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STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND
ECONOMIC GROWTH
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MICHIGAN COUNCIL 25, AFSCME,

AFL-CIO LOCAL 1087.00,

Petitioner - Labor Organization

MERC Case No: L11 B-8008

- and -

Raymond J. Buratto
Fact Finder

SAGINAW COUNTY ROAD COMMISSION

Respondent - Public Employer

Report and Recommendations of the Fact Finder

Appearances:

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This case results from the Labor Organization's Petition for Fact Finding dated September 13, 2011. On September 29, 2011 the Employer

answered the Petition and represented that mediation sessions were held on July 12, August 10, August 30 and September 13, all 2011. By Commission letter dated February 27, 2012, the undersigned was appointed Fact Finder. A pre-hearing scheduling conference call was held on April 4, 2012 and a hearing on the matter was conducted May 24 at the Saginaw, Michigan headquarters of the Employer. Nine unresolved issues were presented at Fact Finding:

Issue # 1 – Article 18 – Layoff and Recall
Issue # 2 – Article 29 – Health Insurance
Issue # 3 – Article 30 – Dental Insurance
Issue # 4 – Article 32 – Life Insurance
Issue # 5 – Article 46 – Sick Leave
Issue # 6 – Article 47 – Wages
Issue # 7 – Article 47 – Payroll
Issue # 8 – Article 50 – Pension
Issue # 9 – Article 52 – Duration and Termination

The parties presented witnesses and introduced copious exhibits in support of their positions on several of the issues. Briefs were received by me on or before the agreed-upon July 20 deadline, and exchanged between the parties. Neither party filed a Reply Brief.

During the telephonic scheduling conference the parties agreed to exchange comparables prior to the hearing. The SCRC offered road commissions in Jackson and Livingston counties, justifying these choices by their (1) geographic proximity to Saginaw County, (2) receipt of Michigan

Transportation Fund ("MTF") revenues in amounts similar to Saginaw County, (3) similar number of bargaining unit members, and (4) responsibilities for maintenance of a comparable number of road miles.

The Union's comparable road commissions were those of Bay, Monroe and St. Clair counties. These comparables were offered for their similarities to Saginaw County in (1) land area, (2) population, (3) gross MTF revenues, (4) MTF revenues per employee, and (5) road miles maintained.

As noted by each party, analysis of comparables is one of the many criteria in the broad approach used by interest arbitration panels established in Section 9 of Act 312. Multiple other factors were considered and afforded appropriate consideration in the following recommendations.

Issue # 1

Article 18 – Layoff and Recall

FINDINGS OF FACT: Section 1 of Article 18 of the contract expired June 30, 2011 defined a "layoff" as a "reduction of the workforce due to a lack of funds". The article further directs that "layoffs", when necessary, begin with temporary and probationary employees first, followed by all other employees in reverse seniority order.

The Employer proposes that layoffs be defined as "a reduction in the workforce" and that when necessary they be done in accordance with

seniority within classification, and allow employees without further training to bump into another position in the same or lesser pay grade. Based on special skills or need, maintenance, shop, office, technical, engineering, and accounting employees would be barred from bumping into one another's classifications, qualifications notwithstanding.

The Union objects to changing the language, arguing that most of the current Article 18 remains unchanged from at least the 1988-1992 Agreement. Further, according to the Union, there is no need at this time to justify this total overhaul of the existing language. To support its position, the Union offered the testimony of truck driver Mr. Raul Sausedo, number three (3) on the current seniority list, who testified of his own lengthy layoff as a truck driver in the decade of the '80's. Important in his testimony was the uncontroverted statement that in spite of approximately one-half of the workforce being cut without respect to classification, no essential road commission services were impacted. Neither party offered testimony regarding the ability to perform skilled work, such as equipment maintenance, nor was there any evidence that such job functions could not have been performed by those still employed following the layoff. While acknowledging he had no basic understanding of effecting a layoff under the present language of Article 18, nor of how the Employer's proposed changes

would work, Mr. Sausedo did agree with Mr. Kluck's question that the skill levels of a mechanic and a truck driver were "appreciably" different.

The Employer's position was supported by the testimony of Brian Wendling, the SCRC's Managing Director. Mr. Wendling testified to personal knowledge of the layoff language of the 2007-2011 contract and of the current Employer proposal and its application. Wendling stated there were no layoffs planned but that needed efficiencies supported the Employer's proposed definition of layoff and procedural changes. He stated

> "...in the event of a layoff in the future, we would want to be careful that we weren't just simply starting at the bottom of the seniority list and working our way up and losing key positions or positions of certain knowledge and expertise and not being able to properly operate." (TR 51-52, lines 24-4)

Wendling also testified that adopting the Employer's proposed language changes would remove the subjectivity inherent in deciding the employee's qualifications in the event of a layoff and bump decision, stating "you're putting the burden on somebody to make a decision of who has what qualifications when, why, how, and to what degree." (TR58, 10-12)

The Union maintains through Sausedo's testimony and in its Brief, that the Employer's proposed language changes are not needed and should be rejected. It questions Wendling's professed concern over the potential loss of key positions, noting that the SCRC offered no evidence to show that

personnel currently employed in the mechanic classification were so far down the seniority roster as to be in peril of being either among the first to be laid off, or that their unique skill set was key to the performance of available work.

In response to questions from Mr. Bailey on cross-examination Wendling suggested the current language with respect to bumping in the event of a layoff "creates a lot of room for argument ... the Employer is going to make a decision on qualifications and somebody's going to disagree with that." (TR 59, 15-17) Mr. Bailey got Wendling to agree that that already happens over job bidding and that it is an issue with which the Employer already has experience. The Union asserts that while having the responsibility for making these decisions is an unenviable position to be in, "such is the responsibility of the management of any organization." (Union Brief, page 18)

According to the Employer all comparables, except Monroe, effectuate layoffs by seniority within classification, and nearly all of them define a layoff as a reduction in the number of employees or workforce.

As to the issue of super-seniority for both the Union Steward and Local President, the Employer's proposal would retain seniority for the Local President only, while the Union asserts that "all of the comparables offered

provide super-seniority for union Stewards". The Union does not address super-seniority for the Local President.

RECOMMENDATION: Based on the record as a whole, it is recommended that the parties adopt the Article 18 language proposed by the Employer as relates to changing the definition of a layoff and also by effectuating them by seniority within classification. Clearly this is not a situation where new language is needed to resolve problems created by past language, but instead a change designed to avoid potential future problems.

Since neither party offered justification for their positions offering super-seniority to either the Local President (the Employer) or to the Union Steward, I offer no Recommendation other than that they resolve the issue in view of the overall impact of these Recommendations, with the best interests of the bargaining unit members and application of the labor agreement foremost in their minds.

Issue # 2

Article 29 – Health Insurance

FINDINGS OF FACT: The Employer has proposed moving the bargaining unit employees from a $10/$20 prescription co-pay to a plan with a $10/$40 prescription co-pay, a $30 office visit and $10 chiropractic and $100 emergency visit co-pays. Management employees have been on this plan for

two years and the Employer asserts the savings are significant. A chart on page 10 of the Employer's Post Hearing Brief illustrates the monthly savings as $152.01 per single employee; $342.03 for the two-person rate; and $425.65 for the family rate. The Employer's proposal would increase deductibles and co-pays from $500/$1000 to $1000/$1500 with "first dollar" reimbursement above these amounts. Employees would also make contributions toward premium costs of 5% and 10% plus any amount above the legislatively mandated "hard caps" of $5,500.00 per single employee, $11,000.00 per 2 –person coverage and $15,000.00 per family coverage. The SCRC cites other road commissions as having already collectively bargained increases in co-insurances and co-pays in response to the requirements of PA 152, and contends that others will follow as collective bargaining agreements expire and renewals are bargained. These changes bring the plan more in line with the savings created by the management plan.

In the interest of reducing future costs, the Commission has also proposed to terminate health insurance coverage at retirement but only for those employees hired on or after December 27, 2011. The Commission offers examples of comparables which have either terminated the provision of health insurance for recent hires upon retirement, or reduced the

percentage of premium borne by the employer. Managing Director Wendling was unable to state with certainty the amount of the post-retirement benefit cost attributable to management versus union retirees, nor what portions of that cost to attribute to actives versus retirees generally.

The Union asserts the bargaining unit had accepted most of the changes proposed, but "steadfastly refused to agree to the elimination of health care at retirement for new hires", basing this refusal on an unwillingness to "divide" the bargaining unit by making new hires lesser citizens subject to cessation of their employer-provided health insurance coverage at retirement. The Union witness Mr. Ferguson also expressed the concern that this SCRC proposal was perhaps the opening for later proposals designed to take away health insurance and other benefits currently afforded employees hired prior to December 27, 2011. With arguments presented contrary to virtually every aspect of the SCRC's health insurance proposal, it is difficult to acknowledge that the bargaining unit has "accepted most of the changes proposed".

The Union's Post Hearing Brief states that the Employer has selected the default "hard caps" approach allowed by statute to comply with the aggregate expense across all three classifications of coverage (single, 2-person, and family), while Wendling's testimony leaves open the possibility

that, indeed, the "hard caps" apply separately within each category, single, 2-person, and family, such that some amount saved by contribution or benefit changes among one or more of the above classifications might be re-allocated to cover the expenses incurred by another group of employees. Thus, to paraphrase Wendling's testimony, some of the employee groups would be in compliance and others might not be. Uncontroverted is the statutory language which speaks to the "total amount" spent for employee healthcare and, as cited by the Union in its Brief, the statutory provision allowing a unit of government to allocate the payment of health care among its employees and elected officials as it sees fit.

The Union offers Bay and Monroe counties as its comparables providing post-retirement health care. The current Bay County contract affords post-retirement health care, with co-insurances to employees hired on or after January 1, 2007 up to fifteen years of service, after which the benefit is fully funded by the employer. Monroe County provides a pre-Medicare retirement health care benefit beginning at age 55 with 30 years service to the road commission and 30 years credited service with the county retirement system. St. Clair also provides a post-retirement health care benefit with a minimum of twenty-years' service without date of hire as

an eligibility criterion. The Monroe contract expired during the pendency of this matter and the St. Clair contract expires in 2014.

RECOMMENDATION: The current benefit level and "legacy" costs would be unsustainable by a unit of government where, as here, funding levels continue to decline. We could argue that the health care plan that is currently in place for the bargaining unit is acceptable under PA 152, however the reality is that health care costs are likely to continue to rise at a rate exceeding the medical care component of the nation's consumer price index. While the state treasurer may assure continued compliance with PA 152 by annually adjusting the maximum rate payable by the unit of government, what assurance is there that the unit of government will maintain the ability to pay? Moreover, the anecdotal testimony does not persuade me that the portion of the provision eliminating post-retirement health care for employees hired after December 27, 2011 will drive a wedge within the unit.

The bargaining unit it well-served by their representative's submissions of the comparables still providing post-retirement health insurance. However, as stakeholder sentiments change the collective bargaining scene evolves in both the public and private sectors with significant changes impacting employees and retirees. Health care benefits

are generally not regarded as a vested right and may be revoked at any time. The parties cannot continue "business as usual" and expect the health care crisis to fix itself.

While there is merit in, and sympathy for, the Union's position, I am convinced that the Employer's proposal better reflects the economic reality for this public sector employer. It is designed to continue to provide the maximum affordable benefit for the maximum number of participants. Therefore I recommend the Employer's proposal be adopted.

Issue # 3

Article 30 - Dental Insurance

FINDINGS OF FACT: The SCRC proposal is to eliminate post-retirement dental insurance only for those employees hired on or after December 27, 2011. No other changes were proposed by the Employer. Among the cited comparables, the Employer notes the road commissions in Jackson and St. Clair counties do not offer post-retirement dental benefits to their employees. Employer exhibit 45 also notes dental insurance is provided to retirees in Bay, Monroe and Livingston counties. The Jackson and St. Clair county contracts were negotiated since April, 2011. No evidence was presented to establish whether those contracts ever provided dental

insurance for retirees or whether that was a recent change. The Monroe County contract was effective beginning November, 2008 with a March, 2012 expiration date. The Employers' Brief notes that the new Monroe County contract has employees responsible for the amounts over the "hard caps" effective April 1, 2012. Agreements in both Bay and Livingston counties were negotiated in 2011. No information was offered as to when those agreements first provided for post-retirement dental benefits, nor regarding any attempts to eliminate that benefit during the most recent negotiations.

The Union contends denying post-retirement dental benefits to employees hired after December 27, 2011 creates a "division" in the bargaining unit, yet offers nothing but the assertions of their witness Mr. Ferguson in this regard. While I found his testimony to be wholly credible, more is necessary to sustain the Union's contention that the Employer's proposal would create a "division within the bargaining unit". It also points out that the Employer failed to state the amount of savings to be gained by its provision. However, it is axiomatic that the less to be paid for a good or service relative to what is currently being paid results in a savings, regardless of the amount. Are we then expected to decide how much is too much or how much is too little?

RECOMMENDATION: Based on the record as a whole and the anticipated savings, I recommend adoption of the Employer's proposal to eliminate the post-retirement dental benefit.

Issue # 4

Article 32 – Life Insurance

FINDINGS OF FACT: The Employer's proposal is to eliminate the payment of a double indemnity benefit upon the death of an active employee, and to totally eliminate a post-retirement life insurance benefit, for all future retirees, regardless of date of hire. This proposal would not impact current retirees. Testimony from the Union's own witness Mr. Ferguson (TR 20,23) is that the Union had originally proposed the exact language now relied upon by the Employer, agreed to it in exchange for other concessions from the Employer, and later reneged. The bargaining notes contained in the exhibit, particularly the Tentative Agreement provision dated 8-30-11 and the hand-written and noted "Read 11:25 am 11.9.11" and "10.25.11 Read 12:25 p.m, all contained in Employer Exhibit 12, "Tentative Agreements" support this assertion. The Union questioned why the Employer offered no evidence as to monies saved by altering the benefit, while offering no explanation as to its stance in bargaining, nor refuting the Employer's assertions referenced

above. Its "counteroffer" is to reject the Employer's proposal and maintain the current contract language.

RECOMMENDATION: Based on the undisputed evidence that the bargaining unit originally proposed this language in exchange for other items conceded by the Employer, I recommend the change to a $15,000.00 life insurance policy for active employees only, without double-indemnity and without coverage for any bargaining unit member retiring after the effective date of the agreement.

Issue #5

Article 46 Sick Leave

FINDINGS OF FACT: The current contract allows for the accumulation of eight (8) hours of sick leave for each completed month of service, up to a maximum of five hundred twenty (520) hours with all unused days in excess of 520 hours to be paid out annually at 100%, with leave taken charged out in two hour increments. The Employer proposes to remove the 520 hour cap, allow no accumulation while an employee is on an authorized unpaid leave, and to allow the sick leave to be used in one hour increments. According to the SCRC, the majority of bargaining unit employees have fewer than 520 hours in their sick bank and therefore would be unaffected

by the proposal. Moreover the employer contends lifting the cap would encourage employees to build up a reasonable amount of banked time to use in the event it is needed. However based on the Employer's past experience, abuse of sick time has been an ongoing problem.

AFSCME presents a long history of contracts providing some form of sick leave, including a two-tiered version from 1988 to 1992 whereby unused time was paid out at retirement at 65% of the pay rate. Beginning with the 2004-2007 agreement a proposal from the SCRC resulted in what is substantially the language of the recently expired contract; the maximum accumulation of 520 hours, an annual payout of 100% of the applicable wage for hours exceeding 520, and a retirement payout at 65% of all hours.

The SCRC offered no evidence projecting its cost savings. Brian Wendling, the SCRC's witness on this item maintained there was no difference between the payout of 100% of the excess over 520 hours for an active employee versus that of 65% of the banked hours at retirement. At Transcript page 80 he stated they've "done the studies" which found no difference between the two payouts, yet offered no documentation to support his assertion. Other than their cross-examination which did not

discredit Mr. Wendling, AFSCME presented no other evidence which would question the employer's assertions.

Neither party put any flesh on the bones of the suggestion that the program provides an incentive, or disincentive, to come to work. Instead the Fact Finder is left with conjecture and supposition from both parties.

RECOMMENDATION: Based on the record as a whole, and the absence of a compelling argument which might justify the language change, I recommend the parties continue the language of the recently expired contract. Abuses of the sick leave article may be addressed by application of other contractual provisions.

Issue # 6

Article 47 – Wages

FINDINGS OF FACT: The parties agree on the wage rates; at issue are the effective dates of those changes. The SCRC proposes no increases on December 27 of 2011 and 2012 followed by a 1% increase on December 27, 2013 and again on December 27, 2014, contending that it is attempting to time the wage increases at a time proximate to proposed increases in employee contributions to health insurance premiums and these dates

certain result in better budget planning. AFSCME requests the changes be effective upon signing, and then upon each contract anniversary date thereafter.

RECOMMENDATION: Consistent with the recommendation regarding contract duration, I recommend adoption of the Employer's request to implement wage rate changes beginning with December 27, 2011. Thus the parties have one wage freeze behind them and one more to go before the wage increases become effective.

Issue # 7

Article 47 – Wages

FINDINGS OF FACT: The SCRC has proposed changing the current weekly payroll provision to a bi-weekly, fully electronic payroll system requiring all bargaining unit employees to provide banking information to the Employer. The Employer asserts that all of the comparables utilize a bi-weekly payroll but the parties agree that only the Monroe County Road Commission requires direct deposit. Direct deposit is optional for bargaining unit employees of road commissions in Bay, Jackson, Livingston and St. Clair counties. All of the non-union employees of the SCRC are on direct deposit.

RECOMMENDATION: There is significant support among the comparables for adoption of the Employer's request to move to a bi-weekly payroll. No evidence to the contrary was presented to the Fact Finder. However, many reasons exist to oppose the requirement of an account for direct deposit, not the least of which are the many privacy concerns heard among employees. Therefore, I recommend the adoption of a bi-weekly payroll and that direct deposit remain limited to voluntary participation.

ISSUE #8

Article 50 - Pension

FINDINGS OF FACT: With respect only to those employees hired on or after December 27, 2011, the Employer proposes a change to MERS C-1 Plan with FAC 5, which calculates pensions solely on the employee's base rate. The Union is concerned that these different pension plans will divide the bargaining unit but offered no evidence in this regard other than conjecture. The Employer offers Bay, Monroe and Livingston as examples of road commissions making changes in retirement calculations, contributions, and benefits, individually or in combination, all in an effort to scale back retirement benefits among bargaining unit employees, and predicated on an employee's date of hire. The changes in Jackson County apply to anyone

retiring after December 31, 2008, regardless of date of hire. Neither party offered evidence regarding the amount of savings, nor did the Union refute the Employer's contention that savings would be recognized.

RECOMMENDATION: While new employees may have a sense of disparate treatment arising from this split pension benefit, no other compelling reason is offered to reject the Employer's proposal. Over time and through attrition, any perceived inequities among the bargaining unit will be alleviated. This change, though unpopular, is not an onerous burden on either current or future employees. It will allow the Employer to reduce its post-retirement benefit costs gradually over time and for this and the above-stated reasons, I recommend the adoption of the Employer's proposal.

Issue # 9

Article 51 – Duration

FINDINGS OF FACT: The most recent collective bargaining agreement expired June 30, 2011. While they have agreed on four years as being the optimum duration of their collective bargaining agreement, the Union proposes a termination date four years from the signing of a new agreement while the Employer proposes a shorter duration, to a date certain, December 26, 2015. The Employer supports its request by Mr. Wendling's testimony that the County seeks a contract which is no more expensive at its end than

at its beginning, and states in its Post-Hearing Brief that "[f]rom this perspective, the duration of the contract as proposed by the Employer is very important for its budget purposes." (Employer Brief, p. 20)

Neither party has persuasively argued the merits of its position. Each of their motives should be questioned. While it may be true that "the duration of the contract as proposed by the Employer is very important for its budget purposes", the Employer did not introduce testimony or evidence which supported its point. To this Fact Finder, it is not enough to state a desired end result without offering the reasons why this result is preferable to the result proposed by the opposing party. Why is it necessary for the Employer's "budget purposes" to have a contract ending on December 26, 2015? I find no evidence in the record for this contract expiration date. It is not four years from the expiration of the prior agreement, not four years from the Employer's Final Offer of Settlement, nor is it four years from the date of the Petition for Fact Finding. At best it is a date following the offer and rejection of a tentative agreement. Short of inferring that this "certain" expiration date affords the Employer the cut-off date for calculating the expenses of this contract, there is no other justification. Surely the Employer could calculate the expenses necessary to support a new collective bargaining agreement which expired on any number of dates sometime four

years hence. If the contract duration is based on four-years from December 27, 2011, the Employer stands to gain at least $27,000 per month by implementing the health care modifications.

However the Union has proffered no evidence which supports its position with certainty. While the Union has submitted testimony and argued in its Post Hearing Brief that "there is no clear trend among the comparables," the twenty (20) years of bargaining history between these parties ending in 2007 shows 2 contracts of 5 years duration, one of four (4) years, and one of three (3) years. From the chart on page 17 of the Union's Brief there appears to be an unaccounted-for two year span from 1992 to 1994. The Union asserts the comparables have a varied history of contract duration. Neither party submitted evidence relating to when these comparables' contracts were entered into, that is to say, whether they were immediately upon expiration of the prior agreement retroactive to a date following the expiration of the prior agreement, or some other date which suited the bargainers and their constituencies. Nor do we know with any degree of certainty whether the duration of prior agreements between the parties to this Fact Finding was based on 3,4, or 5 years from a retroactive date, (as the Employer herein proposes) or whether the duration was some

number of years from a date contingent upon an act such as ratification or signing.

With the exception of the start date of future wage increases coming earlier under the Employer's proposal, most of the other proposed contract changes represent economic gain to the Employer, making it evident why the Employer advocates a four-year agreement, retroactive to a date fully eight months before the date of this Report and Recommendation and five months before the hearing in this matter. Likewise, the Union's proposal makes the effective date contingent upon contract signing, and any number of dilatory tactics may obstruct arriving at that moment

RECOMMENDATION: I recommend adoption of the Employer's proposed contract duration, retroactive to December 27, 2011. It is the better of the two proposed solutions for it is less subject to additional obstacles which might further delay a resolution. In addition, it places the parties nearly one year into a new agreement and thus closer to returning to the bargaining table to deal with issues each might find uncomfortable.

In conclusion, I expressly retain jurisdiction of any issues in the Petition or the joint submission of the parties not specifically addressed by this Report and Recommendations.

Raymond J. Buratto
Fact Finder

Issued at Rochester, Michigan, September 17, 2012