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In the Matter of Statutory Interest Arbitration between:

WAYNE COUNTY AIRPORT AUTHORITY,

Respondent-Employer,

-and-

LOCAL 502, SEIU,

Petitioner (patrol officers)

-and-

AFSCME, LOCAL 3317,

Petitioner (command officers)

_____/

Case No. D04 A-0109 (Patrol officers)
Case No. D04 A-~~0123~~ (Command officers) 0110

Appearances:

For the Respondent-Employer	Kenneth M. Gonko The Danielson Group, P.C.
For the Petitioners	Jamil Akhtar Akhtar & Ebel

DECISION AND ORDER ON

RESPONDENT's MOTION TO STRIKE

These Act 312 proceedings have been under way since February 2007. On August 23, 2007, the Respondent-Employer filed a Motion to Strike and a Supplemental Motion to Strike in which is moves to strike 5 proposals of the

Petitioners from consideration by the Act 312 Panels. The first proposal which Respondent moves to strike is contained in U. Exh. 35, Article 1.03 (Recognition Article), which section says in full:

> It is hereby agreed between the parties that all of the employees in the Bargaining Unit are subject to the hazards of police work and perform duties of a critical service nature. It is further agreed that, since the continued and uninterrupted performance of these duties is necessary for the preservation and promotion of the Public Safety, Order and Welfare, all of the employees in this Bargaining Unit are subject to, and entitled to invoke the provisions of 1969 PA 312 for the resolution of disputes.

The proposal of AFSCME, Local 3317 is contained at U. Exh. 56 and is identical to the SEIU proposal above-quoted.

The second proposal is contained in AFSCME, Local 3317's July 31, 2007 proposals, Article 39.03A (Economic Improvements). It says in full as follows:

> The police departments to be used in setting rates of compensation shall include base wages and longevity if applicable. The law enforcement agencies used as comparables during negotiations on the 2000-2004 collective bargaining agreement shall continue to be used. Said agencies are:
>
> 1. Detroit Police Department
> 2. Michigan State Police
> 3. Oakland County Sheriff
> 4. Livonia Police Department
> 5. Dearborn Police Department
> 6. Taylor Police Department
> 7. Wayne County Sheriffs Department.

A parallel provision on the subject of comparability is to be found in the July 31, 2007 submissions of SEIU, Local 502.

The third proposal is contained at Article 37 of the AFSCME, Local 3317 proposals (submitted on July 31, 2007). It is a comprehensive over-haul of the Workers Compensation rights and duties of the Employer and injured employees and in relevant part states as follows:

> The employee shall file a workers' compensation petition with the State of Michigan, in accordance with the Workers' Compensation Administrative Rules. Once the employee receives notice of a pretrial conference, *the employee may elect* to continue to have the workers' compensation agency process his or her claim or have this or her claim dismissed and present said claim to Wayne County (sic) in accordance with the provisions set forth below. [emphases added]
> [What follows are excerpts from the statutory section on arbitrators' handling of workers' compensation claims, MCL 418.864]

The proposal, though presented in the materials for Local 3317, was intended to "be presented jointly between Local 502 and Local 3317." [Attorney's cover letter of July 31, 2007]

The fourth proposal, designated as Article 20.3 in the Local 502, SEIU's July 31, 2007 materials proposed that if a dispute arises between the employee and the Authority "as to whether or not the employee is disabled under the Workers' Disability Compensation Act or under the Long Term Disability Program, then the employee shall be examined by a doctor on the certified list for National IME Network." The proposal says further that, "Whenever the Employer requires an employee to be examined by a physician for Workers' compensation purposes, the employee shall be sent to [a specific clinic] for ini-

tial evaluation." The same provision was submitted as part of the AFSCME, Local 3317 materials.

In its supplemental Motion and brief addressing the Union's proposals in its Representation Articles (Article 16 of the Local 502 contract and Article 10 of the AFSMCE Local 3317 contract), the Employer argues that reimbursement to Wayne County for time spent by its employees on Employer bargaining unit matters is a permissive subject of bargaining. And, conversely, the implied requirement in Local 502's Representation Article that Local Union officers employed by the Employer should have leave time granted to represent employees of the Wayne County Sheriff's Department is a permissive subject of bargaining. Neither of these proposals should be entertained as part of the mandatory subjects of bargaining considered in these Act 312 proceedings, says the Employer.

EMPLOYER POSITIONS.

The Employer objects to each of these proposals on the grounds that they are permissive subjects of bargaining. Under the structure of PERA and Act 312, argues the Employer, permissive subjects of bargaining are not properly presented to an Act 312 panel, for the reason that the Panel is empowered to decide only issues that are mandatory subjects of bargaining.

The Recognition Article language, according to the Employer, inserts as a matter of contractual obligation the necessity to treat employees as 312- eligible those who may or may not be eligible for Act 312 (such as police dispatchers) under accepted lawful standards. This is contrary to prevailing law, including a recent MERC decision involving these parties. In Wayne County Airport Authority, Case Nos. 05 H-187 and C05 H-196 (4/17/2007), the Commission ruled:

> The National Labor Relations Board has held that interest arbitration is a permissive subject of bargaining, Sheet Metal Workers Local 38, 231 NLRB 669, 702 (1977) and that bargaining to impasse on retaining an interest arbitration clause is an unfair labor practice. Permissive subjects of bargaining can be changed unilaterally without bargaining. Detroit Police Officers Ass'n. v. Detroit, 391 Mich 44 (1974); West Ottawa Ed. Ass'n. v. West Ottawa Pub. Sch. Bd. Of Ed., 126 Mich App 306 (1983). Here Respondent proposed to delete a contract provision, the absence of which would have no impact upon statutory eligibility under Act 312. *We hold that Act 312 eligibility, like interest arbitration, is a non-mandatory subject of bargaining.* We also hold that it is not an unfair labor practice to propose, as did the Respondent, that language addressing Act 312 eligibility be removed from a collective bargaining agreement.[Emphases added.]

The Employer takes the further position that the language of the "comparability clause" runs squarely up against the authority of the Act 312 arbitration panel to determine, in each case which may in the future be presented, what are the appropriate comparable communities. In addition, says the Employer, the "comparability clause" bears only a remote relationship to the matter of wages, hours, or other terms and conditions of employment. It is an intermediary tool, used to determine wages, but does not in itself impact wages directly.

The Employer takes the further position that the language of the Workers Compensation article attempts to insert the Union in a matter which is traditionally, and by statute, a matter handled between the injured employee and the Employer. The Employer also says that the provision allowing the injured employee the election of whether to have his or her case decided by an arbitrator is an infringement of the Employer's statutory rights, which include the right to participate in the arbitration of Workers' Compensation matters on a voluntary basis. [MCL 418.864(12) "Arbitration under this section shall be voluntary."]

Next, the Employer argues that the proposal for a designated group of IME doctors also takes away from the Employer ability, under statute, to designate a physician for diagnosis and treatment during the first 10 days of an employee's disability. Incidentally, it may also take away from the employee's ability to select a treating doctor after the first 10 days. MCL 418.315(1).

Finally, the Employer has filed a supplemental Motion and brief addressing the Union's proposals in its Representation Articles (Article 16 of the Local 502 contract and Article 10 of the AFSCME Local 3317 contract) whereby under some circumstances the Employer would be required to reimburse Wayne County for activities of its employee, specifically someone who is a Local Union President, when such person is engaged in representing mem-

bers of the Local 3317 bargaining unit [Article 10.04(A)(6)]. [1] This proposal would require the Employer to reimburse a stranger to the contract for activities involving the representation of its employees. This proposal is a permissive subject of bargaining, says the Employer.

In addition, the Employer objects to the portion of Local 502's Representation proposal in which it is implied that an Employer employee, if elected President of the local union, could be called upon to process grievances and otherwise assist members of the Local Union who are Wayne County Sheriff employees, on release time.[2] This proposal is also a permissive subject of bargaining, according to the Employer.

The Employer cites case law to the effect that grievance processing is a normal activity for union officers and the provision of release time for such purposes is a mandatory subject of bargaining. *Central Michigan University*, 1994 MERC Lab Op 527. However this and parallel federal case law is limited to situations in which the officers are employees of the Employer. *See, e.g., American Shipbuilding Co.*, 226 NLRB 788, 94 LRRM 1422 (1976).

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[1] "If the president of the union is an employee of Wayne County, the WCAA shall reimburse the County for the actual time the Local Union president is required to spend in the representation of members of the union employed at the Airport Police Department."

[2] "If the Local Union President is elected from the Airport, the Local Union president shall be released from his or her regular work assignments without loss of time, pay or other benefits ...when requested to perform (l) Processing members' grievances and differences concerning the intent and application of the provisions of the Agreement. ...." Article 7.05(A)(1)

UNIONS' POSITIONS.

Unions have filed a responsive brief in which they argue that the Michigan Employment Relations Commission has exclusive jurisdiction over the matter of unfair labor practices. The Unions say that the determination of mandatory vs. permissive subject of bargaining must inherently be made when one party insists to impasse on a condition, which may or may not be mandatory, and must be made in order to determine if there has been a violation of MCL 423.210(l)(e) of 423.210 (3)(c) [refusal to bargain sections of PERA]. *See Ophelia Profitt v. Bd. Of Ed., Wayne Westland Comm. Schools*, 140 Mich App 499 (1985) and *Adriana Ranta v. Eaton Rapids Public Schools. Bd. Of Ed.*, 271 Mich App 261, 721 NW2d 806 (2006). The Unions conclude, "Local 3317 and Local 502 take the position that the panel lacks jurisdiction to hear an unfair labor practice charge as the MERC has never issued a published decision stating a statutory basis which would allow an Act 312 panel to decide unfair labor practice issues." [Brief, p. 13]

Next, with respect to the inclusion of language in the recognition clause defining all employees of this Employer as subject to the hazards of police work and entitled to Act 312 procedures to resolve their contract disputes, the Unions argue that the Panel has already determined "that the members of Local 502

and Local 3317 are Act 312 eligible" [Decision of May 9, 2007]. [3] Thus the contract cannot take away what has already been determined to be a statutory right. The Unions cite *Parchment Sch. District*, 2000 MERC Lab Op 110 (April 28, 2000) in which the Commission ruled that once the Legislature has spoken regarding changes in conditions of employment for school employees, those changes are not subject to bargaining by the parties, and "that an attempt to bargain away or modify said changes in the law constitutes an unfair labor practice." [Brief, p. 15].

Next, with regard to the "comparability" clause, the Unions argue that all the Unions are doing "is to include in the collective bargaining agreement what the panel has already decided" [Decision of May 11, 2007] namely including the City of Taylor and the Wayne County Sheriff's Department as applicable comparables, for the purposes of this Act 312 proceeding. The Unions concede that as to the status of comparables for the next contract, if the parties are unable to agree as to the make-up of the comparables, they will bargain the matter anew and the Act 312 panel will ultimately decide the issue.

Next, with regard to the inclusion of an arbitration clause in the Workers Compensation article of the contract, the Unions argue that in *Wayne County*

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[3] The decision of May 9, 2007, did not go to the members of the Unions, but rather to designated classifications of employees. The Panel concluded, "Thus, employees in the classifications of police officer, corporal, detective police sergeant and police lieutenant appear by operation of 2002 PA 90 to have rights to have their contract disputes resolved by the procedures of Act 312."

Airport Authority, 19 MPER 13 (January 31, 2006), the Commission indicated that:

> transferring employees shall not be placed in a worse position by reason of the transfer for a period of one year after the approval date, or any longer period as may be required in connection with the assumption of any applicable collective bargaining agreement with respect to wages, *workers' compensation*, pensions, seniority, sick leave, vacation or health and welfare insurance or any other term and condition of employment that a transferring employee may have under a collective bargaining agreement that the employee received as an employee of the local government... [emphases added]

The reference to workers' compensation must mean, say the Unions, that the elements of workers' compensation are within the rubric of mandatory subject of bargaining. Certainly, a proposal to "speed up the workers' compensation process by making it mandatory rather than permissive that an employee can elect to have his workers' compensation claim heard by an arbitrator" [Brief, p. 18] can only be regarded as a mandatory subject of bargaining, say the Unions.

Finally, with regard to changes proposed in the Representation article of the two contracts (Article 16 of the Local 502 contract and Article 10 of the AFSCME Local 3317 contract) the Union argues that these proposed changes are mandatory subjects of bargaining and that such status has already been decided by the MERC. In Case No. UC04 C-009 (Dec. 20, 2004), the Commission clarified the bargaining units, which had formerly extended across the lines of Employers-Wayne County and Wayne County Airport Authority by "Severing the airport employees from the overall bargaining unit represented by Service

Employees International Union, Local 502" (and similarly severing the bargaining unit represented by AFSCME, Local 3317). According to the Unions, this determination implies that the subject of paid time for one local union's representing the members of the other bargaining unit (its sister local) has been decided by the Commission and that the decision recognizes the mandatory nature of the subject matter.

ANALYSIS AND CONCLUSIONS.

As to the Act 312 Panel's authority to make these decisions, the case law seems clear that the matter of unfair labor practices is vested exclusively in the Commission. However, as recognized in the *City of Detroit*, 1990 MERC Lab Op 561 at 565 (December 5, 1990):

> Our jurisdiction to determine what is a mandatory subject of bargaining is well established. We also have jurisdiction to decide whether employees are eligible for Act 312 arbitration...[cite] However, the jurisdiction of an Act 312 arbitration panel to make finding on these issues in the absence of or concurrent with our rulings has now been firmly established. We see no reason to grant the Employer's request that we direct the Act 312 panel's action in this case.

Thus, it is apparent that the structure of the interlocking PERA and Act 312 contemplates that there may be circumstances wherein an Act 312 Panel must make its own determination on whether a given proposal falls within the rubric of mandatory subjects of bargaining. The Panel must make such a determination in circumstances such as we face here, where one party indicates that a

subject matter should not be heard or decided as part of the "expeditious and binding procedure" provided in Act 312. [MCL 423.231]. To make such a determination is not to decide the issue of an unfair labor practice. Rather, it is to determine our own jurisdiction to hear and decide an issue. We decide that we have jurisdiction to hear and decide whether proposals that are asserted to be permissive subjects of bargaining are indeed non-mandatory subjects of bargaining, and, if so, to strike them from further consideration by the Panel.

The Employer's Motion requires a determination of whether each of the clauses at issue concerns a mandatory subject of bargaining. Only mandatory subjects of bargaining may be bargained to impasse; thus, only mandatory subjects of bargaining may be presented to an Act 312 Panel. As stated by the Michigan Supreme Court in *Local 1277, Metro. Council 23, AFSCME v. City of Center Line,* 414 Mich 642, 654 (1982), "Given the fact that Act 312 complements PERA and that under §15 of PERA the duty to bargain only extends to mandatory subjects, we conclude that the arbitration panel can only compel agreement as to mandatory subjects."

First, as to the clause dealing with the eligibility of employees for Act 312 procedures, the MERC has determined "that Act 312 eligibility, like interest arbitration, is a non-mandatory subject of bargaining." Case Nos. 05 H-187 and C05 H-196 (4/17/2007). Not only has MERC so held, but it has so held in a very

recent case involving these parties. It would seem incumbent on the Panel to recognize that the matter is *res judicata*. We conclude that the clause dealing with the eligibility of employees for Act 312 procedures is permissive, not mandatory in nature.

Second, as to the "comparability clause" the Panel is convinced that the subject matter of this proposal, besides being within the authority of a panel to determine at the appropriate time, is an intermediary tool, used to determine wages as part of the whole calculus of Act 312 procedures, but does not in itself impact wages directly or significantly. As such, we conclude that the subject matter of the "comparability clause" is a permissive, not a mandatory subject of bargaining.

As to the third clause, the effort to govern the employee's relationship with the Employer in Workers' Compensation matters, the statute by which arbitrators are recognized as a part of the decision-making process says:

> Arbitration under this section shall be voluntary.
> MCL 418.864 (12)

It must be concluded, in the absence of qualifying language, that this statutory provision means that Workers' Compensation arbitration must be bilaterally voluntary, chosen by the Employer as well as by the employee. In fact, the language of the Unions' Workers' Compensation proposal eclipses the Employer's right to choose to participate with an arbitrator as the decision-maker. Although this does not smack of the invidious type of illegality that has been found in the

race discrimination illegality cases, the proposal nevertheless has the same dynamics: It abridges a statutory right of the Employer. Thus, because it appears to be illegal, for interference with the Employer's rights under another, co-equal statute, the Panel concludes that the Workers' Compensation proposal of the Unions is illegal[4] in the particular of providing for arbitration of claims, and is not a mandatory subject of bargaining.

As to the fourth issue, in regard to the designated group of IME doctors, the same observations as apply to the Workers' Compensation arbitration provision, just cited, apply here. The Workers' Compensation statute makes provision for a balancing act between Employer selection of a treating doctor during the first ten days of disability and the employee's selection, after the first 10 days. MCL 418.315. Under the Unions' proposal, "*Whenever* the employer requires an employee to be examined by a physician for Workers' Compensation purposes, the employee shall be sent to [a specific clinic] for the initial evaluation." [emphases added] This provision takes away from the Employer's statutory authority to determine who is an appropriate examining physician in the first instance. The proposal abridges a statutory right of the Employer. Thus, because it appears to be illegal, for interference with the Employer's rights under another, co-equal statute, the Panel concludes that the Unions'

[4] A finding of illegality does not mean that the parties may not discuss the matter. Rather, where there is a finding that the Legislature intended to make certain subjects "prohibited... a school district can never be found to have committed an unfair labor practice by refusing to bargain over them, and these matters can never become part of a collective bargaining agreement." *Parchment Sch. District*, 2000 MERC Lab Op 110 at 115-16.

proposal for a designated group of IME doctors is illegal, and not a mandatory subject of bargaining.

Fifth, in regard to the Representation Articles, the Panel is not convinced that the Commission has decided the matter in Case No. UC04 C-009. The touchstone for assessing whether the inclusion or recognition of rights of non-employees in the collective bargaining agreement is a mandatory subject of bargaining is *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass*, 404 US 157, 179; 78 LRRM 2974, 2982 (1971) in which the Supreme Court held:

> in each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the "terms and conditions" of their employment....
> a matter that "vitally affects" relations between an employer and employees is a mandatory subject of bargaining, whereas a matter that bears a "speculative and insubstantial" impact on the relations between an employer and employees is a permissive subject of bargaining.

Here, paragraph 10.04(A)(6) of the AFSCME Local 3317 proposal requires reimbursement to a non-signatory to the contract for representational assistance provided by a stranger to the contract to members of the bargaining unit. Such reimbursement may facilitate such a person's attending to the needs of members of the bargaining unit; however, it is not a direct concern of the Employer in relation to the working conditions of its employees. It thus has only a speculative impact on labor relations between this Employer and its employees. In the framework of *Pittsburgh Plate Glass*, *supra*, the Representation

proposal of Local 3317 [specifically paragraph 10.04(A)(6)] should be deemed permissive.

The Representation proposal of Local 502 raises similar concerns. The record in this case makes clear that Local 502 would interpret Article 7.05(A)(1) as affording its Local Union president, assuming he or she was from the Airport, the right to assist grievance handling of members of Local 502 at Wayne County Sheriff's Department. While the language of the proposal does not say that, but instead refers to "Processing members' grievances" the record indicates that the Union intends that the Local Union President would have authority, under this proposal not only to assist Wayne County Sheriff Department employees in the processing of their grievances, but also to claim release time with pay for such activities.

The difficulty with such an interpretation of the Representation Article is that it requires this Employer to do something for the Union that relates to representational rights of other employees in another bargaining unit. Thus, the involvement of the Employer in the matter is nil, except to pay for release time. This is what is meant by "speculative and insubstantial" impact on the relations between this Employer and the employees. Thus, we find the provision of Local 502 above referenced to be a permissive subject of bargaining, unless the phrasing of the article is clarified to indicate that it is, "Processing of *bargaining unit members'* grievances" that is at stake.

ORDER

The Unions shall refrain from presenting as part of their final offers or else wise in these proceedings their proposals in regard to eligibility for Act 312 procedures; comparability; Workers' Compensation (arbitration), use of a specified panel of doctors for IMEs; and Local 3317's Representation Article 10.04(A)(6) and Local 502's Representation Article 7.05(A).

The Panel finds these proposals to be non-mandatory subjects of bargaining for the reasons recited above; and will decline to take any further action in reference to these proposals.

Benjamin A. Kerner, Panel Chair, both panels.

I concur in / ~~dissent from~~ the above Order.
Joseph Martinico, Employer Delegate, both panels.

~~I concur~~ in / dissent from the above Order.
Hugh Macdonald, Unions' Delegate, both panels.

Dated: September 19, 2007