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STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
EMPLOYMENT RELATIONS COMMISSION

In the Matter of Statutory Interest Arbitration between:

CITY OF PONTIAC,

Employer

-and-

PONTIAC FIRE FIGHTERS, LOCAL 376, IAFF,

Union.

MERC Case No. D04 G--1121

INTERIM OPINION AND ORDER OF THE PANEL
RESOLVING THE ISSUE OF DURATION OF CONTRACT.

BACKGROUND.

The parties' last collective bargaining agreement expired June 30, 2004. On March 2, 2007, the Union petitioned for Act 312 arbitration. On March 29, 2007, I was appointed as Chair of an arbitration panel to be convened pursuant to Act 312. In preliminary conference the parties agreed to submit position statements on outstanding issues. On September 21, 2007 the Employer submitted its position statements, including a term of agreement from July 1, 2004, through June 30, 2008. On September 28, 2007, the Union submitted its position statements including a term of agreement from July 1, 2004, through June 30, 2008. The matter rested there. Intended hearing dates in February 2008 were delayed due to the Union's not having received actuarial reports on pension changes. A second set of hearing dates was adjourned due to the health

condition of the Union's attorney. Hearings on the main issues in the case began on August 21, 2008, with five days of hearings held before the end of September 2008.

POSITIONS OF THE PARTIES.

The Union takes the position that a change in the initial position statement is justified by the changed circumstance of the case being delayed. Section 9(g) of Act 312, MCL 423.239(g). Furthermore, Section 9(h) providing for the consideration of other factors normally and traditionally taken into consideration during bargaining and contract formation permits the Panel to take account of the fact that in collective bargaining the parties would be able to modify their positions in response to changed circumstances such as the lengthy lead-up time from the appointment of the arbitrator to the beginning of hearings.

Also under Section 9(h) the Union advances the stability of the parties' long-term bargaining relationship as a factor that should be taken into consideration. "Adoption of the Union's proposal for an agreement through June 2010 would allow the parties perhaps as much as one year under a settled agreement to focus their attention and resources on the other labor issues...." says the Union. [Brief, p.8]

In addition, says the Union, the factor of Section 9(c), the public's interest and welfare; supports its position. Certainty regarding labor costs, argues the Union, is a positive benefit to both the City in budgeting for future years and to the public at large.

The Employer says the parties are bound by the stipulation impliedly reached when the Union and the Employer both submitted position statements that envisioned

an identical contract duration, from July 1, 2004, through June 30, 2008. The Employer argues that the Union should not be allowed to withdraw from the implied stipulation because the delay in the conduct of these proceedings was not the cause of the long time elapse observed in this case. "The Panel will note that the Union did not file its Petition for Act 312 Arbitration until March 2, 2007, some two and one-half years after the contract expired," says the Employer. [Brief, p. 4] In other words, the primary reason for the lapse of time between the end of the last collective bargaining agreement and the present posture of the case (where additional hearings are still scheduled) is the two-and-a-half year delay in the filing of the Act 312 petition.

Even when the hearings in this matter were originally scheduled for February 2008, the parties must have contemplated that the final Award would not be issued until near or after the new agreement's impliedly stipulated termination date of June 30, 2008. Thus, says the Employer, there really is no change of circumstance such as to justify a longer term of contract.

The Employer presents a review of the City of Pontiac's recent financial history; together with a summary of the current revenue prospects. The premise of these summaries is that the Employer's recurring deficits and limited ability to make an impact on these deficits means that the Panel should not predict what the future of the economy will hold for the City of Pontiac, or its ability to pay any labor cost increases. Thus, a shorter term of contract is appropriate, in the City's view, than one which extends a year-and-a half into the future. Argues the City, the factor of Section 9(c) indicates that the financial ability of the City to meet the costs of the labor agreement should be considered in the context of:

the extent to which the City's financial ability is known and knowable during the proposed contract term. It is undisputed that the City has suffered through operating deficits in the past years and currently faces great uncertainty with respect to its financial condition in the next few years. The Panel should not take it upon itself to guess the outcome of the greatest economic crisis to face the nation in the last 75 years or how that outcome will impact a community such as Pontiac which was struggling mightily before the crises began.
[Brief, p.12]

Furthermore, says the Employer, Section 9(d) indicates that the status of other bargaining units of the City should be considered. Most of the other unit's contracts are for a three year period and none goes beyond June 30, 2008.

Along the same lines, under Section 9(d) of the statute the Panel must consider the evidence of other comparable communities. The evidence shows that the fire contracts of the eight comparable communities all expire on or before June 30, 2008.

The Employer reiterates its main concern, under the heading of Section 9(h), other traditional factors, in arguing that the Panel should not guess at the financial condition of the Employer in two years' time.

DISCUSSION.

On November 3, 2008, the Union submitted an amended statement of position on a number of subjects, including term of agreement. The amended proposal was for a term of agreement from July 1, 2004, through June 30, 2010.

The case law would appear to support the ability of either party to an Act 312 proceeding to amend its position statements during the course of proceedings. Interpreting the language of Section 8 of Act 312, the Michigan Court of Appeals has held that, "At or before the conclusion of the hearing" the parties may introduce any econom-

ic issues and have them considered by the panel, notwithstanding the prior, announced procedures adopted by a Panel to identify those issues in a timely manner before the end of the hearing. *POAM v. Ottawa County Sheriff (on reconsideration)*, 264 Mich App 133, 694 NW2d 757 (2004), *lv. to appeal denied*, 474 Mich 1081. If a party can introduce an economic issue, late in the game, it follows that a party can make a change in an already announced position statement.

Thus, while I agree with the Employer that the sequence of presentations of the issues in dispute argues for an impliedly stipulated term of contract (2004-08), the prevailing case law indicates that either party is free to withdraw from such an implicit stipulation (if there is such a thing), and to re-state its position. It was not until the parties agreed to submit the issue of term of contract for early determination by the Panel and the Panel specified a date in November 2008 for the submission of Last Best Offers that those offers became final. Under the terms of Section 8, the Panel must decide between those Last Best Offers.

The Employer proposes a 4-year contract, ending June 30, 2008. The Union proposes a 6 year contract ending June 30, 2010, approximately 19 months from the time of this writing and approximately 14 months from April 2009, a realistically projected termination of this Act 312 proceeding.

The Employer's fear that there will not be any money to pay proposed and awarded increases in pay and benefits to firefighters is a realistic worry, given the circumstances outlined in the Employer's presentation on ability to pay. However, we are

not today awarding any specific increases or changes in terms of employment, except to determine when the new contract should end.

It seems clear that a contract term which ends before the date of the projected termination of the Act 312 proceedings has some problems. One is that it cannot stabilize labor relations for any time period in the future. Two is that it would effectively require the parties to re-engage in negotiations for a new "new contract" for the term starting July 1, 2008, and would not give the parties any "breathing room" in which to live under the presently-at-issue contract. Third, it would require the parties to be in nearly continuous negotiations and/or Act 312 hearings for a lengthy period of time, with the attendant personnel costs, outside counsel costs, and other related Act 312 costs, all to the detriment of regular work.

A contract term of 6 years appears to be a long time, on the surface of things. However, in the context of this arbitration proceeding, which began with the Union's petition and with my appointment in March 2007 (and which covers a contract period of almost 3 years preceding that date), the Union's proposed term of contract is not an excessively long period of time. The focus should be on the period of time for which the new contract stabilizes labor relations for the parties. By the projected termination of this Act 312 proceeding, there will be only 14 months remaining in a contract of 6-years' duration. The budget for the City of Pontiac will already have been finalized for 2009-10. Yet, adjustments will necessarily have to be made in that budget for any improvements in the firefighters' terms of employment.

One of the factors that an Act 312 panel is bound to consider is the "Interests and welfare of the public, including the unit of government's ability to pay." MCL 423.239(c). Certainly, the interests and welfare of the public in the City of Pontiac would be better served by a contract which has some existence "going forward" than one which is already a thing of the past.

I give credence to the City's statement of position in regards to Section 9(d) both with regard to the internal bargaining units and the external comparable communities. It appears that one of the internal bargaining units has a contract for a period longer than 3 years and none of the external comparable communities have expiration dates later than June 30, 2008. However, this evidence pursuant to Section 9(d) must be weighed in the balance with other factors.

An Act 312 panel is bound to give consideration to "other factors" normally and traditionally observed in collective bargaining, fact finding and interest arbitration. Section 9(h). One such factor is the stability of labor relations. The traditional factor of preserving or improving the stability of labor relations is a goal to which all collective bargaining aspires. It must be said that in the specific circumstances of this case, the longer term contract, as compared to the shorter term contract, is one that will improve the stability of labor relations. It would not do the people of the City of Pontiac or the firefighters any good to have a contract that determines wages and benefits for a period already past, without attempting to predict, as all Act 312 panels do, the appropriate conditions of employment for the very near future. Such a result would introduce uncertainty where some certainty is possible and desirable.

Another Section 9(h) factor is the cost and diversion of human effort into contract formation, the “transaction costs” of Act 312. It is not only imaginable, it is likely under the City’s scenario of a 4-year contract –except for the brief hiatus the parties will have while the arbitrator writes the final opinion and orders—that the parties would be adjusting to the new contract and starting to bargain for another “new” new contract in April or May of 2009, before the ink is dry on this new collective bargaining contract. There needs to be a period under the contract here-to-be-formed when the parties adjust to its new realities, and live in labor harmony, before making new demands (by either party) in collective bargaining. The continuous diversion of efforts to bargaining is itself a major cost to the efficiency of the City, and to the morale of the firefighters. Although a dollar amount cannot be placed on this factor, it is a palpable, serious, and significant factor, and a traditional factor which I notice under Section 9(h) of the statute.

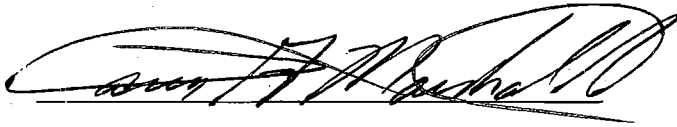
Based on the above factors and the evidence presented, I conclude, and a majority of the Act 312 Panel will conclude, that the Union’s suggested term of contract, one that expires on June 30, 2010, is appropriate and warranted.

AWARD

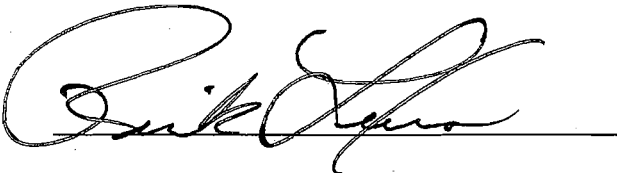
The Panel accepts the Union's Last Best Offer on duration of contract.



Benjamin A. Kerner, Panel Chair



Larry Marshall, Employer Delegate *DISSENT*



Rick Luxon, Union Delegate

Dated: December 2, 2008