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MICHIGAN EMPLOYMENT RELATIONS COMMISSION
STATUTORY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between:

CITY OF HOLLAND,

Employer,

MERC ACT 312
Case No: G 94 C-1032

-and-

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL NO. 759

Union.

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PANEL'S INTERIM OPINION AND AWARD
RE MINIMUM SAFETY MANNING ISSUE

I. APPEARANCES:

For the Employer:

Miller, Johnson, Snell & Cummiskey
By: Michael A. Snapper, Esq. — Attorneys

For the Union:

Randy Fielstra, Esq. — Attorney

II. INTRODUCTION

This Panel is created under the authority of the Michigan Employment Relations Commission (hereinafter MERC), pursuant to the authority of Act 312 of the Public Acts of 1969, as amended. That agency maintains a panel for the resolution of contractual impasses in the collective bargaining process between municipalities and police or fire personnel. The chairman of this panel was appointed to this dispute by letter dated April 14, 1995.

The parties' designated delegates are: Gregory Robinson, Assistant City Manager for the Employer, and David W. Horne, Local President for the Union.

Hearings are concluded.

This interim opinion is to resolve whether a Union issue, "Minimum Safety Manning," is "economic" or "noneconomic" within the meaning of Act 312. Both parties submitted briefs on the issue. Additionally, the employer proffered various arbitral opinions, which have been considered.

III. POSITIONS OF THE PARTIES

The Union states that court and Commission decisions treated the issue of minimum safety staffing as properly before an arbitrator, safety being the premise which removes it from permissive bargaining.

Because the concept addresses work force health and welfare, it is neither traditionally, nor in practice, commonly treated as "economic." Minimum staffing in the fire service does not provide economic enhancement to individual employees or other benefits which are associated with advancement of economic or hedonic values (e.g., recreational or leisure qualities of life, vacation, sick leave, or personal leave days).

Even though minimum safety staffing has inevitable economic consequence to the employer, the complete lack of economic enhancement for fire fighters militates against calling it economic.

Because the concept of minimum safety manning has its foundation in a profound concern for employee safety, the issue transcends economic concepts. While "safety at any price" should not overrule reason and judgment, calling this issue "economic" trivializes the union's proposal. Human lives are at stake.

Analogously, other safety issue examples establish public policy favors safe work places. For example, many OSHA and MIOSHA regulations and standards deal with the fitness of apparatus, equipment, and fire gear. Suitability and quality of these items is absolutely mandated; the employer is not free to make a cost assessment when compliance is mandatory. Cities in the business of providing fire service cannot invoke financial soundness to defeat compliance with certain minimum safety standards.

There are published OSHA and other credible standards. The standards are non-negotiable for the most part. Compliance with the standards has an economic impact as in the case of providing SCBA gear, bunker pants, appropriate fire apparatus, etc. The City of Holland is in the business of providing fire service to its constituents. It has advised the panel that its ability to pay is not an issue. In the face of existing OSHA regulations and professional society standards, it may not properly offer the defense that it will cost them money to comply.

In summary, compliance with minimum safety staffing has an economic consequence to the City. On the other

hand, employees in the fire service would not experience economic enhancement like that associated with wages or benefits. Adoption of a minimum safety staffing concept lacks the economic mutuality attendant to a truly economic issue. Further, the adoption of standards calculated to save life and limb transcends economic concerns. Finally, minimum safety staffing concepts have their basis in published regulatory standards which reasonably define conduct apart from economic concerns.

Therefore, the proposals should be characterized as 'noneconomic' for purposes of final offers.

The Employer argues that minimum staffing is an economic issue. As the proponent of change, the Union has the burden of producing evidence of the proposal's cost. In any event, minimum staffing is an economic issue as that term is used in Act 312.

The cost to the City of Holland of implementing the Union's minimum staffing proposal would be immense, exceeding all other disputed economic issues.

Adoption of the proposal would require the City to add several additional full-time fire fighters to its payroll. The cost of this increased staffing would be several hundred thousand dollars.

The Union proposes to increase staffing, not merely to maintain a certain level of staffing. This would significantly increase the size of the bargaining unit.

This is not a proposal to maintain the status quo, or past levels of staffing.

Nor does it involve an employer proposal to reduce staff levels. The record shows that the City has no intention of reducing current staff levels.

Minimum staffing has been consistently treated as an economic issue in previous Act 312 arbitration decisions.

The City repeats its contention that this issue is not truly a safety issue, and it has a major impact on the inherent management rights and opportunities of the City of Holland to manage its fire fighting and prevention services to benefit its citizens.

In conclusion, the weight of prior authority and sound statutory construction, as applied to the consequences of this overblown union proposal, dictate that this is an economic issue within the meaning of Act 312.

The issues are "economic" and should be so identified.

IV. OVERVIEW OF STATUTORY FRAMEWORK

A. Purpose and Procedure

The purpose of an Act 312 Arbitration is peaceful resolution of labor disputes in the public sector. To that end, it provides for "compulsory arbitration of labor disputes in municipal police and fire departments."

The general statement of statutory policy is the framework for its application. Found at Michigan Compiled Laws Annotated (MCLA) 423.231, and Michigan Statutes Annotated (MSA) 17.455(31), it states:

> Sec. 1. It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provision of this act, providing for compulsory arbitration, shall be liberally construed."

The law: defines policemen and fire fighters [MCLA 423.232; MSA 17.455(32)]; establishes methods and times of initiating the proceedings [MCLA 423.233; MSA 17.455(33)]; provides for the selection of delegates [MCLA 423.234; MSA 17.455(34)]; and establishes the method for selection of the impartial chairman of the arbitration panel [MCLA 423.235; MSA 17.455(35)].

It also sets forth procedural timetables;[1] sets rules on acceptance of evidence;[2] and allows the panel to issue subpoenas and administer oaths. [MCLA 423.237; MSA 17.455(37)]. The dispute can be remanded for further collective bargaining. [MCLA 423.237a; MSA 17.455(37a) [MCLA 423.239; MSA 17.455(3a)]. Enforcement, judicial review, maintenance of terms and conditions during the pendency of the proceedings are also required. [MCLA 423.240-247; MSA 17.455(47)].

On contested issues, the panel must base its findings on the statutory criteria.[3] MCLA 423.239; MSA 17.455(39) states in relevant part:

> . . . 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.

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[1]This hearing has been conducted with as much speed as the availability of counsel and the parties has permitted. Given the complexity of the issues presented, this has been relatively quick. While the arbitrator is supposed to "call a hearing to begin within 15 days" of appointment, the deadline is severely impractical at best.

[2]"Any oral or documentary evidence and other data deemed relevant by the arbitration panel may be received in evidence. The proceedings shall be informal. Technical rules of evidence shall not apply and the competency of the evidence shall not thereby be deemed impaired." A verbatim record is required. The panel works by majority rule. M.C.L.A. 423.236.

[3]The existence of these criteria is critical to the constitutionality of this entire statutory scheme.

(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 goods 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.

V. DISCUSSION

The panel is required to identify each issue as "economic" or "noneconomic". The classification is critical. On an economic issue, the "arbitration panel <u>shall adopt the last offer of settlement</u> which, in the opinion of the arbitration panel, more nearly complies" with the factors set forth in the statute [MCLA 423.238; MSA 17.455(38) (emphasis added)]. On issues other than "economic," the panel may adopt either party's offer, or its own position without being locked into the parties' offers.

The particular disputed provision of the statute uses these words:

423.238 Disputed economic issues, identification; submissions of settlement offers, adoption; findings, opinion, and order; delivery of copies, basis

> Sec. 8. At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute and direct each of the parties to submit, within such time as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive. The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make written findings of fact and promulgate a written opinion and order upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9. . . ." [Emphasis added.]

This dispute arises in the context of court decisions dealing with whether the issue is arbitrable, that is, a matter within the jurisdiction of the arbitration panel to hear and decide. Principally, the lead case on the issue pronounced:

> "Lastly, plaintiff contends that the panel did not have jurisdiction to make the manpower award. An arbitration panel has jurisdiction over labor 'disputes' between firemen and policemen, and their employers. M.C.L.A. 423.231; m.s..a. 17.455(31). M.C.L.A. 423.244; M.S.A. 17.455(44), makes the compulsory arbitration act supplementary to the public employment relations act, M.C.L.A. 423.201 et seq.; M.S.A. 17.455(1) et seq. Under [Section] 15 of that act, M.C.L.A. 423.215; M.S.A. 17.455(15), 'wages, hours, and other terms and conditions of employment' are mandatory subjects of bargaining. See Detroit Police Officers Association v Detroit, 391 Mich. 44; 214 N.W.2d 803 (1974). M.C.L.A. 423.239(h); M.S.A. 17.455(39)(h), also refers to 'wages, hours, and conditions of employment'. Therefore, we conclude that the jurisdiction of an arbitration panel extends at a minimum, to 'disputes' concerning 'wages, hours and conditions of employment.'

> "The union representative testified that the number of firemen on duty affected not only the public safety, but also the firemen's safety. This position was supported by extensive testimony concerning fire fighting practices and procedures. A safety practice is a condition of employment. N.L.R.B. v Gulf Power Co., 384 F2d 822 (CA5, 1967); N.L.R.B. v Miller Brewing Co., 408 F2d 12 (CA 9, 1969); Fiberboard Paper Products Corp. v N.L.R.B., 379 US 203; 85 SCt 398; 13 LEd2d 233 (1964), Mr. Justice Stewart concurring; see Annotation, Subjects of mandatory collective bargaining under Federal Labor Relations Act, 12 ALR2d 265. We hold, therefore, that the manpower award was within the subject matter and jurisdiction of the arbitration panel."

The Michigan Employment Relations Commission has implicitly held that a shift manning provision, by its nature, is a mandatory subject of bargaining. See City of Trenton v Trenton Fire Fighters Union, 1985 MERC Lab Op 414. See also Jackson Fire Fighters Association, Local 1307, IAFF, and City of Jackson, Act 312 Case No. L84-D430 (Donald Sugerman, 1986), 13-14. But compare Leoni Township, 1986 MERC Lab Op 689, holding that a 12-person minimum manning standard was not sufficiently safety-related to become a mandatory subject of bargaining.

MERC also explicitly held that safety minimum manning is a mandatory subject of bargaining, but that minimum staffing was not. In City of Detroit, 1992 MERC Lab Op 698, 709, it stated in part:

> "The safety of firemen is not determined by the number of men at the fire scene, but how they are deployed and the risks to which they are exposed because of what they are required to do. The Union's minimum manning proposal is not a mandatory subject of bargaining. . . . what is bargainable is what firemen are required to do based upon the number at a fire scene."

As affirmed by the Supreme Court, the Court of Appeals reversed that decision in City of Detroit v Detroit

Fire Fighters Association, 204 Mich. App. 541, 517 N.W.2d 240 (1994), lv. den. 447 Mich 963 (1994). The appeals court stated:

> "It is well established that where a staffing issue is related to or inextricably intertwined with the safety of the unit member, the issue is subject to mandatory bargaining. Manistee [v Manistee Fire Fighters Association, 174 Mich. App.118, 122, 435 N.W.2d 778 (1989);] Trenton v. Trenton Fire Fighters Union, Local 2710 IAFF, 166 Mich. App. 285, 294-295, 420 N.W.2d 188; Alpena v Alpena Fire Fighters Association, AFL-CIO, 56 Mich. App. 568, 575, 229 N.W.2d 672 (1974), overrule in part on other grounds, Detroit v Detroit Police Officers Association, 408 Mich 410, 483, n 65, 294 N.W.2d 68 (1980)."

Moreover, where the issue is presented to an Act 312 panel, the panel can determine that there was a sufficient showing that the proposal is safety-related and such an award is enforceable. City of Sault Ste. Marie v Fraternal Order of Police, Labor Council, State Lodge of Michigan, Case No. C84 D-21 and 103 (March 24, 1986). MERC said:

> "In the instant case, the Union did not put detailed evidence on the record to establish the link between safety and the minimum manning clause. It simply asserted that the minimum number of officers assigned to each patrol car has a prima facie impact on safety. We agree with the Union that it is not necessary to support with detailed testimony the proposition that the minimum number of police patrol officers assigned to a shift has an impact on safety."

There is a complete absence of any court cases on whether manning issues are to be characterized as "economic" or "noneconomic." Presumably this arises from two sources: (1) parties generally stipulate to the character of the issue; and (2) the statute itself explicitly bars any review of an arbitrator's decision on identification ["The determination of the arbitration panel as to the issues in dispute

and as to which of these issues are economic shall be conclusive." M.C.L.A. 423.238; MSA 17.455(38)].

A close reading of the Act 312 arbitration cases shows that all but one involved stipulations of the parties that manning is "economic." Township of Leoni and Local 1766 IAFF, Act 312 Case No. L-86-G660 (Thomas J. Barnes, 1987); Jackson Fire Fighters Association, supra.

Only one seems to have actually been disputed and adjudicated on whether manning was economic or not. In City of St. Clair Shores (Police Department), MERC Case No. 085E1647, (Robert F. Browning, 1987) the parties disagreed as to whether minimum manning issues were economic or non-economic and the Panel, without any rationale being provided, determined that those issues were economic.

That finding is consistent with the following language from the panel decision in City of St. Clair Shores (Fire Department), MERC Case No. D85E1593 (Carl Cohen, 1987). In that decision the Panel noted the parties had agreed that manning was economic, and wrote:

> "Minimum manning is exceptionally complicated because it has not only a host of economic ramifications - and is, indeed, recognized by the parties to be an economic issue under the law but because it has other, equally important but less clear cut dimensions as well. Among these other dimensions are (a) the rights of management to organize and deploy personnel in the fulfillment of its responsibilities, and (b) the health and safety of bargaining unit members, as affected by the minimum number of fire fighters on duty."

The employer has also cited a case which did not involve minimum staffing, City of Saginaw, MERC Case No.

L85-D376. Panel Chair Joseph P. Girolamo's opinion suggested as pivotal the following consideration:

> "It is the economic consequence to the Employer and the Unit as a whole which is determinative of whether an issue is economic or noneconomic."

When all of the foregoing is blended, it is apparent that the panel is vested with considerable discretion in the characterization of issues.

Given the preference for resolving disputes through collective bargaining, it is no surprise that both courts and agencies have generally construed the duty to bargain broadly -- safety related issues, including manning, have been held to be within the meaning of "wages, hours and other terms and conditions of employment" subject to bargaining and deemed to be "economic issues" covered by collective bargaining.

In the public sector, the safety rationale was used to create an exception to the employer's claim that this was a sacred management right, and not a mandatory subject of collective bargaining.

This characterization is a two-edged sword, which could be treated as favoring the employer's present position.

Further, although Act 312 is devoid of any definition of "economic" issues, the chair presumes that it would be construed by MERC in a manner that is analogous to the way the National Labor Relations Board has construed the term "economic strike." As is noted in Roberts Dictionary

of Industrial Relations[4], it is a "work stoppage which results from inability of an employer and a union to agree on wages, hours or other conditions of employment. The NLRB distinguishes between economic and unfair labor practice strikes. . . ." Citing, NLRB v Fleetwood Trailer Co., 289 U.S. 375, 66 L.R.R.M. 2737 (1967). This is, of course, based upon the classic phraseology of Section 9(a) of the Wagner Act, which was transmuted into Section 8(d) of the Taft-Hartley Act.[5] The NLRB and the Courts have long recognized that safety regulation is not an exclusive management function, and is subject to negotiation. For example, the Fifth Circuit held it was "inescapable" that "workers through their chosen representative should have the right to bargain with the Company in reference to safe work practices." NLRB v Gulf Power, 384 F.2d 822, 66 L.R.R.M. 2501, 2502 (CA 5, 1967), enforcing 156 N.L.R.B. 622, 61 L.R.R.M. 1073 (1966).[6]

Thus, one can reasonably conclude that if this issue were to be decided with reference to the National Labor Relations Act, safety manning is within the meaning of "other conditions of employment," and therefore it is not

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[4]Harold S. Roberts, Roberts Dictionary of Industrial Relations (BNA, 3rd Ed; 1986), 166.

[5]See Patrick Hardin, The Developing Labor Law (BNA, 3d Ed, 1992), 853.

[6]See Hardin, Developing Labor Law, supra, 897-898.

only subject to bargaining, but is effectively rendered an "economic" issue thereby.

The chair recognizes that by statute there must be a decision as to whether an issue is "economic" or "noneconomic" within the meaning of Act 312.

On the one hand, the monumental economic consequences to the employer would justify its being characterized as "economic" based upon the money that would have to be spent to finance it.

The impartial chair expressly rejects the union's claim that safety-related issues, because they involve matters of life and death, are per se not economic. This is not a proceeding that has the primary purpose of enforcing public policy as enunciated in statute and administrative rule. In any event, the panel will take into account, in determining the merits of the controversy, both the costs and benefits of the proposal, and the applicable regulatory framework.

On the other hand, this is not a pure "economic" issue. It relates to worker safety, which is a significant interest apart from money. It affects the bargaining unit generally, not specific individuals, albeit with an obvious impact upon working conditions.

As presently proposed, it also would significantly affect management's rights to organize and utilize its work force. While management opines that this makes it "economic", this issue is also about control of the work force, and

could just as easily be characterized as an issue 'other than economic.'

The panel chair refuses to divide issues based upon the degree of their cost alone. The legislature took a broader and more liberal approach in Act 312, permitting the person deciding the characterization to look at a host of factors. Almost all issues have economic consequences for the employer. Almost all issues are broadly "economic" for employees, at least being bargainable. Thus, this may account for the fact that most parties stipulate that most issues, and most minimum manning issues are "economic."

On the other hand, as the legislature recognizes, some issues are best characterized as 'noneconomic,' or more properly as 'other than economic.' Then the panel may impose its own judgment on the ultimate result, and fashion language, especially, which may reflect a better resolution of the parties' singular dispute, while abandoning the extremes of particular proposals.

This might be such an issue, and on a different record with different parties, that could be a proper result.

However, as tempting as this is, it has other consequences. The chair is concerned with how this decision might effect the dispute resolution process.

It could permit the parties to maintain their offers' extreme positions, in the hope that the panel may later save them through the deliberative process.

In turn, this may reduce the pressure on the parties to bring their offers to a mid-point that may be justified by the record.

In considering the pragmatic effect, the chair is heedful that drafting language may be outside his expertise, and could have unintended and unacceptable consequences for the parties' administration of their collective bargaining agreement. Drafting is an art, which best proceeds from the partisans' unique understanding of their own needs. Further, Act 312 arbitrators are, after all, primarily statutory adjudicators -- not city administrators, union presidents, or philosopher kings.

Finally, the chair is solicitous of the past conciliation process, and the demonstrated capabilities of the parties' chosen representatives and delegates.

In that light, his opinion is that the advocates and the partisan panel members are -- at least in this particular case -- fully capable of drafting appropriate language as they amend their final offers. Presumably they will protect their own organizational interests, balance the opposing party's needs, and place themselves more in accord with the proofs in the record.

The Chair does not choose to usurp their role.

VI. AWARD

For the foregoing reason, therefore, the arbitration panel holds that the "Minimum Safety Manning" issue in this proceeding is "economic" within the meaning of the statute. The parties are ordered to formulate their last best offer accordingly.

STANLEY T. DOBRY
Impartial Chairman

I concur in the result only.

GREGORY ROBINSON
City Delegate

I respectfully disagree with the reasoning and the result.

DAVID W. HORNE
Union Delegate

Dated: October 3, 1995