STATE OF MICHIGAN
BUREAU OF EMPLOYMENT RELATIONS
CONSUMER AND INDUSTRY SERVICES

IN THE MATTER OF THE 312
ARBITRATION BETWEEN:

CITY OF MADISON HEIGHTS (Employer)
(City)

-and-

POLICE OFFICERS LABOR COUNCIL/PATROL
UNIT (Union)

_____/

MERC Case #D08 E-0796

FINDINGS OF FACT, OPINION AND ORDER

APPEARANCES:

FOR THE EMPLOYER:	Howard L. Shifman, P.C. By: Howard L. Shifman 370 E. Maple Road Suite 200 Birmingham, Michigan 48009
FOR THE UNION:	Police Officers Labor Council By: Thomas R. Zulch 667 E. Big Beaver, Suite 207 Troy, Michigan 48083-1413
CHAIRMAN OF THE ARBITRATION PANEL:	Mario Chiesa
UNION DELEGATE:	Thomas R. Zulch
EMPLOYER DELEGATE:	Howard L. Shifman

INTRODUCTION

The Petition in this matter was received by MERC on June 18, 2009. It listed close to two dozen issues. By a communication dated September 25, 2009, I was informed by MERC that I had been selected to act as the impartial arbitrator and chairman of the

arbitration panel charged with the resolution of this dispute. A pre-arbitration meeting was held on December 3, 2009, with a written summary being issued shortly thereafter.

In an attempt to settle the dispute, a number of pre-arbitration meetings were conducted and ultimately every issue, save one, was resolved.

The outstanding issue revolved around the contract language dealing with the Civil Service Commission and specifically Step 5 of Section 2 of Article VI - Grievance Procedure, which reads as follows:

> STEP 5.
>
> In the event that the grievance is still unresolved after the response from the City Manager, either party may submit the grievance within seven (7) calendar days to final and binding arbitration to be conducted by the American Arbitration Association in accordance with the rules of the American Arbitration Association. The parties shall share equally the arbitrator's fee and those costs imposed by the American Arbitration Association (AAA). An employee who has been disciplined and/or discharged may, at the employee's option within seven calendar days, elect to submit a grievance concerning said discharge and/or discipline, to the Civil Service Commission established under the provisions of Act 78 of 1935 as amended. An employee who selects the provisions of Act 78 shall be barred from the arbitration procedures set forth herein.

Last Offers of Settlement were exchanged between the parties through my office on March 24, 2011. Ultimately the parties filed briefs which were exchanged through my office on July 29, 2011. These Findings of Fact, Opinion and Order are being issued as soon as practical consistent with a thorough analysis of the record

which contained a number of exhibits and literally hundreds of pages of documentation.

PARTIES' POSITIONS

The issue in question was characterized as non-economic. The Union's Last Offer of Settlement is to maintain the current language, and hence, the status quo. The Employer's Last Offer of Settlement reads as follows:

> **Article VI - Grievance Procedure:**
>
> **Modify Step 5 to provide as follows -**
>
> In the event that the grievance is still unresolved after the response from the City Manager, either party may submit the grievance, within fourteen (14) calendar days to final and binding arbitration to be conducted by the American Arbitration Association in accordance with the rules of the American Arbitration Association. The parties shall share equally the arbitrator's fee and those costs imposed by the American Arbitration Association (AAA). An employee who has been disciplined, may, at the employee's option within seven calendar days, elect to submit a grievance concerning said discipline, to the Civil Service Commission established under the provisions of Act 78 of 1935 as amended.
>
> The appeal will only be based upon oral and/or written arguments and with submissions with no testimony. The hearing will last no more than two (2) hours unless stipulated by both sides. The decision of the Commission will not be final, is non-binding and may not be appealed through the Courts. Should either the City or Union not agree with the decision, either party may appeal that decision to arbitration within fourteen (14) calendar days after notification of the Commission's Decision. Should either side appeal to arbitration, the arbitration hearing will be de novo and the original disciplinary decision will remain in effect subject to the Arbitrator's decision. Should neither the Union or the City appeal the Commission decision to arbitration, their decision will be final and binding on the City, Union and the Employee.

Whichever Last Offer of Settlement is adopted will appear in the parties' July 1, 2008 through June 30, 2011 Collective Bargaining Agreement.

DISCUSSION AND FINDINGS

In analyzing and resolving this non-economic issue, the panel is required to base its Findings of Fact, Opinion and Order upon all of the applicable Section 9 factors. Section 9 of the Act reads as follows:

> **423.239 Findings and orders; factors considered.**
>
> Sec. 9.
>
> Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:
>
> (a) The lawful authority of the employer.
>
> (b) Stipulations of the parties.
>
> (c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
>
> (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
>
> (i) In public employment in comparable communities.
>
> (ii) In private employment in comparable communities.

> (e) The average consumer prices for goods and services, commonly known as the cost of living.
>
> (f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
>
> (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
>
> (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

The main focus of the Employer's evidence and arguments relates to two prior termination disputes which were presented and adjudicated by the Act 78 Civil Service Commission. It argues that what transpired in relation to these two cases supports a finding that its proposal should be adopted.

One of the cases involves a prior officer named Richard Craze. In a nutshell, on March 20, 2007 Craze was at a residence of an alleged drug dealer where a search warrant was executed. During the process Craze found a Home Depot credit or refund card which he failed to place into evidence, but instead, pocketed the card. He converted the card for his own use, utilizing the card at Home Depot on three subsequent occasions. His transactions were recorded on video tape and during interviews he initially misrepresented or, as the Employer suggests, lied about events. Ultimately he admitted to the events.

The dispute was presented to the Act 78 Civil Service Commission which, in a two-to-one decision, imposed a suspension and reinstated Craze. Following an appeal to Circuit Court, a remand, further appeal, and finally a hearing in the Court of Appeals, it was determined that the Civil Service Commission erred in its decision-making process and Officer Craze's termination was upheld.

The second case relied upon by the Employer involved Officer Kulwicki. For some reason Kulwicki tasered a prisoner who was in the back seat of a Hazel Park police cruiser, in custody, and unarmed. Kulwicki pled to a misdemeanor. Apparently he was already under suspension for a misdemeanor conviction of driving while under the influence. In this case the Civil Service Commission did uphold the termination of Kulwicki's employment, albeit on a two-to-one basis.

There are several hundred pages of documents related to these two cases which I have reviewed and analyzed. However, there is no need to reiterate the contents of the record in any detail.

In relation to both of these cases the Employer argues that the Act 78 process went astray, causing the expenditure of substantial amounts of money, time and effort to eventually reach the correct result. Thus, it seeks to substitute its proposal for the current contract language.

The evidence establishes, and the Union points out, that since 2006 there has been less than a dozen Civil Service cases, with only six of them involving police officers and four involving

command. The Union also submitted documentation establishing that those external and internal bargaining units which are covered by Act 78 do not have any limitations outlined in their respective Collective Bargaining Agreements. Testimony offered by Local Union President David Koehler suggests that the Union is concerned about the cost of arbitration and regardless of what has transpired in the past, the members of the bargaining unit do not want a change in the language.

The Trenton Police Officers' Agreement for the period July 1, 2008 through June 30, 2011 provides in Article XXIV - Grievance Procedure, inter alia, that the Association has a choice between arbitration or the Michigan Employment Relations Commission.

The 7/1/06 through 6/30/10 Collective Bargaining Agreement covering police officers in the City of Romulus provides in Article XIV - Grievance Procedure, inter alia, that either party may submit a grievance to arbitration in accordance with the rules of the FMCS or the American Arbitration Association.

The Act 312 award in the City of Lincoln Park for the period ending on June 30, 2011 makes no mention of Act 78.

The Eastpointe Collective Bargaining Agreement covering police officers for the period 7/1/2006 through 6/30/2010 provides, inter alia, in Article XIII - Grievance Procedure, that an employee may file a written appeal to the Civil Service Commission or the Union may appeal to arbitration.

Article V - Grievance and Arbitration of the July 1, 2008 through June 30, 2012 Collective Bargaining Agreement between the

City of Allen Park and the Allen Park Police Officers Association provides the choice to an employee or the union to resolve a dispute through Act 78 or through arbitration.

The July 1, 2008 through June 30, 2011 Collective Bargaining Agreement between the City of Southgate and Police Officers Labor Council, Southgate Police Officers Association, provides in Article XX - Grievance Arbitration, inter alia, for arbitration, but also indicates that resorting to "any other forum" shall act as withdrawing the pending grievance. Arguably this language recognizes an officer's ability to utilize Act 78.

The record also contained Collective Bargaining Agreements between the City of Madison Heights and other organized employees. For instance, the Madison Heights Command Officers Association's contract for the period July 1, 2000 through June 30, 2008 provides a choice between arbitration and the Act 78 Civil Service Commission.

The Collective Bargaining Agreement involving the Department Heads Union, AFSCME Council 25, for the period July 1, 2008 through June 30, 2011, provides, inter alia, in Article XIV - Grievance Procedure, that members of the unit have a choice between arbitration and Act 78 proceedings.

The July 1, 2002 through June 30, 2008 Firefighters' Collective Bargaining Agreement provides, inter alia, in Article XIV - Grievance Procedure, a choice between arbitration and Act 78 proceedings.

The Collective Bargaining Agreement relating to the bargaining unit of Technical, Professional and Officeworkers Association of Michigan (TPOAM) for the period July 1, 2008 to June 30, 2011, provides, inter alia, that the last step of the Grievance Procedure would be binding arbitration. There is no access to Act 78. An April 27, 2009 tentative agreement between the foregoing parties displays a contract term of three years, but does not address the issue of arbitration versus Act 78.

The July 1, 2008 through June 30, 2011 Collective Bargaining Agreement involving the Supervisors and Assistants Union, being Local 1917 of AFSCME, provides in Article XIV - Grievance Procedure, for arbitration as the last step in the Grievance Procedure. There is no mention of access to Act 78.

The Collective Bargaining Agreement involving the Technical, Professional and Officeworkers Association of Michigan, being the TPOAM, DPS, for the period July 1, 2005 to June 30, 2008, provides for arbitration and no access to Act 78. That agreement was subject to a tentative agreement dated December 9, 2008 which extended the original contract for three years. There was no mention of access to Act 78. Additionally, there is another tentative agreement contained in the record which is unsigned and deals with the period July 1, 2010 through June 30, 2011. It contains no reference to allowing access to Act 78.

It is recognized that the Employer has expressed extreme frustration with the Act 78 procedure, and specifically the Civil Service Commission's actions in relation to the Craze and the

Kulwicki cases. The documentation in the record, which includes volumes of transcript, tends to establish, assuming no one, including the court reporter, works for free, that considerable cost was incurred in pursuing the Craze procedure, as well as the lesser impact of the Kulwicki case.

The Employer disagreed with the Civil Service Commission's two-one decision reinstating Craze and engaged in intense efforts to reverse the Civil Service Commission's decision, and after a number of legal gymnastics, was ultimately successful. The City's point, however, is that the time and expense, as well as the performance of the Civil Service Commission, supports the proposition that arbitration is more preferable and thus its Last Offer of Settlement should be adopted.

The Union makes the point that while Craze may have been a bad decision, arbitrators make bad decisions which could lead to the same type, if not identical, legal proceedings as existed in the Craze dispute. Frankly, the Union is correct. While the courts have found that in the Craze decision the Civil Service Commission acted inappropriately, there are numerous cases wherein the courts have found that arbitrators have acted inappropriately.

I recognize that the procedural hoops and the costs involved with Act 78 proceedings may be more intense. Nevertheless, I am not convinced those considerations support eliminating the binding effect of an Act 78 decision and the right to use that procedure.

The Union has pointed out, and its testimony supports, the proposition that Act 78 proceedings are much less expensive for the Union because there is no cost associated with securing a hearing before the Civil Service Commission. This is unlike having to engage in and pay an arbitrator to preside over a dispute and ultimately render a decision.

The record also establishes that while there were almost a dozen disputes placed before the Civil Service Commission from 2006 to the present time, it appears that Craze and Kulwicki were the only ones that led the City to take the position that it has in this dispute. Perhaps in the past, as suggested by the record, proceedings before the Act 78 Civil Service Commission were less turbulent than in the Craze and Kulwicki disputes.

As pointed out in the recital of the Section 9 factors, what exists in comparable communities is often an important guideline in determining an appropriate resolution. As can be seen from the evidence, it appears that half of the comparable communities provide access to an Act 78 Civil Service Commission while half do not. So essentially it is a 50-50 split.

However, in some 312 disputes what exists in Collective Bargaining Agreements for the so-called internal comparables is often more probative. That's the case in the current dispute. Those bargaining unit members, which are identified with public safety, being the Command Officers, as well as the Firefighters, have access to Act 78. The Department Heads can also present their grievance to the Act 78 Civil Service Commission. There are three

internal units that do not have access to Act 78, so thus, we again have a 50-50 split.

It is significant to note, as I said, that the Public Safety components in the City all have access to Act 78. Certainly the current collective bargaining unit falls within that general public safety category, and it too currently provides access to Act 78.

The attributes of arbitration are very well known. The parties are in a position to secure an arbitrator with extensive experience in the type of dispute they will be litigating. The rules may be a little different and it is generally accepted that arbitration is a very acceptable procedure to resolve disputes. Indeed, it has been stated that arbitration of disputes is state and federal public policy.

Given the totality of the record, the panel is convinced that at this point the evidence does not support adoption of the Employer's Last Offer of Settlement. Even if it is assumed that the decision in the Craze case was incorrect, and thus initiated what has been established by the record to be an extensive and arguably very expensive excursion in order to reverse the Civil Service Commission ruling, it is also recognized, as submitted by the Union, that arbitrators can make mistakes. So the fact that the ruling was overturn, doesn't necessarily condemn the utilization of Act 78. Furthermore, it is noted that the Collective Bargaining Agreement which the parties have entered into by agreement has, by its terms, terminated on June 30, 2011. This being the case, the current issue regarding the elimination, or at

least serious contraction of the use of Act 78, can be thrown back into the hopper of issues to be negotiated and dealt with during collective bargaining.

After a careful analysis of the available evidence, including that regarding both external and internal comparable communities, costs and other record evidence; the panel is compelled to find that the status quo should continue and thus the Union's Last Offer of Settlement should be adopted.

AWARD

The panel orders that the status quo continue and thus the Union's Last Offer of Settlement is adopted.

12-7-11
Mario Chiesa, Chairman

/S/
Thomas Zulch, Union Delegate

Dissenting
Howard Shifman, Employer Delegate

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After a careful analysis of the available evidence, including that regarding both external and internal comparable communities, costs and other record evidence, the panel is compelled to find that the status quo should continue and thus the Union's Last Offer of Settlement should be adopted.

AWARD

The panel orders that the status quo continue and thus the Union's Last Offer of Settlement is adopted.

12-7-11
Mario Chiesa, Chairman

11-28-2011
Thomas Zulch, Union Delegate

/s/
Howard Shifman, Employer Delegate