

2436

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
ACT 312 ARBITRATION

PORTAGE POLICE OFFICERS
ASSOCIATION

Petitioner,

-and-

MERC Case No. L11-K2047

CITY OF PORTAGE,

Respondent

Panel of Arbitrators

Thomas L. Gravelle, Chairperson
Kevin M. McCarthy, City Delegate
Brett M. Naumcheff, PPOA Delegate

KEVIN M. McCARTHY, ESQ.

BRETT M. NAUMCHEFF, ESQ.

For the City

For the PPOA

OPINION AND AWARD

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INTRODUCTION

The hearing of this matter was held in Portage, Michigan on August 8, 28 and 29, 2012.

The parties have stipulated that three of the issues before the Panel are non-economic. Resolution of non-economic issues is not limited to the parties' last offers of settlement ("LBOs").

The remaining outstanding issues are economic. Under the law, the Panel is required to accept the LBO made by one or the other party for each economic issue. In deciding which LBO to accept, the Panel has considered the applicable factors set forth in Section 9 of Act 312 PA 1969, as amended. Section 9 as amended stresses ability to pay:

(1) If the parties have no collective bargaining agreement or the parties have an agreement and 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:

(a) The financial ability of the unit of government to pay. All of the following shall apply to the arbitration panel's determination of the ability of the unit of government to pay:

- (i) The financial impact on the community of any award made by the arbitration panel.
- (ii) The interests and welfare of the public.
- (iii) All liabilities, whether or not they appear on the balance sheet of the unit of government.
- (iv) Any law of this state or any directive issued under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531, that places limitations on a unit of government's expenditures or revenue collection.

- (b) The lawful authority of the employer.
 - (c) Stipulations of the parties.
 - (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 in both of the following:
 - (i) Public employment in comparable communities.
 - (ii) Private employment in comparable communities.
 - (e) Comparison of the wages, hours, and conditions of employment of other employees of the unit of government outside of the bargaining unit in question.
 - (f) The average consumer prices for goods and services, commonly known as the cost of living.
 - (g) 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.
 - (h) Changes in any of the foregoing circumstances while the arbitration proceedings are pending.
 - (i) Other factors that are normally or traditionally taken in 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.
- (2) The arbitration panel shall give the financial ability of the unit of government to pay the most significance, if the determination is supported by competent, material, and substantial evidence.

STIPULATIONS

The parties have stipulated that the new collective bargaining agreement ("CBA") will consist of the following:

(a) The new CBA will consist of the parties' previous CBA as modified by the parties' agreements and by this Award.

(b) The parties' agreed-upon comparable communities are the following 13 local units of government:

Battle Creek	Bay City
Burton	East Lansing
Holland	Jackson
Kalamazoo	Kalamazoo County
Kalamazoo Township	Kentwood
Midland	Port Huron
Wyoming	

The Panel adopts the above stipulations.

FACTUAL BACKGROUND

The City of Portage is the Employer. It is located in southwestern Michigan and has a population of about 45,200 people.

The City has about 179 full-time employees and 28 part-time employees.

Four separate labor organizations represent different bargaining units in the City.

1. The Portage Police Officers Association ("PPOA") represents about 51 full-time and part-time employees in the following groups: Patrol Officer, Detective, Radio Operator and Police Service Technician (PST).

2. The Portage Police Command Officers Association ("PPCOA") represents the City's 10 Sergeants and Lieutenants.

3. The International Association of Firefighters ("IAFF") represents about 28 Firefighters, Battalion Chiefs, and Captains.

4. The UAW represents about 17 hourly employees in the City's Streets and Parks Department.

The City also has unrepresented office and managerial employees.

ABILITY TO PAY

Act 312 as amended stresses that the following factor be considered: "The financial ability of the unit of government to pay."

Section 9 of Act 312, as amended, states:

(2) The arbitration panel shall give the financial ability of the unit of government to pay the most significance, if the determination is supported by competent, material, and substantial evidence.

In addition, subsection 1 of section 9 of Act 312, as amended, includes the following "ability to pay" factors:

(a) The financial ability of the unit of government to pay. All of the following shall apply to the arbitration panel's determination of the ability of the unit of government to pay:

- (i) The financial impact on the community of any award made by the arbitration panel.
- (ii) The interests and welfare of the public.
- (iii) All liabilities, whether or not they appear on the balance sheet of the unit of government.
- (iv) Any law of this state or any directive issued under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531, that places limitations on a unit of government's expenditures or revenue collection.

Brian Bowling is the City's Deputy Manager. For many years he has been a key person in determining the City's budgets. (II, p 32). Mr. Bowling testified at length about

City Exhibit 19, an 11 page document (including 9 charts) explaining the City's finances over past years and projecting City finances in future years. (II, pp 33-47). This report includes the following:

REVENUE – PROPERTY TAXES

- The City of Portage General Fund provides funding support for most city operational departments, including the Department of Public Safety.
- The major sources of General Fund revenue are property taxes (71% of General Fund revenue in fiscal year 2012-13) and Intergovernmental Revenue (15.6% of General Fund revenue in fiscal year 2012-2013), which primarily consists of state shared revenue. (See Chart 1).
- The Portage City Charter establishes the maximum General Fund millage rate at 7.5 mills. The city currently levies the Charter maximum General Fund millage.
- The Portage City Charter establishes maximum millage levy of 2.0 mills for the Capital Improvement Program (CIP) has also been reached. A millage recap for fiscal year 2012-13 is shown on Chart 2.

The city has no additional taxing authority in the General Fund.

The city has no additional taxing authority in the CIP.

- General Fund property tax revenue is a function of millage rate multiplied by taxable value. General Fund property tax revenue has been negatively impacted by declining property values over the past few years. ...

Total taxable value in fiscal year 2012-13 is less than taxable value in fiscal year 2006-07.

...

General Fund property tax revenue in fiscal year 2012-13 is approximately \$800,000 less than General Fund property tax revenue in fiscal year 2008-09.

REVENUE – STATE SHARED REVENUE

...

The estimated amount of state shared revenue in fiscal year 2012-13 is approximately \$800,000 less than the amount of state shared revenue received by the city in fiscal year 2002-03.

EXPENDITURES

- With no additional millage capacity available to raise funds, the city has responded to the decline in General Fund revenue by decreasing the cost of operations. Notably, full time staffing levels have been reduced from 215 in fiscal year 2005-06 to 179 in fiscal year 2012-13. ...
- Actual General Fund revenues were greater than actual General Fund expenditures in nearly every year between fiscal year 2002-03 and fiscal year 2010-11. Over this time period actual General Fund revenue exceeded actual General Fund expenditures by an average of approximately 2.3 percent per year.
- Budgetted General Fund expenditures in fiscal year 2011-12 and fiscal year 2012-13 exceed budgetted General Fund revenue by 9 percent (2011-12) and 2 percent (2012-13), respectively.

Budgeted General Fund expenditures exceed budgeted General Fund revenues in fiscal year 2011-12 and fiscal year 2012-13.

...

- From the standpoint of the City Administration, it is not prudent to spend 100 percent of city General Fund revenue due to continuing economic uncertainty and in that:
 - It is not clear that property valuations have stabilized.
 - The city has no capacity to levy additional General Fund millage.
 - The city has no capacity to levy additional CIP millage.
 - The Personal Property Tax, which represents approximately \$2.8 million (12.7%) of General Fund revenue in fiscal year 2012-2013 (and approximately \$4.1 million in the total city budget) is likely to be reduced or eliminated. ... The state is considering a plan to revamp the gasoline tax including a redistribution of Act 51 funds, which are a primary source of revenue for street operations and street-related debt. Approximately \$3.2 million is currently received by the city through Act 51.
- ...
- The city is currently carrying approximately \$90 million of outstanding debt. A comparison of city debt to other selected Michigan cities is shown in Chart 8. Should revenue to the city decrease in any number of areas, additional revenue from the General Fund will need to be directed to the payment of city debt obligations.

- As noted on Chart 9, even without the impact of additional losses in Personal Property Taxes or Act 51 revenue, a shortfall between General Fund revenue and expenditures (with transfers) is projected between 2012-13 and 2015-16 as a result of minimal growth in the local property tax base and continuing debt service obligations.

Due to the decline in property tax revenue, in fiscal year 2012-13 transfers from the General Fund of \$130,000 to the CIP and \$570,000 to the Major & Local Street funds are necessary to support the city's large debt obligations.

With additional General Fund revenue decline likely through changes to Personal Property Taxation and/or Act 51, pressure on the General Fund to provide added support of CIP and Major & Local Street debt obligations will increase.

As with any household budget, the city should not spend up to 100 percent of General Fund revenue. Having no additional millage capacity and anticipating further General Fund revenue reductions, some minimal revenue capacity should be maintained.

Union Exhibit Q is the City's June 2012 newsletter, which addresses the 2012-2013 budget approved by the City Council. This document includes the following observations:

The fiscal year 2012-2013 budget was approved by the Portage City Council on May 22, 2012. The Council and City Administration are pleased to have prepared a balanced budget, totaling \$61.4 million. Importantly, during this period of economic difficulties, the city has practiced an approach to the provision of public services that promotes lower-cost service delivery, including partial or complete privatization of services; the use of part-time, on-call and contracted personnel to supplement full time staff; funding of post employment benefit obligations to lessen or eliminate long-term unfunded liability and, most recently, altering benefit programs for new hires to limit added liability in the future. Highlights of the fiscal year 2012-2013 budget include

- ▶ A decrease in the overall city tax rate from 10.8916 mills to 10.7778 mills.
- ▶ A decrease in budgeted General Fund expenditures of approximately 2.4 percent from fiscal year 2011-2012 budgeted General Fund expenditures.

- ▣ Incorporation of a 1.5 percent increase in property tax revenue, resulting from an increase in personal property tax revenue.
- ▣ An increase in the fund balance of the General Fund from 13 percent to 25 percent of total General Fund expenditures.

General Fund Balance

A significant element of the fiscal year 2012-2013 budget involves the increase of the Council-prescribed fund balance for the General Fund from 13 percent to 25 percent of total General Fund expenditures. ... However, it is anticipated that fiscal year 2012-2013 through fiscal year 2015-2016 will continue to be very challenging. As such, it is increasingly important that a conservative financial posture be maintained, with an emphasis on preserving fund balance. Until a clear picture of a stabilizing revenue base exists, reserves above 13 percent of General Fund expenditures will be planned.

...

Conclusion

In summary, the fiscal year 2012-2013 budget maintains the favorable standing of the City of Portage in the lower 25 percent of all Michigan cities of greater than 25,000 population in terms of millage level, while placing the city in the best position to address the anticipated financial challenges that lie ahead. The City Council and City Administration believe that this conservative financial plan is a responsible and sound program for addressing community needs.

The City's police department receives 38.4% of the City's general fund expenditures (the next highest being the City's fire department at 20.2%). (C 19, Chart 6). Among external comparable communities, City police officers rank second, third or fourth from the top, Kalamazoo County, as to wages, longevity pay and bonus. (C 34-38).

In recent years, increases in the CPI have been somewhat low. (C 31).

Chart 8 of City Exhibit 19 shows that the City's debt to general fund ratio is over 350%, which is high in comparison to numerous other Michigan cities.

Chart 9 of City Exhibit 19 shows a very close ratio between general fund revenues and expenditures with expenditures projected to exceed revenues in ensuing years. Mr. Bowling explained that if the State of Michigan were to reduce the personal property tax (now under active consideration before the Michigan legislature) the City's deficits could explode in ensuing years.

The City and its employment groups including the PPOA appear to have worked fairly closely in keeping the City's finances in decent (not flush) condition. But there are yellow flags as mentioned in the documents quoted above, and the testimony of Mr. Bowling. This is a serious consideration in reviewing the City's LBOs, especially for reduced fringe benefits for future full-time hires in the PPOA bargaining unit.

ISSUE 1: DENTAL INSURANCE (Non-Economic)

The City is proposing (C-10) to amend Section 9.3, Dental Insurance to add the following language at the end of Section 9.3:

The Employer may provide comparable benefits through another insurance carrier licensed to do business in the State of Michigan.

In addition:

The City would be willing to either (1) have the same contract language contained in the health insurance section of the current PPOA CBA ...; or (2) have that same language added with the additional requirement that the City would discuss the possible carrier change with (but not have to reach an agreement with) the Union in advance of implementation for the purpose of receiving input on the change.

The PPOA is proposing that the status quo be retained.

OPINION AND AWARD

Because this is a non-economic issue, the Panel is not limited to either party's final offer in deciding this issue.

The City argues that its dental insurance proposal mirrors the health insurance provision in the parties' CBA, which states:

The Employer can provide comparable benefits through another insurance carrier licensed to do business in the State of Michigan.

The City adds that its proposed language would give it some bargaining leverage with the named contractual carrier, Delta Dental, which it currently does not have. Further, while the City is willing to receive input from the PPOA on the identify of the dental carrier providing comparable benefits, it does not want the PPOA to have veto power. Among the 13 comparable communities, 12 provide dental insurance; and of these five do not identify the carrier. (C 11). Internally, the UAW CBA does not limit insurance to a named carrier, whereas the CBAs with the PPCOA and the IAFF name Delta Dental as the carrier. A carrier is also subject to change for the City's non-union employees. (C 12).

The PPOA argues that dental insurance is a mandatory subject of bargaining and that if the City were allowed to decide unilaterally what dental benefits are "comparable," disputes about such meaning likely would ensue.

Patty Thompson is the City's Director of Benefit Services and Strategic Initiatives. Ms. Thompon testified in support of the City's proposal that with Delta Dental as the sole CBA named carrier, she has no leverage to negotiate the best coverage at the lowest cost because Delta Dental knows that it is the sole CBA named carrier.

The PPOA's concerns include the vagueness of the term "comparable."

On this point, if the City were to select a new carrier whose benefits were not “comparable,” the PPOA could grieve the selection. T. ST. ANTOINE, THE COMMON LAW OF THE WORK PLACE 2nd Ed. (BNA Books 2005) is a leading treatise on labor arbitration. It explains at page 353:

Some contracts provide that management may make unilateral changes in health benefit plans provided the benefits under the new plan are “comparable” or “substantially similar” or “substantially equal” to the prior benefits. In deciding whether benefits under a new plan are materially different from or comparable to benefits under a prior plan, arbitrators may consider changes in employee co-pays and deductibles, cost of out-of-network providers, among other matters. Arbitrators may have to decide whether the contract requires the comparison to be made in terms of the benefit package as a whole or as to each significant benefit. ...

Because the City would have to be careful in selecting a “comparable” carrier, sharing potential new carrier information with the PPOA would have a salutary effect. Further, it is unclear why the parties have agreed in their CBA to comparable health benefits but would not agree to comparable dental benefits. I agree with the City that the PPOA should not have a veto over a new dental carrier (although if the PPOA believed that a new carrier did not provide comparable benefits, it could grieve the City’s decision. Further, the City’s proposal would give it some leverage to negotiate better benefits or lower costs with Delta Dental by presenting it with the terms of an alternative carrier.

For the above reasons, the following sentence is added to the City’s proposed language:

The Employer can provide comparable benefits through another insurance carrier licensed to do business in the State of Michigan. Before deciding to switch the insurance carrier, the City will present its reasons and supporting data to the Union for the Union’s review and comment.

ISSUE 2: PART-TIME POLICE OFFICERS (Non-Economic)

The City is proposing that the parties' Letter of Understanding regarding part-time radio operators be incorporated into the new CBA and that the City's February 28, 2011 Implementation Notice for the position of PTPO also be incorporated into the new CBA, with the following new language for section 14 of the Implementation Notice being added in Article XVIII, Employment Conditions, of the parties' CBA (City 14):

14. Article XVIII, Employment Conditions.

- Part-time Police Officers will select available part-time hours based on seniority.
- The normal work week for Part-time Police Officers will be from 20 to 28 hours per week.
- The beginning and ending shift times may be different than the hours outlined for Patrol Team employees.
- Shifts for Part-time Police Officers will be at least four hours in duration.
- A three month schedule, published two weeks in advance will be provided to Part-time Officers. With a minimum seventy-two (72) hour notice, Part-time Police Officer hours may be modified to address a specific need or condition. The City will consider any extenuating circumstances that inhibit the part-time employee from changing hours on short notice.
- Weekly work hours shall not exceed 28 hours except for training purposes of the employee or on a voluntary basis or as defined in #7 of the Implementation Notice. [#7 states: "Part-time Police Officers shall not be required to work in excess of 28 hours per week, except in cases of emergency, defined as event(s) of catastrophic nature."]
- For short term vacation requests part-time staffing will be considered when reviewing requests from Full-time Police Officers, but as with all vacation requests, are subject to management review and approval. All other parts of 18.3 apply as applicable.

The PPOA agrees to the bargaining unit classification of Part-Time Police Officer ("PTPO") and proposes that the terms of the CBA apply to this classification subject to the following (PPOA Ex A): (a) Seniority will be based on time in the PTPO classification and will not count toward full-time seniority (if a PTPO is assigned to full-time status); (b) a PTPO will not be eligible for promotion to Detective or Sergeant; (c) the PTPO classification will be reduced or eliminated prior to any full-time classification layoff or reduction; (d) layoffs among PTPOs will be based on seniority within the PTPO classification; (e) the PTPO classification will be limited to three officers, with one PTPO assigned to each 8-hour shift subject to a maximum of 24 hours per week; (f) shift assignments for PTPOs will be based on six-month scheduling; and (g) PTPOs will not be subject to promotions, assignments and transfers, and civilian clothing operations.

OPINION AND AWARD

Because this is a non-economic issue, the Panel is not limited to either party's final offer in deciding this issue.

The City argues that (a) it negotiated for 10 months with the PPOA before implementing its detailed policy on PTPOs; (b) its implementation notice is based on the parties' 2009 Letter of Understanding in which they agreed to establish a part-time Radio Operators classification; (c) the purpose of the PTPO classification is to provide cost-effective and flexible assignments to address public safety needs. The City adds that the PPOA's proposals amount to treating PTPOs as "second-class citizens," including provisions that (A) all PTPOs be laid off before any full-time employee in any classifica-

tion be laid off or even before any unoccupied full-time positions be eliminated; (B) the City employ a maximum of three PTPOs, with no more than one assigned to any shift; and (C) PTPOs have only eight hour shifts with a cap of 24 hours per week, except for emergencies. The City also disagrees with the PPOA's proposal that shifts continue to be bid every six months (rather than every three months as proposed by the City).

The PPOA argues that none of the external comparables have PTPOs (U I), and that the issues pertaining to PTPOs represent new ground. A concern of the PPOA is that with open-ended contractual language the new PTPO classification could be used to reduce full-time officers (including overtime opportunities for full-time officers).

Union exhibit P shows that in 2012 a PTPO was regularly scheduled to work three 8-hour and one 4-hour shift per week. Public Safety Director Richard White testified that since February 2011 four individuals have been hired as PTPOs.

There is a potential conflict between the interest of the PPOA in maximizing positions and overtime opportunities for its full-time officers and the efficient use of cost-saving PTPOs.

A concern is that by proposing that a PTPO can work in excess of 28 hours per week "on a voluntary basis" a PTPO interested in earning more money (with accompanying savings to the City) could easily become a *de facto* full-time employee.

Another concern is that without a check on the number of PTPOs, the City would have the right to hire unlimited PTPOs.

In seeking a flexible but limited role for PTPOs in this novel situation, the City's proposal for PTPOs is adopted except as follows:

- The language that the PTPO can work additional hours “on a voluntary basis” is deleted.

- The maximum number of PTPOs working in any calendar week is three.

ISSUE 3: PROMOTIONS (Non-Economic)

The City is proposing (C-15) to amend Section 19.3 (f) (4), Scoring and Eligibility, by increasing applicants for promotion on the promotion list from three applicants to five applicants, and from four to six if another vacancy occurs, so that the language as amended will read:

. . The Chief shall fill any permanent vacancy in the rank of Detective or Sergeant by selecting from the top ~~three (3)~~ five (5) individuals on the promotion list.

Note: Once a vacancy is filled from the “top ~~three~~ five,” in the event another vacancy occurs the ~~fourth~~ sixth individual on the promotion list will be pulled up and a new “top ~~three~~ five” established.

The PPOA is proposing that the number of applicants be increased from three to four:

. . The Chief shall fill any permanent vacancy in the rank of Detective or Sergeant by selecting from the top ~~three (3)~~ four (4) individuals on the promotion list.

Note: Once a vacancy is filled from the “top ~~three~~ four,” in the event another vacancy occurs the ~~fourth~~ fifth individual on the promotion list will be pulled up and a new “top ~~three~~ four” established.

The PPOA also is proposing to increase seniority points from 10 to 15.

OPINION AND AWARD

Because this is a non-economic issue, the Panel is not limited to either party's final offer.

The City argues that increasing the applicants to five would give the City more flexibility and would increase the number of employees seeking promotions. The City also argues that with the exception of Kalamazoo County the City's current seniority weighting of 12% already exceeds the comparable communities (which provide either 10% or 0% for seniority). (C 17). The City also objects to the PPOA's seniority weighting because it was never presented until the PPOA submitted its LBO.

The PPOA argues that four applicants is a reasonable compromise and derives some support from the external comparables (C 16) where six of them provide for four or more applicants. It also argues that its proposal to raise seniority points from ten to 15 promotes commitment to long term City employment. In addition, the PPOA argues that its members with more than 20 years of service should not have their seniority points capped at 20 years of seniority.

The PPOAs proposal on the number of applicants is reasonable and has reasonable support among comparable communities. On the issue of seniority points, the City's proposal is supported by the parties' practice and external comparables.

The PPOA's proposal on the number of applicants is adopted.

The City's proposal on retaining seniority points is adopted.

The remaining issues are economic.

ISSUE 4: SICK LEAVE ACCUMULATION

The City's LBO is to amend the sick leave accumulation language set forth in Section 8.1 of the parties' CBA as follows:

Full-time bargaining unit employees hired prior to [the date of issuance of the final Act 312 Award] starting with their second month of continuous employment by the Employer, shall accumulate paid sick leave credits on the basis of one (1) day per month. Full-time bargaining unit employees hired on or after [the date of the issuance of the final Act 312 Award], starting with their second month of continuous employment by the Employer, shall accumulate paid sick leave credits on the basis of one-half (1/2) day per month. Part-time Radio Operators employees hired prior to [the date of issuance of the final Act 312 Award], starting with the second month of continuous employment by the Employer, shall accumulate paid sick leave credit prorated based on hours worked up to one (1) day per month on the pro-rated basis set forth in an October 20, 2011 arbitration award involving the parties. Part-time employees hired on or after [the date of the issuance of the final Act 312 Award], starting with their second month of continuous employment by the Employer, shall accumulate paid sick leave credits on the pro-rated basis set forth in the October 20, 2011 arbitration award, with the pro-ration relating to the accumulation of full-time employees hired on or after [the date of the issuance of the final Act 312 Award].

The PPOA's LBO is to retain the status quo.

OPINION AND AWARD

The City argues that its request for a 50% reduced accumulation rate for future hires is supported by all City internal comparables (City 20), and that internal comparables are to be given more weight than external comparables on fringe benefit issues (citing ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6TH Edition (BNA Books 2003) 1413).

The PPOA argues that the City's proposal is not supported by external comparables (City 21). In addition, the PPOA argues that because its patrol officers

engage in more physically demanding work than the City's civilian employees, they merit the present accumulation rate even though other new City employees will receive less. Further, the monthly accumulation of eight hours per month has been in the parties' CBAs since at least 1975.

The City's LBO is supported by the City's insecure financial condition.

Further, HOW ARBITRATION WORKS, *supra*, explains at 1413:

Generally, arbitrators give greater weight to externals in wage disputes, unless it can be shown that a clear pattern has been established for the internal bargaining units.

Benefit issues, such as health insurance benefits, are often resolved through a review of internal comparables.

Sick leave accrual is a benefit issue, which is supported by all internal comparables.

For the above reasons, the City's LBO is adopted.

ISSUE 5: SICK DAY ELIGIBILITY

The City's LBO is to amend the sick day eligibility language set forth in Section 8.3(b) by adding the following sentence after the first sentence of this section, which refers to the first 26 week period during which the supplement is paid by the City:

It is understood that the employee's sick leave accrual will be frozen during the time period in which the employee is receiving such supplement.

The PPOA's LBO is that sick leave accrual not be frozen during this period.

OPINION AND AWARD

The City argues that the current CBA does not explain whether employees continue to accrue sick time during the 26-week supplement period while on workers compensation. This proposal is supported by the CBAs with the PPCOA and the IAFF. (C 22). (The UAW CBA does not contain a workers' compensation supplement, and so is irrelevant on this issue.) The City adds that fire fighters face physical risks (as do patrol officers). However, the PPOA's bargaining unit also includes radio operators and service technicians who do not face physical risks.

The PPOA argues that only two of the employee groups in the City do not accrue sick leave while on workers' compensation. Further, 11 of the external comparables provide that an injured employee accrues sick leave time while on workers' compensation (City 23). The PPOA also argues that because its patrol officers engage in more physically risky work than the City's office employees, they merit the present accumulation rate.

This is a close issue. It appears in City Exhibit 22 that the other two uniformed bargaining units (PPCO and IAFF) do not receive the accrual, but that the City's non-union employees and directors are eligible to receive the accrual. City Exhibit 23 shows that police officers in 11 comparable communities to continue to accrue sick leave while on workers' compensation.

Accrual of sick leave during the 26-week supplement period while an employee is on worker's compensation would not be financially onerous.

For the above reasons, the PPOA's Final offer is adopted.

ISSUE 6: SICK LEAVE USAGE

The City's LBO is to amend the sick leave usage language set forth in Section 8.3(e) to address sick leave usage by part-time employees. The City is proposing to add the language in the Letter of Understanding for Part-Time Radio Operators and the Implementation Notice for PTPOs that such employees be able to use up to 32 hours of sick time in any 12-month period for the critical illness or injury of an immediate family member. To this end, the City is proposing to add the following at the end of Section 8.3(e):

An employee may use up to sixty-four (64) hours of sick leave in any twelve (12) month period for the critical illness or injury of an immediate family member (current spouse, child, step-child or parent) during hospitalization, hospice care treatment or necessary home health care following hospitalization (where the need for the home health care is documented by a physician). Sick leave shall not apply to dependent illnesses or injuries such as mumps, chicken pox, influenza, hepatitis, mononucleosis, broken bones (unless critical illness results), dental care, or any related illness or injury which does not require immediate emergency hospitalization, nor shall it apply to outpatient visits to doctor's offices or clinics for diagnosis or treatment not requiring hospitalization. Part-time employees may use up to thirty-two (32) hours of sick leave in any twelve (12) consecutive month period as defined above.

The PPOA's LBO is to amend Section 8.3(e) to increase from 64 to 80 hours the amount of sick leave time that can be used in a 12 month period for the critical illness or injury of an immediate family member, and to add new language for the definition of a child by reference to the Family Medical Leave Act, so as to include persons for whom an employee is *in loco parentis*.

OPINION AND AWARD

The City argues that the parties have agreed to 32 hours for part-time Radio Operators. In 2007, the parties agreed to extend sick leave hours for full-time employees

from 40 to 64 hours per year. Further, in bargaining the PPOA never sought to increase sick leave hours. The City adds that it is proposing retention of the status quo.

The PPOA argues that it is seeking increased sick leave time from 64 to 80 hours “in that the requirements under 8.3(e) are more restrictive than those contained in the Family and Medical Leave Act (FMLA) as there is a hospitalization requirement and certain restrictions in the CBA that are not required under the FMLA.” The PPOA also argues that it has proposed amending the meaning of “child” to avoid “confusion and disagreement” about its meaning. The proposed addition to the definition of “child” is based on a publication of the United States Wage and Hour Division, which states (U D):

FMLA definition of “son or daughter”

The FMLA defines a “son or daughter” as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*. See 29 USC 2611(12). The broad definition of “son or daughter” is intended to reflect the reality that many children in the United States live with a parent other than their biological father and mother. Under the FMLA, an employee who actually has day-to-day responsibility for caring for a child may be entitled to leave even if the employee does not have a biological or legal relationship to the child.

The definition of “son or daughter” is limited to children under the age of 18 or 18 years of age or older and incapable of self-care because of a mental or physical disability. See 29 USC 2612(12). ...

What does *in loco parentis* mean under the FMLA?

In loco parentis is commonly understood to refer to a relationship in which a person has put himself or herself in the situation of a parent by assuming and discharging the obligations of a parent to a child with whom he or she has no legal or biological connection. It exists when an individual intends to take on the role of a parent.

...

... The specific facts of each situation will determine whether an employee stands in *loco parentis* to a child.

Increasing sick leave usage beyond the parties' increase in 2007 is unwarranted by any changed circumstances and the application of the increased sick leave usage to part-time employees runs counter to the partial benefits of part-time employees. The *in loco parentis* issue appears to be something that could be argued under the reference to "child" in Section 8.3(e) assuming *arguendo* that a dispute over this issue would ever arise.

For the above reasons, the City's LBO is adopted.

ISSUE 7: SICK LEAVE ACCUMULATION

The City's LBO is to amend Section 8.4 to provide that the maximum accumulation of sick leave hours for full-time employees hired on or after the date of issuance of the final Act 312 Award be 1,000 hours. To this end, the City is proposing the following modified language in Section 8.4:

Whenever sick or emergency leave payments are made under this Article the amounts of such payments shall be deducted from the employee's accumulated unused bank of paid sick leave credits. The maximum total accumulation of which for employees who are hired prior to [the date of the issuance of the final Act 312 Award] shall not exceed 1,400 hours and the maximum total accumulation for employees who are hired on or after [the date of the issuance of the final Act 312 Award] shall not exceed 1,000 hours.

The PPOA's LBO is that the status quo of 1,400 hours be retained.

OPINION AND AWARD

The City argues that this proposal is supported by all internal bargaining units and all non-union employees because they all are subject to a two-tier maximum sick leave

accumulation amount (City 20). The City also refers to its earlier argument concerning fringe benefits and internal comparables (citing ELKOURI AND ELKOURI, *supra*, at 1413).

The PPOA argues that the City's proposal is not supported by external comparables (City 21). Of 11 external comparables, 7 have no maximum accumulation, 1 has a higher accumulation and 3 allow under 1400: "Therefore, eight (8) of the eleven (11) external comparables or seventy-three percent (73%) establish no maximum or a higher accumulation [than] the PPOA at 1400."

The City's LBO is supported by the City's insecure financial condition.

Accumulation of sick leave accrual is a benefit issue, which is supported by all internal comparables.

For the above reasons, the City's LBO is adopted.

ISSUE 8: SICK LEAVE PAYOFF

The City's is to amend Section 8.5 to provide that the maximum payout of sick leave hours for departing full-time employees hired on or after the date of the issuance of the final Act 312 Award be one-half (50%) of 1,000 hours. To this end, the City is proposing the following modified language in Section 8.5:

Effective July 1, 1987, Employees who have been continuously employed by the Employer for fifteen (15) years from their date of hire shall be paid for fifty percent (50%) of the employee's unused accumulated sick bank (with 700 hours as the total maximum of such payout for employees hired prior to [the date of the issuance of the final Act 312 Award] and 500 hours being the total maximum of such payout for employees hired on or after [the date of the issuance of the final Act 312 Award]) at the employee's current base rate on the date of separation of employment.

In the event of death while an employee of the Employer, the employee's beneficiary, as designated by the employee on a beneficiary form supplied by the city, shall be paid for fifty percent (50%) of the employee's unused accumulated sick leave bank, (with 700 hours as the total maximum of such payoff for employees hired prior to [the date of the issuance of the final Act 312 Award] and 500 hours as the total maximum of such payout for employees hired on or after [the date of the issuance of the final Act 312 Award]) at the employee's current base rate at the time of death.

The PPOA's LBO is that the status quo of one-half of 1,400 hours be retained.

The City's LBO is supported by the City's insecure financial condition.

Sick leave payoff is a benefit issue, which is supported by all internal comparables.

For the above reasons, the City's LBO is adopted.

OPINION AND AWARD

This issue is in tandem with the City's LBO on Issue 7: Sick Leave Accumulation.

The City argues that this proposal is consistent with its LBO on sick leave maximum accumulation for future hires and is in accord with all other City employees.

The PPOA argues that only three of the external comparables have a two-tiered system as proposed by the City.

The City's LBO is supported by the City's insecure financial condition.

Sick leave payoff is a benefit issue, which is supported by all internal comparables.

For the above reasons, the City's LBO is adopted.

ISSUE 9: COLLEGE INCENTIVE

The City's LBO is to eliminate the college credit hours payment program set forth in Article XV of the parties' agreement and to replace it with the following new language:

Section 1: All members of PPOA will participate in career development planning, including attending position related training programs which would be mandated by the Director of Public Safety Police/Fire Chief, paid for from the fiscal training budget, and scheduled during regular working hours. Employees enrolled in degree related programs, approved by the Director of Public Safety/Fire Chief, are eligible for tuition reimbursement according to the following guidelines:

1. Each fiscal year, \$4,000.00 in funds will be allocated out of the training budget for tuition reimbursement.
2. June 1 of each year, employees wishing to participate in the tuition reimbursement funding will provide a written communication to the Police Chief, indicating the estimated total tuition expenditures for the following fiscal year. Requests submitted after June 1 will be considered to the extent of funds available.
3. To the extent of fund available, all tuition eligible will be reimbursed at a rate of 50% of actual tuition upon verification of successful course completion with a minimum grade of "C" or better.
4. In the event available funds will not provide a 50% reimbursement, funding will be divided on a prorata basis, among the employees participating.
5. In no event shall any one employee receive more than \$1,000.00 in any fiscal year for tuition reimbursement.

Section 2. When an employee enrolls for a course that is job related as determined by the Director of Public Safety Police/Fire Chief, the Employer shall reimburse said employee for all required textbooks for said course provided that the employee has exhausted other outside sources for such payments, (i.e., L.E.E.P. funding, G.I. Bill). Those texts so purchased by the Employer shall become permanent additions to the Employer's Library following the employee's completion of said course. If the employee fails to complete said course, he shall reimburse the Employer for the textbooks previously furnished

The PPOA's LBO is that the status quo be retained.

OPINION AND AWARD

The City argues that the present system provides a bonus for past credit hours earned, whereas its LBO will encourage future additional education. Further, in recent years virtually all new hires already have a college degree. The City adds that its LBO would also require employees while on working time to participate in career planning and development activities, including position-related training. The City explains that its LBO is the same as in the PPCOA CBA except that its LBO provides more money (the PPOA being a larger bargaining unit than the PPCOA) and is similar to tuition reimbursement for the City's non-bargaining unit employees. Further, the UAW unit does not have any tuition reimbursement program. Only the IAFF has a program similar to the existing program. Over one-half of the external comparable communities do not have any educational incentive program.

The PPOA argues that the City's proposal would require that all PPOA members participate in "career development planning," a phrase that lacks one understood definition: "The City proposal is not about economics, it is about unfettered control over an undefined requirement."

Article XV of the parties' agreement provides that employees will receive "\$50.00 per year for each twelve (12) credit hours earned by such employee" with a cap of \$650 per year. Further, "[s]uch credit hours must be job related and/or part of a job related degree program as determined by the Chief of Police." These payments are made every year irrespective of when the credit hours were earned.

In 2008, the parties' Act 312 panel denied the City's similar LBO by relying in part on the parties' 2002 Act 312 arbitration award, quoting the 2002 award as follows:

[T]he City's last offer of settlement does not appear reasonable in the context of other comparable communities' programs involving either other college incentive bonus or tuition reimbursement or both, nor is it comparable to the Command Officers when considering the difference in the number of employees. Perhaps the parties can negotiate something between what is and what's proposed in upcoming negotiations.

Of the 13 comparable communities, seven provide no incentives; four provide payments each year; and one provides a one-time payment for tuition reimbursement. (C 28).

Of the internal comparables, the IAFF has a college incentive whereas the other bargaining units and non-union employees do not. (C 27).

The PPOA's primary concern about the City's LBO appears to be primarily over the requirement of "career development planning, including position related training programs." At page 22 of its hearing brief, the PPOA explains:

[C]areer development planning is a phrase that does not have one understood definition. As such, allowing the CBA to have this mandate of "career development planning" creates potential problems where none exist now. Career development planning can mean requiring virtually anything of the PPOA member including obtaining firefighter certification, an EMT license or any other certification. The statement by Rob Boulis wherein he mentions that "career development planning" could be defined differently for different people is an example of the PPOA concern. (Boulis Dep., Volume III, page 51-52). In reality, according to Mr. Boulis, and by implication, this language is not needed as the employees already comply when it is appropriate to do so. (Boulis Dep., volume [III, page] 52, line 18.)

Based primarily on other economic dispositions in the present Act 312 Opinion and Award, the Panel adopts the PPOA's final offer on this issue.

ISSUE 10: PENSION

The City's LBO is to modify Section 23.2 (b) (1) to provide that for full-time bargaining unit employees hired after the date of this Act 312 award the City will contribute 10% of the employee's base salary:

For full-time bargaining unit employees hired prior to [the date of issuance of the final Act 312 Award], the Employer shall contribute eighteen (18%) percent of the each bargaining unit employee's base salary, specified in Appendix A, each year to this money purchase pension plan. For full-time bargaining unit employees hired on or after [the date of issuance of the final Act 312 Award] the Employer shall contribute ten (10%) percent of the employee's base salary, specified in Appendix A, each year to the money purchase pension plan.

The PPOA's LBO is the following City contribution for future full-time employees: 10% in first year of employment and increase by 2% per year until the start of the fifth year of the new employee's employment (and thereafter) when the City contribution would be capped at 18%.

OPINION AND AWARD

The City argues that this LBO for future hires is consistent with the pension contribution made by the City for all other new hires throughout the City's workforce. (C 29). Further, this proposal will provide the City with long-term cost savings whereas the PPOA's proposal would end up at an 18% City contribution for new employees at the start of the new employees' fifth year of employment. The PPOA did not make this proposal during bargaining. Several external comparable communities also have tiered employer contributions for newer employees. Further, Michigan public policy currently encourages long-term savings.

The PPOA argues that its LBO “creates an incentive for an employee to stay employed with the City while at the same time saving the City money.” Further, the LBO is not required for the City to receive EVIP benefits.

The City’s LBO is supported by the City’s insecure financial condition.

Pension contribution is a benefit issue, which is supported by all internal comparables.

In addition, a 10% pension contribution appears to have support in state public policy. At pages 35-36 of its post hearing brief, the City explains:

The 10% contribution rate is something that has been encouraged by the State of Michigan. Initially in 2011, the State *required* that a 10% contribution rate apply for all new hires of public employers subject to defined contribution plans in order for those employers to receive their full EVIP payments. Eventually, this was changed such that in order to qualify for these funds, public employers would have to *either* comply with P.A. 152 by capping employer costs for health insurance at certain levels *or* have a 10% defined contribution plan contribution for new hires. Either way, going to this contribution rate for new hires has clearly been encouraged by the State. The purpose of the State is obviously to create long-term cost savings.

The same long-term cost savings would not be achieved under the Union’s LBO as intended by the State or as are in place with every other employee group in the City. Although there would be diminishing cost savings during the first few years of a new hire’s employment under the Union’s proposal, for the majority of years of employment of long-term newly hired employees, there would be absolutely no cost savings.

For the above reasons, the Panel adopts the City’s LBO on pension contributions.

ISSUE 11: PART-TIME EMPLOYEES

The City's LBO is that that the economic terms and conditions of employment contained in the Implementation Notice for PTPOs be maintained. This includes section 7, which states that "Overtime is applicable to Part-time Police Officers."

The PPOA's LBO (as modified at the Act 312 hearing) is the same except that the PPOA proposes the following overtime restriction for PTPOs:

Overtime is applicable to Part-time Police Officers. Scheduled absence overtime and non-scheduled absence overtime shall be filled as stated herein except for as follows as it relates to the PTO classification: If the over-time is not taken or filled by a full-time Police Officer, that available time will be offered or assigned to a PTO based on PTO seniority classification. Part-Time Police Patrol Officers shall not be required to work hours in excess of 24 hours per week, except in case of emergency, defined as event(s) of catastrophic nature.

OPINION AND AWARD

The City argues that the PPOA's entire LBO is before the Panel, and not merely the overtime issue.

On the overtime issue, the City argues that overtime should be paid only for work in excess of 40 hours per week.

The PPOA explained at page 20 of its hearing brief:

The parties stipulated on the record at the 312 hearing to agreeing to the issues found in Union Exhibit S and the Union LBO, in addition to agreeing that there would be no college incentive, no life insurance and that the longevity benefit would be one half day earned per year of service for the PTPO classification. ... With the parties agreeing on the other issues, this left Article XI – Overtime, as the lone issue of dispute between the parties to be arbitrated related to the PTPO classification.

By reason of the resolution of various aspects of the PPOA's LBO on economics for PTPOs, the remaining part of the PPOA's LBO concerns overtime for PTPOs.

Under the PPOA's LBO, overtime would first have to be offered to full-time (40 hours per week) police officers before hours in excess of 24 hours (plus "emergency" hours, if any) could be offered to PTPOs.

Overtime is commonly understood to be hours in excess of 40 hours per week.

It is unlikely that any PTPO would work more than 40 hours in a week. (By common understanding, "part-time" does not mean "full-time.") In the unlikely event that such occurred (e.g., a catastrophic event involving several hours of emergency employment), it would be extremely unwieldy for the City to have to run through the seniority list for full-time police officers before assigning any overtime hours to a PTPO.

The City's LBO is adopted.

ISSUE 12: DURATION

The City's LBO is to amend Article XXIV to provide the following duration language:

24.1 Duration. This Agreement shall remain in full force and effect until 2400 hours on the 30th day of June 2013, and from year to year thereafter unless either party hereto notifies the other in writing at least sixty (60) calendar days prior to the expiration of any subsequent automatic renewal period of its intention to amend, modify or terminate this Agreement.

The PPOA's LBO is that the expiration date be June 30, 2014.

OPINION AND AWARD

The City argues that the history of keeping expiration dates for the City's two police bargaining units the same (and also internal comparisons) support its LBO on this

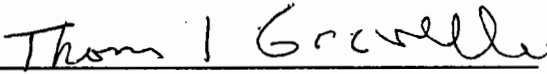
The PPOA argues: "The parties have been perpetually bargaining and/or in arbitration since 2008. The Michigan economic climate and continual legislative changes need some time to settle and be properly interpreted, argued and/or changed and having a three (3) year contract would allow for that settling to occur."

The PPOA is the City's largest bargaining unit. Because of the importance of internal comparables in municipal labor relations, it is desirable for the PPOA to be bargaining at the onset of City bargaining with its bargaining units, rather than belatedly.

For this reason and the reasons offered by the City, the City's LBO on duration is adopted.


PANEL SIGNATURES

Dated: December 18, 2012


Thomas L. Gravelle, Chairperson

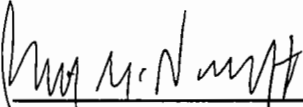
The City *concur*s on Issues 1, 2 (except the two changes), 3 (on seniority points), 4, 6, 7, 8, 10, 11 and 12, and *dissent*s on Issues 2 (the two changes), 3 (number of applicants), 5, and 9.

Dated: December 13, 2012


Kevin M. McCarthy, City Delegate

The PPOA *concur*s on Issues 2 (the two changes), 3 (number of applicants), 5 and 9, and *dissent*s on Issues 1, 2 (except the two changes), 3 (seniority points), 4, 6, 8, 10, 11 and 12.

Dated: December 13, 2012


Brett M. Naumcheff, PPOA Delegate