STANLEY T. DOBRY
ARBITRATOR, MEDIATOR & FACT FINDER

28401 Mound Rd # 1244
Warren, MI 48090-1244
Phone and Fax (586) 754-0840

8275 Camargo Road
Cincinnati, OH 45243-1411
E-mail Dobry@NAArb.org

Member: National Academy of Arbitrators — http://www.naarb.org

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN EMPLOYMENT RELATIONS COMMISSION
BEFORE THE FACT-FINDER

In the matter of the Fact Finding between:

SEIU HEALTHCARE MICHIGAN
Union

-and-

MERC Case No. L13 C-0328(Unit1)
MERC Case No. L13G-0771(Unit 2)

WEST SHORE MEDICAL CENTER
Employer

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FACT-FINDER'S REPORT AND RECOMMENDATIONS

I. APPEARANCES

For the Employer:
Mike Meyers Beckett & Jones PLC
John H. Gretzinger, Esq., P28979
& Counselors at Law
900 Monroe Avenue NW
Grand Rapids, MI 49503-1423
(616) 632-8000
jgretzinger@mmbjlaw.com

For the Union:
SEIU Healthcare Michigan By:
Benjamin Curl Attorneys
2604 4th St.
Detroit, MI 48201-2546
(517) 745-1808
ben.curl@seiuhealthcaremi.org

May 15th 2014

II. INTRODUCTION

SEIU Healthcare ("SEIU") represents two groups of West Shore Medical Center ("WSMC") employees in what is called Unit 1 and Unit 2.[1] WSMC and the SEIU are signatory to two collective bargaining agreements (the "CBA") that are effective through June 30, 2014.

Traditionally, the two bargaining units have acted jointly for the purposes of collective bargaining, meeting with the Employer at the same times and negotiating essentially the same terms, perhaps with slight differences addressing aspects peculiar to each unit's job classifications. In accordance with the wage and fringe benefit reopener provisions found in the CBAs, the parties began renegotiating reopened wages and fringe benefits on June 10, 2013.

The parties have participated in collective bargaining but have been unable to reach agreement on the terms of a revised collective bargaining agreement.

In June 2013, WSMC promulgated its plan to 'right-size' its wage and benefit plan by eliminating $2,900,000 in annual labor costs. This included potential savings in these areas:

[1]West Shore Medical Center is a county hospital that is overseen by a Board of Trustees. The Manistee County Board of Commissioners appoints the members of the Board, but WSMC receives no funding from Manistee County.

Wage freeze	$ 700,000
Health Care Plan Changes	$ 670,000
Easter/Birthday Holiday elimination	$ 90,000
Reduce and redesign Time-off days	$ 400,000
Reduce Pension by 1.0%	$ 210,000
Staffing Redesign	$ 500,000
Other	$ 330,000

This proposed plan was presented to all employee groups in June 2013.

On June 10, 2013, WSMC and the SEIU were scheduled to begin negotiations pursuant to the CBA's wage and fringe benefit reopener provision set forth in Appendix. A meeting was held on June 10, 2013 to provide information to all WSMC unions concerning the WSMC 2013- 2014 budget and the changes that needed to be implemented by January 1, 2014 as a result of the revocation of the Critical Access Hospital status. Separate collective bargaining sessions were held that day with both Unit 1 and Unit 2.

In addition to many informal discussions, WSMC and SEIU held formal bargaining and/or mediation sessions on the following dates:

July 9, 2013 (bargaining session)
August 16, 2013 (bargaining session)
October 10, 2013 (mediation session)
October 17, 2013 (mediation session)
October 31, 2013 (bargaining session)

The August 16, 2014 bargaining session focused on subcontracting of the Dietary and Environmental Services portion of Unit 1.[2] The SEIU declined to meet during August and September on the basis that movement could not be made until WSMC received its health care quotes for the year that would begin on January 1, 2014. During the various bargaining/mediation sessions, the parties discussed many issues, reached tentative agreements on some topics and consensus on others such as the change in the health care plan.[3]

At the completion of the collective bargaining session on October 31, 2013, the SEIU was presented with a Final Proposal and advised that any remaining issues needed to be resolved prior to the WSMC Board meeting on November 21, 2013.

On November 5, 2013, WSMC submitted a revised Final Offer to the SEIU that reflected changes that it made to the MINA in negotiations with that unit.

On November 14, 2013, SEIU Representative Matt Baas sent an e-mail that stated "Hello everyone, please send me some dates that we can use for negotiations. I would like to start again soon." In response that same date, WSMC sent a Revised Final Offer to SEIU with a letter that stated:

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[2]The parties entered into an agreement regarding this proposed subcontracting and it was implemented on November 1, 2013.

[3]This change places all WSMC employees on the same plan. The cost to employees for the coverage remained the same as under the revised plan, but the cost to WSMC was expected to result in an annual savings of $670,000. SEIU ratified this change on December 16, 2013.

Dear Matt:

WSMC and SEIU began negotiations pursuant to the wage and benefit reopener on June 10, 2013. On that date WSMC made a detailed presentation regarding its financial situation and advised that the fiscal year 2014 budget was based upon significant changes that needed to be implemented by January 1, 2014 at the latest. In addition to many informal discussions regarding the outstanding issues, the parties held subsequent formal sessions on July 9, 2013 and August 16, 2013, mediated with the assistance of Mediator Miles Cameron on October 9, 2013 and on October 17, 2013, and held a final collective bargaining session on October 31, 2013. During these sessions the parties positions on the outstanding issues were thoroughly discussed, and WSMC attempted to accommodate the concerns of the members represented by SEIU when crafting proposals that will allow WSMC to remain financially viable. On October 31, 2013 WSMC provided you with a Final Offer that was slightly modified on November 5, 2013 to reflect changes that WSMC decided to propose on the same topics to the nurses represented by the MINA. That Final Offer reflected the worsening financial condition of WSMC as was explained to your bargaining committee on that that date.

It is the understanding of WSMC that this proposal was rejected by the membership on November 8, 2013, although WSMC has yet to receive any formal communication regarding the vote or any indication of the issues that caused its rejection. You did however indicate on November 11, 2013 that the issues could be resolved if some of the changes were implemented on a temporary rather than permanent basis. This concept has previously been discussed on many occasions and has been rejected by WSMC as not being a viable basis to resolve the issues that face WSMC. Attached for your information is a revised Final Offer that contains some clarifications of WSMC's PTO offer that may have not been clear on the previous proposal. This Final Offer also clarifies that those employees hired prior to January 1, 1996 who retained a higher pension benefit for themselves while agreeing to lower pension benefits for new hires will only be required to reduce their pension benefit by the same 1% that will be required for other employees.

WSMC does not see any purpose in scheduling any further collective bargaining sessions since it has no further flexibility on the outstanding issues. The terms of this proposal reflect the economic changes that have been offered to the employees represented by the MINA and reflect the changes that will be implemented for all non-union employees. Please take this revised Final Offer

back to your membership and request that they revote on the proposed changes.

On the morning of November 20, 2013, Mr. Baas sent an e-mail to WSMC:

In case you have not heard the membership did, in fact vote your final offer down earlier this month. I am still trying to free my schedule up for an additional vote very soon (I will let you know as soon as I am able). Yesterday I was informed that you would all be meeting with MNA for negotiations, is this true or just a rumor?

A response was sent to Mr. Baas:

Matt:

Maria and Kim have been tied up most of the day, so I thought it best if I respond to your question. At this time the MINA is considering the Employer's proposal of November 7, 2013 which contains essentially identical economic provisions as have been proposed for the two SEIU units. That unit has agreed to discuss revisions to certain scheduling matters and Paragraph 4 of that proposal reflects and understanding reached at the bargaining table how best to address these issues and provided as follows:

4. Work Schedules. The parties agree to attempt to work out mutually agreeable changes on a permanent or temporary basis through a work group. In the event that agreement has not been reached by November 30, 2013, the parties agree to continue the negotiation process to determine language to be the successor to Article 6 (Section 13 second paragraph), Article 6 —Section 14(b), Article 12 (Sections 2 and 3), Article 20 and other areas of the contract that relate to scheduling. (We need to address the scheduling of PTO as part of the work schedule discussion.) The provisions of Article 12, Section 2 (d) which relates to the revocation of a sign-up commitment for an open shift within 72 hours shall be eliminated immediately.

A small group committee was to meet to attempt to reach agreement on these issues prior to November 30, 2013. Any rumors that you might have heard regarding a collective barging session with MINA related to these issues, since no further collective bargaining or mediation sessions have been

scheduled with MINA regarding the remainder of the economic proposal. Please advise WSMC as soon as possible today regarding the date you will be scheduling a revote vote on the Final Offers that were previously provided to your unions.

The SEIU subsequently advised WSMC that the membership would review the Final Offer at a meeting to be held on December 16, 2013.

On December 17, 2013, WSMC received an e-mail from Mr. Baas that advised:

> Yesterday the membership voted to accept the health insurance portion only (both units). We would like to set additional dates to further negotiate the remainder of the issues. What was added to the last proposal regarding purchase of additional benefits using PTO is not entirely clear to us and we would like to discuss this at the table.
>
> In regards to your message, it is clear that you are unilaterally changing working conditions and benefits. We disagree with the actions you are taking and want you to stop immediately.

WSMC responded on December 17, 2013 with the following correspondence:

> Dear Matt:
> Your e-mail of December 17, 2013 has been received. In my letter of November 14, 2013, WSMC requested that the revised Final Offer be taken back to the membership for a revote on the proposed changes. That revote was held December 16, 2013, but no action was taken by you to advise WSMC regarding the results of the vote on that date. As indicated in the e-mail sent to you this morning by Kim Weckesser, WSMC assumed that the Final Offer had been rejected and implemented that proposal after concluding that

the parties were at impasse. Your subsequent e-mail confirmed that all issues except the health care proposal had been rejected by the membership.

Your e-mail indicated that you "would like to set additional dates to further negotiate the remainder of the issues." In the November 14, 2013 letter, WSMC advised you that it did not see any purpose in scheduling any further collective bargaining sessions since it had no further flexibility on the outstanding issues. That position has not changed, and WSMC does not see any purpose in scheduling any further collective bargaining sessions at this time to discuss the subjects raised in the 2013 reopener negotiations that were implemented today. WSMC will however respond to any written proposal that you send to WSMC.

Your e-mail indicates that "what was added in the last proposal regarding the purchase of additional benefits using PTO is not entirely clear to us and we would like to discuss this at the table." WSMC does not understand how there could be any confusion regarding this proposal. Article 20, Section 7 currently reads as follows:

Section 7. OPTION TO PAY. Upon request by an Employee and with the agreement of the Medical Center, an Employee may elect to work and receive PTO pay for which the Employee is eligible. Exercising this option shall not result in the payment of overtime. Such requests shall be made two (2) weeks prior to the pay day in which the Employee wishes to receive the vacation pay. Employees may cash in any amount of PTO in excess of eighty (80) hours during any pay period or use any excess of eighty (80) hours to purchase additional benefit elections during annual open enrollments.

During the bargaining process, WSMC explained that it no longer wanted to allow employees to be paid for PTO time at their discretion, but wanted to limit the use of PTO time to days that the employee would otherwise have been scheduled to work. As a result, prior to November 14, 2013, WSMC had proposed to eliminate Article 20, Section 7 in its entirety. The November 14, 2013 Final Offer modified this proposal to have Article 20, Section 7 read as follows:

Section 7. Option to Fund Benefits. Employees may use PTO in excess of eighty (80) hours to purchase additional benefit elections during annual open enrollment.

> This simply allowed the continuation of the former ability to use PTO in excess of 80 hours to purchase additional benefit elections as was provided in the current language. WSMC regrets having to take unilateral action, but the timely implementation of these necessary changed after reaching impasse was required for the continued functioning of WSMC.

No further collective bargaining sessions were scheduled, but on January 28, 2014, WSMC elected to file Petitions for Fact Finding for both units and the parties agreed to utilize Mr. Dobry as the Fact Finder for both Units. Extensive discussion regarding the outstanding issues occurred at the Fact Finding Hearing on February 26, 2014 and resulted in a number of tentative agreements that are memorialized in the Summary of Ratified Issues and Tentative Agreements. The remaining 13 issues are set forth in the employer's brief, and are listed as the issues in dispute.

SEIU filed an Unfair Labor Practice charge with the Bureau of Employment Relations, and that complaint is still pending.

The parties have participated in collective bargaining but have been unable to reach total agreement on the terms of a revised collective bargaining agreement.

It is to be noted that duration of the contract , assuming there is a resolution, is itself unresolved. In theory, it would be far better for there to be a longer term contract, without further reopeners, as it would avoid the state of 'ongoing and perpetual negotiation' in which the parties seem to find themselves.

III. HISTORY AND THE CURRENT CRISIS

Prior to August 2009, WSMC operated as an acute care hospital (ACH) and was suffering the same financial issues that had forced the closure or downsizing of many hospitals located away from major metropolitan areas. WSMC incurred operating losses in three out of the previous four fiscal years, [4] and operating income was $2,271,000 less than operating expenses during the four fiscal years between July 1, 2005 and June 30, 2009. [5]

In August 2009 the Centers for Medicare and Medicaid Services ("CMS") certified WSMC as a Critical Access Hospital,[6] in part because the nearest other hospital is across a lift bridge that spans the Manistee River. This allowed WSMC access to additional cost reimbursement options, but even with this change in status WSMC still operated at a significant loss during the 2009-2010 and

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[4] WSMC operates on a fiscal year that runs from July 1 through June 30.

[5] Investment income and gifts and grants resulted in a $461,000 increase in net assets during that 4 year period.

[6] "A Critical Access Hospital (CAH) is a hospital certified under a set of Medicare Conditions of Participation (CoP), which are structured differently than the acute care hospital CoP. Some of the requirements for CAH certification include having no more than 25 inpatient beds; maintaining an annual average length of stay of no more than 96 hours for acute inpatient care; offering 24-hour, 7-day-a-week emergency care; and being located in a rural area, at least 35 miles drive away from any other hospital or CAH (fewer in some circumstances). The limited size and short stay length allowed to CAHs encourage a focus on providing care for common conditions and outpatient care, while referring other conditions to larger hospitals. Certification allows CAHs to receive cost-based reimbursement from Medicare, instead of standard fixed reimbursement rates. This reimbursement has been shown to enhance the financial performance of small rural hospitals that were losing money prior to CAH conversion and thus reduce hospital closures. CAH status is not ideal for every hospital and each hospital should review its own financial situation, the population it serves, and the care it provides to determine if certification would be advantageous." Critical Assess Hospital definition, Department of Health and Human Services http://www.hrsa.gov/healthit/toolbox/RuralHealthITtoolbox/Introduction/critical.html

2010-2011 fiscal years.[7] Thus, a Sustainability Plan was implemented in March 2011 and settlements with Blue Cross and Medicare received in August and September 2011 allowed WSMC to post a modest operating gain in the fiscal year that ended on June 30, 2012.[8]

In September 2012, CMS advised WSMC that its Critical Access Hospital status would probably be revoked because CMS had made a "mistake" in granting that status.[9] WSMC actively sought to reverse that tentative decision, but in the Spring of 2013 exhausted all avenues of appeal and was formally advised that its critical access hospital status would be revoked as of December 1, 2013.

This is part of a larger onslaught on rural health care – in the name of cost cutting – by the federal government.[10] In the fact finder's opinion, the future does not look promising.

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[7] There were deficits in operating income of $726,000 in the 2009-2010 fiscal year and $1,382,000 in the 2010-2011 fiscal year.

[8] The 2011-2012 fiscal year ended with positive operating income of $2,981,000 achieved mainly as a result of the settlements with Blue Cross and Medicare for services provided in prior fiscal year.

[9] WSMC was located within too close a geographical distance to the hospital in Ludington. It is about 31.5 miles away. Drive time is closer to 40 minutes. For those who have a heart attack in Manistee, loss of this hospital could be the difference between life and death.

[10] The perspective of the National Rural Health Association is instructive. Alan Morgan, CEO of the National Rural Health Association, said deep cuts to Medicare funding **"would effectively kill rural healthcare."** [Emphasis added.]

"Looking at CMS data, critical-access hospitals do primary care, and that is where we want our health system headed," Morgan said. "If those patients are not being seen in a rural hospital, are they expecting the patient to go to urban facilities? Or are they expecting them not to seek care? There is a larger issue that is not being talked about here."

"Since 1997, critical-access hospitals (PDF) have been paid 101% of what they say it costs them to provide services to residents of remote areas, unlike traditional Medicare hospitals that receive payments based on uniform fees and which typically cover about 93% of costs of Medicare patients, according to calculations by the American Hospital Association.

"But the OIG found that about two-thirds of the small hospitals that get extra funding to reach remote residents

In any event, for the time being, there is no appeal available. While states could previously exempt hospitals from the 35 mile requirement, that option has been greatly undercut by executive action, if not written out entirely. And short of a change in the policies of the federal government, that is just the way it is.[11]

This change would result in substantial revenue losses[12] that were anticipated to generate an operating loss of $3,400,000 in the 2013-2014 fiscal year[13] and $5,600,000 in the 2014-2015 fiscal year. It was estimated that the annual cash burn to operate WSMC was $4,700,000, that

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aren't actually that remote at all.
"All told, 846 of the small hospitals were less than 35 miles from another hospital, even though the CMS guidelines require at least that distance in order to qualify for the extra critical-access funding. Seventy-one critical-access providers are less than 10 miles from the nearest hospital.
"**It turns out that about three-quarters of the nation's 1,300 critical-access hospitals were certified under an old process that allowed states to exempt the hospitals from CMS' distance rules, the report says. Though Congress abolished that loophole in 2006, the CMS is still prohibited by law from second-guessing the states' decisions in those cases.** [Emphasis added.]
"Most of the hospitals (88%) that would lose their additional Medicare funding if the distance rules were applied uniformly got their certifications through the now-banned, state-approval process.
"The OIG recommended that the CMS jettison the state-granted certifications and create amended criteria that could apply nationally. If even half of the 846 hospitals that were less than 35 miles from another hospital were kicked out of the program, Medicare would spend $373 million less, according to calculations using 2011 spending.
"The Obama administration has proposed decertifying hospitals (PDF, p. 196) that are less than 10 miles from the nearest hospital, which would only cut off the enhanced funding for 71 hospitals, the OIG estimated. Obama's proposed budget projects that would save $40 million in 2014.
"CMS Administrator Marilyn Tavenner wrote that the agency is in favor of asking Congress to give it the power to decertify state-granted critical-access status, but it disagrees with the OIG's recommendation to establish revised criteria because it could be time-consuming and affect hospitals' payment status.
"For example, the report suggests, the CMS could follow the lead of some states and declare that hospitals in high-poverty areas could be exempt from the distance requirements. Or the government could modify the wording to say that critical-access hospitals must be at least 35 miles from another hospital that offers the same services.
"'The existing location and distance criteria already represent a uniform standard to which all CAHs certified since January 2006 have been subjected,' Tavenner wrote. 'We believe a facility's Medicare certification as a CAH versus a hospital should not be tied to rapidly fluctuating criteria.'"

[11]This is a change in the very assumptions that underlay the way the hospital funded its operations. It is like a change in climate: all you can do is change your clothing and take shelter.

[12]And commensurate savings of federal health care dollars.

[13] The 2013-2014 fiscal year would have only six months without CAH status.

by 2015 the revenue would not be sufficient to cover the outstanding bond debt of $18,700,000 and by 2016 cash and investments would be underwater. This dramatic loss in revenue threatened the ability of WSMC to continue to operate.

The Cheboygan Community Hospital precedent:

WSMC was faced with a situation similar to that which had impacted **Cheboygan Community Hospital**. In 2011, Cheboygan Community Hospital was a small acute care hospital that incurred an operating loss of approximately $7,000,000. Negotiations with the unions representing employees at Cheboygan Community Hospital were not able to secure sufficient labor cost savings to allow the hospital to avoid further losses and it was forced into bankruptcy. Bankruptcy was devastating for everyone involved.[14] The hospital building was ultimately purchased by McLaren Health Care and reopened to provide emergency room and outpatient services. As a result the Cheboygan community lost *all* of the acute care beds that had been available and along with more than 150 full time jobs.

Fearing and preparing for the worst, the WSMC Board and Administration did not

[14]Cheboyban Community Hospital went bankrupt, and the doors were abruptly chained closed, leaving workers without jobs, doctors without patients, and patients and the community without a hospital. The effect was said to be devastating for the community. "'It's not just the employees going back to work. There will be a trickle-down effect,' Friday said. 'They have to go to lunch, and the patients will need a place to eat and maybe do some shopping in our downtown district. Having an emergency room within easy driving distance is important in a county where more than one in five residents is 65 or older,' Stuart said. The area is a retiree magnet, with its woods, waters and small-town atmosphere. 'The day it was announced the hospital would close, I got a call from an elderly gentleman. He said, I'm going to have to move; I can't be this far from a hospital,'" Stuart said. "There were probably a lot of people thinking the same thing." *Slimmed-down Cheboygan Hospital To Reopen Monday* (May 13, 2012) CBS.

want that result to occur in Manistee, and developed a plan that it believed would allow it continue to operate as an acute care hospital (ACH) providing many of the medical services that were needed by residents of Manistee and visitors who regularly vacation in the surrounding area. Tourism is an important component of the local economy, and loss of this hospital can foreseeably effect that.

The Board recognized that many impending threats were on the horizon, such things as the reimbursement methodology utilized as an acute care hospital; loss of 340B discounted drug pricing; unsettled Medicaid and Medicare cost reports from 2011-2012; sequestration; health care reform; and high labor and benefit expenses. It was recognized that long term survival depended upon decreasing operating costs and increasing market share and revenue.[15] The largest component of operating costs are wages and benefit costs, so this was the most critical area to quickly address.

V. MEDIATION AND TENTATIVE AGREEMENTS

As indicated, prior to invoking fact finding,[16] the parties engaged in some formal

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[15] WSMC is actively recruiting physicians, but that effort is contingent upon those individuals believing that WSMC has a long term future.

[16] "**factfinding** A dispute resolution procedure. Factfinding may be conducted by a panel of three or more members or by one person who is appointed to review the positions of labor and management in a particular dispute, with a view to focusing attention on the major issues in dispute, and resolving differences as to facts. Factfinding boards have been set up under state laws and have been used on the national level. In 1946, for example, factfinding boards or panels were established in disputes involving the automobile, bus transportation, farm equipment, meat packing and oil industries.

"Factfinding procedures may be provided by law or established by the factfinder or the factfinding panel. The parties have the prime responsibility to present data, but the fact-finder or the board reserves the right to develop such additional or supplementary information as it deems proper in order to make its report or recommendations.

"The factfinder or board may merely report its determination of the facts and hope that the facts

negotiation sessions. Mediation left a large number of unresolved issues. Despite an ultimate inability to resolve some issues, the mediation and fact finding process closed the gap. Submission of post hearing briefs was somewhat delayed, as the parties continued their discussions. Even the remaining issues are closer than they were before the process started,

As directed by the fact finder, subsequent to the fact finding, the parties engaged in ongoing and protracted continuing negotiation. WSMC made a revised proposal on March 19, 2014 that reflects certain changes. The Union responded favorably, with a couple of conditional requirements. In any event, that proposal is attached and is adopted by the Fact Finder in its entirety as his recommendation.

Instead of 13 issues, which are extensively argued in the employer's brief, there really are only the additional conditions. The tentative and proposed agreement addresses adequately and fairly the needs of the hospital.

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are so clear as to provide the parties with an answer. More frequently, recommendations are rendered on the basis of the facts presented. If a recommendation is made, particularly where it is unanimous, it exerts pressure on the parties to accept the recommendation. It is precisely for this reason that objections have been raised and the power to make recommendations has been eliminated in some jurisdictions. The emergency boards under the Taft-Hartley Act are forbidden to make recommendations

"In the public sector, the factfinder or factfinding panel generally is required to provide recommendations for the settlement of a dispute. [Sources omitted.]" Roberts, Harold S. *Roberts' Dictionary of Industrial Relations 3rd Ed.* (Washington D.C., Bureau of National Affairs, 1986), p. 206.

These agreements are of substantial import. They settle many complicated policy and language issues. They make arrangements on issues of power, and move the Hospital and the Union into a better position to serve the needs of the public and their respective constituencies.

They also demonstrate the good faith attempt by both parties to work through their differences, and to come to an accord based upon reason and mutual respect, despite their differences going in to the process.

The tentative agreements are incorporated herein by reference as though set forth in full, and are part of the formal Recommendations of the Fact-Finder. They are attached at the conclusion of this opinion.

An ancillary beneficial effect of the discussion was that it familiarized the Fact-Finder with the issues and interests.[17] As the Fact-Finder well knows, one can go through a formal hearing and never

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[17]This was not intended to be a "mediation." Nor is it an implicit criticism of the mediator – who is highly experienced, well-trained and respected in the state – and whose guidance had already helped the parties resolve many issues. Mediation by such a mediator can be sublimely effective, can empower the parties and get them past difficult issues. It is often preferred to taking a chance on the assignment of a particular Fact-Finder. In the present context, they may be working on a limited budget. Moreover, Fact-Finders are individual and not 'fungible goods' and every one of them has a different approach to an arcane art. So any fear that parties will prefer fact finding in lieu of mediation (and mediators are overworked and understaffed, so they don't lack for work) seems misplaced. Rather, it is understood that the Fact-Finder is another participant in the process – one who may make independent findings and a recommendation at a different level – and that this makes him a potentially useful tool for the voluntary resolution of the parties' conflicts. In effect, the Fact-Finder is 'a fulcrum for the levers' that are the representatives of the parties. Levers without fulcrums are always of limited effectiveness. Moreover, the court-house-step settlement of disputes on the eve of litigation is well-documented. Med-arb is doubly important in fact finding, as the Michigan fact finding statute does *not* create a tripartite panel, as it does in Act 312 interest arbitration (for police and fire), which is an important nuance in the process. What has been evolving is not "mediation to finality," to use Willard Wirtz's phrase, but what the Kagels call "med-arb to finality." Anderson, Arvid. *Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions*. Proceedings of the National Academy of Arbitrators. http://www.naarb.org/proceedings/pdfs/1974-59.pdf

hear the real issues discussed, or the parties' priorities articulated.

That these agreements were voluntarily reached does not change the fact that they will save a lot of money and materially contribute toward the continued viability of the hospital. They go a long way toward addressing the problems facing us all.

A detailed discussion of the multiple issues that were in dispute at the fact finding will serve little purpose. Rather, it is enough said that the Union got it, and adjusted its position. The employer made adjustment. It is now time for the employer to make a final move. It cannot expect to get its own way on every issue.

Reopener as a Result of Improved WSMC Finances

Employer Position: WSMC must agree that the finances of the Hospital have improved in order to trigger reopener provision.

Union Position: Reopener is triggered by improved finances of WSMC, to the extent that the concessions negotiated in 2013 are no longer necessary for efficient operation of the Hospital.

While the specific outcome of the present reopener negotiation remains uncertain, one thing is clear: the Hospital will walk away with significant cost-savings from its employees. The Hospital's demands have always been based on economic need. The

reopener provision see s to hold the Hospital accountable to its claim.

Recommendation:

The Union deserves parity with other bargaining units and the unrepresented employees. If other bargaining units get improved economics, this unit should too. It also needs the ability to reopen, if and when the fortunes of the facility improve. The fact finder recommends the union position.

VI. FACT-FINDER'S AUTHORITY AND STATUTORY CRITERIA

The Application for fact finding noted that there were other issues still unsettled but set forth in the Application the central issues then stalemating the negotiations.

The duty to bargain in good faith under PERA requires the parties to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question rising under the agreement, … but this obligation does not compel either party to agree to a proposal or require the making of a concession." MCL 423.215. The parties satisfy this duty to bargain in good faith in a number of ways, including formal meetings of the bargaining committees, conversations between the representatives of

the parties outside of formal collective bargaining sessions, and the exchange of letters outlining the positions of the parties on issues in dispute. If the parties are unable to reach a voluntary agreement, they are required to utilize the services of a mediator to attempt to resolve their dispute.

As passed by the legislature in 1954, the statute is found at Michigan Compiled Laws 423.25 which says in part (§25) "Whenever in the course of mediation under Section 7 of Act 336 of the Public Acts of 1947 being Section 423.207 of the Compiled Laws of 1948, it shall become apparent to the Board that matters in disagreement between the parties might be more readily settled if the facts involved in disagreement were determined and publicly if known, the Board may make written findings with respect to the matters of disagreement." [18]

It has long been held that "mediation and factfinding are extensions of table bargaining intended to assist the parties in their efforts to reach a negotiated settlement." *County of Wayne*, 1984 MERC Lab Op 1142, 1144. A Fact Finding proceeding is not a litigation procedure to determine whose pre-impasse positions were better supported, but is a process to fully explore all of the issues in dispute so that the Fact Finder can help the parties find a solution to their differences that will result in a

[18]This statute was patterned after a law earlier passed by the legislature for the resolution of private public utility disputes not affecting interstate commerce through three member special commissions. The rationale of both statutes was a belief in transparency. It was thought that public disclosure of the positions of the parties and the recommendations of a third party would enable the disagreement to be more readily settled. It was believed that public knowledge of a third party's recommendations for settlement would have persuasive effect on the parties themselves and add moral suasion to the Recommendations particularly if the recommendations were given wide publicity.

new collective bargaining agreement. More to the point, this is itself guidance of the weight to be accorded to the evidence. The fact finder ought to consider evidence and arguments in the same way– and with the same 'weigh' that the parties would give them in arriving at a voluntary collective bargaining agreement.

In Michigan, the Fact-Finder acts alone without having Panel Delegates appointed by the parties. [19]

Fact-Finding is *not* arbitration. It is only advisory and nonbinding.

Nor is it mediation where the mediator attempts to convince the parties in their enlightened self-interest to modify their positions and to effect compromises.

Fact-Finding partakes of the nature of a quasi-judicial proceeding in that the parties

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[19]Delegates can provide their unique understanding and perspective on the evidence that is adduced. During executive sessions they are encouraged to prioritize amongst various demands. Thus, the panel is more likely to come up to a solution that is closer to the needs of the parties, does not violate their expectations, and avoids unacceptable solutions.

Parenthetically, Judge Kenesaw [(Mountain)] Landis, about to leave the federal bench to become 'czar' of baseball in the backwash of the [Chicago] Black Sox scandal, inflicted the worst interest arbitration ever. He ignored the historical relationships in the construction industry and remade the wage system in Chicago. This resulted in chaos, violence, bombings and killing of policemen for the better part of a decade. The lack of a tripartite panel, and his lack of understanding of the parties' needs, were roots of this misjudgment. "The advantage stemming from information sharing works two ways: the neutral learns what the parties really want (and don't want) and they know what he intends to do. Obviously, it is of importance that the arbitrator discover how much in cents per hour each side will 'take' In fact, nothing else is as significant. It is entirely possible, however, to endure a dozen days of formal hearing without acquiring this knowledge." See Bernstein, Irving, *The Arbitration of Wages*, (Berkeley and Los Angeles: University of California Press, 1954), pps. 41-43.

make formal presentations, although no transcript of proceedings is taken. In addition to affording the parties full opportunity to make their formal presentations, through the cooperation of respective counsel and their clients, the Fact-Finder did spend a short time with each of the groups at which time he was advised as to the disputants priorities. However, no attempt was made by the Fact-Finder to elicit their ultimate positions on the issues, beyond that which developed in the paperwork. Both the formal and informal sessions were of assistance to the Fact-Finder in ascertaining the areas of disagreement and the bases or rationalizations of the parties for their positions.

In its most basic sense, an arbitrator's function in interest disputes is to legislate for the parties.

Of course, a Fact-Finder only recommends. The process is an extension of he collective bargaining process, and is a search for the fairest and most equitable answer to the problem that the parties cannot themselves resolve. Effectively, it is up to the Fact-Finder to determine the reasonableness of the demands, and to recommend a new agreement (which plausibly should have been the one the parties would have come to at the bargaining table).[20]

In resolving such disputes the Fact-Finder will give consideration to a multiplicity of

[20]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.),* (BNA, 2003), pp. 1358-1361.

standards, to "mix the porridge." Internal and external comparable should be given some real weight, and serve to divine "a workable solution satisfactory to both sides."[21] Benefits issues are particularly difficult, and involve consideration of internal comparable, risk pooling, effect on take home pay, costs of administration, access to information, etc.[22] Wage patterns,[23] historical differentials, labor markets, the cost of living, the amount of a living wage, ability to pay are all metal for this forge, depending upon the particular context and their aptness to the dispute. These are items which may need to be elucidated by labor economists, testifying as expert witnesses.[24]

It is also to be noted that fact finding in Michigan exists in the context of Act 312, which provides for interest arbitration for police and fire personnel. There is a long standing cross fertilization between Fact Finding and Act 312.

In the latter, the panel is required to follow the statutory criteria set forth in Section 9

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[21]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.),* (BNA, 2003), pp. 1402

[22]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.),* (BNA, 2003), pp. 1413, 1418-1419.

[23]*But 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.ohiotroopers.org/files/Signal%2520Five. The Elephant in the Tent.

[24]In the case of creation of a health care plan, benefits experts can deal with such issues as creating a formulary for prescription drugs, ways to maximize benefits relative to costs, etc. This has been done for years in the public sector. *See for example* BOARD OF TRUSTEES OF THE UNIVERSITY OF TOLEDO and UNIVERSITY OF TOLEDO CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, and COMMUNICATION WORKERS OF AMERICA Local 4530 and UNIVERSITY OF TOLEDO POLICE PATROLMEN'S ASSOCIATION, Local No. 70 , SERB Case Nos 01-MED-10-0983, 01-MED-08-0704, and 01-MED-12-1107. [http://www.utppa.utoledo.edu/octUpdate/Toledo_Report%20of%20Fact-Finder%20(11-07-2005)_dnj.pdf] *See also*, *City of Rossford and Ohio Patrolmen's Benevolent Association*, SERB Case No. 02-MED-1131 and 02-MED-1132 and [http://www.serb.state.oh.us/sections/research/WEB%20FACT-FINDING/2002-MED-10-1131.pdf].

(MCLA 423.239) of Act 312. Article 9 reads:

Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally.

(I) in public employment in comparable communities

(ii) in private employment in comparable communities.

(e) The average consumer prices for good and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) **Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties, in the public service or in private employment.** [Emphasis added.]

Notably, this section was amended by the legislature in 2011 to add an ostensibly new requirement that the issue of financial ability of the municipal entity is the most critical factor to be considered. In addition, subsection (e) was added to indicate that the wages, hours and conditions of employment of *other employees of the same employer* was also a critical factor, since uniform treatment within an employer is an important consideration.

In fact, ability to pay has always been considered by fact finders and interest arbitrators, although whether it alone would overcome all of the other factors has been a bone of contention. Internal comparability has always been an important benchmark. There is no question that an Act 312 arbitration panel is expected to consider **all** of the Section 9 factors in making an award, at least as they are pertinent to the record made. It also should be recognized that the particular circumstances may dictate that certain criteria may be emphasized more than other criteria. But as the Michigan Supreme Court has noted in *Detroit v. DPOA*, 408 Mich 410 (1980) at 484, 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."

Essentially, the Act 312 criteria address the cost of living, the financial ability of the employer to fund the awards, and internal comparables as well as 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 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 Section 9.

Whether it is required, the Fact-Finder considered all of these factors, consistent with the Supreme Court's opinion in *Detroit v. DPOA*. Yet 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 Northwest Northern Michigan.[25]

Essentially, the Public Employment Relations criteria address the cost of living, the financial ability of the employer to fund the awards, and internal comparables as well as with other similarly situated public and private employees. In other words, the economic realities of the situation must be considered.

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); cost of living increases; adequacy of staffing, needs and expectations of the public; tax effort; hiring patterns; settlement

[25]I am not overlooking the Upper Peninsula (see "Northern Michigan" in Wikipedia) but am simply trying to tlak about labor markets in this analysis.

patterns; and other factors applicable to the wage proposals.

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,"[26] also called "wage contours."[27] Internal comparability is a significant factor: management needs to preserve its reputation and relationship with the other bargaining units with whom it negotiates.

The Fact-Finder has taken notice of the fact that this is *not* the first time that wage rates were established for the Service Employees International Union. Likewise, the general employees represented by SEIU are indispensable, but are not the only organized group of employees working for this employer. Indeed, even the wages of supervisors and other staff at this facility ought to be given some weight. In that sense, comparison to other employees and bargaining units of the same employer has always been a material factor, and has been termed "the first orbit of comparison."

In a concessionary negotiation, rough equality of sacrifice is a highly relevant consideration. Hypothetically, it ill behooves a management that is feathering its own nest to ask for reductions from which they themselves choose to be exempt.

Additionally, it is understood that taking money back from a union, even in hard

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

[27] Institutional economists remarked that unions impose wage standards. 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.

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. While higher wages is a goal, maintenance of employment and avoidance of layoffs is another (sometimes competing) goal for a labor organization.[28] An economic theory of a trade union requires that "the organization be assumed to maximize (or minimize) something."[29] Here maintenance of maximum employment for its members is an important goal for the Union. Maximizing benefits and benefit choices may be inconsistent with the Union's wage proposal.

Among the criteria utilized by Fact-Finders are the bargaining history of the parties, 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.

As Arbitrator George T. Roumell, Jr. stated, this process is about the "art of the possible," trying to replicate the settlement the parties themselves would have reached had their negotiations been successful."[30]

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

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

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

[30] See *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." *County of Saginaw and Fraternal Order of Police*, MERC Case No. I90 B-0797 (1992).

mechanism to get what you want, but rather a process empowering both sides to live with what they get.[31] It is first and foremost an extension of collective bargaining, which is intended to be 'industrial democracy' in the workplace.

VIII. THE HEARING

Proceedings were informal. This was an orderly process of presentation, counter presentation, questioning, research, breaks, negotiation and repositioning. It was rather like a formalized mediation in a group setting. There is no specific format for conducting a fact finding, and there was no requirement that we conform to the rules of evidence. Rather, this was Alternate Dispute Resolution in its purest sense.

Further, the Fact-Finder was inundated by scores of exhibits that make clear the severe financial constraints facing the hospital, its employees, the taxpayers and the patients. These all have an impact on the request for changes in wages and the contract. Taken together, the record established that we need to do the best we can with substantially diminished resources – the crisis makes the need for proper resource management ever more acute.

As a personal note, I appreciate each party's efforts in preparing and presenting their case. Obviously, this was an expensive, labor intensive and time consuming effort. I wrote this opinion

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[31]Some 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." David A. Dilts; Mashaalah Rahnama-Moghadam; Tadessa Mangestus. *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.

in the hope that they will avoid the effort, losses, consequences and risk of further dispute, and of continuing to operate without a negotiated agreement. The Fact-Finder is also acknowledges his appreciation of the cooperation and attitudes of the parties in the fact-finding process. If that attitude of cooperation demonstrated at the Fact-Finding hearings carries over into the future, then the prospects for more normal resolution of labor relations and employment disputes in the future are good.

IX. ABILITY TO PAY AND NEED FOR REDUCTIONS IN PAY AND BENEFITS

Financial Ability of WSMC

The challenges facing rural acute care hospitals are spelled out in the article entitled "Fighting for Rural Hospitals" prepared for the National Rural Health Association. These same factors are applicable to WSMC as identified in the Threat portion of the West Shore Medical Center Critical Access & Budget Update (June 2013). The market for rural hospitals has been changing dramatically over the last twenty years. Metropolitan hospitals began to acquire or affiliate with smaller rural hospitals as those hospitals encountered financial difficulties. After a wave of rural hospital closures in the 1990's, Congress began the Critical Access Hospital Program which provided financial support to hospitals with 25 or fewer beds that are at least 35 miles away from another facility. As indicated in the attached December 2011 article "When 'Critical Access' Hospitals Are Not So Critical," "Forty-one percent of the hospitals in the program are already losing money, according to the National Rural Health Association, and the loss of funding could mean that they will close."[32]

In an October 7, 2012 news article, it was noted that "Obamacare will shut rural

[32]The National Rural Health Association also predicted that the Congressional budget sequestration required by the Budget Control Act of 2011 sequestration process will "push these health care facilities to the brink of closing their doors." The National Rural Health Association also predicted that the sequestration required by the Budget Control Act of 2011 sequestration process will "push these health care facilities to the brink of closing their doors."

hospitals, forcing patients to drive hours to finds a hospital even for emergency care." This prediction came from Michigan Congressman Dan Benishek[33] who stated that "I have been talking to administrators across my district and they are all really worried about being able to keep their hospitals open." He also commented on a rural Michigan hospital that went bankrupt because of Medicare, referring to the closure of Cheboygan Community Hospital earlier that year.

The historical data presented in the West Shore Medical Center Critical Access & Budget Update (June 2013) establishes that WSMC had been in financial difficulties for many years. That report predicted expected financial losses of $6,150,000 based upon loss of Critical Access Status, loss of 340B discount drug pricing, sequestration and health care reform. WSMC has employed the services of Plante Moran and reimbursement specialists from Munson Hospital to ensure that revenues from the services performed are maximized.

WSMC also engaged Plante Moran to make financial projections regarding the next five years, which revealed that if no action was taken the excess of expenses over revenue would be as follows:

2014	**2015**	**2016**	**2017**	**2018**
$2,952,000	$5,513,000	$5,537,000	$5,759,000	$5,858,000

This $18,158,100 in cumulative operating losses would have to be offset by expending cash assets. As of December 2013, WSMC had $27,900,000 in cash and investments and

[33] Congressman Benishek is a general surgeon who practiced for 30 years at Dickinson County Healthcare System in Iron Mountain which is a public hospital organized under the same statutory framework as WSMC. He also served on the Board of that entity.

$18,500,000 in outstanding debt, which translates to $9,400,000 in cash on hand. Assuming that all of proposed changes in the salary and benefit structure were implemented, operating losses during the period from 2014 through 2017 were expected to be $10,000,000. This would mean that WSMC would have exhausted all cash reserves by 2017 and still have $600,000 that it was obligated to pay.

The reality of the financial difficulty facing WSMC was confirmed by the actions of bankers servicing its debt when *none* of them were willing to extend the current loans that were taken out for building renovation purposes without an outside guarantor. As a result the WSMC Board determined that the best course is to utilize current cash and investments to retire debt as the terms of those notes expire during 2014. This reduces the available cash reserves by approximately **$18,500,000.00** and will shorten the time that WSMC has available to make the necessary corrections in operating costs to avoid running out of funds to operate.[34]

It is undisputed that WSMC faces significant financial challenges if it is to remain a viable rural acute care hospital. WSMC remains confident that it can take the actions necessary to remain in operation provided that the proposals it made are promptly implemented. Immediate action is however necessary to reduce employment related costs and WSMC's proposals must be evaluated in light of its demonstrated financial difficulties.

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[34] WSMC is in the process of consolidating the critical care unit with the medical surgical unit, is evaluating the continuation of OB services and is engaged in the active recruitment of additional physicians.

THE LEGAL PICTURE

The legal framework and controversy.

This whole dispute came out of a contract reopener.

The Union argues that the subjects of the reopener are carefully circumscribed, and that it has no obligation to discuss them. Conversely, it asserts that the employer is seeking to reopen terms and conditions of employment that are settled. It also asserts that management has unilaterally altered the terms and conditions, and committed multiple unfair labor practices.

As an initial observation, fact finding is *not* the forum to address those issues. To be sure, the Union can file a grievance which would be heard in a labor rights arbitration; and it has filed an unfair labor practice charge which would be determined by the Bureau of Employment Relations.

Those forums still exist, and the fact finder is not offering any disposition of them. Someone else can make those decisions. This is noted, however, as it provides context.

Reopener and bargaining:

In a general sense, the Public Employment Relations Act is patterned after the National Labor Relations Act. To a large extent, the Bureau of Employment Relations tracks, or at least uses as a touchstone, decisions arising thereunder.

Under § 9(a) of the NLRA, a bargaining obligation is established. And per §8 (a) (5) there is a duty to bargain. In a generic sense, §8(d) requires employers and unions to meet and confer in good faith respecting wages, hours and other terms and conditions of employment. One of the

cardinal obligations is to not make unilateral changes in conditions of employment.

Trying to make sense of the pitfalls and consequences of a unilateral change is an extremely complex topic that we need not decide here. Nevertheless, implementing unilateral changes is a tactic fraught with risks, and no such undertaking is advisable unless legal consequence are understood with certainty.

At its core, an alleged breach of the duty to bargain in good faith is a subjective inquiry, which may revolve around the actors' states of mind. It requires a mind that is open and fair, and a sincere effort to overcome obstacles that stand in the way of an agreement. A mere pretense of bargaining is insufficient, and the mind must be open to a possible solution.

Confounding that inquiry is whether a given subject is mandatory. Ordinarily, that would be a matter of statutory interpretation. However, this dispute at its core runs much deeper. There is the interplay of provision in the contract which may "merge" or "zipper" the contract – that is, provisions which might be held to be an express waiver of the statutory right and duty to confer during a contract's term, including merger clauses, management rights clauses, contract term agreements, duration and reopener provisions. Zipper clauses are an express waiver of he continuing obligation to bargain through the term of the agreement. Because a zipper clause waives rights that are based in law, a waiver will be inferred only by "clear and unmistakable language" demonstrating that intent. A duration clause defines the beginning and end of the agreement.

Reopeners are helpful when the economy is volatile and future trends unpredictable. The implication is that the rest of the contract will be left in place and in effect. This reopener does not clearly say what the parties intended if there was a failure to reach agreement under the reopener

Further, there is the very real but not always clear line between "surface bargaining" and "hard bargaining." Under the act, neither party is required to come to an agreement to a proposal, to make a concession. A determination should not turn upon the substance of the proposals. The question will be whether the respondent, as clearly proved, did not intend to bargain and did not act in good faith. Did the Respondent conduct itself so as to defeat, rather than promote agreement?

An important distinction is where the employer presents the same bargaining proposals, but does so from a sincerely held belief that the good of the enterprise required it. This is called "hard bargaining," but it is not an unfair labor practice.

Even withdrawal of proposals, or regression in proposals, may be justified if it is from a motive to garner an improved contractual position, and not from an intent to frustrate agreement completely.

Boulwarism is a comprehensive bargaining concept that describes a systematic approach to bargaining. Lemuel Boulware of the General Electric corporation —who in many respects was the mentor to Ronald Reagan – proposed that unions were unnecessary, and that they only achieved results that a well meaning employer would have arrived at anyway. After extensive research by the company, its bargaining position was given flesh, and then I would be unchanged. The theory is that it was incumbent upon the union to establish that the position was in error. Boulwarism also envisioned a publicity campaign which appealed directly to the workers, and sought to displace having to go through the union. A campaign to disparage and discredit the union in the eyes of its constituents was considered to be anathema to the purposes of the National Labor Relations Act and an unfair labor

practice.[35]

Finally, there is no clear legal definition of "impasse." If an impasse does not exist, then the employer is not free to make unilateral changes in the terms and conditions of employment. If an impasse does not exist, then the employer's ability to unilaterally implement changes is severely limited. In evaluating an impasse, the board may look at: 1) bargaining history; (2) good faith of the parties in negotiations; (3) length of negotiations;(4) importance of the issues that are in disagreement; and (5) the *contemporaneous* understanding of the parties as to the negotiation's state.

The prior three year agreement was a promise and a hope. Even as it said its term was of three years, it had these reopeners in it.

The Union argues that the expression of one thing is the exclusion of the others. In that sense, it urges that by providing for a reopener on wages, it was implicit that other matters would be left in place. As an abstract proposition, the fact finder agrees. This would seem to be within the province of the legal maxim: *Expressio unio est exclusio alterius*. Items not on the list are impliedly assumed not to be covered by the statute or a contract term. However, sometimes a list in a statute is illustrative, not exclusionary. This is usually indicated by a word such as "includes" or "such as."

The inability of the parties to reach agreement on the outstanding issues is a shared responsibility. While concessionary negotiations are always difficult, several TA's show settlement is now achievable.

In a general sense, the Public Employment Relations Act is patterned after the National

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[35]*General Electric Co.*, 150 NLRB 192, 194-95, 57 LRRM 1491 (1964), enforced, 418 F.2d 736, 756-57 (2d Cir. 1969), cert. denied, 397 U.S. 965, 90 S.Ct. 995, 25 L.Ed.2d 257 (1970).

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Trying to discern whether there has been a breach of the duty to bargain is controversial and problematical. The Board considers the whole of the conduct, and not isolated instances. [36]

A failure to bargain in good faith was premised upon the employer's (a) failure to furnish information requested by the union, (b) its attempt to bargain with the local unions which would undermine the international's position, (c)I presentation of an insurance proposal as take it or leave it (d) an overall contemptuous approach and attitude, based on all the circumstances the Board also found that there had in fact been an absence of collective bargaining as that term was defined by the act. By locking its position down, the employer renounced collective bargaining.

The Union's conduct will also be weighed in the balance. [37]So too will the employer's.

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[36]Although some specific actions, viewed in isolation, would not support a charge of bad-faith bargaining, the gestalt of a party's overall course of conduct may establish a violation. See *Roman Iron Works*, 275 NLRB 449, 119 LRRM 1144 (1985). Antiunion behavior away from the table may be an aggravating factor, but it alone will not establish a violation.

[37]Lareau, N. Peter, Venable, Baetjer & Howard *Drafting the Union Contract: A Handbook for the Management Negotiator* Lexis Nexis first published 1988, with annual supplements ISBN: 9780820514949 Volume1: Part 1 Fundamentals; Chapter GF Legal Parameters of Good Faith Bargaining and Volume II: Part II LAW, LOGIC, AND LANGUAGE Chapter 19 Scope of Agreement. See Hardin Patrick, Editor in Chief; Morris, Charles J. (1st & 2nd

Presumably, this will take into account the bargaining following this report.

I have written this section to let the parties know that it was given weight – at least as it pertains to the merits and the final outcome. These are important issue.

To conclude, lawyers will be able to argue about the commas and their clients' intentions 'til the cows come home. There is a lot to argue about, and the final outcome is in doubt.

Nevertheless, legal rights and wrongs aside, the transcendent value is the continuation of this hospital, this union, the bargaining unit and its members' jobs. Knowing that you legally had the right of way in the crosswalk doesn't change the fact that you died after you were run over by a truck. Resolving the bargaining issues is my first priority.

THE BIG PICTURE

In passing, I note that the fact finder was in the problem solving mode. He appealed to the parties to open up to common ground. This was done with the express understanding that they were not waiving their legal rights or obligations. *Collective bargaining* is the bargaining unit's blessing and strength. And its curse in that it represents everybody within the classifications. Individuals have differing interests, and the group has diverse interests.

The Union has reluctantly come to grips with the realties that confront them. It is expected that the Employer will react in kind.

The Union and its members must recognize that this is a choice between maintenance of

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editions Editor in Chief. *The Developing Labor Law*. 3rd Ed. (1992) (Washington D.C: BNA) pp. 608-632.

wages and benefits, and keeping jobs viable.

A loss of 430 jobs and of this facility would be catastrophic for the employer, the union and the community. The local economy would be hobbled, if not crushed.

Whether the Department of Health and Human Services is willing to recognize it or not, this is a critical care facility. It exists because there is a real and critical need. Driving to Ludington is not a good choice for those who are having a heart emergency in Manistee.

The Hospital provided ample evidence of changed circumstances justifying the drastic cuts it seeks a mere six months after the agreement and ratification of a three-year contract.

That there is an imminent and highly serious crisis is clear. While moving in the negotiations, the Union continues to argue that there isn't a crisis, or that it isn't as bad as the employer claims. However, putting you head in the sand won't save anyone from the oncoming semi-truck.

This is a changing and dynamic situation. At least in and through the fact finding, negotiations were characterized by a problem solving attitude by both sides.

The existence and extent of the crisis was proved to the fact finder's satisfaction. It is not required to be an accountant to recognize it. "You don't need to be a weatherman to know which way the wind blows." – Bob Dylan, "Subterranean Homesick Blues."

The Union urges that "Perhaps most troubling about the Hospital's claim of economic distress are its most recent operating results. According to the Hospital's own report, 2012 and 2013 were the most successful years it has had since 2006 (the earliest fiscal year provided by the Hospital). In 2012, the Hospital increased its net assets by $3.345 million. In 2013, the increase was $1.59

million." It also added that : "Most striking is the Hospital's own analysis showing that if took no action and honored its obligations under the current CBA, it would still have over $7.1 million dollars in net cash/investment assets in 2018. The Hospital has a rainy day fund, and then some."

The short explanation is that the causes of these results have changed. Indeed, the accounting has changed, and the scorecard will too. More importantly, short term results do not undo the long term prospects.

While the hospital operated without critical care status in the past, it does not negate its present expenses, and the need to check a growing operating deficit.

WSMC faces significant financial challenges and must restructure its operations if it is to continue as a rural acute care hospital. The challenges that it and other small hospitals face are real and immediate as reflected by the February 26, 2014 press release that McLaren Northern Michigan will be eliminating 43 positions and reducing the hours for 100 other employees. The President of Munson Healthcare was subsequently quoted as having to deal with similar issues, and that "Changes at the federal government level will cut about $150 million over the next 10 years from our budget, so we are trying to be proactive." No immediate plans were made to cut staff, but "many cost cutting measures are being taken now to make sure that they aren't faced with a more difficult decision down the road." This was followed by the March 13, 2014 announcement that Mercy Hospital Grayling will be laying off 35 employees with the possibility that more employees could be laid off in the future. WSMC's time to take actions to secure its ability to continue to operate is now.

Prescription:

The hospital and the bargaining unit have struck an iceberg. Doing nothing is not an

option. In the lifeboat in stormy weather and a vicious sea, there are just two rules in the boat: the boat will go a lot further and faster if everybody rows together in the same direction; and drilling holes in the boat is considered to be rude behavior.

Those who look at the list of issues may scoreboard. But it isn't about that. Suffice to say that the fact finder will not have to live with the consequences – it is the parties's problem, and they need to take ownership and find a solution.

Rather, the parties have closed the gap, and have had serious discussions and compromise on many issues. Even the remaining issues are closer than they were when we started.

Whether this is enough only time will tell. The long journey begins with a single step.

This is one of those situations where the union and its members have to weigh the wage rates and working conditions that are fair and in accord with the market, as against the need to maintain full employment. It is a stark choice. If these adjustments are not made, there may be no hospital, no jobs, no workers, no members in the union.

There is a need for unanimity. Not just of this bargaining unit, but for all employees. To escape disaster, we need solidarity, not division. A threat to one is a threat to all. The parties have a shared interest in seeking mutually beneficial solutions.

The Union bargaining committee understands the situation. They have pledged to recommend this settlement to their members.

Equality of sacrifice is a stated goal, but not easy to achieve. The analysis is not just about percentages. Three percent of an elephant is not the same as three percent of a mouse. Those who are on the bottom of the wage scale have the least to give. There is an economic justification for the progressive income tax.

The fact finder's recommendations are not the only permissible outcome. There might be other equitable findings and outcomes. We need to come to terms with reality. However, that does not mean that the employer's or the union's solutions are the only ones to the crisis.

Notwithstanding the paternalistic feelings of the employer, concessionary bargaining does not mean that the Union has nothing to say or do. They have at least a voice and can help prioritize. They have the unique insight of the people who actually do the labor. It is only through their cooperation that this organization can survive. There is more than one way to skin a cat.

The settled issues contain extensive reductions to the overall wages and benefits of these employees, and account for substantial cost-savings to the Hospital. Most significant, by foregoing wage increases for 2013 and agreeing to the Medical Insurance changes proposed by the Hospital, the Union has agreed to the two largest cost-saving measures proposed by the Hospital.

The inability of the parties to reach agreement on the outstanding issues is a shared responsibility. While concessionary negotiations are always difficult, the great many TA's show settlement is now achievable. Indeed, the settled issues between the parties are the result of substantial concessions by the Union and Management.

We have in hand an omnibus settlement.

According to the Hospital's own numbers, just two issues alone represent an immediate $2.8 million dollar savings to the Hospital.

In short, I am recommending baby steps. We may not have solved every problem. But this longest journey begins with a single step.

STANLEY T. DOBRY, Fact finder

West Shore Medical Center
-and
Service Employees International Union Healthcare Michigan
Units # 1 and 2
Settlement Agreement of March 19, 2014

1. Existing contractual provisions. All provisions of the collective bargaining agreement effective through June 30, 2014 shall continue, except as modified by this Settlement Agreement.

2. Tentative Agreements. All tentative agreements previously reached between the parties as set forth on the attached Summary of Ratified Issues and Tentative Agreements as of February 26, 2014.

3. Funeral Leave. Modify Article 10, Section 3 to read as follows:

> Section 3. Funeral Leave. An employee shall be granted up to five (5) consecutive days leave within fourteen (14) calendar days following the date of death of an employee's spouse, child or step-child to allow the employee to attend the funeral and to take care of related matters. An employee shall be granted up to three (3) consecutive days leave within fourteen (14) calendar days following the date of death of a member of the employee's immediate family to allow the employee to attend the funeral. "Immediate Family" shall mean the employee's mother, father, step-parents, sister, step-sister, brother, step-brother, grandparents, grandchildren and those individuals residing in the employee home at the time of death. Two (2) days off may be granted to an employee utilizing PTO for motherin-law and father-in-law. One (1) day off may be granted to an employee utilizing PTO for grandparent-in-law, sister-in-law, brother-in-law, aunt, uncle and first cousin. Employees who lose work from their regular scheduled hours shall receive pay at their straight time regular rate of pay for up to eight (8) hours per day. No funeral leave will be paid to any employee while on leave of absence, layoff or on a disciplinary suspension. One (1) of these days may be taken at a later date if the funeral will occur at a time not directly following the death. Additional time off may be requested in accordance with PTO scheduling procedures.

4. FMLA Leave. Modify Article 10, Section 10 to require usage of PTO days to cover all time off, but employees may elect to retain up to forty (40) hours in their bank.

5 Overtime. Modify Article 1 1, Section 2 by deleting (b), (c), (d) and (e) and modifying (a) as. follows:

> Section 2. OVERTIME. Time and one half (1 1/2) shall be paid for all hours worked in excess of eighty (80) hours in any work period and eight (8) hours in any twenty-four (24) hour period commencing with the start of the Employee's shift.

(a) An employee who is called in or requested to work on his/her scheduled time off shall receive time and one-half for all hours worked in excess of 8 and 80 or Flex 40 basis.

Employees who are mandated to stay beyond his/her scheduled hours per Article 1 1, Section 4(b) Mandatory Overtime shall receive time and one half for all hours worked.

6. Overtime Call list. Modify Article 1 1, Section 4 to allow WSMC to call fill-in and

casual employees who can work the time on a non-premium pay basis before calling full time or part time employees. Employees who are missed on the call list will not be paid for the time, but will be given priority for future calls to make up for the lost call.

7. Medical Center Charges. Eliminate Article 15, Section 1.

8. Pay checks. Modify Article 16, Section 6 to discontinue practice of distribution of physical pay checks. Employees will be paid by direct deposit or other future electronic method or have physical checks mailed.

9. Holidays. Modify Article 18, Section 1 by eliminating Easter and the employee's birthday.

10. PTO. Make the following changes to the PTO program:

(a) PTO Usage. Modify Article 20, by adding new section to address the use of PTO to cover absence due to illness and emergencies.

> Section 6. Unscheduled PTO. PTO days are required to be scheduled at a time mutually agreeable to the Medical Center and the employee, but the following conditions control the circumstances in which it is impossible to request prior approval of scheduled PTO time:

(a) Illness. PTO may be taken in the event that an Employee is unable to report to work because of a personal illness or the illness of an individual residing in their home, provided that the Employee calls in as early as practical prior to the start of their shift. As a condition of the use of PTO time, the Medical Center reserves the right to require the Employee to verify the nature of the illness and the necessity for the absence if its purpose was to care for an individual residing in the Employee's home.

(b) Emergency Situations. PTO may be taken in the event that an Employee is unable to report to work because of an emergency situation, provided that the Employee calls in as early as practical prior to the start of their shift. As a condition of the use of PTO time, the Employee is required to verify the nature of the emergency that caused the absence.

(b) HLD/PPD. Modify Article 10 Leaves of Absence by deleting Section 2. Health Leave/Paid Personal Leave days as of December 31, 2013. No additional HLD days will be credited after that date and unused HLD days as of December 31, 2013 shall be paid off in accordance with Article 10, Section 2(c).

(c) PTO Days. Modify Article 20, Sections 1, 2, 3 and 6 to read as follows:

> Section 1.0. PTO Allowance. All full time and part time employees shall be granted Paid Time Off with pay and benefits based upon their length of continuous service with the Medical Center in accordance with the following:

Years of Continuous Service	Time Off
Less than six (6) years	120 hours (.0641/hr worked)
At least six (6) but less than eleven (11) years	160 hours (.0855/hr worked)

At least eleven (11) but less than sixteen (16) years	184 hours (.0983/hr worked)
At least sixteen (16) years but less than twenty (20) years	200 hours (.1068/hr worked)
At least twenty (20) years	208 hours (.1 11 1/hr worked)

PTO accrues and is credited to eligible employees each pay period, based upon their years of continuous service with the Medical Center as of that date. An employee may not maintain more than forty (40) hours more than the number of hours in their annual PTO earning and PTO in excess of this carry over is forfeited, except for any approved PTO hours that have been cancelled
by the Employer.

Section 2. PTO eligibility. In order to be eligible for full PTO earning, an eligible employee must have worked a total of at least seventy two (72) hours during the immediately preceding two week pay period. Eligible employees who fail to work the required number of hours shall be entitled to a pro-rated PTO based upon the ratio of the number of hours worked to seventy two (72). For purposes of this section, hours worked shall include PTO, paid funeral leave, paid holidays, paid jut-y duty leave and all hours actually worked.

Implementation of this plan:

• Employees will be paid out for PTO in their banks that is in excess of the annual maximum less
40 hours for their annual accrual rate as soon as administratively possible after January 1, 2014.

(d) Option of Pay. Revise Article 20, Section 7 to read as follows:

Section 7. Option to Fund Benefits. Employees may use PTO in excess of eighty (80) hours to purchase additional benefit elections during annual open enrollment.

(e) PTO Payout Request. Delete Article 20, Section 8.

(f) Final PTO Pay Out. Modify Article 20, Section 9 to read:

Final pay out of earned and accrued PTO will be paid out in the pay period following the final pay period of time worked to Employees who voluntarily leave employment in good standing and give proper notice.

1 1. Step Increases. Step increases that were not implemented from 7-1-2013 through the date of ratification will implemented on the first full pay period after ratification, but will not be paid retroactively.

12. Maternity/Paternity Leave. Add the following sentence Section 6 Maternity Leave:

Employees who adopt and child and are not eligible for Family Medical Leave Act may apply for personal leave for necessary time.

13. ULP Withdrawal. The Union agrees to withdraw the ULP (Case Number C14 A-003) scheduled for April 18, 2014. West Shore Medical Center will make payments to laid off

employees for the amount of previously contributed amounts that were forfeited as a result of not being vested at the time of their permanent layoff.

14. Scheduling Issues will be addressed in the upcoming negotiations in accordance with the concepts discussed on February 26, 2014.

15. Joint Committee. WSMC will propose a joint committee in upcoming negotiations.

16. Health Care changes will not be addressed until renewal information is available.

17. The parties agree to meet in April 2014 to begin negotiations on a successor agreement.

18. The outstanding grievances (Case No 54 300 00533) scheduled for May 6, 2014 will be dismissed as they are now moot. WSMC will pay the dismissal fee and agrees to work through scheduling language in the negotiation process.

19. MERC will be substituted for AAA in the arbitration process.

20. Attendance bonus. The following new section will be added:

> Section . 100% On Schedule Attendance Bonus. Employees who do not have any instances where they utilize PTO at a time that has not been preapproved by the Medical Center in a calendar year will be provided with twelve (12) hours of PTO for use during the next calendar year.

For calendar year 2014, the months to be counted will be April through December.

21. Ratification Recommendation. The Union bargaining committees agree to recommend ratification of this Settlement Agreement to the Union membership and the Medical Center bargaining committee agrees to recommend ratification to the Board of Trustees.