STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF GREEN BAY To Initiate Sec. 111.77, Stats., Interest Arbitration Between Said Petitioner and THE BARGAINING UNIT OF THE GREEN BAY POLICE DEPARTMENT	Case 237 No. 49030 MIA-1890 Decision No. 27874

Appearances:

Mr. Paul F. Jadin, Personnel Director, 100 North Jefferson Street, Green Bay, Wisconsin 54301, appearing on behalf of the City of Green Bay.

Mr. Thomas J. Parins, Attorney at Law, Parins Law Office, S.C., 125 South Jefferson Street, Suite 101, P.O. Box 1626, Green Bay, Wisconsin 54305, appearing on behalf of the Bargaining Unit of the Green Bay Police Department.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DISMISSING PETITION

On March 30, 1993, the City of Green Bay (herein City) filed a petition requesting that the Wisconsin Employment Relations Commission initiate municipal interest arbitration under Sec. 111.77 with regard to a single issue which the City asserts is made reopenable and subject to such arbitration by the terms of the City's calendar year 1992-93 collective bargaining agreement with The Bargaining Unit of the Green Bay Police Department (herein Union).

An informal investigation was convened in the matter on July 6, 1993 by Commission Investigator Marshall L. Gratz. At the outset of that investigation, the Union submitted a motion to dismiss the City's petition on the grounds that the subject matter on which the City seeks interest arbitration is not unilaterally reopenable by the City during the term of the parties' existing 1992-93 agreement and that, in any event, various procedural conditions precedent to an order initiating Sec. 111.77 arbitration had not been met by the City.

Rather than rescheduling the matter as a formal hearing regarding the Union's motion, the Investigator endeavored to mediate the merits of the dispute in separate caucuses and called upon the parties in joint session to state the facts and arguments supporting their respective positions concerning the Union's motion to dismiss. At the conclusion of their joint session presentations, the Investigator advised them that he would submit a proposed stipulation of facts for the parties' review, revision and approval in an effort to avoid the need for a formal hearing in the matter.

Correspondence between the Investigator and the parties ultimately produced a written stipulation of facts consisting, in part, of Findings of Fact 1-12, below. The Investigator received that signed stipulation from the parties on September 17, 1993.

On the basis of the parties' stipulation of facts, the Commission issues the following Findings of Fact, Conclusions of Law and Order Dismissing Petition.

FINDINGS OF FACT

1. The City of Green Bay, referred to herein as the City, is a municipal employer with offices at City Hall, 100 North Jefferson Street, Green Bay, Wisconsin. One of the City's operational departments is the Green Bay Police Department.

2. The Bargaining Unit of the Green Bay Police Department, referred to herein as the Union, is a labor organization with a mailing address of c/o Thomas J. Parins, Parins Law Office, 125 South Jefferson Street, PO Box 1626, Green Bay, Wisconsin, 54305. At all material times, the Union has been the exclusive representative of a collective bargaining unit of City employes consisting of

> all full-time personnel of the Police Department having powers of arrest employed by the City, excluding the rank of Chief, Assistant Chief, Deputy Chief, Captain and Lieutenant.

3. The City and Union have been parties to a series of collective bargaining agreements, the last of which covers calendar years 1992-93, and which bears a date of execution in February of 1993. The parties' 1992-93 Agreement contains the following language in Art. 14(C)(6), which reads as follows:

> (6) Patrol and communication sergeants shall select vacation as a group. Two sergeants shall be allowed to be on vacation at any time from each of the shifts. (In the event either party wishes to modify this language in the 1993 contract and the same is submitted to interest arbitration, the inclusion of this language in the 1992 contract shall not create an advantage to either party. However, any evidence of past practices regarding sergeant vacation, a subject of current dispute may be submitted in such arbitration.)

4. The language of Art. 14(C)(6), above, appeared in the parties' agreement for the first time in their calendar 1989-91 agreement. The circumstances giving rise to the inclusion of that language include a City reduction by three in the number of road Sergeants in or about 1990; City concerns about the costs of overtime payments to Sergeants; the filing of a grievance concerning Sergeants' overtime for a Sunday Packer game; a Deputy Chief's statement to a bargaining unit member that if that grievance was not withdrawn the Department would change its policy permitting two sergeants to take vacation at a time to a policy permitting one sergeant to take vacation at a time; the filing of a prohibited practice complaint concerning that statement; a unilateral City change from two to one sergeant allowed off on vacation at a time; grievance or other disputes regarding whether and to what extent the City is bound by past practice to continue to permit two sergeants to take vacation time off at the same time; and ongoing discussions between the parties' representatives concerning how to resolve the various pending grievance and complaint proceedings and other disputes relating to the general question of Sergeants' vacation selection. At some point during those ongoing discussions, much of which were apparently outside the parties' formal contract negotiation process, the City indicated a willingness, in return for withdrawal of the above-noted grievances and complaint, to permit two sergeants to take vacation at the same time during calendar 1992 so that the City could monitor the level of overtime expenses associated with that policy, so long as by doing so the City was not placing itself at a bargaining or interest arbitration disadvantage relative to the status of the parties' rights and obligations on that subject prior to such agreement being reached. On January 13, 1992, the

City Personnel Director sent the Union's attorney, among other things, "the vacation memorandum I promised you . . ." . That proposed memorandum of agreement read in pertinent part, as follows:

> It is hereby agreed and understood that, for calendar year 1992, the following policy shall apply to patrol sergeant vacation:
>
> Patrol and Communication Sergeants shall select vacations as a group. Two Sergeants shall be allowed to be on vacation at any given time from each of the shifts. . . .
>
> The above language shall also be incorporated in the labor agreement with the understanding that it will "sunset" on December 31, 1992 unless the parties mutually agree to continue it.
>
> If either party desires to replace this language for 1993, then each party will submit a final proposal on this issue which will be put to interest arbitration. The fact that this language is included in the 1992 contract shall not create an advantage in interest arbitration for the party which prefers to maintain it in 1993. In other words, both parties will proceed to interest arbitration with the same burden of proof.

The Union's attorney responded by letter dated January 20, 1992, in pertinent part, as follows:

> As to the language regarding the sergeant's vacation selection, we do not have complete agreement.
>
> First of all, we did not agree that the language allowing two sergeant's off would "sunset" on December 31, 1992. Rather it was agreed that the two sergeants off policy would continue for a period of one year, and the matter would be looked at at the end of the year to see whether there are any problems, and if so the matter would again be negotiated with neither party to be prejudiced by agreeing to the one year trial period. It was further agreed that the facts and circumstances existing when this matter first arose would be deemed to be the facts and circumstances existent during any negotiation or arbitration of any dispute should negotiations fail. In our mind, such contemplates staffing before the department reorganized the patrol division to eliminate 3 sergeants and institute 3 lieutenancies.
>
> As you know, we did not complete the agenda for our last negotiating session. It is necessary that we have another such session and we would propose that such be scheduled at the earliest possible time. As you will recall, both parties agreed that emphasis would be put in any negotiations on items necessary to reach final agreement on a 1991 labor agreement so that the same could be reduced to writing and ratified. All of the above mentioned items, . . . are such matters. I would propose that we concentrate completely on these items with an eye toward putting the 1991 agreement to rest.

Following that exchange, the parties met on February 24, 1992 and, among other things, signed off on the insertion of what is now Art. 14(C)(6) of the 1992-93 agreement into the 1989-91 agreement then being finalized. At that point in time, the parties had not agreed upon (nor apparently even begun to negotiate about) the duration of the successor to their 1989-91 agreement. The 1989-91 agreement was ultimately ratified by the City Council in June of 1992, i.e., several months after its nominal expiration date. The parties executed the successor to their 1989-91 in February of 1993. That successor agreement covers calendar years 1992 and 1993 and carries forward the language of Art. 14(C)(6) without modification.

5. Sometime early in 1993, after the 1992-93 agreement was executed, the City orally notified the Union of its intent to reopen the 1992-93 agreement and to seek interest arbitration regarding the issue of Sergeants' vacation selection. The Union's immediate oral response was that the 1992-93 agreement governs that subject throughout its nominal term and does not authorize the City to reopen or interest arbitrate Sergeant vacation selection arrangements except in overall negotiations for a successor agreement to take effect after December 31, 1993.

6. On March 30, 1993, the City filed with the Wisconsin Employment Relations Commission (Commission) a petition to initiate interest arbitration with respect to the following City proposal:

> Amend second sentence of Article 14, Paragraph C, Section 6 to read: "One sergeant shall be allowed to be on vacation at any time from each of the shifts." The portion of section 6 which is enclosed by parentheses may be deleted.

7. Sometime thereafter, Department management issued a directive reducing the number of "supervisors" permitted off on vacation at the same time. When the Union objected and sought retraction or clarification, it was ultimately assured by City representatives that the directive was not intended to affect sergeants or any other bargaining unit personnel.

8. On June 11, 1993, the Union's attorney sent the City Personnel Director the following correspondence which was one of several such side letters which the Union's attorney had agreed to prepare and present for City consideration in that same general time frame in an effort by the parties to resolve various outstanding disputes between them. The June 11 correspondence read as follows:

> Re: Green Bay Police Bargaining Unit - Patrol Sergeants Vacation & Off Time
>
> Dear Mr. Jadin:
>
> There has been considerable dispute concerning the number of patrol sergeants who may be on vacation or off time at the same time. Presently two patrol sergeants are allowed off. The City desires that this be modified. The subject is in arbitration.
>
> It was agreed between the City and the Bargaining Unit that the present agreement to allow two sergeants off at one time be continued by side bar agreement during the term of the current Labor Agreement between the City and the Bargaining Unit, or a decision by the arbitrator in the interest arbitration pending in this matter, whichever period of time is shorter.
>
> If the above accurately reflects the agreement of the parties, I would appreciate it if you would sign for the City the copy of the attached letter and return same to the undersigned.
>
> Thank you for your assistance and cooperation in finalizing this matter,

Very truly yours,

Thomas J. Parins
TJP:jan

cc: All Committee Members

The undersigned, Personnel Manager for the City of Green Bay, does hereby agree to the terms and conditions of the above side bar letter to the Labor Agreement between the City of Green Bay and the Green Bay Police Bargaining Unit.
Dated: June _____, 1993.

_____
Paul Jadin, Personnel Manager

9. On July 6, 1993, an informal investigation was conducted with respect to the City's above-noted petition for municipal interest arbitration. At the outset of that meeting, the Union submitted a motion to dismiss the City's petition on the grounds that:

> 1. There exists a collective bargaining agreement between the parties which does not expire until December 31, 1993, and which covers the subject matter that the City of green Bay desires to submit to interest arbitration in mid-contract;
>
> 2. The City has not complied with the requirements of Sec. 111.77, Wis. Stats. requisite to it petitioning the commission to initiate interest arbitration.

The Commission's investigator informally received evidence and arguments concerning the motion and also engaged the parties in separate caucus mediation with regard to the substance of the City's proposal regarding Sergeant's vacation selection. No settlement was achieved. Near the end of that meeting, the City executed and delivered to the Union a copy of the Union's June 11, 1993 document noted above.

10. The City's above-noted petition was not preceded by service of written notice upon the other party, an offer to meet and confer with the other party, notice to the Commission or participation in mediation within the meaning of Secs. 111.77(1)(a), (b), (c) and (e), Stats., respectively.

11. The Union contends that its motion should be granted for the following reasons: The language of Art. 14(C)(6) was formulated before the parties knew for sure what the term of their agreement beginning January 1, 1992
would be. The Union gave up a meritorious complaint and various grievances and made certain other concessions in return for that language. The parties' initial agreement to the now-disputed language -- coming as it did in the wake of the Union's rejection of the City's proposal of a December 31, 1992 sunset of the two sergeants off provision -- left the City free to propose a different provision to take effect in an overall agreement covering only 1992 or to leave that provision in place during 1992 and to propose a different provision to take effect in 1993 in an overall agreement covering only 1993, all without any prejudice to its position in a resulting interest arbitration on account of its having previously agreed to the inclusion of the two sergeants off language. The City chose, instead, to settle a contract covering both 1992 and 1993 without a change in that language. Because the term of agreement ultimately agreed upon included 1993, the Union's negotiators believed, and appropriately so, that the agreement would bar the City from unilaterally reopening the sergeants' vacation selection issue during 1993 except as a part of overall negotiations for the period after December 31, 1993. The language of Art. 14(C)(6) continues to protect the City from its position being prejudiced because of its agreement to include that language in the 1992-93 agreement. Such protection does not constitute a right to reopen the subject for a single issue arbitration as the City is now seeking to do. In any event, the City

admits it has not followed the Sec. 111.77 procedural steps in advance of its filing of the petition. The references to a pending arbitration in the Union's June 11, 1993 merely refer to the City's pending petition for arbitration; that letter does not constitute an agreement that City is entitled by law to the arbitration sought in its petition. It has been the Union's position ever since the City began talking about seeking mid-contract interest arbitration that the contract does not entitle the City to such a proceeding.

12. The City contends that the Union's motion should be denied for the following reasons: In the discussions leading to the parties agreement about sergeants' vacation time off, the City made it clear that it was willing to operate with two sergeants off during 1992 so that it could monitor the associated overtime costs to determine whether the City needed to propose a modification of that arrangement for 1993. When the language was carried forward without change in the 1992-93 agreement, the City's negotiators expected that the existing language would serve the same purpose for which it was originally agreed upon: to give the City the right during 1993 to collectively bargain and interest arbitrate about the issue of sergeants vacation selection arrangements, if the City's study of overtime costs during 1992 revealed that the two sergeants off arrangement was unacceptably expensive. The City did not give notices or offer to bargain as provided in Sec. 111.77, Stats., because the matter had been thoroughly discussed between the parties prior to the 1992-93 agreement being executed and because it is the City's understanding that Art. 14(C)(6) allowed the City to initiate final offer exchanges on the limited subject matter referenced in that section without the City taking those procedural steps. The City recognizes that it is impractical to expect an interest arbitration award could be implemented during 1993, but the City insists that it has the right to reopen that subject now for an interest arbitration during the term of the 1992-93 agreement concerning that issue alone which will at least establish the status quo regarding the issue as a basis for future contract negotiations.

13. The parties' 1992-93 Agreement also provides as follows:

ARTICLE 34

> This Agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Bargaining Unit where mutually agreeable. The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

ARTICLE 37

> If either party desires to negotiate any changes in this agreement to become effective after the end of the term of this agreement or any extension thereof, they shall notify the other party in writing of their desire to enter into such negotiating prior to July 15, and shall be completed by the last Tuesday of October.

ARTICLE 38

> This contract shall be binding on both parties and effective from the 1st day of January, 1992 to and including the 31st day of December, 1993.

14. When the parties' 1992-93 Agreement is read as a whole and interpreted in the context of the bargaining history of Art. 14(C)(6), that Agreement does not entitle the City to unilaterally reopen negotiations (or to invoke interest arbitration) concerning a change in Art. 14(C)(6) prior to and separate from overall negotiations regarding a successor agreement.

CONCLUSION OF LAW

1. The parties' 1992-93 Agreement does not entitle the City to unilaterally reopen negotiations (or to invoke Sec. 111.77, Stats., interest arbitration) concerning a change in Art. 14(C)(6) prior to and separate from

overall negotiations regarding a successor agreement.

ORDER DISMISSING PETITION [1/]

The City of Green Bay's interest arbitration petition is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of November, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(footnote continued)

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(continued on page 9 and 10)

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(continued)

(footnote continued)

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER DISMISSING PETITION

The procedural history of this dispute is fully described in the preface to this decision. The factual background is fully set forth in the Findings of Fact. The parties' positions are fully set forth in Findings of Fact 11 and 12. Reiteration of those matters here is therefore unnecessary.

DISCUSSION

The viability of the City's petition for interest arbitration in this case turns on whether the parenthetical portion of Art. 14(C)(6) of the parties' 1992-93 agreement (see Finding of Fact 3) entitles the City to reopen negotiations and to invoke interest arbitration in pursuit of a change in the first two sentences of that provision, prior to and separate from overall negotiations for a successor agreement. When we read Art. 14(C)(6) in the contexts of the 1992-93 agreement as a whole and of the bargaining history leading up to that agreement, we conclude that it does not grant the City the right it claims to reopen and separately interest arbitrate that issue.

When it was initially inserted in the 1989-91 agreement, the disputed language did not provide for reopening a settled agreement. Rather, as the Union asserts, it protected the City from being prejudiced in any interest arbitration that might arise on the subject if the City allowed the two sergeants off provision to remain in a collective bargaining agreement covering 1992. The language the parties used appears rather clearly to have been written in anticipation of separate collective bargaining agreements being negotiated for 1992 and 1993.

In this case, however, we must read Art. 14(C)(6) in the materially-different context presented by the fact that the parties reached an overall agreement covering both 1992 and 1993 (see Art. 38 in Finding of Fact 13). In that altered context, we find it reasonable to view the parenthetical language in Art. 14(C)(6) as extending the protection the City sought against its being prejudiced by its previous agreements to include the two-sergeants-off provision. However, it does not appear reasonable to conclude that, despite their having reached an overall agreement concerning both 1992 and 1993, the parties nonetheless intended to permit the City to unilaterally open the agreement during 1993 for a single-issue in-term interest arbitration on that subject separate from the overall negotiations about a successor agreement contemplated in Art. 37. Especially so since the parties have expressly and unqualifiedly provided in Art. 34 that their agreement can only be amended by mutual agreement in writing.

The disputed language did not provide for reopening a settled agreement when it was initially agreed upon by the parties, and we are satisfied that it ought not be deemed intended to permit reopening of a settled agreement now. Similarly, the disputed language did not guarantee the City an opportunity to interest arbitrate the two-sergeants-off issue separate from other bargaining issues, and we are satisfied that it ought not be deemed intended to provide the City with that advantage now.

While the wording of the Union's June 11, 1993 letter (see Finding of Fact 8) seems consistent with the notion that the Union understood that the matter would be subject to interest arbitration during the term of the 1992-93 agreement, that letter must be viewed in the context of the Union's prompt, unequivocal and continuous contention that the City's stated intention of seeking interest arbitration during the term of the agreement is contrary to the provisions of the agreement. Viewed in that context, the Union's letter

appears to have been intended to confirm the Union's contractual right to be free from a change in the two-sergeants-off arrangement throughout the term of the 1992-93 agreement unless the City succeeds both in persuading the Commission that the City is entitled to interest arbitrate that issue separately and in persuading the consequent interest arbitrator that the contract ought not contain a two-sergeants-off provision. While the language of the Union's letter was not clearly drafted to that effect, we are persuaded that the City was never misled by the letter's wording to believe that the Union was waiving its contentions that the City did not have the right to the interest arbitration for which it had petitioned. Indeed, the Union's prompt and continuous contentions to the contrary culminated with its presenting the City and the investigator with a written motion to that effect at the outset of the informal investigation meeting, and the City did not sign and return the letter to the Union until later during that meeting. Thus, the City entered into that letter agreement with full knowledge that the Union was formally pursuing its previously-stated contention that the City had no right to the interest arbitration for which it had petitioned.

For the foregoing reasons, we have concluded that the City does not have the right to unilaterally reopen the two-sergeants-off subject matter except as a part of the overall bargaining for a successor to the 1992-93 agreement.

On that basis, the Union's motion to dismiss the City's petition has been granted. We therefore have no occasion to address the Union's additional contention that the City failed meet the general conditions precedent to interest arbitration under Sec. 111.77, Stats.

Dated at Madison, Wisconsin this 19th day of November, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner