

Original

STATE OF MICHIGAN
BUREAU OF EMPLOYMENT RELATIONS

In the Matter of
Act 312 Arbitration and Fact Finding
Between:

Livingston County Deputy Sheriffs Association,
Union

MERC Case No. ^D15 L-0925
Panel Chairman:
Thomas W. Brookover

and

Livingston County,
Employer

_____ /

OPINION, AWARD AND RECOMMENDATION

Attendees:

For the Union:

- David Radtke, Esq., Attorney for Union
- Michael Barry, Corrections Representative
- Alan Reinstein, Consultant
- Nancy Ciccone, Research Analyst
- Matt Schutes, Union President

For the County:

- Richard McNulty, Esq, Attorney for County and the Sheriff
- Jennifer Palmbo, HR Director
- Ken Hinton, County Administrator

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 STATE OF MICHIGAN
 EMPLOYMENT RELATIONS COMMISSION
 DETROIT OFFICE

This is a combined fact finding and binding arbitration. The fact finding is for corrections officers in Livingston County (the "County"). The binding arbitration under Act 312 is for deputies and detectives in the County Sheriff's Department.

The Livingston County Deputy Sheriff's Association (the "Union") represents both groups.

The sole issue is a wage reopener for calendar year 2016, the last year of a three year contract.

PROCEDURAL HISTORY

The Union filed both petitions on January 9, 2016 and I was appointed arbitrator and fact finder by email March 1. A Pre-Hearing conference was held by telephone on March 11. Last best offers were submitted March 28. The hearing was held on April 25, 2016. At the hearing, the parties stipulated to the admission of 25 Union exhibits and 36 County exhibits. Five witnesses testified to fill 264 pages of transcript. Post-Hearing briefs were filed and exchanged on July 11.

A draft Opinion, Award and Recommendation was provided to panel members on September 9, 2016, and the final Award and Recommendation was issued on the date signed below.

The arbitration is pursuant to Act 312, of 1969, MCL 423.231 as amended by Act 116 of 2011

The parties agreed that the comparable counties which should guide the panel in making its decision are Berrien, Ingham, Jackson, Kalamazoo, Saginaw, and St. Clair.

In an Act 312 Arbitration each side submits a "last best offer", or "LBO", on the issue to be arbitrated. The panel must award one or the other and cannot compromise or fashion a different award. The fact finding procedure for the corrections officers does not require the panel to accept one or the other offer, but allows it to fashion its own remedy if supported by the evidence.

EVIDENCE PRESENTED

UNION EVIDENCE

Dr. Alan Reinstein is a chaired professor of accounting at Wayne State University and has testified in numerous Act 312 arbitration hearings.

Dr. Reinstein prepared a report consisting of over 60 pages of text and

exhibits, which was admitted as Exhibit 2. He also prepared a rebuttal report which was admitted as Exhibit 20.

He testified that when he looks at the financial health of a county or city, the most important number is the general fund unencumbered balance (also referred to as the "unreserved fund balance", "unrestricted net assets, and generally "fund balance"). The two other items he looks at are the pension liabilities, and the liability for other post employment benefits, or OPEB.

The unencumbered and unreserved general fund balance is the amount of money the County has in reserve available to pay for emergencies and other unexpected costs. He explained that there is a general rule, which he referred to as the "gold standard", which counties want to maintain. This gold standard for unencumbered and unreserved general fund assets is at least two months of a county's expenses, or 16.7% of its annual expenditures. Livingston County's fund balance, at about 50%, is far in excess of this gold standard.

Over the last few years the County has paid about \$6 million more in contributions to the pension fund than was suggested by the actuaries, which he agrees was the right thing to do. In 2014 the County was required to make pension contributions of \$3,224,000 and instead they paid \$5,338,000. He said they are going to save money by paying prior service costs in 11 years rather than over 25 years.

He noted that for many cities and counties the liability for "other post employment benefits", (OPEB), which are mainly health benefits for retirees, is larger than obligations for the pension plan. In the last few years, however, the County made some changes to reduce its OPEB liability, eliminating them for new employees, having many former and current employees take a cash settlement, and making a higher contributions than necessary. As a result the county has greatly minimized its long-term OPEB obligation

The County also does a very good in budgeting so actual numbers are very close to the budget.

Livingston County has the highest median income, the lowest unemployment

rate, and the lowest millage rate of all 83 Michigan counties, and their Moody's bond rating is AAA.

He agreed that the current budget projects an increase of property tax revenue, which is the largest component of the general fund, of only \$10,000. Overall, however, the county projects expenditures to decrease by 3.5% from 2015 to 2016, and total revenue to increase by 1.8% for a net revenue increase of 5.3%.

He also agrees that MERS is going to make changes to actuarial assumptions for the pension plan which will increase pension costs. County pension contributions went from \$3.6 million in 2014 to \$4 million in 2015, and in 2016 they will go to \$4.46 million.

He also agreed that the total revenue for the County has not yet rebounded back to the 2009 levels.

Nancy Ciccone has a BA in Industrial Psychology, an MA in Industrial and Labor Relations and has worked as a labor research analyst for the Police Officers Labor Council for 30 years. She has testified at hundreds of 312 and fact-finding hearings.

She prepared a number of exhibits for the Union for this hearing, using collective bargaining agreements from the comparable counties, and if she needed further information she called the respective human resources departments.

There are two tiers of deputies, those hired after 2011, and everyone else. Only three members are in the lower tier, and the average seniority of the top tier is 14 years. Her information shows that the top paid deputy was ranked fourth among the comparables in 2014, second in 2015, and will be third in 2016, under either the Union's or the County's proposals (Exhibit 11).

None of the contracts that are settled for 2016 in the comparable counties involved a wage freeze or 0% increase.

In general, Kalamazoo County has ranked the highest, and although it has moved up or down a position or two from year to year, Livingston has been pretty much in the middle of the other counties.

The five year deputies were ranked fourth in 2014, third in 2015 and will remain third in 2016 under either of the LBO's. (Exhibit 11)

About one half of the corrections officers were hired after 2011 so they are in the second tier.

The percentage increase history for top paid corrections officers shows that from 2000 through 2015, even with four years of wage freeze, Livingston County, corrections officers received a 16.82% wage increase, placing them second among the comparables. In 2014 and 2015 they received a cumulative increase of 9.32%.

Five-year corrections officers, ranked fifth among the comparables in 2015.

The average seniority of corrections officers is seven years.

Michael Berry is a Deputy in the corrections department. There are approximately 54 corrections officers.

The County has entered into an arrangement where it began to house Federal prisoners in its jail, and has been expanding the jail for that purpose. The jail formerly housed 254 inmates and will house 408 when finished, but currently houses about 360, with about 50 Federal inmates.

The federal prisoners who are held are waiting for trial or other matters, but are not serving sentences. The jail began to house federal prisoners in November 2014 and it made a corrections officer's job much more difficult. He explained that while the County inmates are serving time for offenses like drunk driving, shoplifting and drug possession, the federal prisoners have been convicted or are awaiting trial for a range of crimes from murder to racketeering. He understood that they were to get white collar inmates, and then the first inmate they received was a contract killer for a gang.

The Federal inmates have a lot more complaints about the facility, food and treatment and like to claim special treatment. He said that it seems like a third of the federal inmates have a special diet or have some kind of medical problem and if they don't get seen immediately they threaten to sue. In addition, inmates used to be transported by deputies but that is now the job of corrections officers.

As he testified:

There -- there's more face time spent as a corrections officer with a federal inmate because they have a lot more complaints, facility, food, treatment, versus your local that gets arrested, he's in jail, he knows he's in jail. The federals like to claim, I'm a federal inmate, I get special treatment.

Q: Okay. And you said that the job got harder because there was more facetime with inmates. Why does that make your job harder?

A: You still have the rest of your job to do, you still have to get inmates to medical, you still have to get inmates to their visits with their attorneys, with probation, and if you're spending more time simply trying to walk to do a cell check, it crushes your time in between. So instead of having -- say it takes 10 minutes to do a cell check, instead of having 50 minutes to do the other things, you're now down to 30 minutes because you're spending time explaining to a federal inmate that this is the way it is in this jail.

Transcript pp 230-231

Deputy Barry testified that to the best of his knowledge none of the jails in comparable counties house federal prisoners, so the corrections officers do not have the additional problems they create.

COUNTY EVIDENCE

Ken Hinton has been the county administrator since June 1, 2015. He has a BS in business management from Oakland University, spent time in public accounting and was county administrator for Wexford from 2010 until coming to Livingston. He was also treasurer and a school board member for Kingsley area schools.

He pointed out that the County expects only a \$10,000 increase in property tax revenue in 2016. The US Marshal will pay the County \$500,000 for the federal prisoners, but costs are projected to increase over \$1 million and the jail will have a net cost of \$650,000.

Mr. Hinton agrees that the economy and the county are bouncing back and the SEV is bouncing back, but Headlee limits their tax increases.

He confirms Dr. Reinstein's testimony that over the years the county has paid an additional \$5 or \$6 million to reduce its unfunded pension liability. In spite of the additional payments, however, it has gone from 75% funded to 70% funded. That decrease, and new adjustments to actuarial assumptions will mean the County faces additional costs to fund the pension.

Mr. Hinton rejects the concept of a "gold standard". He said he does not believe a 16.7% fund balance is sufficient and in fact the County has a fund balance of approximately 50%, which he believes is "very prudent". The County's financial advisor, Public Financial Management, recommends a general fund balance of at least 50%. He thought that there was only one other county in Michigan, either Ottawa or Kent, with a policy to maintain a fund balance as high as 50%.

During the recession the County reduced the number of deputies and he believes that the best interests of the County are to re-institute lost services rather than giving a pay increase to employees who are competitively compensated. However he also said that they plan to reduce the road patrol by two more deputies this year through attrition.

His decision to recommend a wage freeze was in part based on the flat consumer price index and also that the employees have had 6% increases over the first two years of the contract.

He admits that if the total cost of a deputy is \$98,940, and the County is going to reduce two deputies, it represents \$200,000 in savings.

RICHARD MCNULTY testified about the County exhibits 200 to 206, which he prepared. The wage information in those is somewhat different from the Union exhibits, since he would average the tiers, resulting in a blend of the top and lower paid employees.

He admits that the relevant employees in all the other counties are getting increases in 2016.

THE LAW

Act 312 of 1965, MCL 423.231, *et seq*, provides for compulsory arbitration of labor disputes of municipal police officers and fire departments. Section 8 of Act 312 states in relation to economic issues that:

. . . As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9.

Section 9 dictates:

(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 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.

Section 10 of Act 312 provides that the decision of the arbitration panel must be supported by "competent, material and substantial evidence on the whole record. . . ."

POSITIONS OF THE PARTIES

UNION ARGUMENT

The Union argues that the first and most important factor on which the arbitration panel is to base its findings is the financial ability of the county to pay. It argues that the county "absolutely has the ability to pay" and the total impact of a retroactive 2.5% wage increase for the deputies and detectives is less than \$80,000. For corrections officers, the same wage increase, retroactive to January 1, 2016, is about \$85,000.

It points out that during the recession all county employees made concessions including benefit cuts and wage freezes.

Now, the county's finances are on an upswing. The revenues are up. Property values are up. Revenue sharing from the state has returned. Unemployment is down, and in fact the county has the lowest unemployment rate of all of Michigan's counties. The county levies the lowest millage of all of the counties. The county has a AAA bond rating. The county's pension is in good shape. Its other post employer benefits liabilities are low. General fund revenue is estimated to increase by 1.9% over 2015, while expenditures are estimated to decrease by 3.6%.

Among comparable counties, Livingston's employees rank in the middle of the pack, even though some counties are in financial distress. All the comparable counties have agreed to increases in 2016 – only Livingston wants to institute a wage freeze.

The justification for wage increases is even more compelling for corrections officers, who now house the federal prisoners who are significantly more dangerous and more difficult to manage than the local inmates.

Nancy Ciccone pointed out that the top paid corrections officers were ranked fifth out of seven among the comparables and the second-tier corrections officers, which make up nearly half of the unit, were \$1319 below the average of the other counties. Even with the Union's LBO, they will be \$682 dollars below the average.

In spite of the fact that the County based its decision on a wage freeze on a flat cost of living index, neither the County nor the Union have ever based wage increases on a cost of living index in the past. The Union points out that even though the County projects that property tax revenues will be flat this year, it projects overall revenues to increase by almost 4%.

COUNTY ARGUMENT

The County points out that the deputies, detectives and the corrections officers have had significant increases in the first two years of the collective bargaining agreement, in excess of the increases for the similar employees in the coming comparable counties.

The County points out that the phrase in the statute referring to "the financial ability of the government to pay" is modified by the other factors listed in the statute and it argues that the panel should

“...give due respect to the authority of elected public officials to prioritize and implement fiscally prudent measures and the budgetary priorities as part of the budgetary authority. It is axiomatic that safeguarding public monies and assuring long term financial integrity of the county are clearly the most overriding of “financial interest and welfare of the community””.

It mentioned that Dr. Reinstein praised the fiscally wise allocation and budgeting decisions of the County in undertaking to control unfunded pension and

health liabilities. It asserts that where a governmental unit is paying employees competitively in relation to external and internal comparables, and when it pays above average wage increases, the financial interests and welfare of the public would be best served by the continued “prudent fiscal management being demonstrated by elected leaders of Livingston County”

Analysis and Discussion

ABILITY TO PAY

As stated many times by the parties, the County’s ability to pay is to be given the most significance in making an award under Act 312.

In this case, the County is **not** arguing that it is unable to pay. It is arguing that it should not be penalized for its responsible and fiscally prudent behavior. It argues that it has weathered the recession, and through good management it is recovering. It argues that its elected officials should have the authority to plan and set financial priorities.

We are all aware of the problems of Detroit. We are aware of the plethora of emergency financial managers. We are aware of the problems, not just in Michigan, but nationwide, of many of our cities and municipalities. And one lesson we can learn from that is that just because city or county leaders can do something does not mean they should do that thing. Just because they can give a raise to certain employees does not mean that it is, in the long term, the wise thing to do.

When the statute refers to the “financial ability of the unit of government to pay”, it lists four matters that should be applied to determining that ability:

1. The financial impact on the community of any award
2. The interests and welfare of the public
3. Liabilities of the unit of government whether or not they appear on its balance sheet
4. Any law that places limitations on the unit’s expenditures or revenue collection

The County is somewhat unique....as noted above it has the lowest unemployment rate, lowest tax rate, highest median income, and one of the best reserve funds in the State, . It has contributed substantially more to the pension plan than called for actuarially.

It has given these employees percentage increases at or above the rate of the comparable counties. Their pension contributions are about average for the comparable counties. The deputies and detectives, especially, are paid competitively with the comparable counties.

The issue is how do we measure the financial impact on the community and the interests and welfare of the public in making a determination with respect to the award? The statute directs us to give the financial ability of the unit of government to pay "the most significance". Some might argue that if the government can pay, then it should. But blind adherence to that interpretation could ultimately lead to financial instability. How does a panel weigh the long-term financial integrity of the government and the interests and welfare of the public, in determining its ability to pay an award?

They gave the sheriff's deputies and corrections officers substantial raises in the last two years. Before that they had 0% increases for a few years. The Panel is weighing requests for an additional 2.5% increase, which will give the employees an 8.68% increase over the life of a three-year contract versus a zero percent increase. If we are to consider only the County's ability to pay, there is not much dispute. Choosing either LBO would result in deputies and corrections officers being in about the middle of the pack of the comparable counties.

Although Mr. Hinton said he wanted to increase services, he said they intend to reduce the number of deputies by two in the next year. The savings from that reduction will more than pay for the increase asked for by the Union.

Considering all of the above, the Panel concludes that the County clearly has the ability to pay the 2.5% increase for both units, and it is in the best interests and welfare of the public that it do so.

EXTERNAL COMPARABLES

The County argues that for many years it has maintained its deputies and detectives in about the middle of the pack of comparables. It argues that we should choose its LBO, because it would keep the County in that same position.

The Union points out that if we select its LBO, and grant the 2.5% increase, it will still be in the middle of the pack.

Both arguments are correct. Whichever LBO is chosen, the County's relative position with respect to comparable communities will not change.

There are two tiers for wages for Deputies, those hired before and after 2011. There are currently 32 deputies and only three were hired after 2011.

The base wages of both the top paid deputies and the five-year deputy from 2007 through 2015, as presented by the Union in its Exhibit 11, are ranked third among the comparables except in 2011 and 2013 when it dipped to fourth and fifth. In 2016, apparently regardless of what the panel awards, it will still rank third when Kalamazoo concludes negotiations.

A comparison of percentage increases for top paid deputies over the same period also places the County in the middle of the comparables. After four years of zero increases from 2007 to 2013 the County was next to last in percentage increases, but it gave 5.44% and 3% increases in the first two years of this contract, so at the beginning of this year it was back to third place. It appears that if the County's LBO is adopted it will remain in third place, while with the Union's LBO it moves up to second place.

The base wage for top paid deputies ranked them fourth and fifth among the comparable counties in 2012 and 2013, but they moved up to third in 2014 and 2015. In 2015 their base wage was \$1,290 above the average of the comparables. They will retain their ranking under either the Union or County LBO. They received a cumulative increase of 15.94% from 2007 through 2015, ranking them third among the comparables.

Top paid corrections officers have been ranked fifth among the comparables for the last nine years. In 2015 they were paid \$109 above the average. With either LBO they will move up to fourth. They have received a 16.82%

cumulative increase from 2007 which places them second highest among the comparables.

More than half of the corrections officers are second tier officers, hired after June 20, 2011 and they have been ranked fifth among the comparables. In 2015 their base pay was \$1,319 below the comparable average. They would stay fifth with the Union LBO, but \$682 below the average. This is based on the figures available at the hearing – Kalamazoo had not settled and its settlement will probably push the average higher. This will mean that the County corrections officers will drop even lower below the average.

The corrections officers rank significantly lower among the comparable counties than the deputies. Although they have received substantial increases in the last few years, they still lag behind the average. In addition, their job has become more difficult with the influx of Federal prisoners, a problem not faced by any of the other counties.

CONSUMER PRICE INDEX

Although there was a fair amount of discussion about which CPI index was most appropriate, a review of the evidence presented demonstrated that the wage increases for the majority of the deputies have pretty much kept in line with the CPI. This is less true for the corrections officers, half of whom are more recent hires.

OVERALL COMPENSATION

There was also evidence presented with respect to the overall compensation for the deputies and corrections officers, including pensions and health insurance. On the whole, these do not materially affect the position of the county among the comparable counties.

INTERNAL COMPARABLES

One of the problems with internal comparables is that two other units of the Sheriff's department, the Sergeants and Lieutenants, are also in 312 Arbitration and fact-finding, with different arbitrators. As each award is issued, it alters the consideration of internal comparables. The County offered all employees zero increase this year while in both of the other arbitrations the applicable union's LBO was 2.25%

Arbitrator Dobry issued his Award on August 23 for sergeants in the Sheriff's department, some subject to Act 312, and others, working in corrections, not. Both his 312 Award and his fact finding recommendation was in favor of the Union. The LBO's in that case were for 2.25%, retroactive to the beginning of the year, and zero.

We must note that his award dealt with only six Act 312 eligible employees and ten employees subject to fact-finding, compared to the 38 deputies and detectives and 54 corrections officers this panel is considering.

The County did not offer any increase to any other employees in 2016. Of course the jobs of Sheriff deputies are not precisely comparable to that of other non-uniformed County employees, but that does not mean their jobs are any less important. Court clerks and water department employees, for example, are essential to keep the County working. But they do not face the dangers that deputies and corrections officers can face on a daily basis.

CONCLUSION

This case is about a wage reopener for the last year of a three-year contract. The parties will probably begin negotiating a new contract as soon as this award is entered. There is no question that the employees suffered through four years of wage freezes, but so did those in some of the surrounding counties. In the first two years of this contract, the deputies, detectives and corrections officers enjoyed significant increases.

The deputies and detectives had remained competitive with the comparables over the last few years while the corrections officers are comparatively lower. The County is clearly "able" to pay increases, but some respect must be given to its financial conservatism. The pension plan is only 70% funded and it has tried to play catch up with that. It has given substantial increases to the members of this union over the past two years.

The Union LBO for the deputies and detectives is 2.5%, retroactive to January 1. Under the law, we have to accept that LBO or the wage freeze proposed by the County. We cannot fashion an increase that would be non-retroactive.

The corrections officers are also looking for a 2.5% wage increase retroactive to January 1, and the County is also offering zero. But the Corrections officers are not subject to Act 312, so this is a fact-finding proceeding with respect to them. The same factors apply in reaching a decision, but we do not have to accept the position of one or the other of the parties. We can fashion an award that we believe complies with the facts and the law.

As noted above, however, the corrections officers rank lower among the comparables than the deputies, and have a significantly more difficult job because of the federal inmates.

The parties did not brief the issue of retroactivity of any award to the corrections officers. It appears that MCL 423.215b (1) and (2) only apply after expiration of a collective bargaining agreement. Since that is not the case here, the Panel can make a retroactive award for the corrections officers.

The Panel acknowledges the fact that the County has been fiscally conservative, and that its finances are in good order. But in making an award it is supposed to give the most significance to the financial ability of the County to pay. On that measure alone, the Union LBO should be granted.

Comparison with the external comparables is a closer call, but the Panel finds again that the balance is in favor of the Union. This is especially so with respect to the corrections officers, who have lagged behind the other counties for a while

AWARD

After careful consideration of the law, the testimony, the exhibits, and the arguments of the parties, and consideration of each of the statutory factors, under

Act 312, and on the basis of competent, material and substantial evidence, the panel awards the Union's LBO with respect to the deputies and detectives.

In the fact-finding proceeding for the corrections officers, we recommend that they receive a wage increase of 2.5%, effective immediately, and retroactive to January 1, 2016.

Date:

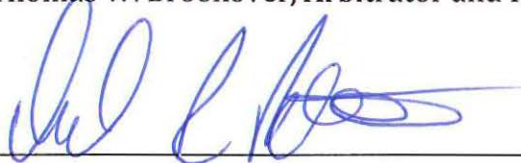
9/9/16



Thomas W. Brookover, Arbitrator and Panel Chair

Date:

9/19/16



David Radtke, Esq
Union Delegate, Concurring / Dissenting with respect
to the Act 312 Deputies.

Date:

9/21/16



Richard McNulty, Esq
County Delegate, Concurring / Dissenting with respect
to the Act 312 Deputies.

Date:

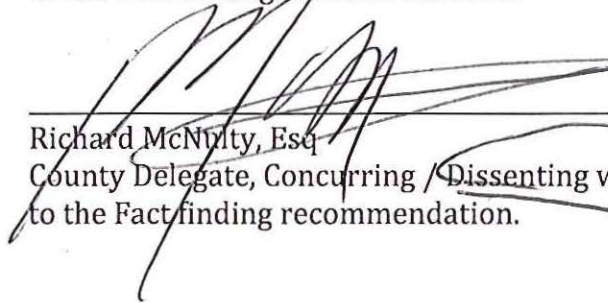
9/19/16



David Radtke, Esq,
Union Delegate, Concurring / Dissenting with respect
to the Fact finding recommendation.

Date:

9/21/16



Richard McNulty, Esq
County Delegate, Concurring / Dissenting with respect
to the Fact finding recommendation.