subject of bargaining; 2). That the charging party failed to establish a unilateral change in an established past practice since, among 13 employees, 8 had accumulated vacation and sick pay included in their final average earnings, and 5 had not; 3). that the case of Stover v. Retirement Board of the City of ST. Clair Shores Fire and Police System, lv. to app. denied, 402 Mich. 479 (1977), though not determinative because it involved a statutory plan, did involve similar principles, compelling a uniform formula for determining F.A.E.; 4). that no "animus" was shown on the part of the City, and; since the record did not show the city altered an existing condition of employment, there was no violation of Section 10 (1) (e) of PERA, and therefor recommended an order dismissing the charges and complaint.

The charging party filed exceptions to the recommended order, and requested a hearing before the full Commission.

The Commission, by its decision and order dated 9/27/79, ruled that the charging party did establish a unilateral change in working conditions (adding Lt. George Tear as one of 3 employees who retired on or about 7/1/78, and whose retirements occasioned the complaint). The Commission rejected the charging party's contention that almost all of the retirees who did not have accumulated time credited to their pension computations did not

have any time to be credited, saying that the evidence does not support such a finding, since of the 8 employees whose pension benefits reflected no accumulated time, one (Mary Girstner) was shown to have exhausted accumulated time by taking early retirement; and two (Frank Mauridian and Sextil Milhaltin), were shown to have accumulated time. However, as to the remaining five employees, the evidence was either totally lacking, or inconclusive, as to whether they had time available that could have been included in their pension computations. The Commission said that the evidence further indicated that the pension plan in this case, was a city-wide plan, established by City Charter in 1960, and that , in 1977, the voters adopted a Charter amendment to continue the plan and by an ordinance adopted on Nov. 21, 1977, continued its same provisions.

The Commission concluded that: 1). The Administrative Law Judge was correct that no uniform and long-standing past practice was established, but; 2). a uniform policy was instituted where none existed before, involving a mandatory subject of bargaining, and an unlawful unilateral change doesn't necessarily involve a change from one written policy to another; or, a change from a uniform past practice to a substantially different policy, but may be shown when a new policy has been established where none existed before; and, if it is a mandatory subject, neither party can take unilateral action until an impasse has occured (citing

cases). Specifically noting that the Stover case,cit. supra, had no application because there the Court of Appeals simply added gloss to the undefined statutory term "average final compensation"; whereas here, where the same term is in a city ordinance the City attempted to invest the term with a definite meaning not found in the ordinance,or enabling charter provision, or the parties' collective bargaining agreement; and did so by unilateral action, instead of the bargaining process required.

It is important that the Commission ordered:

1). That the City cease and desist its unlawful refusal to bargain.

2). The City must bargain on request, before making any changes in contributions to the pension fund; or, in the definition of average final compensation and/or any computation based thereon.

3). Rescind any action taken by the Riverview Retirement System Board in August 1978 to define average final compensation", until the parties have had the opportunity to bargain on the subject.

4). Cause the Retirement Board to review and recompute if necessary, the pensions due to George Tear, Adam Molnar, and Floyd Fountain, when and if a new definition of average final compensation" is reached through collective bargaining.

5). Resume making contributions to the pension fund and

payroll deductions for that purpose, without regard to the Retirement Board's resolution of August 1978, and make whole the retirement fund for any payments witheld pursuant to that resolution.

6). Notify the Commission within 20 days of receipt of its Order, of steps taken to comply.

The City appealed: in Lieutenants & Sergeants Association, Seaway Lodge 154, Fraternal Order Of Police v. City Of Riverview, 111 Mich. App. 158 (1981), the decision of the Commission was affirmed by a majority of the court (1 judge dissenting), the court holding that MERC properly concluded that the city unilaterally adopted a policy concerning a mandatory subject for collective bargaining; and, that the record showed that MERC's findings of fact relative to the change in policy adopted by the city was supported by competent, material, and substantial evidence.

On or about 2/22/83, the Supreme Court of the State of Michigan, denied the City's application for further appeal.

The parties thus, returned to the bargaining table; then to mediation; and finally, the union filed this petition for Act # 312 arbitration.

III. Act # 312 CONFERENCES AND HEARINGS.

After a number of postponements due to the conflict in the schedules of the parties, a pre-hearing conference was held on

11/20/84; and Act # 312 hearings were held on 3/26/85, 3/27/85, 4/11/85, and 4/22/85. The final transcript of the hearings was received on or about 5/3/85, with post-hearing briefs due on or about 6/7/85.

An extension of time for filing briefs was granted, and due to some confusion in mailing, it appears that all parties did not receive copies of the respective briefs, until sometime after 7/19/85. Following the hearings and briefs, the City (Mr. Wycoff), sent the Chairman of the panel a copy of Gentile v. City of Detroit, 139 Mich. App. 608 (1984), as the most recent position taken by the Michigan Court of Appeals concerning the definition of "final average earnings", to which the Union (Mr. Feldman) responded by letter dated 7/18/85, pointing out that the latter was not an Act # 312 case; and therefor, should be no precedent for the proceedings herein.

An Executive Session was held by the Arbitration Panel, on 8/9/85.

IV. THE LABOR AGREEMENT AND PENSION ORDINANCE.

It is noted that while the parties have negotiated certain changes or continued their labor agreement since occurrence of the above dispute, the issue herein has not been on the table, other than through the above mentioned litigation, subsequent bargaining, mediation, and this Act # 312 arbitration. However, during the pendency of these procedings, the parties are again in

contract negotiations; and, upon information and belief,certain unknown proposals including some for enhancement of the pension plan are on the table, but with unknown impact if any, as to employees already retired since 1978.

At the hearing, the parties submitted as their "Joint Exhibit #1"; their labor agreement effective July 1, 1982 through and including June 30, 1985. The agreement of course, lends little to the definition of final average earnings. As to Vacations, Art. 8, among other things; it provides that illness during scheduled vacation time is charged against sick leave in lieu of vacation time; that a week's vacation consists of 7 working days; and an employee with 10 years or more, is entitled to four weeks per year. It does not seem to specifically provide for accumulation and carryover, of vacation time, from year to year. However, Article 8, Section 3, provides for a maximum of 4 weeks after 10 years; but the same Article, Section 1, 4)., provides that no more than 5 consecutive weeks can be taken at a time, unless otherwise agreed to. Further, the Union in its post-hearing brief, argues that FAE should include up to two weeks carry-over from the previous year, plus four weeks earned during the the retirement year; and it would appear that at least two weeks carry-over is implied or has been the past practice of the parties.

Article 9, Sick Leave (Bonus Days and Funeral Leave),

provides, among other things, that a "Sick Leave Day", is an 8 hour work day; and, that each employee accrues one day of sick leave credit for each month of service, not exceeding an aggregate of 12 days per calendar year; to an unlimited accumulation for non-work connected illness. (In order to discourage abuse) If an employee uses 5 days or less sick leave in any one accrual period, 7/1-6/30 of a year, he/she is entitled to 5 bonus leave days, not chargeable against his/her regular sick and/or vacation accrual in the following year.

As to Retirement (Pension), Article 30; among other things, the labor agreement provides; that that this is governed by City Ordinance # 252, except as amended by the labor agreement. In Section 2, entitled "Voluntary Retirement", it provides that effective 7/1/82 Ordinance # 252 is amended to reflect that members may voluntarily retire after 25 years service, or at age 50, whichever occurs last. Further, that pension benefits will not continue to accrue after a member has attained 25 years service, or age 60, whichever occurs last; at which time employer/employee contributions cease.

Section 3, entitled "Social Security Offset", provides, that the City has until 6/30/85 to cause all full-time employees to withdraw from the Social Security System; and, until 6/30/85, to instruct the actuaries to alleviate the Social Security offset provision for bargaining unit members. Either way, the Social

Security offset provision goes into effect for bargaining unit members retiring subsequent to 6/30/85. (A word of explanation: until 6/30/85, the pension plan was "integrated", with Social Security; i.e., the employer and employee contributed to the Social Security Reirement System [O.A.S.D.I], and after retirement, when social security benefits became payable, the employee's pension benefit paid by the city [and its funding contribution] was diminished by the amount paid by social security, so as to amount to the same defined [pension] benefit. After 6/30/85, the amount of the members pension benefit [payment] is augmented, and not diminished, by the amount of the social security payment).

Section 4, entitled "Retirement, Death and Accumulation", provides that upon retirement, a lieutenant shall receive in cash, a sum equal to all accumulated sick leave at the prevailing hourly rate with the total not to exceed one year.

Sergeants, can accumulate up to 120 days of sick leave (sickness in the last year before retirement is deducted from the first 120 days), and all accumulated time up to 120 days on retirement, is paid in cash.

Any accrued benefits under the labor agreement, in the event of death of a member, are payable to his/her beneficiary, as designated in their insurance policy.

Section 4 (sic) entitled "Vesting", provides for vesting at 50% after 5 years, and 10% per year, with 100%, after 10 years.

Eligibility to draw on vested benefits, begins at age 60. If a vested member has 25 years service, he/she receives health insurance benefits commensurate with a full retiree under the agreement, once they begin drawing their vested benefit.

Section 7, entitled "Pension Changes", provides that the bargaining unit will have the opportunity to review any pension ordinance changes, and that no changes can be made that have an adverse affect on employee contributions or benefits. Any such issue in dispute, is subject to negotiation or the grievance/arbitration process.

The above provisions have been summarized rather than quoted verbatim, because while they are very material, they are not in themselves dispositive of the issue, and do not lend themselves directly to the definition of "final average earnings".

The City of Riverview (Pension) Ordinance # 252 itself (Joint Exhibit #2), in most applicable part (Section 30-2, "Definitions", [8]) states: "'Final average earnings' means the average of the highest annual earnings received by a member for <u>any</u> 5 years of service contained within his 10 years of service immediately preceding his retirement. If he has less than 5 years of credited service, his final average earnings shall be the average of his annual earnings received for his total years

of credited service."

[Query: it is unclear but unnecessary to this decision, at least from looking only at the labor agreement and the ordinance,as to how an individual with less than 5 years credited service winds up with a pension at all, other than return of his pension contributions].

Section 30-2 (16), provides for voluntary retirement at any time the member attains 25 years credited service, or age 50 years, whichever occurs last.

Section 30-19, states that normal retirement is age 60, but on recommendation of the City Manager and approval of the Council, actual retirement can be extended for periods up to age 65.

Section 30-20, provides the retirement formula of 2% of final average earnings multiplied by the number (and fraction) of years service not exceeding 25 years, plus 1% of the same, for total credited service in excess of 25 years. There are provisions for death and disability (duty and non- duty connected); and, joint and survivor options, among other things.

An example as to regular pension: if a member's final average earnings were $30,000/yr., and he had 25 years credited service; his retirement pay would be $30,000.x 2%, or $600.x 25= $15,000./yr. If he had 30 yrs., his pension would be $15,000. plus 1% of $30,000., or $300. x the additional 5yrs.; or $1,500.+$15,000. = $16,500./yr. ($30,000.x 55%).

The so- called " multipliers" (2% up to 25 yrs. and 1% thereafter), are important in considering "comparables".

This city-wide Riverview pension plan, is a "contributory, defined benefit plan" (as opposed to a "defined contribution plan"), since the employees contribute 5% of certain portions of their payroll to the fund, and the City based upon certain actuarial assumptions based upon employee ages, etc., must make contributions to the fund which when prudently invested and reinvested over time, are calculated to provide the defined benefit, when the employee is eligible and retires.

V.THE ISSUE: ACT # 312, SECTION 8, directs the Arbitration Panel to make written findings of fact and promulgate a written opinion and order upon the issues presented to it, and the record made; and, as to each economic issue, to adopt the last offer of settlement which, in its opinion, more nearly complies with the applicable factors described in Section 9 (now, M.C.L.A. 423.239).

At the outset of the hearing, the parties stipulated to Mr. Wycoff's articulation of the single issue to be arbitrated in this case; as, "...what shall be included in the definition of final average earnings for determining the retirement benefits under the City ordinance".

The issue, is an "economic" one.

Section 9 of the Act, states (summarizing), that the panel

shall base its findings, opinions and order upon the following factors, as applicable:

(a) Lawful authority of the employer.

(b) Stipulations of the parties.

(c) Interests and welfare of the public, and financial ability of the unit of government to meet those costs.

(d) Comparison of wages, hours and conditions of employment of the employees involved, with other employees performing similar services generally:

(i) In public employment in comparable communities.

(ii) In private employment in comparable communities.

(e) Average costs of goods and services; i.e., COLA.

(f) Overall compensation presently received by the employees, including all benefits, and the continuity and stability of employment.

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

(h) Such other factors not limited to the foregoing, normally or traditionally taken into consideration, in determination of wages, hours and conditions of employment through collective bargaining, mediation, fact-finding, or otherwise, in the public or private sectors.

VI. THE LAST OFFERS OF THE CITY AND THE UNION, are attached

hereto and incorporated herein by reference respectively, as Exhibits "A", and "B".

The City's offer includes in "FAE", only base pay, accumulated vacation time up to 30 days, together with overtime, shift differential, longevity, holiday pay, sick pay (only) while absent from work, together with vacation days taken during the fiscal year, and excludes all other benefits.

The Union's offer, would include in "FAE"; all wages where there has been a deduction taken therefrom, including but not limited to: base wages, overtime, longevity, holidays, shift differential, and vacation taken in the last year of employment,plus, the lump sum payment for up to 24 (accumulated or unused) sick days and the lump sum payment for unused (accumulated) vacation days.

VII. ARGUMENTS OF THE PARTIES.

A. The Union Brief claimed it listed as comparable, 9 of some 15 Downriver communities belonging to a mutual aid pact by virtue of which these cities cooperate in the delivery of fire and police services, excluding only those which have a "MERS" plan (Michigan Employees'[statutory] Retirement System, which specifically excludes inclusion of sick pay as a part of FAE in determining retirement pay; i.e., Flat Rock, Grosse Ile, and Rockwood), plus , according to Union witness Brian Smith , Melvindale was excluded because there is a pending arbitration of

this same issue under its ordinance. Also, according to Mr. Smith, Gibralter was excluded, because Firemen were included in the unit; and, Brownstown was not included, because at the time he prepared the list, he was unaware that it was a member of the mutual aid pact. Although Riverview is not an Act 345 City (where the statute apparently leaves it to employer discretion or negotiation to determine the definition of FAE, and there are certain similarities to the Riverview plan [and although at its inception, Riverview was a MERS plan]); the Act 345 cities of Trenton, Southgate, and Taylor were included. Union Exhibits No's. 5 through 8, list 10 communities including Riverview, as comparable, and argue that 8 of those other than Riverview either have a settlement of sick days rolled into FAE (Trenton, Southgate, Taylor, River Rouge and Ecorse), or, in the alternative, utilize (with the single exception of Woodhaven) a higher (2.5%) multiplier for calculation of pension benefits, or both.

The Union also points out, as indicated in its exhibit #6, that the City of Riverview's rate of pension contribution, is the lowest of its listed comparable communities, and stresses that even if its last offer were adopted and implemented, with whatever increased costs that would be involved, the new rate would remain below the other listed communities.

The Union contrasts this with Employer Exhibit #3, listing some 51 communities within the Greater Detroit Metro Area, which

it challenges as basically non-comparable, and as not properly authenticated, nor accurate.

The Union insists, that its Exhibits # 6 & 7 alone, require that its demand be granted; but in addition, argues that even the City's expert witness (actuary) concedes that the Riverview plan including the Social security offset, is at least 94% funded, and to grant the Union's demand would be no reason for serious economic concern. The plan enjoys a percentage of funding envied by most plans.

Finally, the Union emphasizes, that the City's expert witness also acknowledges, that the current plan is totally unresponsive to the effect of inflation and cost of living increases, pointing to Adam Molnar and George Tear, two of the employees whose concerns precipitated these proceedings, both of whom were involuntarily retired by the City in 1978, receiving approximately $828. and $918. per month respectively, without social security or increases since retirement; amounts inadequate to maintain their previous standard of living in today's economy, and who in fairness and equity, are entitled to relief from the oppressive position taken by the City which should now be alleviated through a favorable decision by the Arbitration Panel.

During Executive Session, the Union designee on the Panel argued all of the above very forcefully, emphasizing Union Exhibits No.s 6 & 7, to the effect that 5 out of its 8 listed

comparables, include 120 to a high of 200 days accumulated sick time in FAE, and the comparables that do not, have a higher benefit multiplier up to 2.5% for all years of service, which the Union would be happy to exchange for its current last offer. The Union here is asking (apart from other, slighter differences), for only 24 days accumulated sick time to be included in FAE. To decide otherwise, would be to encourage abuse of sick time, in lieu of rewarding people who stay on the job to the benefit of the City.

B. The City in its Brief, re-emphasizes its position that inclusion of fringe benefits in FAE would be an improper and unjustified expansion of pension benefits. The City argues that Riverview's present pension benefits are clearly adequate, according to generally accepted pension design theory and practice; that, the vast number of pension systems similar to that of the City of Riverview do not include such fringe benefits; and, to include accumulated sick and vacation time would result in in a windfall or a figure representing FAE which is greater than the earnings of any employee during any given year of his/her active employment.

The City emphasizes the testimony of its expert witness who, among other things, is certified as an enrolled actuary, employed by the accounting firm of Plante & Moran, and who for some 12 years has been involved in the design, implementation, analysis

and administration of employee benefit programs. The expert, Mr. Broesamle, testified that the Riverview pension plan, being a defined benefit plan, is similar in structure to an Act 345 plan but not being limited to only police and fire, is also similar to a "MERS" plan, which also provides for a defined benefit.

He stated that the basic philosophy of any pension system is to allow an employee at retirement, to maintain the same standard of living he enjoyed prior to retirement, based upon certain assumptions; i.e., a pension benefit payment which together with other sources of income or assets such as social security and personal investments or savings, and diminished work and family related expenses and taxes at retirement age, is calculated to maintain this same standard of living.

He testified that another principle in pension plan design, is that the plan must be internally consistent; i.e., individuals covered by the same plan in the same classification with the same period of credited service and the same earnings, should end up with the same retirement benefit.

He indicated that studies show, and actuaries generally agree, that a plan is sufficient according to present standards extant in public or private employment, if the pension benefit together with income from other sources after retirement, replace between 55 and 60% of pre-retirement income. He said that, the Riverview plan, allowing (voluntary) retirement as young as age

50, with 50% of final average earnings without regard to other sources of income, meets this standard. An employee chosing to retire at age 50, obviously must have determined that his pension benefit together with other resources and/or opportunities, makes the retirement option attractive. At age 62, he/she becomes eligible for reduced social security benefits without offset, and of course, depending upon whether he/she has become reemployed with new earnings and possibly even working toward eligibility under a second pension plan, at age 65 is eligible for full social security benefits, without offset.

Using Lt. Robert Queen as an example, Mr. Broesamle testified that if Mr. Queen were to delay his retirement to age 65 (without accumulated vacation or sick days), he would experience replacement of 71% of his pre-retirement income through his pension payment and social security alone, without reliance upon personal savings or investments.

The City, referring to its Exhibit No. 3, emphasizes that the vast majority of pension programs in the Detroit Metro area, regardless of type, exclude accumulated sick or vacation time in calculating final average earnings. The "comprehensive study" shows that those fringe benefits that are earned and paid in the regular course of employment in a given year, are customarily included in calculation of final average earnings; but, those that are not paid but which are accumulated from year to year and

only paid upon retirement, or which are only intended as reimbursement for expenses, are customarily excluded from calculation of final averag earnings.

Of the 51 communities surveyed, 39 (76%) do not provide for inclusion of accumulated sick time. A majority do not include accumulated vacation time. (Actually, Employer's Exhibit No. 3 shows, among other things, that Berkley, pop. 18,637, includes lump sum payments for unused sick leave and vacation; so does East Detroit, pop. 38,280., Gosse Point Woods, pop. 18,886, Oak Park, pop. 31,537, Madison Heights, pop. 35,375, Roseville, pop. 54,311, Trenton, pop. 22,762, Troy, pop. 67,102, Warren, pop. 161,134,and Westland, pop. 84,603; Ecorse, pop. 14,447., includes up to 120 days sick, and 24 days vacation; Taylor, pop. 77,568., includes up to 160 days sick, and unused vacation. Among the remainder, some allow [according to the Exhibit], unused vacation at the employer's discretion; i.e., Bloomfield Hills [MERS], pop. 3,985.; Clawson [MERS], pop. 15,103; Flat Rock [MERS], pop. 6,853; Grosse Ile [MERS] pop. 9,320; Grosse Pointe Park [MERS], pop. 13,639; Huntington Woods [MERS], pop. 6,937; Lathrup Village [MERS], pop. 4,639; Novi [MERS], pop. 22,525; Pleasant Ridge [MERS], pop. 3,217; and Plymouth [MERS], pop. 9,986).

On the other hand, according to the City's survey, a majority of the cities listed do allow the inclusion of overtime pay, longevity pay, plus holiday and vacation time actually taken and paid during the year.

Westland allowed for inclusion of reimbursement allowance for clothing, food, equipment, etc.; and Lincoln Park, pop. 45,105., allows inclusion for food and gun only.

The City refers to page 3 of its Emloyer's Exhibit #3, which it refers to as a "Downriver Survey" (Allen Park, Brownstown Twp., Ecorse, Flat Rock [MERS], Gibralter, Grosse Ile [MERS], Lincoln Park, Melvindale, River Rouge, Southgate, Taylor, Trenton, Woodhaven, and Wyandotte),to the effect that the majority do not include accumulated sick and vacation time in FAE (Ecorse and Taylor include both with limits, Trenton includes both, with Flat Rock, and Grosse Ile including accumulated vacation at "employer's discretion".

The City argues, that even in those communities that do, or have in the past permitted inclusion of accumulated sick or vacation, the trend is to eliminate them from calculation of FAE.

The City also refers to page 4 of its Exhibit #3, comparing cities of similar population (around 16,000) taken from the U.S. Census, but which are mostly not contiguous to Riverview, but which the City claims compel similar conclusions [actually, the exhibit seems to compare cities with populations from 10,902., to 22,525.].

The City attacks the Union's exhibits as to comparables involving those cities in the downriver mutual aid pact; first, because it selectively compared only 9 of 14; and secondly, as

inaccurate in at least 2 instances; i.e., in re the city of Southgate, as being only partially accurate because of having recently eliminated accumulated sick and vacation days (in the last labor agreement); and as totally inaccurate as to the City of Woodhaven, as including sick or vacation days among other things; and as to the retirement formula being 1.75% in lieu of 2% for all years, and for failure to include the employee contribution rate of 3%.

The City points out that the Riverview plan commenced as a MERS plan which by Statute, specifically excludes inclusion of accumulated sick time, and although continued by Charter and Ordinance, was obviously never intended to include such fringes in FAE. Only those items earned and paid in a specific calendar year should be included; such as: overtime, shift differential, vacation and sick time taken during the year, plus longevity and holiday pay; and, such items as gun, education, and food allowance, and other items intended as reimbursement rather than compensation, along with accumulated sick or vacation pay paid only at the time of retirement in the nature of severance pay, should be specifically excluded.

To include accumulated sick and vacation pay distorts the pension plan, and results in 2 areas of injustice: first, people in the same classification with the same earnings and the same number of years of credited service, may receive substantially

different benefits, based only upon fortuitous circumstance. Secondly, it will allow a fortunate employee to balloon his retirement benefit for the rest of his life, predicated on a figure greater than his annual earnings during any year of his active employment; and clearly this is a result never intended within the concept or definition of FAE.

Finally, the City argues that inclusion of accumulated sick and vacation time in FAE cannot be justified in terms of cost. The parties are once again involved in labor negotiations, and to grant such a benefit at the present time would result in a windfall to this police command unit consisting of only 8 persons. The City's expert indicated that to do so, would be equivelant to writing a check to the eight employees for $385,000.

Futhermore, argues the City, no other labor agreement in the city of Riverview provides for the inclusion of accumulated sick or vacation time; and 2 of them specifically exclude such amounts from the calculation of FAE. (The testimony of Mr. Kollman, City Manager, beginning at Vol. #4, p. 139, indicates that although the Firemen have a contract, they are not covered by the City of Riverview retirement program, [Ordinance]. All other employees, except for part-time or consultants are covered. In the Landfill contract, it is provided that base wages only, are included in the calculation of FAE. The Clerical contract includes only base wages, overtime and longevity. The DPW contract is apparently silent on the subject, and this is true also for the 2 police units.).

The City highlights the fact that these employees,

effective 7/01/85 have received a very significant increase in pension benefit, through elimination of the social security offset, at a substantial increase in costs to the City, and that whatever inequities may exist in the current pension program will very likely be eliminated by pension enhancement proposals about to be introduced at the bargaining table, implying that they should be cured by means other than adding to the prevalent and most logical definition of FAE. The City appended to its Brief, certain arbitration and other court cases it feels should be persuasive in this regard.

Needless to say, at Executive Session, the City's designee, also argued all of the above very forcefully. Among other things, he highlighted the significance of the increased pension benefit recently acheived through elimination of the social security offset, stating that among the alleged comparables shown on Union Exhibit #8, all but 3 do not have social security coverage, and pointed out that Woodhaven only just recently went to a 2% benefit formula. It was his opinion that the City's definition more closely fits the comparables, and that the trend has been to eliminate sick pay from FAE. He further emphasized the fact that any time an increased benefit is granted, an unfunded liability is created (there was some argument as to the proper period for amortization of such a liability), and that to grant the union's demand would cause the City's contribution to

go from 4 to 4.8% of total payroll. Furthermore, should it be granted, the City will be faced with similar demands by the City's other bargaining units at the same time there are current proposals on the table to otherwise increase pension benefits. In his opinion, sick pay is in the nature of insurance, and not compensation, and accumulated sick pay and vacation paid at retirement in the nature of severance pay, should not be used to baloon retirement pay out of proportion to the employee's actual earnings, which would increase retirement benefits forever with little relation or value in discouraging abuse of sick time. He also felt that it was unfair for the Union to attempt to compare communities based upon their pension programs alone, without comparing all other wages, hours, conditions and benefits in relation thereto.

V11. DECISION AND ORDER. First, it is specifically ruled that, in accordance with the above-mentioned MERC and court decisions, as of 1978 and thereafter, there is no established policy, past practice, or precedent that would control or compel a specific definition of FAE in this case. Since then, the parties have been at perfect liberty through collective bargaining, to define FAE in any way upon which they could agree. In such cases, it doesn't really matter how the definition was arrived at, whether postured upon logical, legal, political, emotional, or equitable considerations, or some mixture thereof, so long as

the parties are able to agree. Indeed, the exhibits submitted by the parties, show how the process can produce different results, and how given certain personalities, influences, conditions and pressures in a certain time and space, various parties have resolved for themselves, what is "equity" in the general sense, at least for their current contract term.

However, in this case, after much time and anguish, the parties remain unable to agree. It is up to the impartial Chairman of the arbitration panel to agree with one side or the other. In such cases again, the parties have decided that because of whatever pressures they endure, as well as their own perspective as advocates of the people that they represent, it is necessary to "externalize" the decision, through an impartial third person, who presumably, should be more affected by actual fact and merit, and unaffected by political or emotional pressures without the duty of advocacy for one side or the other.

It would therefore seem that in arbitration, logic and reason should take a higher precedence than it sometimes does in the normal bargaining process. On the other hand, the more elusive concept of equity, should not be foresaken in the name of logic, because unfortunately, sometimes the student of logic, finds himself no longer able to reason. Perhaps reason or common sense, imbued with a feeling for the humanities are the proper words. Unfortunately, the social sciences, including

arbitration, are not always susceptible of surgical precision.

There are of course, significant differences in the bargaining process and arbitration of issues in public versus private employment. Apart from different motives and objectives on the part of labor and management in the private sector, it generally being not so much invested with a public interest, there is the powerfull economic weapons of lock-out or strike. Nevertheless, the arbitrator must be careful to see that he does not give one side or the other something that they were unable to acheive at the bargaining table or picket line.

Public employees in the public interest, have been denied the right to strike, and the Chairman is mindfull that he should not deny them equity in addition to or because of their denial of that right.

All of this in mind, the writer will endeavor to make findings of fact, evaluate the factors as required by the Act, and make an impartial decision on the record made:

As to Section 9 (a), it is held that it is within the lawful authority of the employer to adopt the best last offer of either party;

As to Section 9 (b), there are no stipulations of the parties that would weigh in favor of,or require adoption of one offer or the other;

As to Section 9 (c), it is found that the City of Riverview pension plan is sufficiently funded to meet the costs of the

Union's proposed definition of FAE, for the purpose of calculation of retirement pay for the Command Officers of the Riverview Police Department in the unit presently consisting of 8 employees, plus the 3 officers who retired on or about 7/1/78; and although this would create an unfunded liability to be amortized over a number of years, there is nothing in the record that would indicate a concern that the City would be unable to fund it, or to pay these benefits as the employees become eligible and retire without jeapardy as far as this unit is concerned, to the overall fund. As to the longer term interests and welfare of the public as well as the particular governmental unit and its employees (this being, except for firemen, a city-wide plan), and as to the logic or wisdom or longer term impact of adoption of the Union's proposed definition of FAE, this will be discussed in more detail below.

As to Section 9 (d), other than exhibits by both parties submitted as comparables as to pension attributes only, and their own labor agreement in re this single narrow issue, neither party submitted evidence of comparisons of overall wages, hours and conditions of employment of other employees performing similar services or other employees generally:

As to Section 9 (i) and (ii), the proposed comparables introduced by both sides included pension programs in the public sector only.

Without getting into great detail, the City's "Survey of Local Retirement Systems"(pgs. 1 & 2 of Employer's Exhibit No. 3), shows 12 out of 51 communities in the greater Detroit Metropolitan Area as including unused sick and vacation days, with 1 limiting sick pay to 120 days and vacation to 24 days, and another, with up to 160 sick days, and unlimited vacation time. Ten more, include vacation at "employer's discretion"(whatever that means), showing 76.5% who allow no sick or vacation time, and 23.5% who allow both. Therefore, a maximum of 22 of these communities allow some kind of unused vacation; i.e., 56.8% who do, and 43.2% who do not, if one includes those who do so at "employer's discretion".

The Union properly challenged this portion of Employer's Exhibit No. 3 which was prepared at the City Manager's request, by persons unavailable for cross-examination at the hearing, as not properly authenticated and therefore of doubtful weight or accuracy. There are some differences between this exhibit and those of the Union. For example, the City's exhibit shows the City of Southgate as including no allowance for sick or vacation time, while the Union's Exhibit No. 3, shows up to 200 days sick, and unlimited vacation time (it was later agreed that the City of Southgate recently eliminated sick and vacation time).

Actually, the Union did not seriously contest the fact that at least a majority of communities do not include sick and/or

vacation time in their definition of FAE.

As to the City's "Downriver Survey"(p.3, Employer's Exhibit No. 3), this shows 14 of the 15 mutual aid pact cities including Riverview, while Union Exhibits 5 through 7, include 10 of the 15 mutual aid pact cities, including Riverview, which it contends for one reason or another, are more perfectly comparable.

Of the 14 cities listed in its exhibit, the City shows 3 (21.4%), who allow both unused sick and vacation time. One of the 3, is unlimited as to both; another, is limited to 120 sick days, and 24 days vacation; the third, allows up to 160 days sick time, and unlimited vacation. Again, 2 others allow vacation time at "employer's discretion". Including the latter, 21.4% would allow both, and 35.7% would allow some kind of vacation. However, the employer's exhibit does not show any figures as to River Rouge at all, and does not show pension "multipliers".

Per contra, Union Exhibit No. 6 as amended, does show pension multipliers with 5 of the 10 cities listed having a 2.5% multiplier with 2 of them giving a 2.5% multiplier for <u>all years</u>, and Union No. 7, shows River Rouge giving up to 120 days sick time and unlimited vacation. The Union argues, that those 5 (really 3) cities who disallow any sick or vacation time (with the exception of Riverview and Woodhaven), compensate by having a higher pension benefit multiplier.

Actually, there are certain omissions, defects and lack of detail in all of the exhibits. For example, Brian Smith, who prepared the greater part of the Union's exhibits, testified that all MERS cities were excluded from them (Flat Rck, Grosse Isle and Rockwood). Gibralter was excluded , because the plan includes

Firemen. Brownstown was excluded, because he wasn't aware that it was a part of the mutual aid pact. Melvindale was excluded, because it is undergoing an arbitration on the same issue as Riverview. Further, he did not check other cities as to whether they participate in the Social Security system although he "assumed" they all do; nor, did he check whether there is a social security offset in any of the cities he listed. He did not know, that the city of Southgate recently eliminated sick and vacation days from its definition of FAE. During the hearing, it was established that the city of Woodhaven, listed by the Union as allowing up to 180 sick days, in fact allows none. As to Taylor, River Rouge, Ecorse and Trenton, he didn't know whether the sick day allowance is merely credited toward early retirement, or is included lump sum in calculation of FAE. On cross-examination, there were a considerable number of things that he did not know, including but not limited to the voluntary minimum retirement ages, which he only assumed.

The Chairman regards all of the downriver mutual aid pact cities as most naturally comparable, to the exclusion of none in terms of what is the reality in the area. The conclusion is inescapable in spite of the defects in the various exhibits, that a majority of these cities do not include unused sick or vacation time in the definition of FAE.

As to the Act, Section 9 (e), the Chairman finds, that the Riverview pension system, does not include a factor for the inflationary economy for those already retired. There is something of a built-in factor for those still actively employed until they retire, given periodic contract negotiations, assuming periodic wage increases that will roll into final calculation of their FAE, as well as possible specific modifications in the pension program itself, when reality and the bargaining process demands.

As to the Act, Section 9 (f), overall compensation and benefits; as already stated, little evidence was submitted other than the labor agreement and pension comparisons. There were no contentions made as to overall inadequacy, nor are there any issues as to continuity or stability of employment.

As to Section 9 (g), upon information and belief, there have been no changes in any of the foregoing. However, also upon information and belief, the parties are again in contract negotiations, and among the proposals on the bargaining table, is a proposal by the Union to increase the pension benefit multiplier to 2.5%.

As to the Act, Section 9 (h), it is found based primarily upon the testimony of the city's actuary-expert witness, that the City of Riverview's pension system for its command officers is "adequate", based upon current pension design theory and

practice, and in accordance with comparables extant in public employment. This is not to be understood to rule however, that the program ought not not to be enhanced according to the parties agreement, through the bargaining process as to what is more equitable in today's economy, and in the foreseeable future, both for active employees, and those already retired.

Nevertheless, the writer holds, that a change in the definition of FAE as proposed by the Union, is improper for a number of reasons: First, it is held that such a change is not in the public interest, also for a number of reasons; it is not in the best interest of the unit of government involved, nor is it in the best interests of a majority of its employees, present or future in the short or the long run because, to adopt the Union's proposal would not be acceptable pension plan structure or design. The latter is true, because although the proposal may not be totally and economically destructive; if adopted, it would make the plan "internally inconsistent"; i.e.,it would allow some of the more fortunate employees who do not suffer illness, to balloon their pension benefit for the rest of their life, based upon an artificial definition of earnings, higher than actual earnings attained during any active year of their employment.

Taking Lt. Queen as an example, as illustrated by the city's witness, Mr. Broesamle: without the recently granted social security offset, and based upon his earnings of $15.13/hr., base

wage x 2080 (without overtime) = $31,470.40 x 50% = $15,735.20 (according to the Chairman's figures) and according to Mr. Broesamle's figures, his pension benefit would actually be $15,800./yr. With the social security offset, it is $19,050./yr. With his accumulated sick and vacation time, his pension payment would be $21,690./yr.

The result of adopting the Union's proposal would be, that persons who are in the same classification, with the same earnings, and the same number of years credited service, would wind up with substantially different pension benefits.

The latter would, in the opinion of the Chairman, inevitably lead not only to economic detriment to the plan, but also to employee conflict and discontent in the command unit, and also among the other units employed by the City. This opinion is based upon the testimony of the City's expert, as well as the experience of the writer who since the advent of ERISA, has been involved in pension and welfare plan design and modification. The Union's proposal, apart from purely equitable considerations, is at odds with the principles embodied in ERISA, and inherently defective in terms of pension plan design and is embued with the seeds of very poor labor relations.

Were this opinion based upon equity and the ability to pay only, the Union might be entitled to an award. However, because of the nature of its proposal, if it were granted, the result would be deleterious to the unit of government, its employees in general, and to the public interest in the long, if not the short run.

In arriving at this opinion, the writer does not rely upon

other arbitration cases to the same effect, or upon cases such as Gentile v. City of Detroit, 139 Mich. App. 608 (1984) defining "pay" and "compensation" according to the "rule of common understanding", which excludes among other things, unused sick and vacation time from the definition of FAE. Nevertheless, he does believe the case has merit, and that there is a strong public interest in achieving a common definition of FAE, except where the legislature in its wisdom, decides otherwise.

ORDER

Having duly considered the record as a whole, including the testimony of the witnesses, exhibits and arguments of the parties, it is hereby determined that a preponderance of the competent, material and substantial evidence on the record made, supports the position and the last best offer made by the City.

IT IS THEREFORE ORDERED, that the last best offer made by the City is hereby adopted and the last best offer made by the Union is hereby rejected; i.e., the definition of Final Average Earnings or Compensation to be used in calculation of the pension benefit of the command officers of the City of Riverview Police Department (Lieutenants & Sergeants), is as follows:

"FAE for the purpose of computing pension benefits under the retirement ordinance shall include within the computation thereof, base pay, accumulated vacation time up to 30 days, together with overtime, shift differential, longevity, holiday

pay, sick pay while absent from work, and vacation days taken during the fiscal year, and shall exclude all other benefits."

Respectfully Submitted,

Jack G. Burwell

Jack G. Burwell, Chairman
Act # 312 Panel

The other members of the panel are invited to affix their signature, and to indicate whether they concur, or dissent:

For the City:

Ralph E. Lesko, concur

Ralph E. Lesko

For the Union

Charles W. Withers

Dated: 9/11/85

Charles W. Withers

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May 16, 1985

Mr. Jack G. Burwell
Attorney at Law
32620 Wayburn West
Farmington, MI 48018

Re: City of Riverview -and- Fraternal Order of Police Labor Council
Act 312, Case No. D-84-B473

Dear Mr. Burwell:

In accordance with the agreement of the parties at the last arbitration hearing, on behalf of the City of Riverview I hereby submit their LAST BEST OFFER. Their offer is as follows:

> FAE for purposes of computing pension benefits under the retirement ordinance shall include within the computation thereof, base pay, accumulated vacation time up to 30 days, together with overtime, shift differential, longevity, holiday pay, sick pay while absent from work, vacation days taken during the fiscal year, and shall exclude all other fringe benefits.

Respectfully submitted

LOGAN, HUCHLA, WYCOFF & PENTIUK, P.C.

Charles E. Wycoff
OFFICE OF CITY ATTORNEY
CITY OF RIVERVIEW

CEW:sjk

"DECISION EXHIBIT A"

UNION'S LAST OFFER OF SETTLEMENT

FINAL AVERAGE EARNINGS

1. Final Average Earnings means the average of the highest earnings received by a member for any five years of service contained within his ten years of credited service immediately preceding his retirement. If he has less than five years of credited service, his Final Average Earnings shall be the average of his annual earnings received for his total years of service.

2. Annual Earnings shall be defined as including both of the following:

(a) All wages wherein a pension deduction has been taken off including but not limited to base wages, overtime, longevity, holidays, shift differential, and vacation taken in the last year of employment.

(b) The lum sum payment for up to 24 sick days and the lump sum payment received for unused vacation days.

"DECISION EXHIBIT B"