

STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
ACT 312 ARBITRATION

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EMPLOYMENT RELATIONS COMMISSION  
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WAYNE COUNTY,

Public Employer,

-and-

MERC Case No. D18 G-0877

AFSCME COUNCIL 25, LOCAL 3317

Labor Organization.

**PANEL'S FINDINGS OF FACT, OPINION AND AWARD**

Thomas L. Gravelle, Chairperson  
Joseph Martinico, County Delegate  
Jamil Akhtar, Union Delegate

AFSCME LOCAL 3317  
Jamil Akhtar, Esq. (P38597)

Attorney for Labor Organization

WAYNE COUNTY HUMAN RESOURCES  
Kenneth S. Wilson, Esq. (P31384)

PERKINS LAW GROUP, PLLC  
Joseph R. Furton, Jr., Esq. (P45653)

THE MIKE COX LAW FIRM, PLLC  
Michael A. Cox, Esq. (P43039)

Attorneys for Public Employer

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## INTRODUCTION AND FACTUAL BACKGROUND

The public employer in this case is Wayne County, Michigan (“the County”).

The County has more than 3,500 active employees and 5,000 plus retirees.

AFSCME Council 25, Local 3317 (“Local 3317” or “the Union”) represents the command officers of the County’s Sheriff Department. There are now around 100 active Sergeants, Lieutenants and Captains in the Local 3317 bargaining unit, or about 3% of the County’s active employees.

Michigan’s Local Financial Stability and Choice Act, 2012 PA 436, as amended, MCL 141.1541 *et seq* (“Act 436”) provides that a local unit of government in financial peril can request a preliminary review of its financial condition by a state-appointed financial review team.

The City of Detroit has about 40% of Wayne County’s population. In mid-2015, the City of Detroit recently had emerged from the largest municipal bankruptcy in U.S. history.

On June 17, 2015, County Executive Warren Evans (“CEO Evans”) requested a preliminary review under Act 436.

After conducting a preliminary review from June 19, 2015 to June 30, 2015, the Michigan Department of Treasury granted the request.

On July 2, 2015, the Governor appointed a five-member Financial Review Team.

On four days in July 2015, the Team met and reviewed the County’s financial condition. On July 9, 2015, the Team met with leaders of Michigan Council 25 AFSCME and six AFSCME locals representing many County employees. It appears that Local 3317 did not attend this meeting. (Cty. Bk. A, Ex. 13, at p. 13).

In its July 21, 2015 Report, the Team concluded “that a financial emergency exists within Wayne County.” (*Id.*, at page 16).

The County was given the option of negotiating and signing a consent agreement committing the County to remedial measures or being governed by a state-appointed emergency manager.

By August 21, 2015, the State Treasurer, CEO Evans and the Wayne County Commission signed their Consent Agreement. The Consent Agreement includes the following:

**1. Remedial Measures.** (a) The County shall implement the Remedial measures necessary to address the financial emergency within the County and provide for the financial stability of the County, consistent with the requirements of this agreement. . . .

**2. Employee Relations. . . .**

(c) Beginning 30 days after the effective date of this agreement, if a collective bargaining agreement has expired, the County Executive may exercise the powers prescribed for emergency managers under section 12(1)(ee) of Act 436 to impose by order matters relating to wages, hours, and other terms and conditions of employment, whether economic or noneconomic, for County employees previously covered by the expired collective bargaining agreement. Matters imposed under this section 2(c) will remain in effect for those employees until a new collective bargaining agreement for the employees takes effect under 1947 PA 446, as amended, MCL 423.201 to MCL 423.217, or other applicable law. The authority described in this section 2 (c) is in addition to the powers retained and granted under sections 1 and 2(a).

. . .

**11. Release.** (a) The County is released from this agreement and requirements of section 8 of Act 436 upon written notification from the State Treasurer to the County Executive and Clerk of the County Commission that the County has complied with this agreement (**the “Release Date”**).

On September 21, 2015, CEO Evans issued his initial order of County Employment Terms (“CET”).

On October 16, 2015, the Michigan Employment Relations Commission (“MERC”) decided that an earlier agreement by Local 3317 and the County for Act 312 arbitration was nullified by the CET.

In late 2015, the County negotiated new collective bargaining agreements (“CBAs”) with 11 of its 12 bargaining units, thereby ending the CET as to them. These units represent about 85% of the County’s employees. The lone holdout has been Local 3317.

On September 23, 2016, CEO Evans issued his order amending the CET for Local 3317. (Cty. Bk. B, Ex. 20).

In late 2018, the State Treasurer released the County from its Consent Agreement.

The parties have had a persistent disagreement as to whether the “starting point” in Act 312 should be the parties’ 2011-2014 CBA or the terms of the 2016 CET.

On November 14, 2018, MERC decided that the 2016 CET is the starting point. *Wayne County -and- AFSCME Local 3317, Case No. D-18 G-0877:*

**ORDER**

The Union’s October 1, 2018 petition for Act 312 arbitration is dismissed. The document currently covering the parties’ relationship is the document containing the County Employment Terms dated September 23, 2016. The terms and conditions of employment set forth in that document shall be the starting point for the parties’ negotiations, mediation, and Act 312 arbitration in this matter.

Also on November 14, 2018, Local 3317 validly renewed its petition for Act 312 arbitration.

On November 20, 2018, Local 3317 appealed the MERC Order to the Michigan Court of Appeals.

On November 28, 2018, the County asked MERC to stay the Act 312 proceedings.

On December 5, 2018, MERC Director Ruthanne Okun cited the above Order in denying the County's request for a stay.

On March 11, 2019, the Court of Appeals stayed the Act 312 proceedings pending appeal.

On June 11, 2019, Local 3317 withdrew its appeal, and the stay ended.

Local 3317 has continued to rely on the parties' 2011-2014 CBA as its starting point in the present Act 312 arbitration.

Despite the parties' disagreements, the command officers represented by Local 3317 have continued to perform their important work in a professional and cooperative manner. Wayne County Undersheriff Daniel Pfannes – who is responsible for “the operational oversight of all aspects of the Sheriff's office” – testified as to his daily experience in working with the Local 3317 command officers (Tr. 8/22/19, at p. 184):

I can tell you that my experience with your members is that they have always treated me with great respect, have been very personable to me, and that I've enjoyed my contact with them, and . . . if their morale has been affected, that it has never affected my interaction with them, they have always been extremely pleasant and professional, and I have always enjoyed my time with them.

The Act 312 hearing was extremely thorough. Attorneys for the County and Local 3317 left no stone unturned.

Simply stated, the County seeks to preserve terms of the parties' CET, whereas Local 3317 seeks to revive terms of the parties' 2011-2014 CBA.

## STATUTORY FACTORS

Section 9 of Act 312 PA 1969, as most recently amended in 2014, MCL 423.239, contains the following factors to be considered by the arbitration panel:

(1) If the parties have no collective bargaining agreement or the parties have an agreement and have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors:

- (a) The financial ability of the unit of government to pay. All of the following shall apply to the arbitration panel's determination of the ability of the unit of government to pay:
  - (i) The financial impact on the community of any award made by the arbitration panel.
  - (ii) The interests and welfare of the public.
  - (iii) All liabilities, whether or not they appear on the balance sheet of the unit of government.
  - (iv) Any law of this state or any directive issued under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531, that places limitations on a unit of government's expenditures or revenue collection.
- (b) The lawful authority of the employer.
- (c) Stipulations of the parties.
- (d) Comparison of the wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in both of the following:
  - (i) Public employment in comparable communities.
  - (ii) Private employment in comparable communities.

- (e) Comparison of the wages, hours, and conditions of employment of other employees of the unit of government outside of the bargaining unit in question.
  - (f) The average consumer prices for goods and services, commonly known as the cost of living.
  - (g) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
  - (h) Changes in any of the foregoing circumstances while the arbitration proceedings are pending.
  - (i) Other factors that are normally or traditionally taken in consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration, or otherwise between the parties, in the public service, or in private employment.
  - (j) If applicable, a written document with supplementary information relating to the financial position of the local unit of government that is filed with the arbitration panel by a financial review commission as authorized under the Michigan financial review commission act.
- (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.

## **APPLICATION OF STATUTORY FACTORS**

### **Ability to Pay**

Recent amendments to section 9 of Act 312 stress “the financial ability of the unit of government to pay.” Section 9(1)(a) explains that four factors “shall apply to the arbitration panel’s determination of the unit of government to pay.” These include the welfare of the public, all liabilities of the unit of government, and any law or directive limiting the unit’s “expenditures or revenue collection.” Section 9(2) requires the



arbitration panel to “give the financial ability of the unit of government to pay the most significance.”

Other Act 312 factors have a financial aspect.

### **2015 Finding of Financial Emergency**

In giving “the most significance” to the County’s financial ability, the record before the arbitration Panel supports the existence of a “financial emergency” in 2015:

The July 21, 2015 Report of the Financial Review Team (Cty. Bk. A., Ex. 13) includes the following problems facing the County:

- The County ended a fiscal year in a deficit condition and was in breach of its obligations under a deficit elimination plan. For the County’s 2014 fiscal year, deficits existed in the entity-wide governmental activities of \$373.0 million in unrestricted net assets. Unrestricted General Fund deficits peaked at \$156.4 million in 2013 and were reduced to \$82.8 million in 2014. The recent reduction in the deficit was primarily due to a transfer of \$91.6 million from the Delinquent Tax Revolving Fund, which will increase borrowing costs to the County when collecting delinquent taxes on behalf of local governments within the County. (According to County officials, \$153.4 more was to be transferred in 2015.) Unrestricted deficits in the General Fund began in the 2008 fiscal year, with an unrestricted deficit of \$10.6 million. Without taking remedial measures, County officials projected a \$171.4 million deficit by 2019.
- . . . No deficit elimination plan had been submitted for the County’s 2014 fiscal year; it was due when the County’s most recent audit report was submitted at the end of March 2015.
- The County’s primary pension plan was 45.1 percent funded and had a liability of \$910.5 million based upon the last actuarial valuation dated September 30, 2013, in contrast to a 94.8 percent funding ratio and total liability of \$49.6 million in 2004. Over the past 10 years, the pension funding ratio decreased by 52.4 percent, while the unfunded liability increased to more than 18 times its 2004 level. The decreased funding ratio was caused by reopening plans to new members in 2002 and 2008, underperforming investments, increasing payrolls, and generous incentives including early retirement that waived age requirements and enabled eligible persons to purchase years of service at discounted rates.
- Recently, the County’s credit rating was downgraded by the three major credit rating services. Moody’s rating is now at Ba3, Fitch’s rating is at B, and Standard and Poor’s are classified as non-investment grade, speculative, or junk, while Moody’s rating is only slightly better.

- . . .  
Over the past several years, taxable valuation of real and tangible personal property within the County declined approximately 24 percent, reducing the amount of property taxes received by the County and underlying units of government. Since 2007, the property tax revenues in the County's General Fund decreased by over \$155.7 million, as total General Fund expenditures increased by over \$50.0 million.
- . . .  
In September 2011, construction began on a \$300.0 million jail to replace and consolidate three aging jail facilities. In June 2013, construction was halted when estimates put the cost of completion at \$391.0 million. From May 1, 2014 to April 30, 2015, County officials spent roughly \$14.3 million on construction-related debt service and an additional \$725,000 for site preservation. It was unclear whether County officials would sell the site or complete the construction.

At the arbitration hearing, various witnesses testified in support of the above findings. For example, County Budget Director Kevin Haney testified that before August 2015 the County's annual deficits were about \$50 million per year, and that this decline led to an ongoing structural deficit. (Tr. 7/17/19, at pp. 90-91).

Many Local 3317 command officers work in the County detention facilities where they supervise hundreds of deputies. The 2015 Report explains:

**c. Wayne County Jail.**

The Jail Division of the Wayne County Sheriff's Department presently operates three detention facilities: the Andrew C. Baird Detention Facility, the Old Wayne County Jail, and the William Dickerson Detention Facility. According to information from the Sheriff's Department, the three facilities in the aggregate house an average daily population of approximately 2,200 individuals. This is despite the fact that existing court orders or consent orders limit the daily population to less than 1,800 individuals.

• . . .

**d. Jail Operations Overtime.**

The decision making process utilized by County officials has proven problematic. For example, for several years staff of the Sheriff's Department has logged considerable overtime in regards to jail operations. Some estimates provided to the Review Team presently place the amount of overtime at nearly 1,000 hours per day.

The reasons for the amount of overtime appear to be several: too few officers; inadequate compensation and insufficient opportunities for advancement, making it difficult to recruit and retain high quality employees; unsavory working conditions within the existing detention facilities; the fact that individuals are hired as police officers, but essentially perform the duties of corrections officers; and, candidly, the impact upon final average compensation, and therefore pension benefits, of those who work overtime.

The Review Team discussed this issue with a number of County and union officials. Not one of them disagreed that it would be more prudent to hire additional officers than to continue to pay exorbitant overtime. . . .

In the four years since the publication of the Report of the Financial Review Team, the County has improved its financial condition. The improvement has resulted largely from (a) the concessions agreed to by 11 of the 12 County bargaining units; (b) cash contributions from the Treasurer's Delinquent Tax Revolving Fund ("DTRF"); and (c) continued deferred maintenance and replacement of County buildings and equipment. Despite this success, a need for caution remains.

### **Delinquent Tax Revolving Fund**

The County's deficit has been eliminated largely by huge contributions from the County Treasurer's Delinquent Tax Revolving Fund ("DTRF"). However, it appears that this boon will be reduced. The 2015 County recovery plan (Bk. A Ex. 4) explains:

#### **STRUCTURAL DEFICIT AND LIQUIDITY**

The accumulated deficit amassed from 2008 to 2013 was substantially eliminated using extraordinary transfers from the DTRF of \$91.6 million in FY 2013-14 and \$78.9 million in FY 2014-15. While a portion of the annual DTRF transfer could be considered ongoing annual revenues, a significant portion of the FY 2013-14 and FY 2014-15 transfers represented one-time revenues [resulting from the great recession]. As a result, the DTRF will no longer have sufficient funds to hide the structural deficit in the future.

But for the stunning losses incurred by delinquent property tax payers in the Great Recession, the County may have followed the City of Detroit into bankruptcy.

Between 2014 and 2018, the DTRF contributed \$395 million to the County. (Cty. Bk. A, Ex. 9). Without these huge contributions, the County's general fund balances would have remained in deficit. Annual DTRF contributions to the County from 2019 to 2024 are projected at the lesser sums of between \$20 million and \$10 million. (*Id.*) An additional concern is that the constitutionality of how local units of government administer their DTRFs is under review before the Michigan Supreme Court. If the Supreme Court decides that DTRF administration has resulted in an unconstitutional "taking," this could reduce the revenues of local units of government. Similarly, the DTRF enabling statute could be amended by the Michigan Legislature to correct perceived abuses.

### **Financial Condition and Limits**

For the fiscal year ending September 30, 2018, the County had an unrestricted General Fund balance of about \$160 million, or 26% of expenditures and transfers out. (Cty. Bk. A, Ex. 25).

Juan Romero, Local 3317's witness for labor economics, has cited "Fund Balance Guidelines for the General Fund" (U. Ex. 56), an article posted on the website of the Government Finance Officers Association ("GFOA"):

*Appropriate Level.* The adequacy of unrestricted fund balance in the general fund should take into account each government's own unique circumstances. . . . Nevertheless, GFOA recommends at a minimum, that general purpose governments, regardless of size, maintain unrestricted budgetary fund balance in their general fund of no less than two months of regular general fund operating

revenues or regular general fund operating expenditures. . . . Furthermore, a government's particular situation often may require a level of unrestricted fund balance in the general fund significantly in excess of this recommended minimum level.

. . .

*Unrestricted Fund Balance Above Formal Policy Requirement.* . . . In all cases, use of those funds should be prohibited as a funding source for ongoing recurring expenditures.

“Two months” or 1/6th of \$560 million in expenditures equals \$94 million or a 17% fund balance, the minimum fund balance to be maintained per the GFOA article. Without more, this would support the argument that the County has experienced a full financial recovery. But there is more.

The County's “particular situation” and “own unique circumstances” include the following:

- The DTRF's huge contributions of \$395 million between 2014 and 2018 by reason of the Great Recession will not continue at anything approaching that level. (Cty. Bk. A Ex. 9).

- Property taxes provide 60% of the County's general fund revenues. However, these receipts are stagnant. Over the period 2014-2018, property tax receipts increased by less than 1%. (U. Ex. 31). Further, between FY 2008 and FY 2018, annual property tax receipts declined by \$76 million – from \$370 million in 2008 to \$294 million in 2018. (Cty. Bk. A Ex. 6). Also, property taxes are paid late in the fiscal year with the result that general fund revenues are not maintained at a constant level. County expert witness Stephen Blann explained that the County has to get through 3/4ths of its fiscal year before its July levy of property taxes. (Tr. 7/24/19 at p. 158).

- Between 2014 and 2018, despite a reviving economy, the County's overall revenues increased by only 2%.

- The County defined benefit pension plan is only 62% funded. (U. Ex. 42). Even to reach 80% funding would cost at least an additional \$250 million. (U. Exs. 11 and 19).

- The County is far behind in maintaining its physical assets. County CFO Mathieu Dube gave as examples a dozen elevators out of order in the County's Guardian Building headquarters and the Medical Examiner's office having water leaking into the storage area and the cooler malfunctioning. (Tr. 7/24/19, at p. 62). Mr. Dube estimated that it would cost \$50 million to refurbish the Guardian Building. (Tr. 8/9/19, at p. 49). Union expert witness Hugh Macdonald explained, "I do know the County's building division has been almost gutted. So they couldn't do any improvements and probably not even maintenance." (Tr. 7/26/19, at p. 191).

- The County has potential financial exposure in the construction of the new Criminal Justice Center.

- For fiscal year 2018, the County's general fund surplus was only \$1.5 million over the previous cumulative balance. (U. Ex. 43, at p. 4).

- The County has been released from the 2015 financial emergency Consent Agreement for little more than one year.

- County CFO Mathieu Dube analyzed the pressures on the County's general fund balance based on data for the fiscal year ending September 30, 2018. (Cty. Bk. A Ex. 23). His analysis began with revenue and expenditure balances of \$173.8 million or 28.7%. From this he subtracted the court fund balance, budget stabilization fund, inventory, restricted payments and assigned payments, thereby reducing the general

fund balance to \$103.2 million or 17.0% of revenue. He then reduced this sum by \$20 million for capital expenditures, thereby reducing the general fund balance to \$83.2 million or 13.7% of revenue. Finally, he subtracted \$400 million as the cost of funding the pension and OPEB to 80%. Mr. Dube's analysis yielded a deficit of over \$300 million or minus 52%.

- County expert Stephen Blann opined that an adequate fund balance for the County would approach 50%. (Tr. 7/24/19, at p. 227).

- An important source of funding for local units of government is the sale of bonds. As of 2018, the Fitch bond rating agency raised the County's "non-investment grade, speculative" grade up one step to "BBB-." (Bk. A, Exs. 35 and 36). Fitch's analysis includes the following:

Fitch expects revenues to grow marginally in the near term as property values recover; however, the county's revenue framework remains vulnerable to future economic downturns. The county's independent legal ability to raise revenues is limited by state law and the county remains unable to adjust tax rates for assessed value (AV) declines absent voter approval. . . .

Structural Balance: Restored reserves and achievement of structural balance have been instrumental to credit quality improvement. Any reversal of such progress could put downward pressure on the rating. . . .

The county is dependent on property taxes for more than half of general fund revenues and is highly susceptible to losing revenue during times of declining property values.

Similarly, Moody's and S&P have determined the County's investment rating to be somewhat above "junk" status.

- The County's financial condition is basically confirmed by the County's August 9, 2019 annual rating surveillance presentation to Fitch Ratings. (U. Ex. 62). For the fiscal year ending September 30, 2018, the County's presentation shows a net change

in fund balance from the previous year of \$1.5 million based on total revenues of \$606.4 million and total expenditures of \$604.9 million. For that year, the presentation shows an unassigned fund balance of \$146.7 (or 24.3% of expenditures). As to CAFR property taxes, the presentation lists the 2014 total as \$294.9 million and the 2018 total as \$306.8 million, an increase of only 4%. For pensions, as of September 30, 2018 the County's unfunded accrued actuarial liability was \$545.6 million, with the funded ratio being 61.7%.

- State laws, including Public Act 436 and Public Act 202, impose financial constraints on local units of government. Unlike the City of Detroit (for example), the County cannot levy income taxes under the City Income Tax Act, MCL 141.501 *et seq.* The Headlee Amendment (Mich. Const. 1963 art IX, §§ 25-33) requires a popular vote for any property tax increases; and the County Charter, §3.115(13), requires that a proposed property tax increase be authorized by a 2/3 vote of the County commissioners and a popular vote of more than 60%. Another limitation is that Proposal A limits property tax increases to the lesser of a 5% increase in taxable value or the rate of inflation. Inflation has been low in recent years. For example, in 2018, the Consumer Price Index increased by 1.8%. (U Ex. 31, Table D). In addition, the Michigan Constitution excludes counties from the “townships, cities, and villages” which are entitled to share 15% of the State 4% sales tax on retailers. (Mich. Const. 1963 art IX, § 10), although otherwise the County does receive substantial sales tax revenue. (Ex. 62, at p. 5). Finally, the County does not share in the \$170 million in gaming taxes received by the City of Detroit (a local unit of government the parties have agreed is comparable to the County).



## Health Care

Health care benefits are referred to as “Other Employment Benefits” (“OPEB”). As of 2015, the County’s OPEB liability was \$1.33 billion and its OPEB assets were only \$9.1 million. (Cty. Bk. A, Ex. 11: Historical OPEB Funding Trend). By reason of major changes in the payment of health care costs beginning in FY 2015 with CEO Evans’ order of CET (and subsequent CBAs with County bargaining units), the County has achieved significant relief in its health costs. Outside accounting and auditing expert Stephen Blann’s analysis explain that between 2015 and 2018 the County’s payments for active County employees were reduced by almost \$300 million. (Cty. Bk. A, Ex. 16: S. Blann, “*What-If Analysis – Health Care Changes,*” at p. 1; Tr. 7/24/19 at p. 116). For County retirees, the County reduced its payments by \$94 million between 2015 and 2018. (Bk. A Ex. 16: S. Blann, “*What-If Analysis – OPEB Changes,*” at pp. 4-5). Also, the County has reduced its OPEB accrued liability from \$1.3 billion to \$206 million by ending retirement health care for newer employees, and providing stipends for active employees who attained 20 years of service by October 1, 2015. (Tr. 8/7/19, at pp. 32-35). Mr. Blann estimated that to fund the current OPEB deficit at even 80% would cost the County at least \$136 million. (Tr. 8/7/19, at p. 32). Further, if the County incurred a general fund deficit, County CFO Matthieu Dube explained that the deficit would prevent prefunding. (Tr. 7/24/19, at p. 37).

## Pensions

The County's defined benefit pension plans are administered by the Board of the Wayne County Employees Retirement System ("WCERS"). As found by the financial review team, in 2004 the County's primary (defined benefit) pension plan was 94.8% funded with a liability of \$49.6 million. However, as of September 30, 2013, the WCERS actuary reported that the plan was only 45% funded and had a liability of \$910.5 million. A publication of the national AFSCME office in Washington, D.C. (Cty. Bk. A, Ex. 22) illustrates the problem faced by the County:

The deep financial downturn of 2008 and 2009, spurred by recklessness on Wall Street, caused significant problems in many pension funds. Until the recent market crash, public pensions were well funded and not a problem – they had on average 86% of the assets they needed to pay for accrued benefits (anything over 80 percent is considered healthy).

Based on actuarial recommendations, the WCERS Board requires the County to make annual legally required contributions ("ARC"). Between 2009 and 2013, the County's ARC more than doubled – from \$32.5 million to \$66.2 million. (U. Ex. 42: WCERS Schedule of County Contributions). Defined benefit payments to pensioners were \$123.7 million, which was only slightly less than County active employee salaries of \$125.5 million. (Bk. A Ex. 4: Recovery Plan, at p. 10).

This expansion of County pension liability was largely the result of the WCERS Board's decision to award an annual 13<sup>th</sup> pension check for many years.

The 2013 Act 312 case between the County and the POAM ("Dr. Richard N. Block Act 312 Award") (U. Ex. 52, at pp. 11-12) found "poor financial performance" by WCERS in investment decisions, and WCERS' discretionary decision to issue 13<sup>th</sup> checks to County retirees:

A second reason for increased financial obligations on the County associated with the pension fund has been the establishment within WCERS of a separate Inflation Equity Fund (IEF) in 1985 from which 13<sup>th</sup> checks were distributed to retirees between 1986 and 2009. The establishment of this plan and the distribution of the 13<sup>th</sup> checks were within the discretion of the WCERS Retirement Commission.

In 2010, WCERS actuary Judith Kamens reported that as of September 30, 2009 WCERS had assets of \$950 million; but if WCERS had not adopted the 13<sup>th</sup> checks program WCERS would have had assets of \$1,285,000,000. (Cty. Bk. A, Ex. 19). In other words, the discretionary 13<sup>th</sup> checks program cost the pension system \$335 million.

By reason of tightened pension terms and County general fund contributions of over \$160 million between 2015 and 2018 beyond ARC requirements, as of September 30, 2018 the plan became 62.1% funded. (U. Ex. 42: GRS-WCERS Annual Actuarial Valuation Report, 9/30/18, at p. A-5). 62.1% is barely above the 60% funding requirement of the Protecting Local Government Retirement and Benefits Act of 2017 (P.A. 202). For the County plan to reach the minimum responsible goal of 80%, funding would cost an additional \$250 million. (U. Exs. 11 and 19, CEO Evans state of County addresses). A recent WCERS actuarial report explains that the County's required ARC payments equal 47.66% of payroll. (Bk. A Ex. 21: GRS-WCERS Annual Actuarial Report, Sept. 30, 2018, at p. A-4). The County's high ARC for required pension payments adversely affects the County's ability to pay increases in compensation.

In other words, even with the concessions made by 11 of the 12 County bargaining units, pension funding remains a major concern.

**Overall Compensation**

Section 9(1)(g) requires the Panel to consider the “overall compensation” of the command officers represented by Local 3317. Overall compensation is not limited to “direct wage compensation” but also includes “vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and other benefits received.”

County assistant corporation counsel Drew Van De Grift recently had worked for the Michigan Department of Treasury at the Bureau of Local Government Services, in the Office of Fiscal Responsibility. (Tr. 8/7/19, at p. 124). His work there included “direct engagement and correction for fiscally distressed communities.” (*Id.* at p. 125). He prepared an exhibit comparing overall compensation (excluding medical insurance and OPEB) of employees represented by Local 3317 with comparable employees in the following communities: Benton Harbor, Cuyahoga County Corrections, Detroit, Flint, Genesee County, Milwaukee County, Saginaw County and the Michigan Department of Corrections. (Cty. Bk. B, Ex. 4). Mr. Van De Grift testified that he included Detroit, Benton Harbor and Flint because they had been through Act 436. (Tr. 8/7/19, at p. 143). By way of example, his exhibit shows the following “overall compensation” for a Local 3317 Sergeant for the fiscal year beginning on October 1, 2018 (assuming a 5% wage increase and working on paid holidays):

<u>0-12 month Rate</u>	<u>Holiday Pay</u>	<u>Shift</u>	<u>Subtotal</u>	<u>Pension Expense</u>	<u>Total</u>
\$ 63,272	\$6,814	\$1,248	\$71,334	\$47,408	<u>\$118,742</u>

The Pension Expense is based on the September 30, 2018 WCERS Annual Actuarial Valuation Report. (Cty. Bk. A, Ex. 21; Tr. 8/7/19, at p. 136). (To be noted is that at 12-24 months the County Sergeant Total is \$127,453.)

The Local 3317 Sergeant Subtotal is higher than all the comparisons except Cuyahoga Corrections (\$73,454) and Detroit (\$78,640). However, this Local 3317 Sergeant Total is higher than all the comparisons except Flint for one 12 month period (\$119,040). The reason is that while the Flint Subtotal is \$64,221 the pension obligation allocated to each Flint sergeant is \$54,819. Because Detroit's pension is better funded than the County's, the pension allocation in Detroit is \$20,973, resulting in a Detroit sergeant's Total compensation for the year being \$99,614 (about \$19,000 less than the Total for a Wayne County Sergeant).

In comparing the County with its own proposed comparables (including the City of Detroit), their average Totals are between 64% and 90% of the County's Totals for all command positions.

Mr. Van De Grift's analysis also compares Local 3317's overall compensation with the following Local 3317 proposed comparables: Dearborn, Livonia and Oakland County. Their average Totals are between 85% and 92% of the County's Totals for all command positions.

As a result, regardless of which comparables are considered, the command officers represented by Local 3317 have a very high "overall compensation." Unfortunately, this is largely the result of lackluster investment returns by WCERS and its discretionary issuance of a 13<sup>th</sup> paycheck for many years. In this sense, the active members of Local 3317 have been charged with "the sins of their fathers."

### **Internal Comparables**

In recent years, the following language was added as section 9(1)(e):

Comparison of the wages, hours, and conditions of employment of other employees of the unit of government outside of the bargaining unit is question.

The record shows that beginning in 2015, 11 of the 12 County bargaining units agreed to new CBAs containing concessions in response to the financial crisis faced by the County (replacing the CET as to them). The union bargaining units agreeing to new CBAs are as follows:

- AFSCME Council 25, Locals 25, 101, 409 and 1659
- AFSCME Council 25, Locals 1862, 2057 and 2926
- Police Officer Assn. of Michigan
- Michigan Building Construction Trades Council
- Int'l Union of Operating Engineers
- Govt. Administrators Ass'n. ("GAA")
- GAA General Fund Supervisors
- Govt. Administrators Ass'n Nurses Unit I
- Govt. Administrators Ass'n Nurses Unit II
- Govt. Bar Assn.
- Dieticians and Nutritionists

Of these County employee units, the closest to Local 3317 is the Police Officers Association of Michigan ("POA M"). The POAM represents several hundred Sheriff's deputies who are supervised by the members of Local 3317. The two bargaining units work together.

## **Pattern Bargaining**

Section 9(1)(l) of Act 312 – which may be read in conjunction with section 9(1)(e)

– states:

Other factors that are normally or traditionally taken in consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration, or otherwise between the parties, in the public service, or in private employment.

A factor normally considered in collective bargaining involving multiple labor units is a practice called “pattern bargaining.” ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, 8<sup>th</sup> Ed. (BNA Books 2016) at pages 22-52 – 22-54 explains:

A “pattern” may be defined as a particular kind of solution for collective bargaining issues that has been used on a wide enough scale to be distinctly identified.

. . . Patterns do not always call for wage increases. Rather, the pattern may be for wage decreases [citing *City of Detroit, Mich.*, 102 LA 764 (Lipson, 1993)], or, when the economy so justifies, for maintenance of the status quo.

. . . The longer a set of internal linkages is found to have existed, the greater the weight given to maintenance of the pattern.

*HOW ARBITRATION WORKS*, *supra* at 22-31 and 22-32 cites Dell’omo, *Wage Disputes in Interest Arbitration: Arbitrators Weigh the Criteria*, 44 ARB. J. 4, 8 (1989), a survey reporting the common practice in interest arbitration that “the arbitrators look first to internal wage-settlement patterns.” *HOW ARBITRATION WORKS* also cites a recent railroad industry award where the board of arbitration relied on internal settlements of 13 of 15 employee organizations because the internal patterns “ensure internal equity among different craft groups and avoid the instability associated with

each organization trying to exceed gains achieved by other organizations in bargaining.”  
(quoting *AMTRAK*, 133 LA 105, 111 (Jaffe, 2014)). *Id.* at page 22-55.

In the present case, a “pattern” has existed among “other employees in bargaining.” The pattern shows “virtually identical substantive provisions of retiree medical, medical, and pension” concessions (Tr. 8/9/19, at p. 51), as well as an initial wage freeze, and concessions as to overtime, sick pay, holidays and personal days for active employees. (*Id.* at p. 15).

### **External Comparables**

The County has proposed the following nine comparable communities:

- Genesee County
- Saginaw County
- Cuyahoga County, Ohio (which includes the City of Cleveland)
- Milwaukee County, Wisconsin (which includes the City of Milwaukee)
- Allegheny County, Pennsylvania (which includes the City of Pittsburgh)
- Cities of Detroit, Benton Harbor and Flint
- Michigan Dept. Of Corrections

Local 3317 has proposed the following six comparable communities:

- Cities of Detroit, Livonia and Dearborn
- Michigan State Police
- Oakland County
- Wayne County Airport Authority

In reviewing proposed external communities , HOW ARBITRATION WORKS at 22-46 offers the following word of caution:

The selection of “comparable communities” is often tainted by “cherry picking,” where each party selects as “comparable” only communities whose contract terms support its position.



The County's proposed comparables are the same as its proposed comparables in the 2013 POAM/County Act 312 arbitration ("Block Act 312"), except that it has added the Michigan Department of Corrections ("MDOC"). Of some interest, the 2013 Block Act 312 opinion explains that "[n]either party has contended that any particular jurisdiction is relevant [or] should be considered as an external comparable." (U. Ex. 52, at page 15).

Local 3317's proposed comparables have been used in the past except that it has added the Airport Authority. For example, the parties' 2000-2004 CBA incorporated the five comparables "which were used in the 1983 contract." (U. Ex.76, at p. 100). Of some interest, the 2007 George Roumell Act 312 opinion cites but does not decide which proposed communities were comparable. (U. Ex. 56).

In support of its proposals, the County has relied primarily on the testimony of Patricia Becker. Ms. Becker has provided demographic services for many years. At the hearing, the parties agreed that she is an expert demographer. (Tr. 7/17/19, at p. 17). Since 1983, Ms. Becker has addressed the issue of "comparable communities." (Tr. 8/7/19, at p. 58). For the present case, Ms. Becker prepared a comparability analysis in which she considered the following "potential comparable counties:" Cuyahoga, Milwaukee, Allegheny, Genesis, Saginaw and Oakland, - plus the City of Detroit. (Cty. Bk. B, Ex. 1). Ms. Becker included in her analysis the following "proposed comparable non-county entities" proposed by Local 3317: The Cities of Flint, Livonia, Dearborn and Detroit, and the State of Michigan. In her Analysis, she considered the following factors:

- % change of population 1970-2018;
- % change of housing units 1970-2018; median household Income;
- median household income;
- % of population in poverty;
- 2018 unemployment rate (LAUS);
- 2018 assessed valuation/10,000 population;
- police protection/1,000 population; corrections/1,000 population; and
- type of officer.

Ms. Becker testified that size and population loss were primary factors. Of all the comparables, the City of Cleveland (in Cuhahoga County) was the closest to the City of Detroit. She found Genesee and Saginaw Counties not to be comparable because too small in comparison with Wayne County. She also explained that cities as a rule are not comparable to counties because they are functionally different and much smaller. Cities have smaller prisons than counties, more policing work than counties; and more functions, such as garbage collections. Counties serve primarily as centers of criminal justice and corrections. Despite its geographic proximity, Oakland County is no longer comparable to Wayne because of demographics which include Oakland's 39% population increase since 1970 compared to Wayne's 34% population decline; Oakland's 97% increase in housing units compared to Wayne's 6% decline; Oakland's median household income of \$77,500 compared to Wayne's \$40,500; Oakland's 8% poverty rate compared to Wayne's 23%; Oakland's 2018 assessed valuation per 10,000 population of \$5,708 compared to Wayne's \$2,765; and Oakland's corrections cost per 1000/population of \$62 compared to Wayne's \$134. In sum, Ms. Becker found that

Cuyahoga, Milwaukee and Allegany Counties are most comparable to Wayne County, as each contains a large city and a large population.

Local 3317 called Nancy Ciccone for her organization of data and testimony. U. Ex. 28). She, too, is an expert. However, Ms. Ciccone was not asked to recommend comparable communities but rather to provide data about the communities selected by Local 3317.

The parties have agreed that the City of Detroit is comparable to the County. The parties' other proposed cities are much smaller than Wayne County and differ in significant ways from a county. Based on Ms. Becker's analysis, the Counties of Cuyahoga, Milwaukee and Alleghany appear most comparable to the County. The Wayne County Airport Authority ("WCAA") is a separate and distinct corporate government entity created by Act 90 of 2002. Unlike the County, it need not fear a structural deficit because airlines are required to make up any deficit. (Tr. 8/7/19, at p. 102). MDOC corrections officers are not sworn police officers and the record does not establish that the State of Michigan is an employer comparable to the County. The lack of record also applies to the Michigan State Police.

Having said all this, because of the above comparisons of "overall compensation" no set of proposed communities is dispositive in the present case. Under "overall compensation" the Local 3317 command officers rank high.

### **Stipulations**

The parties have agreed to a three-year term for the new CBA. The parties also have settled a number of issues through negotiation and mediation. It appears that the ten remaining issues are all that are outstanding.

### **Other Factors**

Increases in the cost of living (CPI) have been low in recent years. (U. Ex. 31, Table D).

If the County again experienced a financial emergency, it would have an adverse financial impact on the community because of cuts in County services; and also would imperil County employees' continuity and stability of employment which depend on the fiscal health of the County.

## **ECONOMIC ISSUES BEFORE THE PANEL**

For economic issues, Act 312 requires the Panel to pick one last offer of settlement in its entirety.

The County's last offers of settlement are based largely on the 2016 CET.

Local 3317's last offers of settlement are based largely on the parties' 2011-2014 CBA.

The Panel majority believes that because of MERC rulings on this issue, it is required to treat the 2016 CET as the starting point.

The County claims that Local 3317 “seeks unprecedented economic benefit increases that exceed \$86,000 for each member of the length of the three-year contract.” (Cty. Post-Hearing Brief, at p. 5).

## **ISSUE 1: ARTICLE 35 – WAGES AND LONGEVITY**

### County Last Offer of Settlement:

#### 35.01 Special Skills Positions

- B. Effective beginning October 1, 2001, Employees in the classifications of Sergeant and Lieutenant will receive an additional one thousand dollars (\$1,000) per year upon completion of five (5) years of service in-grade. This payment is in addition to the [\$1,000.00] stipend contained in the following section.
- C. [E]ach employee who is in active service and has completed at least one year of service prior to April 1, 2018 shall, on a one-time basis, receive a \$1,000 retention stipend. . . .

#### 35.03 Wage Rates of Employees in Local 3317

Wage rates shall be increased by five percent (5%) effective October 1, 2018, an additional five percent (5%) effective October 1, 2019, and an additional three percent (3%) effective October 1, 2020.

#### C. Captain

Captains shall receive an additional three thousand dollars (\$3,000.00) annually over the contractual maximum salary for the Lieutenant classification.

### Union Last Offer of Settlement:

7% wage rate increases beginning October 1, 2018, October 1, 2019 and October 1, 2020.

For annual longevity the following payments:

Sergeants with 5 years of seniority in grade: \$6,000.

Lieutenants with 5 years of seniority in grade: \$7,000.

Captains with 5 years of seniority in grade: \$8,000.

## Discussion

Wages: A factor normally taken into consideration in collective bargaining is the maintenance of wage differentials between supervisory employees and the employees they supervise. In the present case, Local 3317 command officers supervise the POAM deputies.

For the period October 1, 2015 to date, the POAM deputies have received wage increases totally 15.5%. The County is offering 13% to Local 3317.

The difference is largely one of timing.

The County and POAM agreed to a 5% wage rate increase beginning on October 1, 2015, 5% on October 1, 2016, 2.5% in 2018, and 3% on April 1, 2019. (In return, POAM agreed in 2015 to concessions, including major pension and health care changes.)<sup>1</sup>

The County's proposed base rate increases for Local 3317 begin retroactively on October 1, 2018.

By October 1, 2020, the percentages of wage rate increases for Local 3317 and the POAM will be comparable. By this time, however, the actual wage increases will be higher for Local 3317 members than for newer POAM deputies. For example, 5% of \$70,000 is more than 5% of \$35,000.

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<sup>1</sup> The 2013 Block Act 312 Award covered a three-year period ending on September 30 2016, and so was exempted from the 2015 Act 436 Consent Agreement until September 30, 2016. The Award froze base wage rates and did not change pensions because in the predecessor CBA the parties had agreed that there could be no pension changes until 2020. The December 2015 POAM CBA includes the pension changes sought by the County.

If one looks backward, it may seem unfair that for three years POAM received base rate increases and Local 3317 did not. At the arbitration hearing, AFSCME staff representative Richard Johnson calculated from a zero base that for the period 2016-2019 POAM wage rate increases have come to 33%, whereas the County's proposal would come to 15%. (Tr. 8/21/19, at pp. 55-59). Mr. Johnson assumed that the POAM wage increases were 5%, 5% and 3%.

If one looks forward, under the County's offer the base rate differentials between command officers and deputies will be maintained; and (it is to be hoped) these base rate increases will not be reduced for years to come.

Local 3317 is proposing base rate increases totally 21% by October 1, 2020.

By that date, the 21% increase would place Local 3317's base rate above all of both parties' proposed external comparable communities except for the Wayne County Airport Authority (which has not been found to be comparable). (Cty. Bk. 2 Ex. 4; U. Ex. 28). It also would exceed the base rate increases (if any) of internal comparables. For the four year period 2015-2018, the consumer price index (CPI) increased by only 6.4%. (U. Ex. 31, Table D).

Although the Panel reserved discretion to treat each year as a separate issue, the Panel majority cannot now find a coherent reason for doing so. This result might have been different if Local 3317 had made a less expensive offer.

Longevity: Local 3317 argues that it should receive major increases in longevity pay because in January 2019 the County agreed with the Government Bar Association ("GBA") and County Prosecutor Kim L. Worthy to provide longevity pay ranging from \$6,000 to \$8,000 for the County's assistant prosecuting attorneys.

The County argues that the pay is a one-time effort to encourage newer prosecuting attorneys to remain in the County's office rather than staying there only long enough to acquire valuable experience and then to move to higher paying prosecutor offices in other jurisdictions. County Prosecutor Worthy explained this to the Wayne County Commission on August 15, 2019. (Cty. Bk. A Ex. 42). There is no comparable retention problem for Local 3317. Also, Local 3317's offer is to be paid annually, whereas the GBA's agreement is for one year only.

#### AWARD ON ISSUE 1: ARTICLE 35 – WAGES AND LONGEVITY

The County's last offer of settlement is accepted.

#### **ISSUE 2: ARTICLE 24 – SICK LEAVE**

##### County Last Offer of Settlement:

Source: CET.

24.03          Applicable to Employees hired on or after October 1, 1983

On October 1<sup>st</sup> annually the Employer will audit each Employee's sick leave bank and shall pay the Employee for all sick time in excess of forty (40) days accumulation on or before December 15<sup>th</sup> annually. Such payments shall reduce the Employee's sick leave bank by the number of days paid over 40, as of the date of the audit.

- A. Annual sick leave accumulation in excess of forty (40) days shall be paid at the rate of 50%.
- B. At the Employee's option, payment for sick time in excess of forty (40) days may be taken in the form of deferred compensation. The Decision and notification to the Employer with respect to this option shall be made by the Employee within thirty (30) days before December 1<sup>st</sup> annually.
- C. For Employees whose effective date of retirement in on or after October 1, 2015, no sick leave pay will be used in calculating average final compensation for retirement credits in any retirement plan.

24.05

An Employee who uses three (3) or less sick leave days per calendar year (12 month period) shall be credited with twenty-four hours [3 days] of annual leave on April 1 of the succeeding year.



Union Last Offer of Settlement:

Source: 2011-2014 CBA.

75% of payout of sick leave bank included in employee's final average compensation.

Annual accumulated sick leave be paid at the rate of 100% for six or more accumulated days, 50% for five or fewer days.

3 days of annual leave for employees with five or less sick days.

**Discussion**

Both parties have proposed a 100% payout of all of an employee's accrued and unused sick leave upon the employee's death, retirement or separation from employment.

The major difference between the parties' final offers is that Local 3317 proposes that 75% of payouts of an employee's banked sick leave be included in the calculation of the employee's final average compensation ("FAC") for the purpose of calculating the employee's pension entitlement under a defined benefit retirement plan, whereas the County proposes that these payouts be excluded from the calculation of FAC.

This FAC exclusion has been negotiated with every other County bargaining unit, and has been applied to all other County employees.

At page 56 of its post-hearing brief, the County explains:

[U]niformity among all of the County's bargaining units is essential with regard to the determination of AFC and creating a greater benefit for Local 3317 would undoubtedly cause pressure upon all of the County's 11 other bargaining units to obtain parity, at great financial expense to the County and adversely impacting the funding of the retirement plan.

The retirement plan is underfunded. If Local 3317's proposal became a model for other County bargaining units, the County's funding obligation would be significantly increased.

Local 3317 has not established why it alone should be awarded this increase in the calculation of its members' FAC.

AWARD ON ISSUE 2: ARTICLE 24 – SICK LEAVE

The County's Last Offer of Settlement is accepted.

**ISSUE 3: ARTICLE 34: RETIREMENT – PENSIONS**

County Last Offer of Settlement:

Source: CET. Retain status quo.

Union Last Offer of Settlement:

“Simply stated, the Union's retirement demand is that as of October 1, 2018, their defined benefits retirement plan be identical to the retirement plan benefits being received by Local 3317 members employed at the Detroit Metropolitan Airport Police Department and who belong to the same retirement system as do the Sergeants, Lieutenants and Captains employed at the Wayne County Sheriff's Department.”

**Discussion**

Local 3317's simple statement has the virtue of simplifying the Issue.

As an initial matter, the Wayne County Airport Authority is not a comparable community. Unlike the County, the Airport Authority cannot run a deficit. Any deficit it might incur is paid for by the airlines. Also, it is apparent that an airport differs from a county.

As with the Sick Leave Issue (above), the County's pension offer has been negotiated with every other County bargaining unit, and has been applied to non-union County employees.

The pension terms sought by Local 3317 are comparable to the pension terms in pre-2015 CBAs, which County-wide were a major cause of the County's structural deficit and 2015 State intervention because of the County's "financial emergency."

During the Act 312 hearing, Local 3317 obtained a draft of a supplemental actuarial valuation of its final offer on defined benefit pensions. (Cty. Bk. A Ex. 34).

In reviewing this actuarial draft, County financial expert Blann testified that if the proposal were adopted and limited to the 86 employees represented by Local 3317 it would increase the County's pension liability by \$7.7 million. If through pattern bargaining the other County bargaining units were to receive the same increases, the defined benefit plan's funding ratio would drop from 63.1% to 50.8% (which would cause the State Treasurer to declare the plan to be statutorily underfunded).

Local 3317 has not established why it alone should be awarded pension terms far more generous than the terms for all (or nearly all) other County employees (including the deputies supervised by Local 3317).

The County's offer, which repeats the terms of the CET, has the virtue of keeping the County's financial recovery on track.

AWARD ON ISSUE 3: ARTICLE 34, RETIREMENT (Pensions)

The County's Last Offer of Settlement is accepted.

**ISSUE 4: ARTICLE 34 – PENSION BOARD MEMBERSHIP**

County Last Offer of Settlement:

Source: CET.

34.13 The Wayne County Retirement Commission shall consist of the following ten (10) individual trustees:

- A. The chairperson of the County Commission or his or her designee;
- B. A trustee chosen by the CEO, subject to approval by a majority of the County Commission, who is neither a participant in the plan or an Employee of the County;
- C. The County Executive or his or her designee;
- D. Two (2) trustees appointed by the County Executive, neither of whom is a participant in the plan or an Employee of the County, and each of whom must be either a licensed or certified professional in investment or finance or otherwise have an educational background and proven experience in municipal finance;
- E. Three (3) members of the Retirement System who are residents of the County, to be elected by the members of the Retirement System. Each member trustee shall be from a different County department, as provided in the County Charter of January 1, 1987. The elections shall be conducted in accordance with procedures adopted by the Retirement Commission;
- F. One (1) retired member who is a resident of the County to be elected by the retired members and beneficiaries. The election shall be conducted in accordance with procedures adopted by the Retirement Commission;
- G. 10<sup>th</sup> Trustee. An additional 10<sup>th</sup> trustee who shall not be a participant in the plan or employed by the County in any capacity shall be selected by the County Commission Board of Trustees, and is a licensed or certified professional in investment or finance. Such trustee shall serve as a full member of the Retirement Commission Board of Trustees and vote on any and all matters considered by the Commission. The term for this trustee shall be three (3) years.

Union's Last Offer of Settlement:

38.08 Retirement Board Eligibility

Effective the date of execution of this Agreement by the County Executive, if not otherwise prohibited by law, eligibility for election or appointment to a position of trustee on the Board

of the Wayne County Employees Retirement System will include retired employees of Wayne County who reside within the State of Michigan.

### Discussion

The County's proposal repeats the CET.

The 2013 Block Act 312 Award accepted the County's offer to change the composition of the retirement board. The Block panel found "poor financial performance" by the WCERS board in investment decisions, and WCERS' discretionary decisions to issue 13<sup>th</sup> checks to County retirees for many years:

A second reason for increased financial obligations on the County associated with the pension fund has been the establishment within WCERS of a separate Inflation Equity Fund (IEF) in 1985 from which 13<sup>th</sup> checks were distributed to retirees between 1986 and 2009. The establishment of this plan and the distribution of th 13<sup>th</sup> checks were within the discretion of th WCERS Retirement Commission.

(U. Ex. 52, at pp. 11-12)

In 2010, WCERS actuary Judith Kamens reported that as of September 30, 2009 WCERS had assets of \$950 million; but if WCERS had not adopted the 13<sup>th</sup> checks program WCERS would have had assets of \$1,285,000,000. (Cty. Bk. A, Ex. 19). In order words, the discretionary 13<sup>th</sup> checks program cost the pension system \$335 million.

The County's proposal in the present case is almost identical to the County's last offer of settlement in the Block arbitration, which the Block panel accepted. The Block panel explained (U. Ex. 52, at pp. 45-46):

The current WCERS Commission is composed of eight members, the CEO (County Executive) or the CEO's designee, the Chairperson of the County Commission four active employees who are residents of Wayne County, and two retirees. The structure clearly disadvantages the County, as only one-fourth of the member represent the County, which has the responsibility for financing

pension plans. Three fourths of the members of the Commission represent either future or current retirees and represent the interests of those who elected them.

. . . The record in this case . . . establishes that the Commission, structured as it is, has tilted toward the interests of retirees at the expense of the County and, at the same time, has been a poor administrator of the assets of the pension plans. As noted, the decision to issue 13<sup>th</sup> checks to retirees has done severe damage to the long-term sustainability of the fund. Indeed, an actuarial report in 2010 stated that the plan would have been 90% funded had the fund not issued 13<sup>th</sup> checks for 24 years. The decline in the funding ratio of the plans between 2007 and 2011 from 82% to 49% has been noted, as has the poor financial performance of the fund.

The County's proposal has been agreed to by the other County bargaining units.

On its face, Local 3317's final offer (quoted above) seems incomplete. Also, the proposal already exists in section 34.13 of the CET.

Local 3317 appears impliedly to be proposing that the composition of the retirement board be as accepted by the parties in earlier years: First, in its post-hearing brief, Local 3317 refers to the County's proposal as a "power grab." Second, it has cited with approval a court case addressing the denial of seating to the new members of the WCERS Commission.

This disagreement puts in issue the following factor set forth in Section 9(1)(b) of Act 312: "The lawful authority of the employer."

The recent unpublished decision of the Michigan Court of Appeals, No. 339714 (May 9, 2019) reveals the following: In 2017 the County brought a mandamus action in the Wayne County Circuit Court against the Retirement Commission to compel it to seat the new members. The Court of Appeals explained that the Circuit Court denied the County's complaint:

The trial court found that:

any changes to the Retirement Commission are changes to the County Charter that must be submitted to the electorate for a vote pursuant to the Michigan Constitution, 1963 Const Article 7, § 2, and pursuant to the Charter Counties Act, MCL 45.514(1)(o). To do otherwise would be a violation of the due process rights of non-represented employees, exempt employees, retirees, and the public at large.

The County appealed the denial of mandamus to the Court of Appeals

In its May 2019 decision, the Court of Appeals affirmed the Circuit Court as follows:

For purposes of resolving this appeal, we presume, although we do not decide, that a vote by the electorate was not required to amend the Charter. We express no opinion as to that issue. . . .

Because a vote is not required, the County can show that the first, second, and fourth requirements to obtain a writ of mandamus are met: the County has a clear, legal right to performance, defendant has a duty to perform, and there is no other adequate remedy.

However, it is less obvious whether implementation of the new Commission is a ministerial act.

. . .

We therefore conclude that the trial court properly determined that the issuance of a writ of mandamus would be inappropriate.

In its post-hearing brief, Local 3317 explains that “[t]he County Executive has now filed an application for leave to appeal to the Michigan Supreme Court.”

Assuming that the County’s proposal is not unlawful in an Act 312 proceeding, the Panel majority finds that the County’s proposal should improve the performance of the Board, which will be of special benefit to the County’s active employees.

AWARD ON ISSUE 4: ARTICLE 34 – PENSION BOARD MEMBERSHIP

The County’s Last Offer of Settlement is accepted.

## ISSUE 5: ARTICLE 33 – INSURANCE

### County Last Offer of Settlement:

Source CET. Status quo for healthcare for active Local 3317 employees, including the following:

#### 33.2 Medical Insurance

- C. Bargaining unit members with twenty (20) years or more of completed service as of October 15, 2015, when eligible to retire, will be eligible to receive post-retirement retiree healthcare stipends (attached as Appendix \_\_\_), as determined pursuant to the healthcare eligibility provisions contained in the settlement in *Macdonald, et. al. v. County of Wayne*, Circuit Court Case No. 09-031117.
- D. Employees who are promoted into the bargaining unit after the effective date of the Act 312 Arbitration Award, who possessed a vested right to a post-retirement medical insurance benefit at the time of their promotion, shall remain eligible to receive such benefit upon retirement.
- E. Health care coverage for eligible dependents will be in accordance with the terms and conditions outlined in the Wayne County Health and Welfare Benefit Plan, as amended.

Spouses who are eligible for primary medical coverage through another Employer shall not be eligible for primary coverage through Wayne County.

#### 33.2.

For other insurance programs:

- Life Insurance: Increase from \$25,000 to 30,000.
- Life Insurance for Certain Specialty Units: Status quo of \$50,000 for SWAT Detail, Bomb Squad Detail, and Canine Unit Members.
- Workers' Compensation: Status quo, including medical, dental, life, and vision insurance continuation for two years.
- Long-Term Disability Income Benefit Plan: Status quo, including a maximum of \$2,400 per month for two years.

### Union Last Offer of Settlement:

In agreement with County except primarily as follows:



37.01 Medical Insurance.

G. All members of the bargaining unit who retire with a duty disability retirement or age and service retirement, shall be provided with the “MacDonald” stipend under the terms of the 2015 Court Settlement and the 2015 amendments to the Wayne County Retirement Ordinance, (Copy Attached.) These post-Retirement stipends shall be lifetime benefits for the employee, the employee’s spouse and legal dependents; this post-retirement medical benefit shall only apply to members of the bargaining unit who [had] 20 years of credited service, included the purchase of service credits, as of October 1, 2017; in the event the County grants the POAM bargaining unit an extension after 2017, the same extension will apply to Local 3317 members.

J. Healthcare coverage for eligible dependents will be in accordance with the terms and conditions outlined in the now existing *Wayne County Health and Welfare Benefit Plan*, which cannot be amended except by mutual agreement.

- a. Spouses who are eligible for primary medical coverage through another employer, shall not be eligible for primary coverage through Wayne County; provided that [for] said spouses, medical coverage is the same as or is better than the medical insurance provide[d] by Wayne County, only then will this provision take effect.

37.23

Other terms and conditions regarding eligibility for and the application of long-term disability benefits shall be as described in the *County of Wayne, Michigan, Long-Term Disability Income Benefit Plan*, which is incorporated by reference and shall not be changed absent mutual agreement of the parties.

**Discussion**

In large part, the parties agree on Insurance.

Their differences are discussed below.

*First*, Local 3317 has proposed than any changes in Wayne County’s *Health an Welfare Benefit Plan* and *Long-Term Disability Income Benefit Plan* be subject to its agreement. If Local 3317 were to withhold its approval of a change, at a minimum this would result in different benefit terms for Local 3317 than for all other County employees.

*Second*, Local 3317 argues in favor of its spousal coverage proposal:

This will stop the County from taking away employee's medical insurance if their wife works for K-Mart and receives a minimal insurance policy which is paid for by the employee and only covers the employee and not the employee's spouse and dependent children. This inequity must be changed.

Local 3317 post-hearing brief, at pp. 55-56. [Emphasis in original.]

The record does not show that the County has been engaging in this inequity. As a result, there is nothing to be stopped. In applying its spousal coverage proposal, the County would be expected to do so in good faith. In other words, a denial of spousal coverage would be wrong where the spouse was eligible to pay for minimal "K-Mart" coverage at the spouse's place of employment. Also, because insurance policies vary, applying "the same or better" test could be a challenge.

*Third*, Local 3317 has proposed that service credits purchased in the past be part of the formula for determining 20 years of credited service. The 2015 Report of the State Financial Review Team (Cty. Bk. A Ex. 13) found that "[o]ver the past 10 years, . . . the [pension's] unfunded liability increased to more than 18 times its 2004 level" in part by "enabling eligible persons to purchase years of service at discounted rates." A significant part of the CET's insurance programs was to eliminate the purchase of service credits in determining years of credited service. Other County bargaining units have agreed to eliminate the purchase of service credits.

*Fourth*, Local 3317 has proposed that the deadline for computing years of credited service for retirement healthcare stipends be the same as the POAM deadline. In 2015, POAM agreed to waive its 2013-2016 CBA which included higher pension and healthcare benefits than the reductions in the CET in return for some concessions by

the County. The County agreed to extend the deadline for qualifying for the retiree healthcare stipend deadline from October 1, 2015 (which applied to everyone else under the CET) to October 1, 2017. More recently, the County has agreed to extend the POAM deadline to October 1, 2018. The County's motive was to encourage senior POAM deputies to remain in employment. Local 3317 does not have the staffing problems that POAM has.

Under Local 3317's proposal, the deadline would be increased by three years, from October 1, 2015 to October 1, 2018. In all likelihood, this would launch efforts by other County bargaining units to extend the October 1, 2015 deadline.

*Fifth*, Local 3317 has proposed that duty disability retirements be added to eligibility for the retiree healthcare stipend. For example, an employee with a short period of employment who is disabled on duty would qualify. This is inconsistent with the requirement of long-term credited service. Also, duty disability benefits are addressed elsewhere in the parties' proposals.

*Sixth*, the County's insurance proposal is supported by internal comparables.

HOW ARBITRATION WORKS, *supra* at 22-42 and 22-50 explains:

Benefit issues, such as health insurance benefits, are often resolved through a review of internal comparables. Applying the internal-comparison standard to determine the appropriate health insurance package, one arbitrator explained:

[Because of risk pooling, economies of scale and lack of quality data about coverage, contribution levels and the costs of health insurance benefits to external communities, most arbitrators give heavy weight about the instant Employer's internal structure of health insurance coverage/contributions as opposed to what external practices are in these areas. Clearly, one cannot expect the Employer to offer a different health insurance package to each of its different work groups. . . .

. . .

When an interest arbitration involves the subject of insurance, arbitrators generally agree that internal comparables are most germane. This is especially so where the contribution rates prevailing in comparable communities lack uniformity.

Various factors, including financial and organizational stability, favor the County's offer.

#### AWARD ON ISSUE 5: ARTICLE 33, INSURANCE

The County's Last Offer of Settlement is accepted.

#### **ISSUE 6: ARTICLE 20 – OVERTIME**

##### County Last Offer of Settlement:

Source: CET. Retain status quo.

##### Union Last Offer of Settlement:

Return to overtime language of parties' 2011-2014 CBA

##### Discussion

The 2013 Block Act 312 POAM Award accepted the County's proposal that overtime be paid at time and one-half (150%) for hours of work performed in excess of 80 hours in an employee's bi-weekly pay period. The Award also provided that "[v]acation, sick, holiday, personal leave, and bereavement days shall not be included as hours worked for purposes of entitlement to overtime." The award also eliminated double-time.

The 2015 Review of the Financial Review Team addressed the problem of "exorbitant overtime" in the County's jail operations. (Cty. Bk. A, Ex. 13). The Team also recognized "candidly, the impact upon final average compensation" of lucrative overtime payments.

The County's 2015 CET followed the Block Award on overtime, and began to address the concerns about overtime expressed by the Financial Review Team.

Local 3317's proposal includes the following:

- Overtime (150%) for work in excess of 8 hours in one work day, 40 hours in one work week, and all hours worked on the 6<sup>th</sup> day of the employee's work week.
- Overtime at double-time (200%) for work on the employee's second leave day in a work week if the employee is paid 40 hours in that work week.
- Non-working paid hours (vacation, sick time, holidays and personal business leave) to be included as hours worked in determining eligibility for overtime.

Local 3317 has not established why it should receive overtime on terms far superior to the overtime terms of the hundreds of deputies it supervises.

The County's proposal is harmonious with the overtime treatment of the POAM deputies, and is financially responsible.

#### AWARD ON ISSUE 6: ARTICLE 20, OVERTIME

The County's Last Offer of Settlement is accepted.

#### **ISSUE 7: ARTICLE 22 – HOLIDAYS**

County Last Offer of Settlement:

Source: CET. Retain status quo.

Union Last Offer of Settlement:

Reinstate holiday language of the parties' 2011-2014 CBA except delete 300% for hours worked in excess of 8 hours on "major" holidays and substitute 200% for it.

## Discussion

The parties agree that the following days are paid holidays:

1. New Year's Day
2. Martin Luther King Day
3. Memorial Day
4. Independence Day
5. Labor Day
6. Columbus Day
7. Veterans Day
8. Thanksgiving Day
9. Day after Thanksgiving
10. Christmas Eve
11. Christmas Day
12. New Year's Eve
13. All state and National Election Days

The parties also agree that an employee's birthday is a paid day if the employee entered the Local 3317 bargaining unit prior to April 1, 2012.

The difference is that for employees required to work on holidays, (a) the County proposes that they be paid 200% for the first eight hours and 150% for any additional hours worked on the holiday, whereas (b) Local 3317 proposes that 200% be paid for employees working on 8 "major" holidays and 150% for employees working on the remaining "minor" holidays with 4 hours added to their holiday leave banks.

Three points tip in favor of the County's proposal:

*First*, the County's proposal is harmonious with the holiday terms of the POAM.

*Second*, the County's proposal has been in effect for four years under the CET.

*Third*, MERC has ruled that the terms and conditions set forth in the parties' CET "shall be the starting point for the parties' . . . Act 312 arbitration."

### AWARD ON ISSUE 7: ARTICLE 22, HOLIDAYS

The County's Last Offer of Settlement is accepted.

## **NON-ECONOMIC ISSUES BEFORE THE PANEL**

For non-economic issues the Panel is not limited to accepting one written final offer of settlement. For a non-economic issue, Section 8 of Act 312 states: "The findings, opinions and order . . . shall be based upon the applicable factors prescribed in section 9."

### **ISSUE 8: ARTICLE 18 – TRANSFERS**

#### **County Offer of Settlement:**

Retain status quo of CET Article 18 except for the following minor changes, one of which clarifies and recognizes the organization under the Executive with respect to the Juvenile Detention Facility:

#### *17.02(A) added:*

26. Lobby Desk
27. Any special details created by the Sheriff's Office to provide policing service for contracting entities.

#### *17.02(C) added:*

3. Juvenile Detention Facility – This addition recognizes that the Juvenile Detention Facility is wholly under the control of the Executive, not the Sheriff's Office.

#### *17.03(C) deleted.*

#### **Union Offer of Settlement:**

Return to the seniority language governing transfers contained in the parties' 2011-2014 CBA, and, add that Sheriff's office cannot discretionarily remove top Local 3317 officials from any position to which the Sheriff had discretionarily appointed them.

#### **Discussion**

The 2016 Local 3317 CET identifies 25 assignments for which the Sheriff is granted discretion to appoint or remove. (U. Ex. 77, pp. 24-25).

The 2015-2019 POAM CBA identifies 16 assignments for which management is granted discretion to appoint or remove. (U. Ex. 78, pp. 34-46).

The County has proposed to add two assignments as discretionary, bringing its total to 27 assignments.

Local 3317's proposed Transfer language identifies 18 assignments as discretionary; however, as to 11 of them removal "shall be for documentable cause" which is "related to job performance." The remaining 7 assignments are not subject to the "job performance" standard. (Union post-hearing brief, pp. 83-84).

At the hearing, Local 3317 agreed that two of the County's contested assignments – Registration and Classification – are discretionary. (Tr. 8/22/19, at pp. 66, 75).

Under both parties' proposals, discretionary removal does not apply to positions held by reason of competitive bid and seniority. In other words, the County's proposal is that if an officer accepts a discretionary assignment, the Sheriff has the discretion to remove the officer from the discretionary assignment.

Undersheriff Pfannes testified (Tr. 8/22/19, pp. 48-72) that to carry out certain assignments satisfactorily the Sheriff needs to have discretion to assign an officer who is better suited for the assignment. Officers have varying skills, and there are assignments that require special skills not acquired merely by accruing seniority. Undersheriff Pfannes gave as examples the supervisory skills required for road patrol, the records desk and court services. As to the latter, courts purchase the services of officers assigned to them. Courts are the customer. Courts (and other third parties) can look elsewhere for police protection. If a court wants to replace a court officer, its request should not be obstructed by the officer's seniority.



“The lawful authority of the employer” – a section 9 factor – encompasses matching the skills required for an assignment with an officer who possesses the skills.

In its offer, Local 3317 proposes that the Sheriff not be permitted to remove from a discretionary position the Local 3317 President, Vice President, and Chief Steward.

#### AWARD ON ISSUE 8: ARTICLE 18 -- TRANSFERS

The County’s Offer of Settlement is accepted with the following language to be added: “The Local 3317 President, Vice-President and Chief Steward will not be removed from a discretionary assignment for engaging in lawful union activities.”

#### **ISSUE 9: ARTICLE 17 – SENIORITY**

##### County Offer of Settlement:

Retain status quo of CET Article 17.

##### Union Offer of Settlement:

Restore seniority terms of parties’ 2011-2014 CBA.

#### Discussion

A major concern expressed by Local 3317 is the County’s proposal that seniority continue to accrue for employees promoted outside the bargaining unit.

A major concern expressed by the County is the Local 3317 proposal that Captains promoted outside the bargaining unit cannot return to the rank of Captain, and can only fill a Local 3317 vacancy.

There are also some minor quibbles over how many days the County will have to furnish Local 3317 with a seniority list (90 days or 60 days), and loss of seniority for failure to provide notice of absence (3 days or 5 days).

POAM deputies work together with Local 3317 command officers. POAM is the closest internal comparable.

The 2015-2019 POAM CBA is very similar to the CET. The POAM CBA does not recognize seniority accrual for employees while serving in a promotion outside of the bargaining unit (U. Ex. 78, p. 32):

If an employee is promoted outside this Bargaining Unit, his or her seniority shall not accumulate but shall be frozen.

This provision is not unreasonable.

Having said this, employees who seek to return to the Local 3317 bargaining unit should not be penalized for having accepted a promotion outside the bargaining unit. A factor normally taken into consideration in collective bargaining is treating employees fairly and not in a punitive manner.

The POAM CBA provides that a seniority list shall be furnished to the POAM within 60 days of approval of the contract. As to loss of seniority for failure to provide notice of absence, the POAM CBA states that the period is 5 work days.

In 2019, the County and the POAM negotiated their second post-2015 CET CBA, apparently without changing their above cited language.

## AWARD ON ISSUE 9: ARTICLE 17 – SENIORITY

The County's offer is accepted except for the following:

- Delete last sentence of Article 16.03 beginning "Rather all service time outside the bargaining unit. . . ."
- Provide in 16.05 that a seniority list will be furnished to Local 3317 within 60 days (in place of 90 days)
- Provide in 16.06 D for 5 consecutive work days of failure to provide notice of absence (in place of 3 consecutive work days).

## **ISSUE 10: BURDEN OF PROOF**

### County Offer of Settlement:

XX.06 Grievance and Demand for Arbitration

F. In all disciplinary proceedings, the Department shall carry the burden of proof.

### Union Offer of Settlement:

XX.06 Grievance and Demand for Arbitration

K. In all disciplinary proceedings, the Department shall carry the burden of proof in order to substantiate the charges and the standard of proof shall be proof beyond a reasonable doubt. In application of this standard, the parties understand that all department charges are non-criminal in nature.

### Discussion

The standard of proof in arbitration in the Local 3317 CET states:

12.05 Arbitration Hearing

B. The arbitrator shall conduct a hearing and the burden of proof shall be upon the Employer using the Preponderance of Evidence Standard, to prove the charge brought against the Employee.

The 2015-2019 POAM CBA states: “In all arbitration hearings involving discipline, . . . [t]he standard shall be proof by a preponderance of the evidence.” (U. Ex. 78, at p. 26). Local 3317 supervises the POAM deputies, yet desires a proof beyond a reasonable doubt standard for itself (at least in discharge cases).

DISCIPLINE AND DISCHARGE IN ARBITRATION, 2<sup>nd</sup> Ed. (BNA Books 2008) is a leading treatise on labor arbitration. On the issue of burden (or quantum) of proof in disciplinary cases, the authors explain at pages 431-432:

. . . Generally, in more straightforward cases involving normal work rules, such as attendance policies, arbitrators will use the preponderance of the evidence standard. Recent cases demonstrate, however, a tendency by arbitrators to use a heightened standard when charges of a serious nature that may result in termination are involved. For example, arbitrators have applied the clear and convincing in cases involving falsification, workplace violence, dishonesty, theft, or other conduct that would arguably be subject to criminal prosecution or termed as an act of moral turpitude. In doing so, arbitrators cite the effect upon future employment that such an action will have.

Adoption of the beyond a reasonable doubt standard is rare.

The County’s proposal is an improvement over the burden of proof language of the CET and the POAM CBA because it does not require a preponderance of evidence standard in all cases, but rather leaves the quantum of proof to the judgment of the arbitrator. For example, in a case involving moral turpitude Local 3317 could argue that a clear and convincing standard should be used by the arbitrator. Local 3317 also could argue that the proof beyond a reasonable doubt standard should be used by the arbitrator.

AWARD ON ISSUE 10: BURDEN OF PROOF

The County’s Offer of Settlement is accepted..

**SIGNATURES**

Case No. D18 G-0877

Dated: December 3, 2019

Thomas L. Gravelle

Thomas L. Gravelle, Panel Chair

Dated: December 4, 2019

Joseph Martinico

Joseph Martinico, Wayne County Delegate  
Concurs on Issues 1 through 10.

Dated: December 5, 2019

Jamil Akhtar

Jamil Akhtar, Local 3317 Delegate  
Dissents on Issues 1 through 10.