

STATE OF WISCONSIN  
BEFORE THE ARBITRATOR

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In the Matter of an Interest Arbitration	:
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between	:
	: Case 204
DANE COUNTY, WISCONSIN MUNICIPAL EMPLOYEES:	No. 56471
LOCAL 60, AFSCME, AFL-CIO	: INT/ARB-8496
and	: Decision No.29452-A
	:
CITY OF MADISON (LIBRARY UNIT)	:
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Appearances:

Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO appearing on behalf of Local 60, AFSCME, AFL-CIO.

Michael Deiters, Labor Relations Manager, City of Madison, appearing on behalf of the City of Madison (Library Unit), Wisconsin.

Dane County, Wisconsin Municipal Employees, Local 60, AFSCME, hereafter the Union, and the City of Madison (Library Unit), Wisconsin, hereafter the Employer, are parties to a collective bargaining agreement which expired on December 31, 1997. The parties met on several occasions in efforts to reach a new collective bargaining agreement. On May 13, 1998 the Union filed a petition with the Wisconsin Employment Relations Commission to initiate arbitration pursuant to Sec. 111.70(4)(cm) 6 of the Municipal Employment Relations Act. On September 24, 1998 the WERC certified that an impasse had been reached and ordered arbitration.

On October 26, 1998, on the advice of the parties, the WERC

appointed the undersigned to arbitrate the dispute. A hearing was held on January 14, 1999 in Madison, Wisconsin at which time the parties were present and given full opportunity to present written and oral evidence. A transcript of the hearing was made and briefs were filed by the parties, the last of which was received by the arbitrator on April 10, 1999.

#### Statutory Criteria

As set forth in Wis. Stats. 111.70(4)(cm), the arbitrator is to consider the following criteria:

7. "Factor given greatest weight." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of the factor in the arbitrator's or panel's decision.
- 7g. "Factor given greater weight." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.
- 7r. "Other factors considered." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:
  - a. The lawful authority of the municipal employer.
  - b. Stipulations of the parties.
  - c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

- d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.
- e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.
- f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.
- g. The average consumer prices for goods and services, commonly known as the cost-of-living.
- h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties in the public service or in private employment.

#### Final Offers of the Parties

Two issues were placed before the Arbitrator: (1) the general wage increase to be paid in 1998 and 1999; and (2) the Union's proposal that part-time employees in the Library Unit will receive an overtime payment of time and one-half for all

hours worked on Sundays. Only the Sunday overtime payment, however, is in dispute.

#### The Union's final Offer

(Italicized language will be added and strikeouts deleted).

12.05 Shift Differential: Employees performing authorized work between the hours of (six) 6:00 p.m. and (six) 6:00 a.m. and for all hours worked on a contract designated holiday, shall be paid a premium of fifty (\$.50) cents per hour. *Effective January 1, 1999, employees performing authorized work on Saturday outside the hours cited herein above shall be paid a premium of twenty-five (\$.25) cents per hour.* ~~Employees performing authorized work on Sunday shall be paid a premium of seventy five (\$.75) cents per hour.~~

#### 13.01 Hours of Work

##### *E. Sunday Hours*

1. *All Sunday hours will be additional hours for employees and are not to be considered as part of the normal work week. Sunday shall be considered overtime.*
2. *Sunday hours will be filled with volunteers from the classification and department/division involved. If there are insufficient volunteers from within the department/division, volunteers will be solicited within the classification throughout the bargaining unit. Seniority shall be used in selecting slots by volunteers. If there are still insufficient volunteers, the Library may assign employees from the classification from the department/division involved by inverse order of seniority. The Library shall solicit volunteers on a quarterly basis.*
3. *Security will be provided during all hours the library is open.*

#### Wage Rates

1. Effective the beginning of the pay period that includes January 1, 1998 - 3%.
2. Effective the beginning of the pay period that includes January 1, 1999 - 2.8%.

## The City's Final Offer

(Italicized language will be added and strikeouts deleted).

12.05 - Shift Differential: Employees performing authorized work between the hours of (six) 6:00 p.m. and (six) 6:00 a.m. and for all hours worked on a contract designated holiday shall be paid a premium of fifty cents (\$.50) per hour. Employees performing authorized work on Sunday shall be paid a premium of seventy-five cents (\$.75) per hour. *Effective January 1, 1999, employees performing authorized work on Saturday outside the hours cited herein about shall be paid a premium of twenty-five cents (\$.25) per hour.*

### 13.01 Hours of Work:

#### *E. Sunday Hours*

1. *All Sunday hours worked will be additional hours for full time employees and are not considered as part of the normal work week.*
2. *Part time employees who work on Sunday will receive the seventy-five cents (\$.75) per hour premium pay in addition to their normal rate of pay. If a part time employee has worked thirty-eight and three-quarters (38  $\frac{3}{4}$ ) hours in the same work week in which they work a Sunday, all hours worked beyond 38  $\frac{3}{4}$  hours will be at time and one half their normal rate of pay.*
3. *Sunday work hours will be filled with volunteers from the classification and department/division involved. If there are insufficient volunteers from within the department/division, volunteers will be solicited from with the classification throughout the bargaining unit. Seniority shall be used in selecting slots by volunteers. If there are still insufficient volunteers, the Library may assign employees from the classification from the department/division involved by inverse order of seniority. The Library shall solicit volunteers on a quarterly basis.*
4. *Security service will be provided during all hours the Library is open on Sunday.*

#### Wage Rate:

1. 3.00% increase effective the pay period that includes January 1, 1998.

2. 2.84% increase effective the pay period that includes January 1, 1999.

### The Parties' Positions

#### The Union's Position

The Union argues, first of all, that it is not relying on internal or external comparisons. Rather, says the Union, it is attempting to be faithful to the bargaining process created for previous negotiations by the former Mayor, Paul Soglin. According to the Union, once agreement is reached on the amount of funds available for wages and benefits each bargaining unit is free to spend on its own priorities. The more that is spent on benefits the less is available for general wage increases. The Union maintains that it used the same process and type of data that worked successfully in the 1996-97 negotiations.

The Union claims that the City's offer is a breach of this bargaining process. In the Union's view, the City has attempted to frustrate the process by refusing to agree on the cost of the Sunday overtime benefit. Moreover, says the Union, the City can not refuse to sell a benefit unless it is illegal or if the Union is willing to pay the price by a commensurate reduction in the wage increase to be applied. This, argues the Union, it has done. It calculated the cost of the benefit and then reduced the general wage increase from 2.84% to 2.80%. Thus, says the Union, its membership has paid for this new benefit by taking less in wages than was available.

The second argument raised by the Union is that its offer is fairer. That is, all Library employees who work on Sunday - whether full-time or part-time - will receive overtime for such work. As a consequence, contends the Union, compensation will be equitable and will result in an increase in the pool of employees willing to work on Sundays. Further, maintains the Union, the Sunday work requirement is not simply a minor inconvenience but a major disruption of the work and personal lives of Library employees.

Third, the Union disputes the Employer's claim that the Union proposal will disrupt internal consistency. Contending that there is no uniformity among wages or benefit packages among the different City bargaining units, the Union argues that each bargaining unit chooses how to spend money available for compensation based on its own specific needs. Moreover, the City agreed to a Saturday differential for both Library units even though no other City employees receive this benefit. Thus, the Union adds, "whipsawing" is unlikely to cause the benefit to spread beyond the Library unit.

Fourth, the Union contends that its proposal does not create an unusual or unique benefit. In support of this point, it presents evidence that it argues shows that libraries across the state already provide overtime for Sunday work whether considering either full-time or part-time employees.

Finally, the Union dismisses the City's contention that the Fair Labor Standards Act (FLSA) is applicable, asserting that the

FLSA is irrelevant.

### The City's Position

As a general matter, the City points out that the 1996-97 contract provides that Library unit employees working on Sundays will be paid a premium of \$.75 cents per hour. For reasons considered below, the City's proposal would not change the status quo.

First, the City contends that internal comparisons support its position. Citing, for example, Parking Utility part-time cashiers who work Sundays on a straight time basis, the City maintains that part-time City employees do not receive the Sunday overtime benefit the Union is seeking. The City argues that if the Union proposal is granted the benefit will spread to other bargaining units, most notably the Professional Librarian unit that has a "me-too" clause in its contract.

The City also asserts that the Union's proposal will permit part-time employees to receive overtime pay at a faster rate than will regular full-time employees. According to the City, Library unit employees would not have to work 38  $\frac{3}{4}$  hours per week to be eligible for overtime pay.

Second, the City challenges the Union's interpretation of the bargaining system adopted by the Parties for the previous round of negotiations. On the one hand, the City contends that it has not agreed to the costing of the Sunday overtime issue. On the other hand, the City also disputes the premise that it agreed that "everything" is for sale. With regard to the latter point,

the City says that everything that was proposed did not end up in the final agreement nor did everything get costed. The Union, says the City, initially requested additional benefits and later withdrew them. Accusing the Union of trying to have it both ways, the City argues that the Union can not deny buying while not permitting the City to deny selling an item.

Finally, the City maintains that the Fair Labor Standards Act requires only that overtime be paid after 40 hours or a normal work week. Thus, concludes the City, there is no requirement under the FLSA to pay overtime premiums based on the Union demand.

#### Background

The City's employees are organized across nine separate bargaining units three of whom are represented by Local 60. Two of Local 60's units consist of employees at the Madison Library system: 37 professional librarians (Librarian Unit); and 63 paraprofessional clerical and technical employees (Library Unit).<sup>1</sup> The Parties are at impasse over the collective bargaining agreement for the Library Unit.

Data presented at the hearing indicate that 52 percent of the members of the paraprofessional Library unit are part-time workers and more than half are also employed in clerical positions. In contrast, 38 percent of the Professional Librarian Unit are part-time employees. Local 60's general City unit is six percent part-time while four of the other City bargaining units

have no part-time employees (Police, Fire, Streets and Trades). In the remaining three units part-time employees range from 42%(Nurses), 11%(Transit) to 8%(Attorneys).

The Madison Library System itself consists of a central library, seven branch libraries and a Municipal Reference Center, providing services across South Central Wisconsin. The library system traditionally has been open Monday through Saturday except for a 13-week experiment carried out in 1991. However, during the current round of negotiations the parties entered into a memorandum of understanding by which the Library could be open on Sundays on a limited basis.<sup>2</sup> The memorandum provides a two year pilot project under the following terms:

- Library building will be open four hours on 28 Sundays
- Employees will work 4 ¼ hours
- Sunday hours will be scheduled from the first Sunday in October through the last Sunday in April.
- One Clerk (Circulation) and one Library Assistant (Audiovisual/Fiction Area) will work each Sunday
- Volunteers will be solicited within the classification throughout the bargaining unit
- Seniority shall be used in selecting slots by volunteers
- If there are insufficient volunteers employees will be assigned by inverse order of seniority from classification

The Tentative Agreements also provide, in a restatement of Section 13.01(B) - Work Week, that the normal work week for full-time employees will consist of 38 ¾ hours within the period of Monday through Saturday.<sup>3</sup> The prior contract defined the normal work week as Sunday through Saturday. The consequence of this

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<sup>1</sup> Union Exhibit #6.

<sup>2</sup> Union Exhibit #4, "Summary of Tentative Agreements", Item #12.

change is to allow full-time Library Unit employees to receive 1.5X overtime for any hours worked on Sundays.

#### Discussion

First, it should be noted as MERA requires in 111.70(4)(cm)7, "Factor Given Greatest Weight", that the Parties to this dispute have given no consideration in their evidence or argument to this statutory factor. Therefore, the Arbitrator has not addressed this factor in his decision.

Second, the City has argued the applicability of the Fair Labor Standards Act to this dispute. The MERA contains no mention of the FLSA in its list of factors to be considered. The Arbitrator has no jurisdiction or standing to interpret or apply the FLSA in the instant interest arbitration. The Arbitrator agrees with the Union that the FLSA is not relevant to the case at hand.

Third, the Union devotes much of its argument to the contention that the City has breached an agreement to engage in "Consensus" bargaining. The Union asserts that it has hewed faithfully to a process initiated by a previous City administration in which benefits and other bargaining items may be "bought" by the Union through a commensurate reduction in an agreed upon general wage increase. The Union accuses the City of failing to follow the process by refusing either to cost or to sell the Sunday overtime for part-time workers it seeks. The City's reply is merely that it neither has to cost nor to sell if

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<sup>3</sup> Ibid. Item #1.

it so chooses.

The Arbitrator is sympathetic to the Union's complaint concerning the City's alleged breach of an apparent agreement to adopt a "consensus" approach to the Parties' contract negotiations. Whether under the name of "win-win", "principled bargaining", "Integrative Bargaining" or similar such labels unions and employers have been seeking for some years now to find a better way than the traditional zero sum approach on which to base their contractual relationships. While the Arbitrator is a strong advocate of such bargaining approaches he has no authority in this instance to order the Parties either to adopt such an approach in the first instance or to resurrect one that is no longer working as anticipated. The undersigned also has no standing in this interest arbitration to penalize one of the parties for an alleged failure to follow the procedures by which such negotiation systems are often structured. This alone is a matter for the Parties to this dispute to resolve.

If, however, the Union is alleging that the City has failed in its duty to bargain in good faith under MERA the remedy for this also lies outside the realm of the instant interest arbitration. The proper forum for such issues is the Wisconsin Employment Relations Commission. As stated above with regard to the Fair Labor Standards Act, the Arbitrator has no jurisdiction to enforce or apply the prohibited practices section of the Wisconsin Municipal Employment Relations Act.

Fourth, the Arbitrator finds little evidence in either the

external or internal comparisons to support the Union's final offer. With regard to the former, only three of the seven largest unionized library systems in Wisconsin provide a time and ½ premium payment to part-time library employees for Sunday work.<sup>4</sup> On the other hand, a review of the internal comparables show no instances in which part-time City of Madison employees working Sunday hours receive a 1.5X premium. This is exemplified in the Professional Librarian unit in which the Union agreed to a \$.75 per hour premium pay for part-timers working Sunday.<sup>5</sup> Another illustration is the City's Parking Utility Division, also represented by Local 60, in which approximately six of 15 permanent part-time cashiers staff the City's parking ramps on Sundays and are paid straight time plus a Sunday premium.<sup>6</sup> While the Union would explain away the lack of an internal pattern supporting its position, nevertheless, the Arbitrator is not prepared to ignore this situation. Under the circumstances, the Union's offer would constitute a significant policy change in the Parties' collective bargaining agreement, altering the status quo in a major way.

Arbitrators are in general agreement that policy changes should not be imposed through interest arbitration.<sup>7</sup> While arbitrators differ somewhat in the analysis they apply in

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<sup>4</sup> Waukesha, Oshkosh and Eau Claire. Employer Exhibit #1, Union Exhibit #34.

<sup>5</sup> Union Exhibits #7 and 19.

<sup>6</sup> See the testimony of Karen Stults, Revenue Supervisor for the Parking Utility, tr. At 77-80.

<sup>7</sup> See Columbia County (Health Care Center), Kessler, Dec. No.

evaluating efforts to alter a policy status quo the consensus requires as a necessary condition that the proponent for change demonstrate convincingly such need.<sup>8</sup> Among the evidence taken in support of changes is a showing of prevailing patterns of practice among relevant comparable municipal governments or employees.<sup>9</sup> The Union has not made that showing here.

#### Summary

In sum, the Arbitrator finds that the City has prevailed in its position.

#### AWARD

In light of the above discussion and after careful consideration of the statutory criteria enumerated in Section 111.70 (4)(cm)7 Wis. Stat. the undersigned concludes that the City's final offer is more reasonable. Therefore, the final offer of the City shall be incorporated into the Collective Bargaining Agreement for the period beginning January 1, 1998 and extending through December 31, 1999.

Dated at Middleton, Wisconsin this \_\_\_\_\_ day of June, 1999.

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Richard Ulric Miller, Arbitrator

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28960-A, 8/20/97.

<sup>8</sup> City of Verona (Police Department), Malamud, Dec. No. 28066-A, 12/30/94.

<sup>9</sup> Maple Dale-Indian Hill School District, Stern, Dec. No. 27400-A, 2/18/93.