Rec'd 8-24-16

STATE OF MICHIGAN
DEPARTMENT OF LABOR
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Statutory Arbitration
Pursuant to Act 312 (Public Acts of 1969) as amended
and the Fact Finding between:

LIVINGSTON COUNTY BOARD OF COMMISSIONERS and LIVINGSTON COUNTY SHERIFF,

Public Employers,

-and-

LIVINGSTON COUNTY SHERIFF'SASSOCIATION/ MICHIGAN ASSOCIATION OF POLICE,

Labor Organization.

MERC Case No D15 L-0850

Arbitrator and Fact-Finder:
Stanley T. Dobry, Esq.

ARBITRATION PANEL'S OPINION AND AWARD

I. APPEARANCES

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Dated: August 23rd 2016

II. STATEMENT OF THE CASE

This consolidated compulsory arbitration and fact-finding proceeding is between Livingston County (hereinafter "County") and the Livingston County Sheriff ("Sheriff"),1 who are joint employers (hereinafter "Employer") and Livingston County Sergeants Association/Michigan Association of Police (hereinafter "Union").

The sheriff's office is a unique and constitutionally embedded branch of Michigan local government. By statute, the Sheriff (in his official capacity) is the custodian of prisoners in the county jail, and would be liable for a negligent failure to protect their welfare.2

The bargaining unit is composed of all Sergeants employed with the Livingston County Sheriff's Department. It is undisputed that all sergeants are first line supervisors as defined by the Michigan Employment Relations Commission.

Although all are employed with a law enforcement agency, not all are P.A. 312 eligible. Those sergeants assigned to the corrections or jail facility of the Sheriff s department are

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1In passing, the Sheriff holds a unique legal and social position, and retains substantial management's rights. Those rights are reserved under the collective bargaining agreement and they include those under the laws of the State of Michigan, including the Sheriff's Act, the Michigan Constitution and the Public Employment Relations Act. See for example, E Frank Cornelius (2008) "The Authority of a Michigan Sheriff to Deny Law Enforcement Powers to a Deputy" *Thomas M. Cooley Law Review*, vol. 25, no. 3, pages 433-462, regarding a Michigan sheriff's authority under Michigan Compiled Laws, § 51.70 et seq. Article VII § § 4, 5 and 6, Constitution 1963. The Sheriff is entrusted with running the jail, which is a core function; there are those who opine that road patrol is optional, but that the Sheriff must run a jail.

2Included are: Operation of County Jail, twenty-four hours per day, seven days per week. (MCLA §Sec. 801.1, 51.75); Care of prisoners, including separation, (MCLA § 801.6 and 801.103, and 801.104); conversations with counsel (MCLA §. 801.7, Michigan Constitution Article I, § 20); feeding (MCLA § 801.8); record-keeping (MCLA §§801.4, 801.12, 801.229 801.252); punishment (MCLA §801.25); maintain order (MCLA 801.27); keeping of federal prisoners (MCLA 801.101); medical care (Op. Atty. Gen. 1977 Op. No. 4957); visitation (*O'Bryan v Saginaw County, Mich*, 437 F. Supp. 582); examination of prisoners for diseases (Op. Atty. Gen. 1055-56 No. 2324); prescribed jail rules (MCLA 51.281); keep records of infractions (MCLA §51.282); Liability for safekeeping of prisoners (MCLA § 801.102) including sheriff's liability for treble civil damages, misdemeanor criminal penalties and forfeiture of office (MCLA §§801.105, 801.108, 801.109).

not subject to P.A. 312.

The remainder of the membership clearly is eligible for P.A. 312 status.

Importantly, this bargaining unit is mixed, being comprised of both Livingston County law enforcement Sergeants (in charge of road patrol) and Livingston County corrections Sergeants. The Act 312 compulsory arbitration addresses the six Livingston County Law Enforcement Sergeants ("Liv. Road Sgts."). The advisory fact-finding proceeding addresses the remaining ten Livingston County Corrections Sergeants ("Liv. Jail Sgts.").3

The Employers and Union are signatories to a three year collective bargaining agreement which commenced on January 1, 2014 and which will soon expire on December 31, 2016 (the "Current 3 Year CBA"). The single issue here is the 2016 wage rate for the Sergeants unit for the third and final year of the agreement (*i.e.*, 2016) pursuant to a wage reopener provision in Article 53 of the CBA.

The Union exercised its right to negotiate 2016 wages pursuant to a re-opener for 2016. Although the parties participated in bargaining, an impasse ensued. The Union petitioned for Arbitration as to the Liv. Road Sgts. pursuant to Act 312 of the Public Acts of 1969. MCL 423.231 *et seq*. The Union also sought fact-finding as to the Liv. Jail Sgts. under the terms of the labor mediation act and the Public Employment Relations Act.

Consequently, Stanley T. Dobry, Esq. was appointed as impartial Arbitrator, Chairman of the Arbitration Panel and Fact-Finder by the Michigan Employment Relations

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3 In the recent past, the number of Liv. Jail Sgts. was five. However, in direct response to the massive expansion of the Livingston County Jail, the number of Liv. Jail Sgts. doubled from five to ten. The significant new expense of the jail expansion and higher operation costs of a larger jail is one factor which negatively impacted the County 2016 Budget. According to management, the significant increase in jail operations and commensurate expense contributed to the decision to offer a 0% across-the-board wage increase in 2016. Due to the expansion some of the Union's members received promotions and higher wages.

Commission. Delegates designated by the parties are Mr. Fred Timpner on behalf of the Union and Mr. Rich McNulty on behalf of the County. Exhibits were submitted by the parties, a hearing held on March 22, 2016 and extensive testimony taken.

A complete record was duly made. The panel has carefully and full reviewed that voluminous record, including he disputed testimony (which differs mainly on the weight specific facts are given. The Arbitration Panel, thus, must issue an award based upon the applicable factors, in the judgment of panel, as prescribed by §9 of the Act (see pages 6-8 hereafter).

"Last Best Offers" were submitted by the parties on February 17, 2016. The Union's Last Best Offer seeks a 2.25% increase to each of the steps for the Sergeant's wage classification. ("Union LBO"). The County's Last Best Offer seeks a wage freeze or 0% wage increase to the Sergeant's wage classification for 2016. ("Employer LBO").

The parties have waived time limits for the issuance of this award.

III. COMPARABLES

This is *not* the first time that wage rates were established for this bargaining unit. We are trying to determine a fair wage and benefit rate for the final year, based on the bargaining history and labor market factors and conditions. In doing this the panel bears in mind the total compensation packages (and changes thereto) of the agreed comparables.

1. Internal Comparables

In July 2011, the State Legislature made modifications to the Act 312 Statute. One of the changes was to specifically include *internal comparables* as a named factor for the arbitration panel to consider. Their specific inclusion in the revised statute reinforced their import as a 312 factor, although it did not change arbitral thought very much.

However, since the dawn of public sector interest arbitration arbitrators have customarily looked at the employer's pay structure and history with other employees, that being within the first line of comparison. The interest arbitration panel must try to establish a fair rate in the context of the historical relationship of the parties, and taking into account the labor economics concept of "orbits of coercive comparison" in a labor economics sense. These are sometimes called "wage contours."[4]

2. External Comparables

At the urging of the Chair, the parties agreed on a method to determine the external comparables for the Act 312 hearing process. The following is an alphabetical list of stipulated comparable communities and bargaining units under § 9(d):

- Berrien County
- Ingham County
- Jackson County
- Kalamazoo County
- Ottawa County
- Saginaw County
- St. Clair, County

At the outset, unlike the majority (*i.e.*, 4 of 7) of the other relevant comparable counties, the Act 312 eligible Liv. Road Sgts. and the Liv Jail Sgts. (which are not Act 312 eligible) are members of the same bargaining unit and are paid the same wage rates for the

[4] A concept first coined by Arthur M. Ross. Arthur Max Ross, (1956) *Trade Union Wage Policy* (Los Angeles, Berkeley: University of California Press). See Otto Eckstein and Thomas A. Wilson. "The Determination of Money Wages in American Industry" *The Quarterly Journal of Economics* (1962) 76 (3): 379-414. doi: 10.2307/1879627 http://qje.oxfordjournals.org/content/76/3/379.abstract. See, *e.g.*, *City of Adrian and POLC*, MERC Case No. D-08-A-0098, Kovinsky, 2011. Institutional economists remarked that unions impose wage standards. John Dunlop (1957) called the standards "wage contours" and Ross (1948) called them "orbits of coercive comparisons" Bewley, Truman F., *Why Wages Don't Fall During a Recession*, page 109 (Harvard University Press, 2002) ISBN 06740o09437, 9780674009431 (pp. 527). As a practical matter there is a "labor market" analysis, and there is the "coffee shop" comparison.

corresponding years of service.5

As stipulated, this was the parties' bargained-for decision and their own comprehensive compromise. It effected both component groups of the Sergeant's unit. It equalized the comparable counties' road patrol units somewhat higher wages with that of the significantly lower wages paid by comparable counties to corrections Sergeants.

It adjusted wage rates for both units to provide for parity.

Ordinarily, external comparables can be used to demonstrate the pattern of wage and benefit settlements. *Rank orders* and historical data is put into the record, it enables the panel to make meaningful objective comparisons. Unlike some of the other Act 312 criteria, this data helps provide a clear direction as to what decision to make, not just a cited justification for a particular result.

IV. THE ACT 312 CRITERIA

In resolving such disputes the panel will give consideration to a multiplicity of standards, to 'mix the porridge."6 Internal and external comparable communities and bargaining units should be given some real weight, and serve to inform "a workable solution satisfactory to both sides."7 Benefits issues are particularly difficult, and involve consideration of internal comparables, risk pooling, net effect on take home pay and employee expectations, costs of

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5 Jackson, Ottawa, St. Clair and Berrien differentiate and pay different wages to law enforcement sergeants and corrections sergeants. In each instance, corrections sergeants are paid SIGNIFICANTLY LESS than are law enforcement sergeants. More specifically, for the year 2015, law enforcement sergeants were paid more than $6,000.00 more per year than corrections sergeants in St. Clair and Berrien counties; more than $5,000.00 per year than corrections sergeants in Ottawa County, and $2,000.00 per year in Jackson County where corrections sergeants took an actual pay decrease of 2.6% when their unit was separated from the law enforcement unit.

6See Howlett, Robert G. (October 1984) "Interest Arbitration in the Public Sector - The Kenneth M. Piper Lectures" *Chicago-Kent Law Review* Volume 60 Issue 4 Article 3.
http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=2549&context=cklawreview

7Ruben, Alan Miles, Ed. In Chief, *Elkouri & Elkouri, How Arbitration Works* (6th Ed.), (2003) (Washington D.C.: BNA) p. 1402. ISBN-10: 157018335X ISBN-13: 978-1570183355

administration, access to information, etc.8 Wage patterns,9 historical differentials, labor markets, the cost of living, the amount of a living wage, job security, and ability to pay are all metal for this forge, depending upon the particular context and their weight on a designated issue.

The criteria to be considered by the Panel resolving the disputes here are set forth in §9 of Act 312 of Public Acts of 1969, MCLA 423.239, which reads:

> **MCL 423.239 Findings, opinions, and orders; factors considered; financial ability of governmental unit to pay.**
>
> Sec. 9.
>
> (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:
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> (a) The financial ability of the unit of government to pay. [Emphasis added.] 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

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8Ruben, supra, pp. 1413, 1419-1419.

9But see, *Signal Five*, Official Bulletin of the Ohio State Troopers Association, "The Elephant In the Tent, The case Against Pattern Bargaining." [http://webcache.googleusercontent.com/search?q-cache:nG_PRfvdlJQJ:WWW.ohiotroppers.org/files/Signal%2520Five. The Elephant in the Tent].

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 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.

(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. [Emphasis added.]

The panel is required to consider each of these § 9 criteria, although it has substantial discretion in determining the weight to be accorded to them. *City of Detroit v DPOA,* 408 Mich 410 (1980). It also should be recognized that the particular circumstances may dictate that some criteria may be emphasized more than other criteria. The court noted that since the:

> "factors are not intrinsically weighted, they cannot of themselves provide the arbitrators with an answer. It is the panel which must make the difficult decision of determining which particular factors are more important in resolving a contested issue under the singular facts of a case, although, of course, all 'applicable' factors must be considered."

In addition to the enumerated criteria the Legislature, in setting forth Section 9(h), incorporated criteria sometimes used by Fact-Finders in making recommendations as to collective bargaining agreements which are not specifically enumerated in § 9.

Required or not, as the Fact-Finder I also considered all of these factors,

consistent with the Supreme Court's opinion in *Detroit v. DPOA*. There were certain key criteria, namely, 9(c) "the financial ability of the unit of government to meet those costs," 9(e) overall compensation, and 9(h) the other factors criteria which would include the bargaining history and the general economic climate in lower Michigan.

The mosaic may also include, *inter alia*, historical and future comparisons and relationships to other internal bargaining units; external communities and bargaining units, prevailing wages paid in similar communities; wage settlement patterns in the public and private sectors; ability to pay; local, regional, state and national economic events and prediction; labor market rates; costs of maintaining other benefits (especially health care and retirement costs, funding and liabilities); cost of living increases; adequacy of staffing, needs and expectations of the public; tax effort; hiring patterns; settlement patterns; employee morale; and other factors applicable to the wage proposals.

Essentially, the Act 312 standards address the cost of living, the financial ability of the employer to fund the awards, and internal comparables as well as comparisons with other similarly situated public and private employees. In other words, the economic realities – for both sides and the public – of the situation must be applied.

The interest arbitration panel must try to establish a fair rate in the context of the historical relationship of the parties, and taking into account the labor economics concept of "orbits of coercive comparison,"[10] also called "wage contours."[11] Internal comparability is a

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10Arthur M. Ross, *Trade Union Wage Policy* (Berkeley and Lost Angeles: University of California Press, 1948), Chapter III, pp. 53-70).

[11] Institutional economists remarked that, historically at least, unions impose wage standards. John Dunlop (1957) called the standards "wage contours" and Ross (1948) called them "orbits of coercive comparisons." Bewley, Truman F. (September 30, 2002) *Why Wages Don't Fall During a Recession*, page 109 (Harvard University Press, 2002) ISBN-10: 0674009436 ISBN-13: 978-0674009431 ISBN 06740-09437, 9780674009431 (pp. 527). As a practical matter there is a "labor market" analysis, and there is the "coffee shop" comparison.

factor: management needs to preserve its reputation and relationship with the other bargaining units with whom it negotiates.

Additionally, it is understood that taking money back from a union and its members, even in hard economic times, is a difficult sell for Management who must backtrack against a history of bargaining and agreements. There are also likely to be diverse political repercussions, one way or another. Wage comparisons between bargaining units, and among related groups, is inevitable. These people talk to each other over coffee and doughnuts. While higher wages is a goal, maintenance of employment and avoidance of layoffs is another (sometimes competing) goal for a labor organization.[12] An economic theory of a trade union requires that "the organization be assumed to maximize (or minimize) something."13 Here maintenance of maximum employment for its members is an important goal for the Union. As is maximizing wages. Maximizing benefits and benefit choices may be inconsistent with the Union's wage proposal.

And an the ultimate reality is that these union members work for this employer in a quasi supervisory role. They figuratively hold the reigns of the organization and literally hold the keys to the jail. In that sense, there is a very real need for comity and mutual respect, working in harmony for the good of the public.

Entitled to great weight is the parties' bargaining history, both past and current, as well as the "art of the possible," based upon the parties' competing needs and interests, in light of the give and take of negotiations" – trying to replicate the settlement the parties themselves

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[12]Reed, Albert, *The Economics of Trade Unions 3rd Ed.* (University of Chicago Press, 1989) (ISBN 0226707105, 9780226707105, 44-56, 204 pages.

13John T. Dunlop, *Wage Determination under Trade Unions* (New York: Macmillan Co., 1944), p. 4.

would have reached had their negotiations been successful."14 Resolution should gravitate toward a recognition that successful collective bargaining includes compromise at its essence; and that without give and take, no compromise is possible.

Neither Management nor Labor should to come to arbitration with a list of demands, expecting to walk away with their list fully granted. Like collective bargaining, Fact-Finding is not a mechanism to get what you want, but rather a process empowering both sides to live with what they get.15

On each issue, the Panel has considered every §9 criteria as they are supported by the record – based upon a preponderance of the credible evidence.

14*County of Lake and Command Officers Association of Michigan*, MERC Case No. LO2 H-9004 (2004), where he wrote at page 4: "As Dean Theodore J. St. Antoine of the University of Michigan Law School wrote: 'the soundest approach for an outsider in resolving union-employer disputes is to try to replicate the settlement the parties themselves would have reached had their negotiations been successful." See, *County of Saginaw and Fraternal Order of Police*, MERC Case No. I90 B-0797 (1992). http://archive.lib.msu.edu/LIR/awards/r729.pdf

15Some pundits have offered the general observation that 'management gets the language, and the Union gets the money.' However, as some scholars observed: "For negotiations that are at impasse most public sector collective bargaining laws require interest arbitration. Typically, the only issue remaining at impasse in public sector negotiations is the economic package, and the most common economic issue is that of wages. Because the strike is proscribed in most jurisdictions, and the labor market is imperfect, a theory of second bets has emerged in settlement of these matters. Rather than relying on market forces, the parties must rely on interest arbitrators and their applications of the institutional wage standards to the record of evidence to determine what the appropriate wage shall be." Dilts, David A. Dilts; Rahnama-Moghadam, Mashaalah; Mangestus, Tadessa. *Institutional Wage Standards in Public Sector Interest Arbitration.* Journal of Collective Negotiations (formerly Journal of Collective Negotiations in the Public Sector) Volume 30, Number 4 / 2005, Page 339 - 348.

V. ABILITY TO PAY

The employer asserts that it has a diminished ability to pay.

The Union counters that the issue is a misnomer and a 'red herring' misdirection based upon a 'distorted view' of the relevant data. It concludes that a more appropriate interpretation is the employer's unwillingness to pay a fair wage, and a belated attempt to undo the omnibus settlement of wages for the two units.

As a number of Act 312 arbitrators have noted, the phrase in § 9(a) of the Act: "the financial ability of the government to pay" is not self-defining.16

To be sure, ability to pay is nothing new; it has been considered by Act 312 panels since the inception of the act. Nevertheless, in 2011, the State Legislature modified the Act 312 Statute.17 The statutory language further memorialized a legal position giving precedence to limitations based on the concept of ability to pay. The following statutory language applies:

> 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 the 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. [Emphasis added.]

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16. See, *City of Muskegon Heights and Command Officers Association of Michigan*, MERC Case. No. L-12 A-0009 (Falvo, Chair) (January 18, 2013) http://archive.lib.msu.edu/LIR/awards/r2439.pdf.

17 2011 Public Act 116

In modifying the 312 Statute to expressly recognize that non-balance sheet liabilities – most notably pension and other long term benefit costs – are included in the concept of ability to pay, the State recognized that merely looking at an employer's balance sheet and/or annual budget failed to take into account a major component of a public employer's overall financial situation. As such, the State established that such liability must be considered when addressing the ability to pay issue. The panel recognizes that it should look at the gestalt of the employer's finances, not just small pieces or the short term.

Temporally, this is a parallel track with changes in the Governmental Account Standards Board's reporting rules, especially Statements 67 and 68.18 In that connection, the actuaries and plan administrators have also changed the expected rate of return on investments, which has the expected effect of upping the employer's current contribution for pensions.

Nevertheless, the changes in account reporting did not create new liabilities. Instead, it required more transparent reporting of preexisting liabilities. While it may change the apparent face of the County's finances, at least to the casual observer, it left the reality of the promises and the indebtedness untouched. This is not news to those working with pensions on a day-to-day basis.

The "Great Recession" of 2008 continues to have an effect, particularly on County revenues. The County presented ability to pay issues with respect to its annual budget.4

18"For many public sector retirement plan sponsors, the Governmental Accounting Standards Board's new pension reporting rules couldn't have come at a worse time. The changes, effective June 20 and encapsulated in GASB Statements 67 and 68, mandate that governmental balance sheets reflect unfunded pension liabilities. This has been met with grave concern by plan sponsors." Lastee, Mark; Lieberman, Marc. "Impact of GASB's new pension rules on government bond ratings" (April 14, 2014).
http://www.pionline.com/article/20140414/PRINT/304149996/impact-of-gasbs-new-pension-rules-on-government-bond-ratings

More to the point, the cost of living has a perverse effect on the employer's ability to pay. Proposal A limits the county's ability to levy taxes on recovering real estate values is annually limited to 2% or the rate of inflation, whichever is lower. Thus, the effect of the recession has a continuing effect on taxable values, even as State Equalized Values rebound.

Further, there is a synergy between Proposal A and the Headlee Amendment.[19]

To be sure, the County's revenue sources have declined over the past few years while expenses, including employee wage and benefit costs, have continued to rise. The County, like many municipalities in this area, is still adjusting to life with reduced revenue. These are the synergy between several factors: the result of general economic woes, the effect of Headlee and Proposal A[20], the downturn in taxable values and tax revenues, and a series of adverse actions by the Michigan legislature and executive, including sporadic and declining revenue sharing.[21]

The County struggles daily to adjust to these new realities.

19As the County Administrator testified: "The operating millage rate is applied to the taxable value to generate part of the compensation. If the – the taxable value has increased more than the rate of inflation from the prior year it may be limited – you may have to reduce your millage rate to – down to that. So, that the Headlee keeps your total tax revenue from increasing more than the rate of inflation or 5 percent, whichever is greater. **In 2016 the factor was three-tenths of one percent.**" [Emphasis added.]

20MCL. 211.34d.

21The wisdom and politics of these changes is beyond the panel's mantle or authority. We can't change it here. Like a weatherman, it is enough for the panel to note that these conditions exist, and they are beyond the power of the two parties to change. Indeed, the record made was not directed toward assigning blame.
But pundits do observe and report on this economic 'weather.' See Lawrence, Eric D. (February 29, 2016) "Evans: System for financing local government 'broken'" *Detroit Free Press* http://www.freep.com/story/news/local/michigan/wayne/2016/02/29/evans-blasts-michigan-local-tax-limitations/81124048/; Henderson, Stephen, Editorial Page Editor (November 23, 2015) "How Michigan's cities are set up to fail" *Detroit Free Press* http://www.freep.com/story/opinion/columnists/stephen-henderson/2015/11/21/cities-reflect-states-problem-cost-value/76037152/.
The conundrum may also be the result of alleged legerdemain by the Michigan Department of the Treasury on the amount and identity of funds being paid by the state to satisfy its revenue sharing obligation under the Headlee constitutional amendment. See Mogk, John E. guest writer (Wayne State University Law School professor). (May 28, 2016) "State's dereliction in funding cities violates constitution" *Detroit Free Press* http://www.freep.com/story/opinion/contributors/2016/05/28/states-dereliction-funding-cities-violates-constitution/84586842/.

VI. BARGAINING HISTORY RESULTING IN THE JANUARY 1, 2014 THROUGH DECEMBER 31, 2016 COLLECTIVE BARGAINING AGREEMENT HERE AT ISSUE

A. Economic Backdrop to the Negotiation of the Current 3 Year CBA in 2013 – 2014

There can be no question that like most other municipalities in Michigan, the "Great Recession" significantly and adversely impacted the tax and other revenue of the County. The effects on County general fund revenue were further exacerbated by the fact that the residents of Livingston County had authorized (and to this day continue to authorize) the lowest millage rate in Michigan.

However, during this same period of declining revenues, the costs to the County including jail operations and prisoner medical, pensions, and employee healthcare costs continued to escalate. Wages and benefits of employees formed and continue to make up the largest County costs and constitute the overwhelming majority of general fund expenses of the County. Like other municipalities, hard decisions needed to be made regarding the cutting of programs, eliminating or not filling positions, expending general fund balances to balance the budgets, foregoing and suspending capital outlays, and regarding compensation of employees.

In 2013, taxable valuation and general fund revenue remained well below pre-recession levels.22

However, by 2013, there was reason to be cautiously optimistic that the downward spiraling of taxable values and declining general revenue appeared to be slowly reversing. With this backdrop, the County entered negotiations with the Union in 2013 for the Current 3-Year CBA with the Union.

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22 And, even today, taxable values and general fund revenue have failed to recover to the pre-recession levels.

B. The Basis of the Negotiations for the Current 3 Year CBA and the History Regarding the Bargained-For Method to Address the Wages of "Mixed" Liv. Road Sgts. and Liv. Jail Sgts. Unit.

The Union's priority was its commitment to seek improvement of the wages of the Liv. Road Sgts. and the Liv. Jail Sgts. **as a whole**. There is no question the County was receptive to a reasoned and analytical approach to appropriately compensate Livingston Sergeants compared to external counties and other Livingston County employees.

During negotiations for the Current 3 Year CBA, the County and Union chose and evaluated the comparable counties and their respective corrections and law enforcement sergeants units. The maximum base wage rates of comparable counties' corrections sergeants proved to be significantly less (between a low of $2,000 less to over $5,000 less) than the wage rates of road patrol sergeants in the majority of the comparable counties which differentiate between road patrol and corrections sergeants. As such, one option during the negotiations was to bifurcate the Livingston Sergeants into a slightly higher paid classification of road patrol sergeants and a lower paid classification of corrections sergeants.

Ultimately, the Union maintained and the County agreed (even though ultimately more expensive to the County given the changing demographics of the unit) that the Livingston Sergeants would continue to be compensated based upon a single, uniform wage rate. The Union and County further bargained and agreed that THE UNIFORM RATE WOULD BE EVALUATED AND CALCULATED BASED UPON A TRUE MIXED UNIT AND INCLUDE BOTH THE CORRECTIONS AND LAW ENFORCEMENT UNITS OF THE COMPARABLE COUNTIES. This analysis resulted in a conclusion that in 2013 the "mixed" Livingston Sergeants Unit was between 4 and 5 percent below comparable counties. This was the catalyst

for the Union and County agreeing that Livingston would include a new 6th wage scale step such that the "mixed" Livingston Sergeants classification maximum wage rate would equal the AVERAGE (or "middle of the road average") maximum wage rate of the of the comparable counties considering both corrections and road patrol.

As such, as to wages the County and Union negotiated to add the new and additional top 6th wage step for the existent single "mixed" sergeants' classification. (Article 53)

C. The Significant Wage Increases Obtained by the Union for 2014 and 2015 During the Current 3 Year CBA

The Parties ultimately agreed to significant increases in the wages at the top step of the sergeants classification in 2014 and significant percentile across-the-board increases to all levels of the wage rates for the Livingston Sergeants classification in 2014 and 2015. First, the NEW and ADDITIONAL top or maximum wage rate was established to apply to all Livingston County Sergeants who had six or more years of service. This newly negotiated top rate had the effect of raising the 2014 top wage rate applicable to the Livingston Sergeants' classification from $61,843.00 to **$65,234.00** which in and of itself was a **5.5%** increase in 2014 alone. In addition, consistent with other County units and employees, the County and Union negotiated a cumulative **3.13%** across-the-board base wage increase in 2014 to all other wage steps in the Livingston Sergeants' classification.

Again consistent with other County units and employees, for the year 2015 the County and the Union negotiated another across-the-board wage increase tied directly to the reported increase in the County's year-over-year increase in taxable value. There is no question that for 2015 this across-the-board base wage percentile increase was 3%.

For the three year period here at issue – even with a 0% wage increase for 2016 –

top rate unit sergeants achieved an **8.6%** wage increase over the term of the Current 3 Year CBA. In addition, other steps have been subject to across-the-board increases for 2014 and 2015 equal to 6.6%.

The Last Best Offers for the final year of the Current 3 Year CBA must be made in the context of the bargaining history and the increases attributable to the first two years of the three year contract, being 2014 and 2015.

VII. DISCUSSION

A. External Comparables and the Unified Wage Scale for Sergeants

Segregating the Road Patrol and the Jail Sergeants wages is contrary to the bargaining history which formed the basis for the Current 3 Year CBA.23 The overriding lessons to be gleaned from BOTH the Employer's and Union's exhibits regarding external comparables (as well as the record at the hearing) are that – even with a 0% increase during the year of 2016 – the Union was extremely successful in negotiating wage increases over the term of the Current 3 Year CBA which met or EXCEEDED IN EVERY RELATIVE MEASURE the wage increases achieved by sergeants units in comparable counties over the same time period. Moreover, even with a 0% increase during 2016 – the Union has successfully negotiated wage increases which over the life of the Current 3 Year CBA improved the relative salary ranking of the Livingston Sergeants amongst the comparable counties.

The combined units met or exceeded the "average" of the external comparables. The parties the bargained-for goal of bringing the unit as a whole up to the average of the comparable county Sergeant units and, further, the Union exceeded the percentile wage across-

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23 The top wage rate for Liv. Jail Sgts. far exceeds by almost 10% that paid by comparable counties.

the-board increases of the comparable county sergeants units during the term of the current CBA.

The top rate of the Livingston Sergeant's Classification **INCREASED BY 8.6%**. This is more than twice the average (3.7%) of the comparable counties' units and, moreover, **2%** higher than the next closest county.

It is to be noted, however, that relatively few of the Sergeants are at the top rate. Highlighting the top rate ignores those currently on the lower rung, who make due with less. This is illustrative of the basic philosophical principle: "Your mileage may vary." Or the basic wisdom that, "3% of an elephant is not equivalent to 3% of a mouse."

Indeed, mention should be made in this context of the regressive effect of the increase in employee contribution to health care (which is a flat rate based on premiums). This has the most pronounced effect on those at the bottom of the salary scale.

The percentile across-the-board wage paid to the Livingston Sergeants' classification increased **6.13%** during the term of the Current 3 Year CBA. During this same period, only Ottawa County was fractionally (*i.e.*, 0.12%) higher.

Remaining comparable Counties/bargaining units receive across-the-board wage increases of as little as 1% to as high as 5% during that same three year period.

Conversely, considering separately Liv. Road Sgts. from Liv. Jail Sgts. demonstrates the <u>significant</u> wage advantages to the Liv. Jail Sgts. of single Sergeant classification. As Union Exhibit 107 make clear, considered separately, the top wage rate for Liv. Jail Sgts. far <u>exceeds</u> by almost 10% that paid by comparable counties. 24

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24 The Union and County have set forth exhibits which seek to demonstrate the relative additional "value" or "cost" of other the fringe benefits such as holidays, vacations, clothing allowance etc. between those provided by Livingston County and those of the comparable counties. Union Ex. 108 and 109. While, as pointed out at the hearing on cross examination, these Union exhibits fail to consider that certain benefits do not actually accrue to

However, even Mr. Steffes admitted "**that we thought it was in the best interests of all the employees that we considered them as a whole**." [Emphasis added.]

B. Internal Comparables

The County's LBO here of a 0% across the board rate increase in 2016 was also the Last Best Offer to the other unions with whom the County has negotiated and has been implemented for all non-union employees in Livingston County.

D. The 2016 Fiscal Condition of the County and the Prudent and Fiscally Appropriate Legislative Budgetary Decisions Which Are in the Best Interests of the Public and, in the Long Term, the Employees and Retirees.

The County argues that it does not have the financial ability to pay.

It urges that § 9(a) read in context of subsections (I)-(iv) should include more than having sufficient cash flow to meet payroll. It urges a broad reading to include a more nuanced definition, including the financial impact on the community; the financial interests and welfare of the public, and other financial liabilities. It suggests that unfunded liabilities are part of that equation, and that the discretionary judgments of the County Board are entitled to weight.25

The residual impact of the "Great Recession" continues to impact the finances of Livingston County. This, of course, is exacerbated by the limitations on tax revenue growth imposed by the Headlee Amendment, Proposal A, and continuing revenue cuts imposed on the

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wages to unit employees as implied by the exhibits, fails to (Tr. Winokur, pp. 50-51). Even so, the Union exhibits reflect favorably on the overall compensation. It makes clear Liv. Jail. Sgts. rank 2nd on the listing and well before average, while Liv. Road Sgts. rank 4th of 8. (Tr. Winokur, pp. 50-51). What is not accounted for in Union 108 and 109 is the lower sums paid by Livingston for employee contributions to healthcare coverage (Employer Ex. 237) and pension (Tr. 107). Based upon the record, it is fair to say that the compensation of the Livingston Sergeants' Unit is at least equal, and actually demonstrably superior to the comparable counties' averages.

25The Board seeks to pay down (or at least stem the increase) of unfunded liabilities including the increasing unfunded employee pension liability

County by the Legislature.

Although County property tax revenue is projected to be FLAT (*i.e.,* a mere $10,000.00 net increase for 2016) the costs to the County continue to mount. This includes significant employee (not retiree) health care expenses of what is projected than $3,000,000.00 in 2016; higher annual pension costs payable to MERS based upon higher unfunded liabilities and significant changes to the actuarial assumptions and additional jail operations cost of approximately $645,000.00 in 2016. The higher projected 2016 costs also include an additional almost 2 million dollars of "roll up" costs attributable to the 2014 and 2015 across-the-board wage increases for County employees.

In budgeting for 2016, the County faced a budget deficit. It was required draw down reserves and make other adjustments to balance the 2016 budget.

The Employer has a surplus of unrestricted general fund monies available to pay the employees in the bargaining unit.

The parties sought to have the 2015 CAFR report entered as an exhibit in these proceedings, unfortunately it had not been released as of the date the briefs were due.

The most current CAFR that was available at the time of the hearing was for fiscal year 2014. Employer exhibit 217, is a copy of page 12 of a recommendation from the County's financial management firm. The firm recommends the County maintain a general fund balance of "not less than 50% of General Fund Revenues." These recommendation far exceeds the State of Michigan Treasury Department's and Government Finance Officer's Association's standard

recommendation.26

Although that may be an admirable and fiscally prudent goal, it is unrealistic. The vast majority of local governments do not maintain such a healthy fund balance. Indeed, most communities feel they are fortunate to maintain a 20% general fund balance.

In short, the County has the ability to pay. Even as the community has chosen to have historically and strikingly low 'tax effort' compared to the comparable communities. Notwithstanding the learned and sincere legal and accounting arguments, the employer has the means to pay the Union's demand.

When examined separately in the context of comparable corrections sergeants (and without the benefit of the road patrol comparables) there can be no question that the Liv. Jail Sgts. are paid more than "10%" or "significantly above average.".

To be sure, wherever they work, a Sergeant is a first line supervisor. They are responsible for the direct monitoring and supervision of the officers on their shift.

The Sergeant's in the jail are in charge of the jail, and the Sheriff has a constitutional responsibility to run the jail. Importantly, the jail is a capital investment. It makes money. Rent-a-cell is a factor here, which has in turn created a building boomlet. This was a canny business decision by the county. There was a 1.9 million bond to finance it.27 The financing has two components, one of which adds cells, and the other involves maintenance and upgrade of existing facilities. In some respects, one could argue that the jail sergeants are

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26The Treasury Department for the State of Michigan recommends at least a 10%-15% General Fund Balance. The Government Finance Officers Association (GFOA) recommends maintaining at least a two month General Fund Balance, which equates to 16.67%.

27Mr. Hinton conceded that 1.2 million dollars of the 1.9 million is offset by a 1.2 million dollar influx of new money the source of which is the U.S. Marshall's office. The Federal Government has "rented" jail space to the tune of 1.9 million dollars per year, to house their prisoners.

revenue producers and have a higher pay justification as a result. Of course, that is not to say that maintaining the peace and dignity of the community, enforcing the law and protecting citizen's lives is not worthwhile. To the contrary, there are communities that pay their road patrol sergeants more.

It is obviously true that Correction and Road Patrol Sergeants are not entirely fungible. They have different roles, problems, responsibilities and challenges. Not to mention they work with different rules, and an entirely diverse environment and cast of characters.

The parties made a grand bargain. However, in this department sergeants need to be able to work interchangably. And they are paid on the same scale, regardless of where they are assigned.

It is abundantly clear that there have been significant wage gains made by the Livingston Sergeants unit during the first two years of the CBA, even assuming an award of 0% in 2016:

- Exceeding the percentile wage gains for sergeants in the comparable counties;

- Improved the historical relative wage "ranking" of Livingston Sergeants as to the comparable counties;

- Moved the top rate of "mixed" sergeants unit from over 4.7% below average to <u>exactly</u> the rate of the bargained-for "middle of the road average" which formed the basis of the negotiations;

- The Liv. Road Sgts. remain competitive and average with respect to the external comparable counties units; while the corrections comparables reflect that Liv. Jail Sgts. are significantly ($5,000.00 or roughly 10%) ABOVE the average;

- The Employer LBO is wholly consistent with the internal comparables; and

- The Employer LBO is consistent with the flat "cost of living" increase for 2015 as reported by the Department of Labor.

The issue before the panel is a single issue, wages for the year ending on December 31, 2016. The parties are presently in the final year of a three-year agreement that provided for a contract re-opener for the third year. The re-opener was restricted to the issue of wages for 2016.

The Sergeants in this unit have to pay either 10% or 20% of their health care premium. The date of hire determines which of the two rates the employee is mandated to pay.

As health care costs rise, the amount the employee is required to contribute to the premium, increases. A modest increase in wages for the unit would help to offset the increased costs incurred. This alone should be reason enough for a wage increase.

Union exhibit 105 is a list of the stipulated external comparable communities for these proceedings. For those groups reporting settled agreements for 2016, every department received a wage increase. Two departments, Kalamazoo and Saginaw, have not settled as of the time of this hearing.

A zero increase award for Livingston County Sergeants would make the unit the only settled agreement for 2016 without a wage increase. Union 106 is an accounting of the top pay for Sergeants for 2015. The pay rates listed in Union 106 range from a high of $72,067 for Ingham to the lowest being Saginaw at $59,273. Livingston comes in at number 5 at $67,191.

The effect of a zero increase for 2016 would drop Livingston County Sergeants from fifth place.[28] Clearly, with all but the two previously identified open contracts for 2016, a total

[28]Union exhibit 108 is a comparison of total compensation for all of the comparable communities for 2015. Out of the eight listed, Livingston Sergeants are ranked number four. There was not enough data at the time the exhibits were exchanged to complete a similar exhibit for 2016. However, since Union exhibit 105, updated at the hearing with recent settlements for St. Clair County, Ingham County and Berrien County, the panel has enough information

compensation exhibit for 2016 would indicate where Livingston would fall in relation to the other seven communities.

An award in favor of the Union maintains Livingston County Sergeants relative position with the other seven communities.

The remainder of the unit does not fall under the purview of the Act, and therefore the decision of the panel with respect to the non-Act 312 group will be treated as non-binding.

The non-Act 312 employees do fall under the jurisdiction of P.A. 54. They are not exempt from this Act like the Act 312, employees.

The Panel finds that Act 54 does not apply. Specifically, Act 54 only is effective upon the expiration of a collective bargaining agreement. The current contract is not expired. This is a re-opener in the final year of the agreement for wages.

The rest of the Agreement has been and continues to be, in effect.

Full retroactivity for all the sergeants is both legal and appropriate. Act 54 does not prohibit the Employer from paying retroactivity to the non-312 Sergeants since this is the final year of an unexpired collective bargaining agreement, which remains in effect until December 31, 2016.

PA 54 of 2011 in its original form prohibited public employers from agreeing to, and Act 312 panels were prohibited from awarding, retroactive wage and benefit increases. P.A. 322 of 2014 was enacted on October 15, 2014 and amended P.A. 54 to allow retroactive wage increases for Act 312 eligible employees. Until P.A. 54 was amended, Act 312 arbitrators were prohibited by statute from awarding retroactive wage increases. Therefore the Arbitrator is

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to extrapolate what 2016 total compensation would show.

permitted to award retroactivity in this matter. The October 2014 amendments to PA 54 exempted employees who are Act 312 eligible from the prohibitions relating to retroactivity of wage and benefit levels post contract expiration.

The County argues that even though Act 54 was modified to permit retroactivity, there was an implicit recognition that retroactive wages are not a foregone conclusion, However, in that sense, the employer's argument against retroactivity, and any extension of it to the Road Patrol, is an unwarranted extension of the law. It is 'boot strapping' unsupported by the law's history.

Even though Act 54 was modified, there was obviously some recognition that retroactive wages need not always be granted. Rather, retroactivity is like any other issue. Its allowance or disallowance by an Act 312 panel depends upon the total context and settlement, and application of the § 9 factors.

Hypothetically, the Employer's Last Offer of Settlement of no retroactivity is not remotely consistent with any of the external comparables. None was denied retroactivity for wage increases in 2016.

The work was performed, and the employer has had the use of the employees' money. Adopting the employer's offer is bad for long term labor relations, and foreseeable could have an adverse impact on departmental morale.

The panel has given serious consideration to the Employer's argument. However, in light of the record as a whole, retroactivity of wages is appropriate.

The Panel, therefore, adopts and grants the Union's Final Offer of Settlement that wages be retroactive for 2016. The essential symmetry and intent of the omnibus settlement

ought to be honored by the Panel. The carefully considered and executed decision to equalize pay for both parts of the unit should be given effect for the final year of the contract.

The potential disputed effect of external law (on retroactivity, and the fact that part of the unit is deemed Act 312 eligible, and the other must resort to fact finding) should have no bearing on the outcome.

At bottom, it was the party's decision to treat Sergeants as fungible goods, and to pay them the same wage. They set the market rate. It is their contract, and the parties get to call the tune.

There are two tiers in comparability. As indicated above, it is difficult to compare, as there are qualitative differences.

It is fundamental that this is a multi-year contract, and that the first two years are history. 2014 and 2015 are already worked, bought and paid for.

The issue for the panel's decision is wages for the final year ONLY.

In the earlier years of the contract, the parties set the market value – that is the relative worth – for both units. During the pendency of this hearing the Employer stipulated to the fact that historically, the Employer and the Union have sought to maintain parity between the corrections and law enforcement on wages and benefits. Segregating the Road Patrol and the Jail Sergeants wages is contrary to the bargaining history which formed the basis for the Current 3 Year CBA.29

The panel declines to deprive the parties of the benefit of their bargain.

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29 The top wage rate for Liv. Jail Sgts. far exceeds by almost 10% that paid by comparable counties.

The issue here is only the final year wages for both units. In effect, they negotiated comparability and the system for implementing it.

The first two years of the current agreement, wage increases were a product of negotiations between the parties. Ironically, it was the Employer who proposed basing the wage increases on any potential increases in the State Equalized Value for the County. The theory being that if the County did well, the employees would benefit, but if the County suffered a drop in S.E.V., the employees would receive little or no raise.

To the Union membership's credit, they accepted the offer to "partner" with the Employer, and share in both the good times as well as the bad times.

To everyone's surprise, the S.E.V.'s in Livingston County rose in 2014 and 2015, beyond all expectations. Unlike other areas of the State of Michigan that have not as yet benefitted in the uptick in the economy, Livingston County is at the forefront of increasing property values.

The employer and the Union made a wager based on the fluctuations of State Equalized Value (SEV). That system carried risks for both parties. The outcome was in doubt, particularly due to the “clawback” effect of proposal A, which plunged values of existing real property in absolute terms, and then prospectively limits the multiplier.

It was an uncertain and moveable anchor which controlled the wage rate.

In short, the County and the Union set the market rate for the prior years, and are now estopped to deny their prospective consequence.

That the employer now expresses ‘buyer’s remorse’ for the bargain it struck does not relieve it from the consequences of its settlement.

It is undisputed that the employer has a more than adequate fund balance and the ability to pay as discussed above.

Significantly, the employer's offer came in below 1%. Hypothetically, if it had been at that level or higher, this would have been a much closer case. In 2016 nobody else in any of the external comparables took a zero.

Baseball arbitration is in many respects the applicable model for Act 312 arbitration.[30] This is like horseshoes. It is ultimately a question of whether the Employer's or the Union's offer is closest to the mark.

While 2.25% for this year may arguably be a tad high, it is clear that 0% is significantly below market rates. In the Chair's opinion the Union's final offer is closer to the going rate, so that it ought to be adopted by the panel.

The evidence does not support the Employer's position of no wage improvement.

Clearly, those Sergeant's covered by P.A. 312 are eligible for an award providing for retroactivity to January 1, 2016. The Panel also believes that a recommendation of retroactivity for the non-Act 312 Corrections Sergeants is not prohibited by P.A. 54 – since this is the final year of a collective bargaining agreement that is in effect until December 31, 2016.

Therefore, the panel believes, based on the record and in the interests of the good of the public, a recommendation of a 2.25% wage improvement effective January 1, 2016 should be made.

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30 See, John Sands, "Baseball Arbitration and the 'Engineering' of Effective Conflict Management," 13 *Dispute Resolution Magazine* 10 (Spring 2007).

VIII. AWARD

I adopt the Union's Last Best Offer on wages. Likewise as to the fact finding, I adopt the Union's offer on wages and retroactivity for all the reasons indicated.

8/23/2016

STANLEY T. DOBRY, Chairperson

I DISSENT from the Chair's opinion, reasoning and award.

8/23/16

RICHARD D. McNULTY, Delegate

I CONCUR with the Chair's opinion, reasoning and award.

8-24-16

FRED TIMPNER, Delegate

This concludes the panel's award. We retain no further jurisdiction.

8/23/2016

STANLEY T. DOBRY, Chairperson

8/23/16

RICHARD D. McNULTY, Delegate

8-24-16

FRED TIMPNER, Delegate