

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**THE ASHWAUBENON PUBLIC
SAFETY OFFICERS' ASSOCIATION**

and

THE VILLAGE OF ASHWAUBENON

Case 41
No. 59782
MA-11406

(Back Pay and Wage Increase Grievance)

Appearances:

Shneidman, Hawks & Ehlke, S.C., by **Mr. Aaron N. Halstead**, on behalf of the Association.

vonBriesen, Purtell & Roper, S.C., by **Mr. James R. Korom**, on behalf of the Village.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "Village", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Ashwaubenon, Wisconsin, on November 9, 2001, at which time the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was not transcribed and both parties filed written submissions that were received by January 22, 2002.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Whether the Village violated Appendix B of the contract by the manner in which it calculated the 2000 wage adjustment and, if so, what is the appropriate remedy?

BACKGROUND

The Village employs Public Safety Officers who perform both law enforcement and fire protection duties. Because a combination of such duties is so rare, it is difficult to find precise wage comparables for such a position. Hence, the parties for a number of years have agreed pursuant to Appendix “B” of the parties’ collective bargaining agreement that the annual wages for the Public Safety Officers should float ten percent higher than the composite average wages paid to 14 other designated police and/or fire departments. Appendix “B” thus provides:

...

**PROCEDURE FOR ANNUAL IMPLEMENTATION OF SALARY FORMULA FOR
ASHWAUBENON PUBLIC SAFETY OFFICERS ASSOCIATION**

The Village of Ashwaubenon, hereinafter the “Village” and the Ashwaubenon Public Safety Officers Association, hereinafter the “Association”, do hereby agree as follows:

For the purpose of implementing the annual wage adjustment for the Association based on the following “comparable” jurisdictions and collective bargaining units: Police and Fire – DePere, Green Bay, Kaukauna, Menasha, Neenah and Two Rivers; Police only – Brown County; Fire only – Allouez, the Village and the Association agree to the following procedure:

1. On or about January 1 of each year, the Village will contact the above-cited jurisdictions to obtain the negotiated salaries for the applicable bargaining units for the calendar year beginning on said January 1.
2. On or about February 1 of each year, the Village shall furnish the information obtained from the jurisdictions to the Association and, if desired by either party, a meeting shall be held between the parties to discuss the information.

3. If ten or more of the bargaining units are settled for the current labor contract year, the Village will proceed to implement the resultant average wage change in a timely manner.

4. If fewer than ten bargaining units are settled for the current labor contract year, the Village will implement a “good faith” increase in amount to be agreed upon by the Association and the Village, said increase to be implemented in a timely manner.

This dispute centers on whether the Village properly deducted about 4 percent from the 7.13 percent wage increase provided for in the published wage schedule covering the Two Rivers firefighters in 2000, which is one of the 14 comparables used in determining the average annual wage increase that must be paid here. The 2000-2002 collective bargaining agreement for the Two Rivers firefighters (Joint Exhibit 3, Appendix A) states:

...

POSITION CLASSIFICATIONS AND SALARY RANGES

January 1, 2000 Salary Schedule

Three (3) percent increase

STEPS

Position Class	Pay Period	Hiring Step A	6 Mos. Step B	12 Mos. Step C	24 Mos. Step D	180 Mos. Step E
Firefighter	Bi-Weekly	\$1,189.60	\$1,244.00	\$1,298.40	\$1,358.40	\$1,399.20
	Hourly	\$14.87	\$15.55	\$16.23	\$16.98	\$17.49
Lieutenant	Bi-Weekly	\$1,298.40	\$1,358.40	\$1,429.60	\$1,492.80	\$1,537.60
	Hourly	\$16.23	\$16.98	\$17.87	\$18.66	\$19.22

January 1, 2001 Salary Schedule

Three (3) percent increase

STEPS

Position Class	Pay Period	Hiring Step A	6 Mos. Step B	12 Mos. Step C	24 Mos. Step D	180 Mos. Step E
Firefighter	Bi-Weekly	\$1,255.60	\$1,281.60	\$1,337.60	\$1,399.20	\$1,440.80
	Hourly	\$15.32	\$16.02	\$16.72	\$17.49	\$18.01
Lieutenant	Bi-Weekly	\$1,337.60	\$1,399.20	\$1,472.80	\$1,537.60	\$1,584.00
	Hourly	\$16.72	\$17.49	\$18.41	\$19.22	\$19.80

A comparison of the 1999 Two Rivers wage schedule (Joint Exhibit 2, Appendix A) and the 2000 Two Rivers wage schedule shows that salaries for Step D were increased from \$1,268 per month to \$1,358 per month, an increase of \$90.40 per month, or about 7.13 percent.

The situation here marks the first time that the Village has deducted any amount from any published wage schedules.

Former Association President David Mather testified that Finance Director Stephanie Meyers told him she had used a different formula for calculating the 2000 wage increase; that the Village never before had deducted money from other wage schedules in the manner Meyers did here; that the City's calculation reduced the wages by about ¼ percent; and that Two Rivers in the past had hidden extra money for its firefighters by paying them a very generous longevity payment of \$200 per month. He also stated that the Two Rivers' contracts in the past had provided for much lower wages.

On cross-examination, Mather stated that employees here only receive \$20 per month in longevity payments, rather than the \$200 per month previously paid in Two Rivers; that the Village in 2001 subsequently included the large wage increase given to Green Bay firefighters who received about an 8% increase; and that the purpose of Appendix B is to keep employees at 10 percent over "the blended rate". He also stated that the Union in the past had tried to get rid of the lower comparables, but to no avail.

Former Association President James Magestro testified that former Finance Director Bill Diamond in the past refused to accept the Association's argument that the longevity payment in the Two Rivers contract should be included as part of that City's wage schedule. He also said that the year 2000 marked the first time the Village has looked outside a

contractual wage schedule to determine a city's wages; and that, "There was no procedure for this." On cross-examination, he said that the Village in 1985 had refused to include the Two Rivers longevity payment as part of the wage schedule and that the luck of the draw determines which of the first 10 comparables are used in determining the average wage increase here.

Former Association officer Donald Penza testified that the Two Rivers longevity payment was a "heated issue" in the past because it brought down the wage average that was used to compute the wages here; that former Village negotiator Bruce Patterson then refused to include the longevity payment as part of Two River's wages; and that the Village over the years always refused to include longevity as part of the Two Rivers wage schedule. On cross-examination, he said that the Village "basically refused to negotiate" by claiming that the "salary of Two Rivers is salary" without regard to any longevity payment.

Finance Director Meyers explained how she each year in November and December collects data from the 14 comparables and then calculates the average wage increase for the first 10 comparables that provide her with data. She said that she called the Two Rivers fire department who told her that longevity had been dropped in the 2000 contract in exchange for an additional four percent to the wage schedule. Meyers the next year called the Green Bay fire department who told her that the 8.9 percent wage increase in 2001 included catch-up and that the union there did not give up anything to receive it. That is why, she said, she used that 8.9 figure in computing the average wage increase here in 2001.

On cross-examination, Meyers said that she looks for the "reasonableness" of any large wage increase even though the parties' contract here does not expressly provide for that; that she does not know the details of the 7% increase given to the Kaukauna police and fire units in 1994; that she does not know what was agreed to in the parties' 1994 contract negotiations because she was not around; that she was unaware of the Two Rivers' longevity controversy before 2000; and that she does not know whether any of the other comparables provide for longevity.

She also said that she only calculates "wage changes" under Appendix B and that if employees receive no wage increase in exchange for health insurance that costs 3 percent, she would calculate their wages to be 3% because they gave up a benefit.

Two Rivers Fire Chief Michael Pohlman testified that the Two Rivers firefighters gave up their contractual longevity pay in 2000 -- which averaged four percent for fire fighters who work there for six years or longer -- in exchange for adding four percent to their wage schedule. He said that if that additional four percent were excluded, the across-the-board wage increase would be three percent, which was the same percentage increase given to Two Rivers law enforcement employees. He explained that is why the 2000 and 2001 wage schedules in the Two Rivers firefighters' contract both state: "Three (3) Percent Increase".

POSITIONS OF THE PARTIES

The Association asserts that the “plain language’ of the collective bargaining agreement compels the Village to utilize a 7.13 percent figure to reflect the Two Rivers firefighters’ 2000 salary increase; that the parties’ past practice supports its position; and that, “The Village’s interpretation and application of Appendix B is completely unworkable.” As a remedy, the Association requests that the Village be ordered to use the 7.13 percent annual salary increase granted to the Two Rivers firefighters in calculating the 2000 salaries here and that the Village also be ordered to award backpay to all affected employees.

The Village contends that the grievance is without merit because Appendix B does not clearly address the kind of situation found here and that, as a result, the Village retains the right under Article VI, the contractual Management Rights clause, not to grant the wage increase demanded by the Association. The Village also asserts that “as a group, the wage increase in the Two Rivers Fire Department was 3%”; that past practice and bargaining history support its position; and that the parties never intended for the result sought by the Association because “The original wage rates were set using a Two Rivers wage rate which does not include the value of longevity.”

DISCUSSION

The Village correctly points out that “Appendix B is not the model of clarity”, as it first refers to “the average wage adjustment”, which is followed by Section 1 which refers to “negotiated salaries”, and then by Section 2 which refers to “the resultant average wage change. . .” By using such different terms, different results can occur, depending upon how each of the terms are interpreted and applied.

The Association contends that bargaining history supports its position because the Village in about 1994 construed these terms to mean that an abnormally high settlement reached in the neighboring town of Kaukauna should be used in calculating the wage/salary increases here. The record is not crystal clear, however, as to exactly what took place at that time. Hence, that one isolated incident sheds little light here.

The Village contends that the Association in the past was unsuccessful in trying to obtain the high longevity increase given in Two Rivers and that the Association now “is trying to get through the Arbitrator what they could not otherwise get in interest arbitration or at the bargaining table.”

I disagree. The Association, in fact, argues that since the Two Rivers longevity payment was never included in the comparable wages/salaries pursuant to the Village’s own insistence, its deletion and effect on the wage structure must be ignored by looking solely at the salary schedule contained in the Two Rivers contract, just as in the past.

Moreover, since that published wage schedule is 7.13 percent higher than the published wage schedule for 1999, that 7.13 figure must be used for comparability purposes, rather than the “Three (3) percent increase” figure contained therein which relates to the total wage increase and longevity payment that the Two Rivers firefighters received the year before, which of course is a separate question of how much higher the 2000 wage schedule was over the 1999 wage schedule.

Appendix B’s meaning can best be determined by looking at the two prior interest-arbitration proceedings involving the parties.

In the first, Arbitrator Joseph Kerkman ruled against the Association and included Kaukauna as one of the comparables to be used, as he adopted the Village’s final offer. See VILLAGE OF ASHWAUBENON (1985), (Joint Exhibit 9). He stated: “the 10% differential over and above wage rates paid in surrounding communities to police and fire personnel was contemplated from the inception of the institution of the Public Safety Department.” Id., at 7. He added: “the minimum rates in the wage structure should be increased so as to reach 110% of the average rates paid to police and firefighters in surrounding communities. . .” Id., at 10.

The clear import of his ruling was that the “wage rates” and the “average rates” paid elsewhere would be the basis for calculating the ten percent differential here. That supports the Association’s claim that the Village can only look at the Two Rivers “wage rates” in determining what wage increase must be paid under Appendix B.

Arbitrator Rose Marie Baron in the second case also selected the Village’s offer and rejected the Association’s claim that Kaukauna should not be used as a comparable. See VILLAGE OF ASHWAUBENON, WERC Case 20, No. 43981, MIA-1532 (1991) (unpublished decision attached to the Village’s brief). She found: “The statements of various Village Board and/or Fire and Police Commission members confirm their recollection that the PSO compensation system was to provide 10% over average comparable salaries.” Id., at 8. She also addressed the Association’s claim that certain data should be used in computing the wages in comparable communities because of the actions of Kaukauna’s then-personnel director. She refused to do so on the ground that: “The Arbitrator cannot accept such subjective argument [by the Association] in the context of factual data . . .” Id., at 9.

Her statements establish that the Village itself originally wanted future increases to be based on the “average comparable salaries” found elsewhere without regard to how those salaries came about. In other words, the collection of that comparable data was to be little more than a ministerial task not requiring any analysis of how and why those comparable salaries come about. This supports the Association’s claim that the salaries in the Two Rivers contract must be utilized without regard to why those parties agreed to that increase.

The Village however, wants to go behind that objective salary data by trying to ascertain why there was a big jump in the salaries of the Two Rivers fire personnel and to then deduct from those salaries whatever amount the Village believes should be deducted. The Association correctly explains the problem with this approach by stating, at page 10 of its brief:

...

Not only is the Village's approach in violation of the contract and past practice, but it is totally unworkable. It invites controversy over whether a comparable unit's increase is so "unreasonable" as to warrant an investigation into what a union surrendered in exchange therefor. It also invites disputes over whether, in fact, a comparable unit truly "gave up" anything in exchange for the increase in question. This would require, in effect, a hearing-within-a-hearing. In addition, it creates problems where a non-comparable unit gives up non-economic items in exchange for a higher raise. How will corresponding Association benefits, if they exist, be affected? (footnote omitted)

...

Both the Village and the Association originally agreed to Appendix B precisely to avoid the kind of dispute and judgment made here as to why a particular wage and/or salary increase was granted elsewhere in a comparable community.

The Village for a number of years adhered to the parties' original intent by only looking at the wage and/or salary increases given in comparable communities and by not going behind those numbers in an attempt to determine what quid was given for what quo. The Village violated that understanding when Meyers went behind the numbers and used a different formula in calculating what wage increase had to be granted in 2000 pursuant to Appendix B.

It is true, as pointed out by the Village, that the higher wage rates agreed to in Two Rivers represented a "buy out" of the longevity payment and that the Association was unsuccessful in the past in trying to have that longevity payment included with Two Rivers' overall wage increases. Hence, employees here are getting something they never got in the past, i.e., higher wages predicated upon Two Rivers' published wage schedule and its very generous longevity payment.

But, that result can occur under the random luck of the draw provided for in Appendix B. For many years, the employees here pursuant to Appendix B drew the bad luck of the draw when the Two Rivers lower wage schedules were used to establish the wages here even though the Two Rivers lower wage schedules were dramatically offset by the very generous longevity payments that were never used in the comparable data. Employees here drew that bad draw because Appendix B provides that published wage schedules represent the only data that can be used in granting the wage increases here. Given that language and its historical application, that is still the only data that can be used, regardless of whether it produces a good or bad luck of the draw.

The Village also asserts that the grievance must be denied because Appendix B is ambiguous on its face and because the Village cannot be forced to pay higher wages than it ever bargained for. As set forth above, Appendix B is somewhat ambiguous, which is why it is necessary to ascertain how that language has been construed in the two prior arbitration proceedings before Arbitrator Kerkman and Arbitrator Baron. Moreover, mere ambiguity alone is insufficient to dictate dismissal of a grievance, as it is well-established that an arbitrator can go beyond such language to ascertain the true intent of the parties and to then issue an award that is consistent with that intent. See Elkouri and Elkouri, How Arbitration Works, (BNA, 5th Ed., 1997), pp. 479-481.

Based upon all the above, I thus conclude that the Village violated the contract by the manner in which it calculated the 2000 wage increase.

The Village thus shall immediately recalculate the year 2000 wage increase by including in the comparables the 7.13 percent wage increase granted to the Two Rivers firefighters and by not deducting any amount from that increase. Thereafter, the Village shall immediately make whole all affected firefighters by paying to them all of the backpay to which they are entitled. Pursuant to the agreement of the parties, I shall retain my jurisdiction indefinitely to resolve any questions that may arise over application of the remedy.

In light of the above, it is my

AWARD

1. That the Village violated Appendix B of the contract by the manner in which it calculated the 2000 wage adjustment.

2. That to rectify its violation of the contract, the Village shall immediately take the remedial action stated above.

3. That pursuant to the agreement of the parties, I shall retain my jurisdiction indefinitely to resolve any remedial questions arising over application of this Award.

Dated at Madison, Wisconsin this 11th day of April, 2001.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

