

PRESENTING AN EFFECTIVE ACT 312 CASE

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INTRODUCTION

Act 312 of the Acts of 1969, as amended (MCLA 423.231, *et seq.*; MSA 17.455(31), *et seq.*) ("Act 312") establishes a procedure to resolve impasses in collective bargaining between public employers and certain defined groups of public employees. The Act 312 process is one of contract formation and may be viewed as a continuation of the collective bargaining process. This chapter focuses on the employer's preparation and presentation of its case in Act 312 arbitration. Given the compulsory nature of the process (an Award will be issued whether or not the employer participates), the high costs involved (economic, operational, personnel and labor relations) and the limited and narrow bases for appeal, the Act 312 case demands careful and thorough preparation which forms the foundation for the proper presentation of the employer's case in Act 312 arbitration. In view of the 2011 amendments, preparation is now more important than ever.

BACKGROUND

The Statutory Framework

Act 312 is specifically supplementary to, and does not amend or repeal any of, the provisions of the PERA (MCLA 423.201, *et seq.*); MSA 17.455(1), *et seq.*) as Section 14 of Act 312 makes clear. The two statutes must be read in conjunction with each other.¹ At the same time, the two Acts create a separate body of rights and obligations. *City of Lincoln Park*, 1977 MERC Lab Op 679. The MERC is not divested of jurisdiction by the initiation of proceedings under Act 312. The MERC has asserted jurisdiction to consider alleged violations of the PERA which also may be violative of Section 13 of Act 312. *City of Sterling Heights*, 1978 MERC Lab Op 236. The MERC will impose its own decisional standards under the PERA and an alleged violation of Act 312 is not a *per se* unfair labor practice under the PERA. *City of Lincoln Park*, 1977 MERC Lab Op 679; *City of Jackson*, 1977 MERC Lab Op 402. While the MERC

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¹ *Lincoln Park Detention Officers v City of Lincoln Park*, 76 Mich App 358, 256 NW2d 593 (1977); *Local 1325, Michigan Council 5b, AFSCME, AFL-CIO v McKerve*, 62 Mich App 689, 233 NW2d 836 (1976).

continues to enforce the provisions of the PERA, the MERC has indicated its unwillingness to enforce Section 13 of Act 312. *City of Saginaw*, 1983 MERC Lab Op 768; *Ionia County Board of Commissioners*, 1983 MERC Lab Op 1146.

The Courts, on the other hand, while recognizing MERC's exclusive jurisdiction to enforce the PERA, maintain that, even though the action may have constituted an unfair labor practice under the PERA, the Court is not divested of jurisdiction over the union's action under Section 13 of Act 312. *Metropolitan Council No 23 v City of Center Line*, 78 Mich App 281, 259 NW2d 460 (1977).

Act 312 interest arbitration is viewed by the MERC as "a final step" in the collective bargaining process. *City of Detroit*, 1978 MERC Lab Op 633. Consequently, the parties involved in an interest arbitration case must meet the obligations imposed by both the PERA and Act 312. It is within this statutory framework that the party presents the interest arbitration case.

Collective Bargaining and Mediation: The Prelude to Act 312 Arbitration

The PERA and Act 312 require that the parties participate in both collective bargaining and mediation prior to the initiation of the "final step" in the collective bargaining process - interest arbitration under Act 312. Such participation must be undertaken with an eye to the hopefully unnecessary final step of Act 312 arbitration. What occurs in Act 312 arbitration is necessarily intertwined with, and determined by, what occurred in collective bargaining and mediation. The employer's presentation, resolution and/or preservation of its proposals in negotiations and mediation will define (and limit) the issues (proposals) which may be presented in Act 312 arbitration. In a very real sense then, preparation for Act 312 arbitration must begin when the employer commences preparations for collective bargaining. The employer's treatment of its proposals during the course of negotiations and mediation will determine the nature and scope of the employer's presentation in Act 312 arbitration.

Under the prior statute, Section 8 of Act 312 provided, in part:

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 limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue. (emphasis added)

Last offers of settlement were exchanged after the evidentiary hearings were concluded.

In *Police Officers Association of Michigan v Ottawa County Sheriff*, 264 Mich App 133, 694 NW2d 757 (2004), the Act 312 Panel refused to consider the union's last best offer on an issue not contained in the union's petition for Act 312 arbitration. The Panel opined that "by allowing an issue to be added near or at the hearing, when it is opposed by the other side, serious problems could be created." 694 NW2d 759. The Court reversed the Panel's ruling based on the Section 8 "at or at the conclusion of the hearing" provision and held that the Panel erred by not considering the union's issue. As a practical matter, the *Ottawa County* case had little effect

since the Court ruled only that such issues should be "considered" by the Panel. Most Panels continued to reject such apparent afterthought proposals absent clear evidence of a changed circumstance which prompted the new proposal. Under the 2011 amendments, Section 8 has been modified to require the Panel to identify the economic issues in dispute and require the exchange of last offers before the hearings commence. Hence, under the amended statute, a party will not be able to submit a new issue after the hearings have been concluded.²

Collective Bargaining

Section 7(2) of the PERA requires that the parties notify the MERC of the status of negotiations at least 60 days before the expiration date of the collective bargaining agreement. The PERA in Sections 10 and 15 imposes upon both parties the duty to bargain in good faith. This primary obligation stands unmodified by Act 312. (Section 14, Act 312). The Chairperson of the Arbitration Panel may remand the matter to the parties for further negotiations for a period of up to three weeks. (Section 7a, Act 312).

Two potentially troublesome areas that sometimes result in disputes are the parties' treatment of "tentative agreements" and proposals "withdrawn" during the course of bargaining. The MERC has held that a party's reservation (and exercise) of the right to return to its initial table position for purposes of presentation of such initial proposals in Act 312 arbitration does not violate the PERA. Thus, the rescission of tentative agreements and the reinstatement of original proposals do not violate the PERA. *City of Manistee*, 1987 MERC Lab Op 590. The key to avoiding subsequent disputes is to reach an agreement with respect to the treatment of "tentative agreements" and "withdrawn" proposals before the negotiations commence.

At the outset of negotiations, a firm agreement should be reached as to whether the "tentative agreements" entered by the parties stand (even if no complete agreement is concluded) or whether the "tentative agreements" are conditioned upon the total agreement of the parties. Both approaches are valid and frequently adopted in negotiations. Neither approach creates a tactical advantage for a particular party, since both parties can tailor their bargaining positions in light of the ultimate impact of a tentative agreement. Similarly, parties should distinguish between formal table positions and "off-the-record" proposals which may not be used to adversely affect a party's position in Act 312 arbitration. It is frequently agreed that, while a party may "withdraw" a proposal subject to a total agreement or as part of a package proposal, the party may reserve the right to reinstate the proposal and present it in Act 312 arbitration. In this way, subsequent disputes with respect to "withdrawn" proposals may be avoided. The parties' treatment of "tentative agreements" and "withdrawn" proposals will become critical when defining the issues which may be submitted to the Arbitration Panel for decision.

² A party could, of course may still, attempt to justify the last introduction of a new proposal, but under the 2011 amendments the Panel may consider any dispute motion by the adverse party or, at a minimum, consider in the hearings whether the late introduction can be justified. The Panel can also take into account the late introduction of the proposal in determining whether the moving party's final offer should be awarded.

Mediation

Section 7(2) of the PERA provides that, if a dispute remains unresolved 30 days after the notification of the status of negotiations and a request for mediation has not been submitted by either party, the Commission shall appoint a Mediator. The mediation process is separately administered by the MERC (Section 16(j), PERA). The mediation process normally focuses on those key issues creating a roadblock to a settlement. Movement may be accomplished informally (i.e., on an "off the record" basis) through the mediator who is not allowed to testify in an Act 312 (or any other proceedings).

Section 3 of Act 312 references mediation and provides an opportunity for the parties to utilize the mediation process. Act 312 may not be initiated until after 30 days from the submission of the dispute to mediation. A party may not "block" Act 312 by refusing to set a mediation date or by claiming that the other party did not engage in "good faith bargaining" in mediation. In *City of Manistee v Employment Relations Commission*, 425 NW2d 168 (Mich App 1988), the Court ruled that there is no requirement of "good faith bargaining." The only prerequisites are those expressly stated in Section 3 of Act 312. 425 NW2d at 171.

ACT 312 ARBITRATION

To reflect, and comply with, the 2011 amendments of Act 312, the MERC, after consultation with both labor and management practitioners, has prepared and submitted for adoption revised compulsory arbitration rules. The proposed rules (a copy of which is attached hereto) are still pending before the Office of Regulatory Reinvention at the time this article was drafted. However, the proposed rules will be referenced herein.

INITIATION OF ARBITRATION

The Petition for Act 312 Arbitration

Pursuant to Section 3 of Act 312, either party may initiate binding arbitration by submitting a written request to the other party with a copy to the MERC. The request may be submitted after 30 days of the submission of the dispute to mediation. MERC Administrative Rule R423.505 Petition to Initiate Compulsory Arbitration provides as follows:

Rule 5. (1) The petition shall be prepared on a form furnished by the commission. The original shall be signed and served on the other party. At the same time, 3 copies, along with a proof of service, shall be filed with the commission.

(2) The petition shall include all of the following:

(a) The name and address of the public employer involved and the name, fax number, email address, and telephone number of its principal representative.

(b) The name and address of the collective bargaining representative involved and the name, fax number, email address, and telephone number of its principal representative.

(c) The name and address of the petitioner and the signature, fax number, email address, and telephone number of the person executing the petition.

(d) Date of the first mediation conference convened with the parties to the dispute.

(3) A petition may be dismissed administratively if not filed in accordance with these rules, or if filed before 30 calendar days have passed since the dispute was submitted to mediation as evidenced by the date of the first scheduled mediation conference.

Assessment of a Union's Petition for Arbitration

If the union files a Petition for Arbitration, the employer must evaluate the Petition in a number of areas.

Act 312 Eligibility

Act 312 eligibility is defined in Section 2 of Act 312 as modified by the 2011 amendments.³ A challenge to the eligibility of all, or part of, the bargaining unit covered by the Petition may be filed with the MERC. A number of general tests have been established to determine eligibility of employees for Act 312 arbitration. First, the department/employer must be a critical-service department having, as its principal function, the promotion of public safety, order and welfare so that a work stoppage in that department would threaten community safety. Second, an employment relationship must exist with the critical-service department. Third, mere employment is insufficient - the employee must actually perform the duties described in the statute. Fourth, the individual must be a public "employee" (i.e., a non-executive).

Are All Of The Union's Issues Mandatory Bargaining Subjects?

Pursuant to Sections 3, 9, 10 and 14 of Act 312, the Arbitration Panel has jurisdiction over disputes with respect to "wages, hours, and other terms and conditions of employment." Thus, the only issues which may be brought to impasse and submitted to Act 312 arbitration are those which center on mandatory bargaining subjects, as determined on a case-by-case basis by the MERC. The courts have dealt with a number of specific issues presented in Act 312 arbitration with the central analysis focusing on whether the issue is a mandatory bargaining subject.⁴ Thus, an award limiting unit layoffs to be the same as those made in other city departments was not centered on a mandatory bargaining subject and was held to be beyond the authority of the Arbitration Panel. *Metropolitan Council No. 23 and Local 1277, AFSCME, AFL-CIO v City of Center Line*, 414 Mich 642, 327 NW2d 822 (1982).

³ A copy is attached to the authors' companion article "Act 312: History and Amendments."

⁴ See for example: *City of Roseville v Local No. 1614, Intern. Ass 'n of Fire Fighters, AFL-CIO*, 53 Mich App 547, 220 NW2d 147 (1974) (identity of insurance carrier); *Flynn v City of Fraser*, 45 Mich App 346, 206 NW2d 448 (1973) (work schedules); *Pontiac Police Officers Ass'n v City of Pontiac*, 397 Mich 674, 246 NW2d 831 (1976) (disciplinary procedures).

The most common disputes involve whether staffing matters, in these various formulations, are mandatory bargaining subjects and, thus, within the jurisdiction of an Act 312 Panel. The test, as originally applied, required that the union demonstrate that the proposal was "related to" or "inextricably intertwined" with employee safety. *Local 1227 AFSCME v Center Line*, 414 Mich 642; 327 NW2d 822 (1982). The test was re-examined in two subsequent cases: *Jackson Fire Fighters Ass'n*, 1996 MERC Lab Op 125, *aff'd Jackson Fire Fighters Ass'n, Local 1306 v City of Jackson*, 227 Mich App 520; 575 NW2d 823 (1998) and *Oak Park Public Safety Officers Association v MERC*, 19 MPER 50, pp. 145-162, *aff'd Oak Park Public Safety Officers Association v City of Oak Park*, 277 Mich App 317; 745 NW2d 527 (2007).⁵ In *Jackson*, the Court declined to address the distinction between "related to safety" and "inextricably intertwined with safety" because the MERC decision was correct under either standard. In *Oak Park*, the Court affirmed the test there must be "competent evidence of the proposal's demonstrable and significant relationship to the safety of employees." Whether a proposal in Act 312 is a mandatory subject of bargaining may be challenged at any point in the process, i.e., before the Act 312 hearings commence⁶ or after the award is issued.⁷

In the circumstances presented in these cases, the following staffing matters were held to be permissive not mandatory bargaining subjects: 1. the number of personnel in the bargaining unit; 2. the number of personnel on each work-shift; 3. the number, if any, of two-police officer cars on a shift; 4. a no layoff provision until all non-unit personnel who perform the same duties laid off; 5. a preferential recall provision providing for the recall of unit personnel before the recall of non-unit personnel who perform the same duties; 6. the minimum number of personnel to respond to any structure fire; 7. a restriction on the utilization of other on-duty and off-duty unit personnel; 8. a restriction on the use of other (non-unit) department members; 9. the restriction on the use of mutual aid responders. The responders in example 8 and 9 and previously performed the work in conjunction with unit personnel and the proposed prohibition on the use of such personnel was held to not be a mandatory bargaining subject.

The Objections, if any, to the Petition for Arbitration

The party upon whom a Petition for Arbitration is served may file with the MERC and the petitioning party a response to the Petition for Arbitration either by way of an Answer and/or Motions. The response should raise and preserve all procedural and substantive objections to the Petition, e.g., not all unit members are eligible for Act 312 arbitration; some union issues are not mandatory bargaining subjects.

Once the Petition and employer challenges are filed, through Answer and/or Motions, the Director of the MERC determines whether the Petition is valid and whether the Petition and response raise any issue that must be determined by hearing prior to the appointment of an Act

⁵ The authors acknowledged representation of both public employers in the cited cases.

⁶ *Oak Park*.

⁷ *Jackson*.

312 Arbitrator. If such an issue is raised, a hearing date is set and the Petition is held in abeyance. If no such issue is raised, the Director processes the Petition for Arbitration.

Were All Of The Union's Stated Issues Presented In Negotiations?

As set forth above, the Courts have held that "good faith bargaining" is not required to file a petition for Act 312 arbitration. Nonetheless, the Panel should be advised of the late introduction of an issue so that the Panel may, if nothing else, take the late introduction into account in deciding whether the union's final offer should be adopted.

Maintenance Of The Status Quo During The Pendency Of Proceedings

Once the petition for Act 312 is filed, the parties will be deemed to be in Act 312 arbitration. Section 13 of Act 312 provides as follows:

Sec. 13. During the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act.

Historically, Circuit Courts freely entered injunctive orders on the ground that the disputed employer action changed the "status quo" in violation of Section 13 of Act 312. The authority of a Circuit Court to enter an injunctive order was circumscribed in *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 753 NW2d 579, 482 Mich 18 (2008). The Court established two important principles. First, the moving party must satisfy the traditional four-part test that is prerequisite for the issuance of a preliminary injunction (1. demonstration of irreparable harm; 2. demonstration that the harm to the applicant (without the injunction) outweighs the harm to the adverse party if the injunction is granted; 3. the moving party has shown that it is likely to prevail on the merits; and 4. whether there will be harm to the public interest if the injunction is issued). If the injunction is issued, the Court must promptly decide the merits of the status quo claim. Second, the Court made clear that the statute's reference to the "status quo" did not mean, as some unions would posit, that the employer could make no changes with respect to anything, rather, it meant that the contractual status quo was to be maintained:

The status quo provision does not prevent parties from exercising their contractual rights if they do not alter an existing wage, hour or other condition of employment.

753 NW2d 581.

The Court carved out a narrow exception to this general rule holding that, because the employer planned to lay off employees and reorganize the department, the union's claim that a safety working condition would be unlawfully changed. In doing so, however, the Court adopted the MERC standard affirmed by the Court of Appeals in the *Oak Park* case.

APPOINTMENT OF THE ARBITRATION PANEL

Procedures for the Appointment of the Impartial Chairperson

The appointment of the Panel Chairperson is made under Section 5 of Act 312 and the MERC administrative rule 423.506 (Rule 6). The MERC supplies a list of three arbitrators from its panel of arbitrators. A nominee may be struck from the list for advocacy if an objection is raised by either party. In such cases, a replacement arbitrator is added to the list. Each party may strike one nominee on the list, the MERC appoints the Chairperson from among the remaining nominees on the list. Prior to the appointment of a chairperson, the parties may mutually agree to an arbitrator who is on, or is eligible for membership on, MERC's panel of arbitrators. The submission of a stipulation does not preclude the filing of an Answer or preclude the filing of objections to the Petition or raising other issues which would otherwise be available.

Selecting the Impartial Chairperson

Whether selected from the traditional three nominees or by stipulation of the parties, the employer must exercise care in the selection of the Chairperson. The employer will want to consider, among other things, the individual's background, education, training, labor relations and negotiation experience and general reputation. A review of previous Act 312 awards and hearing transcripts will be useful, as will consultation with the employer involved in the Arbitrator's prior proceedings.

Commencement of Arbitration

Under Section 6 of Act 312, the arbitration proceeding commences upon the appointment of the Arbitration Panel Chairperson. A party's failure to appoint a Panel Delegate or participate in the proceeding will not deprive the Arbitration Panel of "subject matter jurisdiction" or deprive the Arbitration Panel of jurisdiction to enter an award. *Dearborn Fire Fighters Union Local No. 412, IAFF v City of Dearborn*, 394 Mich 229, 231 NW2d 226 (1975). A Petitioner is not required to take the additional step of procuring a court order to compel arbitration, since such step would encourage dilatory tactics and be at odds with the statute's policy of providing an expeditious procedure for the resolution of disputes.

Thus, a party who fails to participate acts at its own peril.

Selection of the Panel Delegate

Section 4 of Act 312 provides that, within ten days after the submission of the petition, the parties are to select a Panel Delegate to the Panel and advise the other party and MERC of their selections. It must be borne in mind that the best prepared and presented employer Act 312 case can evaporate in the executive sessions of the Act 312 Panel unless the employer is represented in such sessions by a competent representative. Care should thus be taken in the selection of the employer's Panel Delegate to ensure an experienced and forceful advocate on the

Panel. Experience in collective bargaining, the history of the particular contract negotiations and familiarity with the involved community are most advantageous.

The Role of the Panel Delegate

The Delegates generally serve throughout the course of the proceeding, although there is no statutory prohibition on the substitution of delegates and it is generally allowed at the request of one of the parties. The question sometimes arises whether a party's Panel Delegate may also be the party's advocate in the proceeding. The statute does not address this issue and advocates frequently also serve as Panel Delegates. At least one lower court has held that no conflict arises when the advocate also sits as the party's Panel Delegate.⁸ The statute does not address whether a Panel Delegate may also serve as a witness in the proceeding, however, chairpersons routinely allow such testimony. Where the parties are represented by advocates and have designated Arbitration Panel Delegates, it is normally agreed or ordered that the Panel Delegates play a subsidiary role in the presentation of the case, i.e., the parties' advocates conduct direct and cross-examination. At the same time, however, the Panel Delegates, like the Chairperson, may seek clarification from a witness following examination.

Respective Authority of the Chairperson and Panel Delegates

Act 312 defines the authority of the Chairperson and Panel Delegates differently. The Chairperson, as a member of the Panel, has all of the same authority as the Panel Delegates. In addition, the Chairperson has sole authority in a number of areas. For example, the Chairperson is to preside over the hearing and take testimony (Section 6, Act 312). While the Arbitration Panel is to receive in evidence any oral, documentary or other data deemed relevant (Section 6, Act 312), evidentiary rulings are made by the Chairperson as the presiding officer.

THE SCHEDULING CONFERENCE

Section 8 of Act 312 was modified under the 2011 amendments to require the arbitration Panel to identify the economic issues in dispute and direct the parties to exchange and submit to the Panel their last offers of settlement before the hearings begin. The MERC revised its administrative rule 423.507 (Rule 7) to provide for this change in practice and to allow the Panel to consider and address the many procedural questions which must be resolved before final offers of settlement are exchanged.

The modification in MERC administrative rule 423.507 (Rule 7) are, in pertinent part, as follows:

Rule 7. (1) An arbitrator shall begin the hearing by conducting a scheduling conference within 15 days of the arbitrator's appointment. The scheduling conference may be conducted by telephone conference call. A court reporter need not be present at the scheduling conference.

⁸ *Livingston County v Keidan and POAM*, 44th Circuit Court, Case No. 85-8115-CL (January 27, 1986).

(2) The scheduling conference shall be used to discuss matters relating to the proceeding, including all of the following:

(a) Issues raised in the petition for binding arbitration submitted to the commission.

(b) Issues that the parties have resolved.

(c) Whether the issues in dispute are economic or noneconomic.

(d) The dates, times, place, and manner for all of the following:

(i) Exchange of a list of comparable communities to be used under sections 9(d)(i) and 9(d)(ii) of 1969 PA 312, MCL 423.239(1)(d)(i) and MCL 423.239(1)(d)(ii).

(ii) Exchange of applicable collective bargaining agreements or tentative agreements, or both, and applicable documents, if the collective bargaining agreement has not been completed and executed, for all comparable communities not listed by the opposing party.

(iii) The procedure and hearing dates for the determination of issues in subrule 3(a) and (b) of this rule.

(iv) The start of the evidentiary hearing unless that date will be established under subrule 3(d) of this rule.

(e) The exhibits to be entered into evidence, the method to be used for marking the exhibits, the number of copies of exhibits to be provided by the parties, and the dates and means of exchanging exhibits before hearing.

(f) The list of witnesses, including experts, to be presented by each party.

(g) The list of comparables for purposes of wages and benefits.

(h) The procedural format for the hearing.

(i) Any subpoenas, stipulations, or depositions.

(j) Whether oral arguments or written briefs are to be submitted.

(k) Other matters the panel considers appropriate.

(3) The arbitrator shall do all of the following:

(a) Make a determination on the economic issues in dispute and the duration of the collective bargaining agreement, and require each party to exchange and submit all of the following:

(i) A statement of the party's issues setting forth the specific changes in the collective bargaining agreement proposed by the party.

(ii) The party's position as to whether each issue is economic or non-economic.

(iii) The proposed duration of the collective bargaining agreement.

(b) Absent mutual agreement, conduct a procedural hearing and advise the parties in writing of the arbitration panel's decision on the issues in dispute including the duration of the collective bargaining agreement, jurisdiction of the arbitration panel concerning any disputed issue and, if in dispute, whether an issue presented by a party is economic.

(c) Direct each party to submit to the arbitration panel and to each other its last offer of settlement on each economic issue by either of the following:

(i) On a date certain after the close of the scheduling conference but prior to the first day of the evidentiary hearing.

(ii) If a procedural hearing has been scheduled, after the submission of the arbitration panel's decision on the procedural issues. Once submitted, a party may withdraw, but not otherwise modify, any economic issue submitted in its last offer of settlement except by stipulation of the parties.

(d) Establish the start date of the evidentiary hearing, if a procedural hearing was held under subrule 3(b) of this rule.

(4) The record shall be the official record of the evidentiary hearing. Before the first day of the evidentiary hearing, the arbitrator shall give reasonable notice, in writing, to the commission's court reporting supervisor of the dates, times, and locations of the evidentiary hearings. A court reporter shall be assigned by the commission or designee. If the hearing date is canceled or changed, the arbitrator shall notify the commission's court reporting supervisor immediately. If a transcript of the hearing is made and a party asserts that the transcript is incorrect, then the transcript may be corrected if the errors are substantive. Proposed corrections may be submitted by stipulation or motion to the arbitrator with notice to the other party. After notice and an opportunity to submit statements in opposition by the other party, the arbitrator shall rule on whether the transcript will be corrected.

(5) The cost of the hearing transcript shall be paid by the party or parties requesting the transcript. The cost of a hearing transcript for the benefit of the panel chair shall be divided equally among the parties.

The MERC rules will specifically provide for the resolution of the critical procedural questions discussed above. In doing so, the MERC has provided a coherent practical procedural guide for panels to follow. We now turn to a number of other procedural/housekeeping matters.

Order of Proof

Under general rules of procedure, the moving (petitioning) party, would be required to carry the burden of going forward with its case. Under this procedure, once the moving party presents its case, the burden shifts to the other party to rebut the case. The procedure is then reversed and the non-moving party proceeds with its evidence on its issues and, then, the moving party rebuts the non-moving party's case. Combining these two procedures results in the following procedure: the union presents its case on its issues; the employer rebuts the union's case; the employer presents its case on its issues; and, the union rebuts the employer's case. The advantage of this procedure is that a witness, who will be called upon to testify with respect to a number of union (or employer) issues, need only appear once to offer testimony. This substantially shortens the hearing time and reduces the inconvenience to the witness.

Many arbitrators prefer an "issue by issue" presentation on the ground that all pertinent evidence on each issue will be "centralized" in the record. While this suggestion may be appealing on its face, there are several shortcomings. First, centralization in the record never occurs, since all of the evidence with respect to the Section 9 factors will bear on the specific issues and will not be part of the "centralized" record. Second, as invariably occurs, a party may wish to offer evidence on an issue litigated earlier and, if the Arbitration Panel admits the evidence, the record on the specific issue is no longer "centralized." Third, inasmuch as the

parties' file post-hearing briefs in which all of the pertinent evidence is pulled together, there is, in fact, no need to ensure that the record is centralized. Fourth, the greatest difficulty is that an "issue by issue" presentation greatly inconveniences the witnesses. For example, if an employer witness is to testify with respect to a number of issues he/she must be called and re-called as many times as necessary to complete the testimony on all of the issues. Because the employer's witnesses generally carry other ongoing responsibilities and, given the difficulty in predicting precisely when a particular issue may be presented, the witness must either sit idly in the hearing room for long periods of time or be "on call." This burden is further magnified if the union induces the Arbitration Panel to conduct the hearings away from the municipal offices. Hence, if the Arbitration Panel wishes to adopt an "issue by issue" procedure, it becomes essential that the hearings be conducted at or near the municipal offices and/or the Panel agrees to allow time for the employer to retrieve its witnesses when the next issue is to be presented and/or witnesses will be allowed to testify with respect to all of the issues on which they will testify at once.

Exhibit Exchanges

At the pre-arbitration conference, the parties typically reach an agreement on the number and distribution of the exhibits to be submitted at the hearing. A more troublesome area is what, if any, pre-hearing exhibit exchange will take place. Every practitioner has "war stories" with respect to how an exhibit exchange was abused to disadvantage a party. Late submission under the guise of "rebuttal exhibits," and other such ambush tactics may occur if there is in place only a loose agreement to exchange exhibits prior to the hearing. The statute does not require a pre-hearing exchange of exhibits. On the other hand, a pre-hearing exhibit exchange can substantially reduce hearing time by allowing the parties the opportunity to evaluate, and validate the accuracy of, the information set forth in the exhibit.

The time, manner and scope of any pre-hearing exchange should be carefully specified to avoid potential future disputes. Typically, such an agreement would call for the exchange of the parties' direct exhibits (i.e., those exhibits a party will rely upon to support its case in chief - the issues it intends to present in the hearing) in advance of the formal hearings. Thereafter, usually several weeks later, the parties exchange rebuttal exhibits (i.e., those exhibits a party will rely upon to counter the other party's case in chief - the issues the other party will present in the hearing). Thereafter, usually several weeks later, the parties exchange sur-rebuttal exhibits (i.e., those exhibits a party will rely upon to counter the other party's rebuttal exhibits). Thereafter, additional exhibits may be presented by a party only to respond to new matters, e.g., in response to testimony from an adverse witness or for cause. In the event of a late, unjustified submission, most Arbitrators reject the document or, if admitted, make clear that the opposing party will be provided ample opportunity to evaluate the document and respond, even to the point of adjourning the proceeding if necessary.

Additional Matters

Frequently discussed and resolved (at least on a tentative basis) are the additional matters of the post-hearing briefs and the executive sessions of the Arbitration Panel. Post-hearing briefs are generally submitted thirty days after receipt of the last transcript. This allows the parties to analyze the record and present the arguments supporting their final offers. The executive

sessions of the Arbitration Panel are then scheduled after submission of the parties' post-hearing briefs. Cautionary note: the 180-day time line set forth in Section 6 requires that the post-hearing briefs be filed within the 180-day period which starts on the date of the scheduling conference. This must be borne in mind when the hearing dates are scheduled to complete the evidentiary hearings in time to allow the filing of post-hearing briefs.

REMAND FOR FURTHER COLLECTIVE BARGAINING

The Arbitration Panel Chairperson may remand the dispute to the parties for further collective bargaining at any time prior to rendering an award. The remand is limited to a three-week period. The better practice is to avoid using the Arbitration Panel Chairperson as a supervisor of negotiations or as a Mediator. In the event that further negotiation may be fruitful, it is best to seek remand of the matter so that the parties may openly discuss the issues without fear of prejudicing their positions before the Arbitration Panel. If mediation is advisable, the assistance of a staff Mediator is always the preferred course of action.

EVIDENCE IN ACT 312 ARBITRATION

Act 312 treats the question of the evidence which may/must be considered by the Arbitration Panel in several different provisions. Section 6 provides in part:

The arbitration panel may receive into evidence any oral or documentary evidence and other data it considers relevant. The proceedings shall be informal. Technical rules of evidence do not apply and do not impair the competency of the evidence.

Section 7 provides in part:

The arbitration panel may administer oaths, require the attendance of witnesses, and the production of such books, papers, contracts, agreements and documents as may be deemed by it material to a just determination of the issues in dispute, and for such purpose may issue subpoenas...

Section 10 provides in part:

A majority decision of the arbitration panel, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the arbitration panel in the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside...

Section 12 provides in part:

Orders of the arbitration panel shall be reviewable by the circuit court for the county in which the dispute arose or in which a majority of the affected

employees reside, but only for reasons that the order is unsupported by competent, material and substantial evidence on the whole record...

Taken together, the provisions of the Act make clear that the "technical rules of evidence" do not apply, yet the Award is valid and enforceable only to the extent that it is supported by "competent, material and substantial evidence on the whole record."

The moving party (i.e., the proponent of a proposed change) bears the burden of proof. This burden consists of two distinct elements - the burden of going forward (presenting evidence) and the burden of persuasion. This latter burden will be borne only through the presentation of sound evidence, i.e., evidence that is competent, material and substantial.

For these reasons, an employer should not be misled by the "liberal admission of evidence" inasmuch as the admission of evidence must be distinguished from the weight, if any, assigned to the evidence by the Arbitration Panel. Simply because the evidence was "admitted" does not mean that the Arbitration Panel will place any reliance on the evidence in its findings of fact. An important function of the employer's representative is to make, and to protect, the record supporting the employer's case. Thus, despite the more informal approach to the admission of evidence, the rules of evidence remain a significant consideration in an Act 312 proceeding. From this perspective, it is important that the representatives be conversant with the basic principles and concepts embodied within the rules of evidence. This knowledge will prove invaluable in preparing and presenting the employer's case.

Evidentiary Issues

Presumptions And Administrative Notice

A party may be aided in establishing its claim, or defense, by the operation of a presumption recognized by law. Of particular interest in the arbitration setting are the presumptions that: public officers properly discharged the duties of their office;⁹ if a party fails to testify or to produce witnesses or evidence under its control such testimony or evidence would have been unfavorable to the party;¹⁰ knowledge of facts where there is a duty to know such facts;¹¹ knowledge of the law;¹² and, that written agreements were properly executed.¹³ In the interest of time, the arbitrator may take administrative or arbitral notice of certain facts within

⁹ 29 Am Jur Evidence, §171, p. 212.

¹⁰ For the use of such an adverse inference in an analogous administrative proceeding, see: *Monahan Ford Corp.*, 173 NLRB 204 (October 18, 1969); *Volkswagen of Puerto Rico Inc.*, 172 NLRB 2031 (September 11, 1968); *Acme Products, Inc.*, 164 NLRB 443 (May 9, 1967); *Exber, Inc., d/b/a Cortez Hotel*, 160 NLRB 1442 (September 29, 1966); *Auto Workers v NLRB*, 459 F2d 1329, 79 LRRM 2332, (C.A. D.C., 1972), Sub. Nom. *Gyrodyne Co.*, 185 NLRB 934 (October 8, 1970).

¹¹ 29 Am Jur Evidence §221, p. 271.

¹² 29 Am Jur Evidence §222, p. 272.

¹³ 29 Am Jur Evidence, §247, p. 295.

common knowledge.¹⁴ Thus, certain and commonly known facts need not be established through the introduction of evidence.

Admissibility of Evidence

Evidence may consist of testimony, documentary evidence, objects, exhibits, expert opinions and, in cases where it is impractical to place all of the primary facts before the finder of fact, opinions of non-experts based upon such facts. The admissibility of evidence, distinguished from the weight to be attached to the evidence, is dependent upon its competence, materiality and relevance.

Competent Evidence

Testimony offered by a witness must be based upon the witness' personal knowledge.¹⁵ A document is subject to a requirement of authentication or identification.¹⁶ A party seeking to introduce a document must establish by competent evidence the authenticity of the document, i.e., that it is genuine and written or signed by the person by whom it purports to be written or signed. The authentication may be accomplished through the testimony of a competent witness, another authenticated writing or by stipulation of the parties.

The method by which the competence of the evidence (personal knowledge or authentication or identification) is tested by the opposing party is referred to as "voir dire." This procedure is well recognized in arbitration.¹⁷

Material Evidence

Evidence is material if it has an effect (making it more or less likely) on a question in issue. If the evidence goes to a question not in issue the proffered evidence is immaterial.

Relevant Evidence

As defined in MRE 401:

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence.

¹⁴ Michigan Rules of Evidence ("MRE") 201.

¹⁵ MRE 602.

¹⁶ MRE 901.

¹⁷ *Treasury Department*, 82 LA 1209 (Kaplan, 1984) (opposing party entitled to voir dire on any proffered document).

Thus, evidence is relevant if it has an effect (making it more or less likely) on the existence of a fact bearing on a question in issue. If the evidence goes to prove (or disprove) a fact not bearing on a question in issue, the proffered evidence is irrelevant.

It will be noted that what questions are in issue (defining materiality) and what facts bearing on the questions in issue (defining relevance) must be proved are drawn from the Section 9, Act 312 criteria and the specific issues presented by the parties. To properly prepare for arbitration, the employer must identify the elements of its case (i.e., what must the employer prove to prevail) which will determine the questions that will be in issue. The employer must then determine the facts that bear on the question(s) to be resolved. The employer is then in a position to assemble competent evidence to prove the facts in issue.

Direct Versus Circumstantial Evidence

Direct evidence proves the existence of the fact in issue without the necessity of drawing any inferences. Direct evidence consists, for example, of a witness testifying from his personal knowledge with respect to the fact to be proved. Circumstantial evidence, on the other hand, consists of proof of circumstances from which an inference may be drawn. Circumstantial evidence is just as competent and admissible as direct evidence.

Hearsay

Hearsay is generally defined as a "statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted."¹⁸ The "statement" may be oral, written or assertive conduct (i.e., conduct which makes a representation such as pointing or nodding). The purpose of the rule excluding hearsay is both to protect the opposing party, who is deprived of the opportunity to cross-examine the declarant, and to exclude evidence, the competence of which has not been established. For example, the declarant's perception and recall of the statement may be erroneous. Further, the maker of the statement may have been joking or lying. Without the production of the declarant at the hearing, there is no way to establish the competence of the declarant and the reliability of his/her testimony.

It will be noted that not all out of court "statements" fall within the hearsay rule.¹⁹ Additionally, there have been many exceptions carved out of the hearsay rule on the ground that the underlying circumstances make the statement more reliable than would otherwise be the case. Exceptions to the hearsay rule which may arise in arbitration include: testimony in other proceedings where judicial safeguards are present; records of past recollection; business records; official records; declarations against interest; dying declarations; declarations of pain or other bodily feelings; declarations expressing state of mind or emotion; excited utterances and present sense impressions.

¹⁸ MRE 801(c).

¹⁹ For example, prior admissions by a party are not hearsay. MRE 801(d)(2).

Arbitrators vary greatly in their admission and weighing of hearsay testimony. The more critical the issue on which the hearsay testimony is offered, the less likely the arbitrator will admit (or, if admitted, accord any weight to) the proffered "evidence."

Opinion Versus Fact

A witness in arbitration will often attempt to offer an opinion or conclusion with respect to a fact in issue. While such opinions may be allowed if rationally based on the perception of the witness or to assist in understanding the witnesses' testimony, the witness should, at a minimum, be required to specify all of the underlying facts on which his/her opinion is based. In this way the Arbitration Panel may form its own opinion which may not comport with that of the witness.

PREPARING THE EMPLOYER'S CASE: METHODOLOGY

In every Act 312 case, the employer must develop a theory, i.e., why the employer's position should be adopted. This process starts with an analysis of the necessary elements of the employer's case. Discussed below are the general matters which should be presented in every Act 312 case and the treatment of the specific issues which will be presented by the employer and union. A review of those elements will establish the specific areas that will be in question (i.e., materiality). The next step in the process is to identify those facts which will be necessary to prove to establish the employer's position on the question in issue.

Once the questions in issue and those facts necessary to establish the employer's position on the questions in issue have been determined, it is necessary to assemble competent evidence to prove the employer's case. Each necessary fact element must be established through stipulation, testimony or exhibits. While stipulations may be entered prior to, or at, the hearing, the employer should be prepared to establish all of those facts in possible dispute through competent witnesses and/or exhibits.

Preparation of Witnesses

Those witnesses who will be called upon to testify in the arbitration proceeding should be interviewed in advance to ascertain the testimony they are able to offer based upon their first hand knowledge. Witnesses should be advised of the nature of the dispute, the employer's theory of the case and likely areas of cross-examination. Witnesses should also be counseled with respect to the appropriate demeanor during the course of their testimony. A verbatim record of the proceeding is made (Section 6, Act 312) and witnesses are normally sworn as authorized by the statute (Section 7, Act 312).

Preparation of Exhibits

Those matters which are to be proved through the utilization of exhibits should be identified. Exhibits specifically prepared for presentation at the hearing (e.g., a survey of comparables) should clearly designate the source of the information, the methodology in the preparation of the exhibit and what, if any, assumptions were utilized in its preparation. Other

documents, e.g., contracts, work rules, etc. should be produced in a clean legible form. While photocopies are always acceptable, the original documents should be available for inspection by the Arbitration Panel and the union.

Assembling the Evidence

Once the employer has determined the witnesses and exhibits to be utilized, the evidence must be placed in a chronological order so that the presentation is easy to follow and makes sense to an individual hearing the case for the first time. Those involved in the procedure, based upon their familiarity with the facts, may assume that many aspects of the case are self-evident. Such an assumption, of course, may lead to a disappointing result. The best practice is to ensure that competent evidence has been prepared on each element of the employer's case. While preparing its case, the employer should also anticipate its needs for a rebuttal case. The union, in countering the employer's case, may be expected to make certain claims at the arbitration hearing. To the extent such claims can be anticipated, the employer should have prepared witnesses and/or exhibits designed to rebut the evidence which may be submitted by the union.

PREPARING THE EMPLOYER'S CASE: GENERAL CONSIDERATIONS

Adversarial Process

Interest arbitration under Act 312 is first and foremost an adversarial process. The Arbitration Panel must issue a written opinion and order "upon the issues presented to it and upon the record made before it." (Section 8, Act 312). While the Arbitration Panel may take notice of "matters of public record or general information," Arbitration Panels are without the time, inclination or funding to supplement the record made by the parties. Ultimately any appellate review will be limited to, and founded upon, the record developed in the arbitration proceeding. Therefore, thorough preparation and effective presentation of the arbitration case is critical.

Presenting a Frame of Reference

As the Arbitrator takes the oath of office, he/she generally knows little of the involved community and even less about the inner workings of the particular department involved in the proceeding. This lack of information may result in decision making in a vacuum because, as the Panel focuses on a particular issue, the Panel does not have the same perspective as the parties which has been acquired through their shared mutual experiences. The burden falls upon the employer to ensure that the Panel has sufficient background information to enable it to assess the individual proposals within a meaningful framework.

THE SECTION 9 FACTORS: THE STANDARDS FOR DECISION MAKING

Sec. 9. 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 arbitration proceedings are pending.

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

(2) The arbitration panel shall give the financial ability of the unit of government to pay the most significance, if the determination is supported by competent, material, and substantial evidence.

PRESENTING EVIDENCE ON THE SECTION 9 FACTORS

In overruling an earlier decision²⁰ the Michigan Supreme Court, in *City of Detroit v Detroit Police Officers Ass'n*, 408 Mich 410, 294 NW2d 68 (1980), held that an Arbitration

²⁰ *Alpena v Alpena Fire Fighters Ass'n AFL-CIO, Local 623*, 56 Mich App 568, 224 NW2d 672 (1974).

Panel's obligation to consider the statutorily enumerated factors applies even when the parties fail to introduce evidence on the applicable factors. Thus, the need exists to submit evidence on each factor and for the Arbitration Panel to "consider" the enumerated factors. Under the 2011 amendments, one factor (ability to pay) is to be given the "most significance."²¹ While given the most significance, that factor is not dispositive. On the other hand, the other factors need not necessarily be weighted equally so long as the Panel bases its decision on the factors. In sum, the party must show not only entitlement under a specific factor, but also why the factor must be given particular emphasis by the Arbitration Panel.

PREPARING THE EMPLOYER'S CASE: GENERAL MATTERS

Given the adversarial nature of the Act 312 process, the need to develop and present to the Arbitration Panel a frame of reference and the need to present evidence on each of the Section 9 factors for consideration by the Arbitration Panel, certain essential evidence should be presented by the employer in every Act 312 case irrespective of the specific issues to be presented. These general matters are grouped below by topic area.

Proceedings

Among those exhibits which should be introduced with respect to the proceedings are: the preceding collective bargaining agreement; the tentative agreements, if any, which are not in dispute; the Petition for Arbitration; the Answer; the Appointment of the Arbitrator; the written summary of rules of procedure established at the pre-arbitration conference; and the position of the parties on the issues in dispute.

Background

The exhibits which should be introduced with respect to the general background of the community include: form of government; relevant Charter provisions and ordinances; organizational structure; municipal budget; the other groups of represented and unrepresented employees; other collective bargaining agreements and/or personnel policies; and other exhibits which will provide a frame of reference for consideration of specific issues.

Exhibits which should be introduced with respect to the general background of the involved department are, among others: the organizational chart; the department's budget; personnel roster; unit seniority list; functions performed by employees within various classifications and within the various bureaus and sections; work schedules; and other exhibits which will provide a frame of reference for consideration of specific issues.

Selection of Comparable Communities

A critical element is a comparison with those in public employment in "comparable communities." (Section 9(d)(1), Act 312). A determination must be made as to the number of

²¹ No one factor (e.g., "ability to pay") is determinative. *City of Hamtramck v Hamtramck Firefighters Ass 'n 750*, 128 Mich App 457, 340 NW2d 657 (1983).

communities to be included within the universe - too few and the employer's proposed comparables may be swamped by the union's; too many and the case may become unmanageable. Potential criteria for the selection of comparable communities include: mutual agreement of the parties and past collective bargaining history; historical comparisons from previous interest arbitration proceedings; communities participating in "mutual aid pact" arrangements; population; geographic proximity; geographic area; population density; per capita income; taxable valuation; per capita state equalized valuation; analysis of the state equalized valuation (the percentage of the TV consisting of commercial, industrial and residential); the number of employees in the bargaining unit; the TV per each employee in the bargaining unit; the ratio of employees to citizens; form of government; bonded debt; millage rates; bargaining unit expenditures as a percentage of the community's total expenditures; total bonded debt; the number of occupied dwelling units; firefighters - total number of alarms and/or number of alarms per firefighter; and police officers - total number of arrests and/or total number of arrests per police officer.

The selection of the communities for comparison must be done on a rational and uniform basis, i.e., the selection of certain communities may not be done simply on the basis of whether the community has a higher/lower level of overall compensation.

Comparison to the Comparable Communities

Once the group of comparable communities has been selected, comparisons may be made on each of the potential criteria set forth above, as well as, the communities' comparative ability to pay, overall compensation and the specific employer and union issues in dispute. To make comparisons meaningful, they must be made for uniform and defined periods of time. For this purpose a "base year" must be selected. While any year may be designated, the last year under the preceding contract is usually the easiest and most instructive for the Arbitration Panel. The years following the base year may then be shown as the years in dispute and the parties' offers in each of the years may then be compared with the settled contracts from the comparable communities. It is best to present the data in a uniform way, i.e., a listing of the comparable communities, an indication of the year examined, the base year or a year in dispute, and the sources of information. The communities may be ranked and an average may be shown, as well as, the position of both parties on the particular issue.

Overall Compensation

A critical computation, and comparison to comparable communities, is that of overall compensation. (Section 9(g), Act 312). For this purpose, the most recent collective bargaining agreement from the involved community will provide the best basis upon which these comparisons may be made. The most significant comparison is that of "overall compensation" for the base year and each year in dispute. Inasmuch as wide variations may exist on each economic issue, the most meaningful comparison will be one of overall compensation.

An analysis of overall compensation may include annualized salary (i.e., a weighing of salaries to determine the salary paid in each comparable community during the base year), COLA payments, longevity, holiday pay and/or bonuses and other direct cash payments. The

employees' pension contributions may be deducted to determine total net pay. In addition, the cost of vacation time, holiday time off, sick leave, personal leave, and the employer's pension contributions should be calculated to determine total overall compensation. Comparisons may be made with respect to past increases in overall compensation for the involved and comparable communities. A comparison with the comparable communities for the years in dispute may be made in terms of the overall percentage increase negotiated and the total dollars negotiated. A comparison may be made of overall compensation for employees with various levels of service, i.e., 1-3-5-10 years, based on the average seniority in the unit, etc.

The employer may show the historical ranking of the involved community among the comparables the employer has selected. Changes in the criteria (i.e., an increase/reduction in population, TV, per capita income, etc.) may justify upward/downward movement. Less/more relative ability to pay in terms of the criteria set forth in Section 9 of Act 312 may justify upward/downward movement among the comparable communities.

Internal Comparison

Comparisons with other represented and nonrepresented employee groups in the involved municipality are very persuasive elements. This comparison was, in the past, justified by the indirect references to it in Sections 9(d) and 9(h). The 2011 amendments added a new Section 9(e) to specifically require this comparison.

The employer should show the number of employees involved in each of the employee groups. A comparison of the overall compensation for the base year and (if settled), for each of the years in dispute may be shown. The parties may also show the: (a) historical differential between the involved employees and the other employee groups; (b) the increases in overall compensation awarded to other employee groups compared to the increases to the involved employees; and (c) the increases scheduled for other employee groups for each of the years in dispute, including a showing as to the average percentage increase for the employee groups in each of the disputed years.

Ability to Pay

Section 9(c), of the prior statute set forth as a criterion, "the interests and welfare of the public and the financial ability of the unit of government to meet those costs." The 2011 amendments,²² which clarified and strengthened this factor, provides as follows:

(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.

²² The amendments are discussed in detail in the companion article "Act 312: History and Amendments."

(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.

* * *

(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.

Ability to pay may be analyzed from three different perspectives: first, historic ability (the ability of the community to pay compared with its historic position); second, comparative ability (the ability of the community to pay compared to the comparable communities); and third, the employer's current balance sheet. The amendments make it clear that the third is the primary and most significant perspective because it focuses on the employer's current, actual financial condition. Thus, among other things, consideration of the employer's budgets, Consolidated Annual Financial Reports and Other Post-Employment Benefits should be presented. An historical perspective showing the costs and the overall compensation of the involved employees as a percentage of the municipal budget for the base year may be presented. The historical allocation may also be computed over several preceding years to ascertain the average allocation. This historical allocation may then be compared with the municipal budget for the year[s] in dispute to show whether the parties' offers will increase or decrease the involved bargaining unit's "share of the pie." An analysis of the municipality's comparative ability to pay may be demonstrated from a comparison of the comparable communities in terms of per capita expenditures for the service, millage rates, TV, the budget allocated to the bargaining unit service, per capita income, etc.

Cost of Living

The Consumer Price Index (CPI) published by the Bureau of Labor Statistics (BLS) is a measure of the average change in the prices paid for a fixed market basket of goods and services purchased for consumption by the population covered by the index. The CPI is calculated for two population groups: All Urban Consumers (CPI-U) (covering about 80 percent of the total U.S. population as of 1982-1984); and, Urban Wage Earners and Clerical Workers (CPI-W) (covering about 30 percent of the total U.S. population). The price movement will depend upon the index utilized, the geographic area and the period examined.

The CPI is not a wage escalation factor. Care must be taken in the Act 312 proceeding to ensure that the Arbitration Panel appreciates the nature and scope of the CPI. While "cost-of-living" allowance provisions have become increasingly uncommon in the public sector, comparisons may be made with cost-of-living allowance provisions in the private sector.

Other Relevant Factors

The parties may wish to submit evidence on a number of other relevant factors, including a comparison of overall compensation with employees in the private sector in both the involved and comparable communities. (Section 9(d)(ii), Act 312). The parties may also show the rates of compensation for employees performing similar services in the private sector, collective bargaining agreements from community employers, MESC tabulations on the earnings of area workers, and the continuity and stability of employment (or lack thereof) in the municipality. (Section 9(i), Act 312). Moreover, the parties may show the lawful authority of the employer. (Section 9(b), Act 312). This consideration normally arises as a consideration only with respect to certain non-economic matters, i.e., union security clauses, etc.

Other factors which may be introduced (Section 9(i), Act 312) include: the bargaining history of the parties in terms of the past voluntary settlements of the parties in collective bargaining; the costs of each offer on the economic issues and the total cost of the offers made by both sides; the increase in costs of fringe benefits during the term of the preceding contract; the projected increase in costs of fringe benefits, i.e., hospitalization insurance; the total "roll-up" costs, i.e., what a \$100 salary increase actually costs due to the automatic increase in other fringe benefits, such as longevity, pension, vacation, overtime, etc.; an increase or decrease in work load shown by changes in the levels of staffing and the number of alarms/arrests per employee; analysis of capital outlay for the involved department; number of applicants for each job vacancy; and the bargaining history of the parties on each issue.

The total cost of each party's overall package should be shown. The Arbitration Panel should also be aware of the total cost of each issue so that it can judge the overall cost of the package awarded.

PREPARING THE EMPLOYER'S CASE: SPECIFIC ISSUES

Employer Issues

With respect to each of the specific employer issues to be presented, the following exhibits and/or testimony should be prepared:

Position statement - The former contract provision, if any, and the proposed new contract provision with a clear statement of how the proposed provision would amend the contract.

Definition of the current problem - A statement of how and why the former provision imposes an undue burden upon the employer, e.g., costs, operational inefficiencies, deviation from other municipal contracts, etc.

Background - The history of the provision and how the provision impacts the employer, e.g., prior grievance arbitration awards, department studies, reports or analyses from outside sources, etc.

How and why the employer's proposal would resolve the problem.

The limited burden, if any, on unit members - The employer's proposal is narrowly tailored to resolve a specific problem, e.g., the availability of other paid time off, etc.

Survey of the comparable communities.

Survey of the other employer bargaining units.

Union Issues

With respect to the specific union issues, the following exhibits and/or testimony should be prepared:

The nature and scope of the union's proposal - A clear statement of how the union's proposal would amend the former contract provision, if any.

How the current provision, if any, operates in practice.

Background bargaining history of the provision.

The impact of the union's proposal.

The burden imposed on the employer by the union's proposal - e.g., costs, operational inefficiencies, conflicts with other contract provisions, etc.

Survey of the comparable communities.

Survey of the other employer bargaining units.

EVALUATING THE UNION'S CASE

An evaluation of the union's exhibits must be undertaken to determine what, if any, objections, voir dire, cross-examination of the presenter or rebuttal evidence may be necessary. The evaluation should include an assessment of: the source of the data; the accuracy of the data; the validity of the methodology utilized; the propriety of the assumptions made; the completeness of the proffered analysis; and how the fact purportedly demonstrated by the exhibit fits into the overall picture. On this last point, it will be observed that most unions have mastered the act of "cherry picking," i.e., focusing on one isolated benefit component and demanding an improvement in that area. The success of this approach turns on the distraction of the Arbitration Panel from the overall picture - which again underscores the need for the employer to develop a frame of reference against which the Arbitration Panel may assess the specific union issue.

SUBMISSION OF LAST OFFERS OF SETTLEMENT

The 2011 amendments resulted in a very significant change in the Panel's determination of the economic issues and the parties' submission of last offers of settlement.²³ Under the prior

²³ While the statute refers to a final offer of settlement on the economic issues, the general practice is to submit such offers on all outstanding issues.

statute, generally, last offers of settlement were submitted within some brief period after the close of the record. This procedure allowed the parties, in formulating their last offers of settlement, to consider the full record before the Arbitration Panel. Section 8 of Act 312 was amended to require the Panel's determination of the economic issues in dispute and the parties' exchange of their "last offer of settlement on each economic issue before the beginning of the hearing." The amendments immediately posed a number of practical problems for practitioners because the amended Section 6 provided that the chairperson is to "begin a hearing within 15 days after appointment." The MERC-proposed administrative Rule 7 resolves this problem by distinguishing between a preliminary scheduling conference and the commencement of the evidentiary hearing. MERC Rule 7 (2)(c) provides that the final offers of settlement be exchanged after the scheduling conference or issuance of the Panel's procedural rulings (if such were required)²⁴ but before the start of the evidentiary hearing.

Under this procedure, the parties will know the Panel's ruling on any procedural issues and review the opposing parties' specific issues, position papers and exhibits. This procedure has been followed by practitioners since the 2011 amendments took effect.

There is, of course, still a significant difference from prior procedures because final offers must be submitted before the hearing itself, i.e., the direct and cross-examination testimony of witnesses, the Panel's rulings on, and treatment of, each parties' proffered testimony and exhibits will not be known until after the final offers have been submitted. Hence, the ability to anticipate the other parties' proffered testimony and its likely reception and weighting by the Panel are more important than ever.

PRESENTATION OF THE EMPLOYER'S CASE

As set forth above, the moving party is required to initially proceed with its case and the opposing party is provided the opportunity to submit a rebuttal case. This may be achieved by presentation of the parties' entire case or on an issue by issue basis. The moving party may then submit additional evidence (generally limited to those matters presented by the opposing party) and the opposing party is then permitted to submit further rebuttal evidence (generally limited to those new matters presented by the moving party). Most arbitrators liberally allow additional sur-rebuttal until both parties rest. As also set forth above, the employer may be the moving party (on the employer's issues) or the opposing party (on the union's issues). Significant considerations may arise in either situation in the presentation of the employer's case.

²⁴ Rule 7 requires the Panel to address the various procedural issues which exist and advise the parties of the Panel's ruling.

Direct Examination of the Employer's Witnesses

The employer should focus on a few competent witnesses sufficient to prove the employer's case.²⁵ Direct examination should be planned in such a way that the testimony is coherent and presented in a chronological order. Generally, the witness should be initially called upon to explain the basis of his or her personal knowledge. For this purpose, for example, employment history, education and job responsibilities should be established. From this point, the witness may be called upon to testify to the pertinent facts. The most effective approach is generally for a witness to be asked "open" questions calling for a narrative answer. In this way, the witness is allowed the freedom to place his/her answer in his/her own words and to explain directly to the Arbitration Panel the facts and circumstances at issue. The testimony should center on those relevant facts necessary to support the employer's position. If there are shortcomings or harmful matters, they should be brought out on direct examination rather than allowing the union to unveil them during cross-examination. The direct examination should be concise and to the point. The goal is to keep the record as clear as possible and, therefore, the witness should not be allowed to wander into extraneous matters which will not be relevant or assist the Arbitration Panel in making a decision.

Cross-Examination of the Employer's Witnesses

In arbitration, as well as in most courts, the opposing advocate is allowed to ask questions on cross-examination beyond the scope of direct, i.e., although the employer did not ask questions with respect to certain matters, the union will be allowed to cross-examine the witness in these areas. While the employer cannot shield its witnesses from probing questions (unless the Arbitration Panel becomes convinced that the exercise has turned into a wasteful "fishing expedition"), there are a number of common inappropriate tactics from which an employer can, and should, protect its witnesses, for example, multiple questions, assuming facts not in evidence, misquoting the witness, cutting the witness off or presenting argumentative questions.

Redirect Examination

Once the witness has been cross-examined, the employer is entitled to engage in redirect examination. Redirect examination is not necessary unless points of clarification to questions posed on cross-examination are required or new matters were probed on cross-examination which require further explanation or clarification.

²⁵ In the presentation of the employer's case, one witness who can competently testify with respect to the relevant facts is sufficient to support the employer's position, i.e., there is no necessity to present four additional ("cumulative") witnesses who will all testify to the same facts. If the testimony presented by the employer's witness is not disputed by the union, there is no necessity to call the additional four witnesses. If the question does come into dispute, the additional witnesses may be called to counter any claims made by the union.

COUNTERING THE UNION'S CASE - DEALING WITH THE UNION'S WITNESSES AND EXHIBITS

Objections to Questions Posed to Union Witnesses

As set forth above, the cornerstone of the employer's objections should be based upon the rules of evidence. Although the Arbitration Panel may overrule an employer's objection to a particular question that is posed, the objection will alert the Arbitration Panel to the shortcomings in the union's presentation. Typical objections that should be registered include: the use of leading questions;²⁶ the lack of foundation with respect to the employee's personal knowledge; the lack of relevance and/or materiality; eliciting hearsay; and eliciting an opinion rather than personal knowledge with respect to a fact in issue. Although not responding to a particular question, witnesses sometimes weave objectionable testimony into an answer, e.g., hearsay ("employee x told me that ..."); irrelevancies ("well it was my understanding that ...") or, conclusory statements ("the employer fired him without cause"). In this event, the employer should register a timely objection and ask that the answer be disregarded.

The Use of *Voir Dire*

As set forth above, the employer is entitled to *voir dire* a witness with respect to his/her personal knowledge of the facts in dispute. The employer is also entitled to *voir dire* on any document that is offered for admission in the arbitration proceeding. The purpose of *voir dire* is to test the competence (personal knowledge) of the witness and authenticity of the document tendered by the union.

Cross-Examination of Union Witnesses

Cross-examination may serve a number of different objectives: eliciting evidence proving the employer's case; eliciting evidence refuting the union's case; undermining the competence of the witness; or, attacking the credibility of the testimony (e.g., it is not consistent with itself, other evidence of record or with human experience). There is no requirement, of course, that a witness be cross-examined and, if one error is made in this regard, it is that cross-examination is undertaken when it is not necessary or when there is a greater risk to the employer's case than a possible benefit. Cross-examination should only be undertaken if a certain defined objective is clearly in mind. No question should be asked unless the examiner already knows the answer and can prove the fact, i.e., if the witness does not give the expected answer, the employer has an exhibit and/or a witness prepared to testify with respect to the pertinent fact.

Cross-examination should consist of closed (i.e., leading) questions so that the witness is limited to responding to a specific, narrow inquiry. Posing open questions calling for a narrative answer amounts to nothing more than asking a witness to repeat all of the testimony he/she has already offered. Needless to say, this can prove to have disastrous results, in that, if the Arbitration

²⁶ "Leading" questions, as a rule of thumb, are those that may be answered with a "yes" or "no" response. The witness is not required to specify any facts because the examiner has already done so for the witness in framing the question. The result is that the examiner does the testifying. Leading questions are inappropriate on direct examination; they are, of course, permissible (and preferred) on cross-examination.

Panel was not convinced the first time it heard the testimony, it may well be after the second time it's heard it.

The Employer's Rebuttal Case

After submission of the union's rebuttal case, the employer is entitled to submit further evidence in a rebuttal presentation. The rebuttal case should be limited to those matters presented by the union, which either create disputes with respect to questions of fact or create new questions for the Arbitration Panel to resolve.

AS THE RECORD CLOSES

As the record comes to a close, the employer must ensure that two matters are resolved. First, the date and manner of exchange of the parties' post-hearing briefs must be confirmed. Second, how the scheduling of the executive sessions of the Act 312 Arbitration Panel will be arranged should also be confirmed.

PANEL DELIBERATIONS

The statute provides that the "arbitration panel ... 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..." (Section 8, Act 312). Thus, a majority of the Arbitration Panel must vote for the award. While not explicitly required by the statute, the parties should urge that the Arbitration Panel formally convene to consider the evidence of record. This provides a final opportunity for the parties to present their case and answer the adversary's contentions. An effective Panel Delegate will ensure that the Chairperson appreciates the impact of a proposed award, both in terms of cost and its effect on operations. This continuation of the decision making process is often critical to the proper representation of the employer's interests.

CONCLUSION

Act 312 Arbitration can result in reasonable and appropriate awards; however, there are no statutory guarantees. The best (and only) way to ensure an appropriate result is the employer's commitment to the proper preparation and presentation of its case in the Act 312 arbitration proceeding.