BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

STEVENS POINT CITY EMPLOYEES LOCAL 309
(DPW), AFSCME, AFL-CIO

and

CITY OF STEVENS POINT (DPW)

Case 123
No. 62187 INT/ARB-9905
Decision No. 30913-A

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 35, Plover, Wisconsin, 54467-0035, on behalf of the Union.

Mr. Louis J. Molepske, City Attorney, City of Stevens Point, 1515 Strongs Avenue, Stevens Point, Wisconsin 54481-3594, on behalf of the City.

ARBITRATION AWARD

Stevens Point City Employees Local 309 (DPW), AFSCME, AFL-CIO, hereinafter referred to as the Union, and City of Stevens Point (DPW), hereinafter referred to as the City or Employer, met on several occasions in collective bargaining in an effort to reach an accord on the terms of a new collective bargaining agreement to succeed an agreement, which by its terms was to expire on December 31, 2002. Said agreement covered all regular full-time and regular part-time employees of the Department of Public Works and Department of Parks, Recreation and Forestry, except the Director of Public Works, Street Supervisor, Director of Parks, Recreation and Forestry, Assistant Street Supervisor, Park Supervisor, Recreation Facilities Supervisor, clerical and administrative aides, summer, seasonal and temporary employees. Failing to reach such an accord, the Union, on March 7, 2003, filed a petition with the Wisconsin Employment Relations Commission (WERC) requesting the latter agency to initiate arbitration, pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act, and following

an investigation conducted in the matter, the WERC, after receiving the final offers from the parties by May 21, 2004, issued an Order wherein it determined that the parties were at an impasse in their bargaining, and wherein the WERC certified that the conditions for the initiation of arbitration had been met, and further, wherein the WERC ordered that the parties proceed to final and binding arbitration to resolve the impasse existing between them. In said regard the WERC submitted a panel of seven arbitrators from which the parties were directed to select a single arbitrator. After being advised by the parties of their selection, the WERC, on July 6, 2004, issued an Order appointing the undersigned as the Arbitrator to resolve the impasse between the parties, and to issue a final and binding award, by selecting either of the total final offers proffered by the parties to the WERC during the course of its investigation.

Pursuant to arrangements previously agreed upon, the undersigned conducted a hearing in the matter on October 12, 2004, at Stevens Point, Wisconsin, during the course of which the parties were afforded the opportunity to present evidence and argument. The hearing was not transcribed. Initial and reply briefs were filed and exchanged, and received by April 30, 2005. The record was closed as of the latter date.

THE FINAL OFFERS OF THE PARTIES:

The Union and City Final offers are attached and identified as Attachment "A" and "B," respectively. Attachment "C" is the list of tentative agreements.

BACKGROUND:

The instant DPW unit, with approximately 49 employees, is one of six bargaining units in the City. The others are the police (42 employees), fire (44), water and waste water (20), clerical (20) and transit (17). The latter two are also represented by AFSCME.

Prior to January 1, 2003, all six units received supplemental payments to worker's compensation claims. In the police, fire and wastewater units, the benefit was bargained. In wastewater, the benefit is in the contract. The police unit bargained the benefit as part of a grievance settlement. The fire receive the benefit pursuant to an "existing practice" clause. [1] The AFSCME unites have received the supplement for many years pursuant to City administrative policy. The policy was terminated for the AFSCME units by the following letter dated December 30, 2002, sent to Union Representative Gerald Ugland, over the signature of the City Attorney:

> As you may be aware, the City has a long-standing practice of making up the difference between an employee's regular pay and the benefit they receive from the City's worker's compensation carrier when they are off work due to a work related injury.
>
> By way of this letter, I am informing you that the city intends to cease this practice at the end of the contract term (12/31/2002) for the three City bargaining units you represent (Streets & Parks, Clerical and Related and Transit). (Union Exhibit 6)

The policy in pertinent part reads as follows:

> All worker's compensation payments should be sent in care of the Personnel Office so the Accounting/Data Processing Manager can be informed of the amount of the payment. The difference between his/her normal gross wage and the worker's compensation payment.

At the hearing, the Union representative presented exhibits in support of its position and reviewed and explained the exhibits to the Arbitrator.

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[1] Tr., p. 31.

The Employer presented two witnesses. Witness Eric Twerberg [2] offered testimony regarding the City's health insurance plans and how they compared to the plans of comparable cities. He opined that the City of Stevens Point plan is superior. It has higher deductibles and lower co-pays than the comparables, (City Exhibit 1).

Lisa Jakusz, the City's Personnel Specialist Director, who is a member of the City's bargaining team testified regarding the Union's worker's compensation proposal. She testified that the City has had a worker's compensation supplemental plan policy applicable to the instant unit for many years. The City, after giving notice to the Union, unilaterally discontinued the plan effective January 1, 2003. The move was necessary due to budget problems and the number of lost days experienced in the unit. She testified that after the City's discontinuance of its supplemental payments to worker's compensation the number of cost days and cost to the City decreased, (City Exhibits 4, 7 and 8). Jakusz offered additional testimony regarding the total package cost of the Union's offer, (City Exhibit 3), benefit cost per employee, (City Exhibit 2), settlements among comparables, (City Exhibit 4 and 5), and the change in CPI, (City Exhibit 6).

Concurrent with negotiations, the Union filed a prohibited practice complaint with the WERC alleging that the Employer committed a prohibited practice by unilaterally discontinuing the worker's compensation supplemental plan and thereby failing to maintain the status quo upon expiration of the parties' collective bargaining agreement. The WERC Examiner issued his decision on May 16, 2005, during the pendency of the instant interest arbitration case. The Employer appealed that portion of the Examiner's Conclusions of Law (paragraph B. 1.) that

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[2] Twerberg specializes in insurance marketing and is employed by Virchow Krause accounting firm.

awarded interest as part of the make-whole remedy. There was o appeal of the substantive issues.

ISSUES:

At the hearing, the parties agreed that all items in their proposals that match up will be considered to be tentative agreements. They agreed that the matched up items are reflected in the Union's list of tentative agreements, (Appendix C).[3] Additionally, the Employer agreed that the Union's proposal regarding Section 9, Limited Term Employees is a tentative agreement.[4]

As a result, there are three issues in dispute. The Union's worker's compensation proposal and the City's Section 9 – Job Availability proposal and its "note" at the end of "Appendix A."

It is abundantly clear to the Arbitrator as well as the parties that the only real issue in this case and the one that prevented a voluntary settlement is the Union's worker's compensation proposal. The City's two proposals are so minor and insignificant in comparison that they really need no discussion. Accordingly, the party that prevails on the big issue will be deemed to have the more reasonable final offer.

POSITIONS OF THE PARTIES:

The parties filed comprehensive, well-reasoned initial and reply briefs in support of their positions including the citation of numerous cases in support thereof. What follows is not intended to be a detailed review of the parties' arguments, but rather, a brief general overview of their main arguments. The parties, however, should be assured that the Arbitrator has reviewed their briefs, and cases and sources cited therein, in detail.

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[3] The parties agreed that the tentative agreement on Section 17, B. 3. (Health Insurance – Prescriptions) is effective January 1, 2003.

Union's Position

The Union's position is best summarized by the Union in its brief as follows:

> The Union believes that the most significant factor in this arbitration is maintenance of the status quo provision for a wage payment when an employee has a work-related injury or illness. Thought the Employer repudiated the practice of paying employees according to the City's policy, effective the end of the last day of the previous contract, Arbitrator Imes would clearly consider the practice to be the status quo:
>
> > At issue between the parties is whether or not the status quo relevant to high school department chairmen compensation should be maintained. Not a clause heretofore in the collective bargaining agreement, the Association has proposed the District's past practice be continued, while the District has proposed eliminating the release time practice and providing additional compensation for the elimination of the release time in certain instances. The undersigned finds there is no persuasive reason for why the status quo should be changed. [9]
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> [9] School District of Wausau (Professionals), Decision No. 18189-A (4/1/1982), Arbitrator Sharon Imes, Page 5; underlining added for emphasis.

Arbitrator Imes insisted on a compelling need for removal of a long-standing practice though in the School District of Wausau case it was not documented in the collective bargaining agreement.

> It is not uncommon for arbitrators to require a "compelling need" be shown and/or that a quid pro quo exist in order to justify the removal of benefits secured by a party through negotiations. The undersigned recognizes in the question at hand that the benefit is not a negotiated benefit. However, it may be assumed that the shaping of bargaining demands over the years has encompassed the silent recognition of existing benefits.[10] Although compensation for the department chairmen has not been a negotiated clause, as a benefit, it has existed for 20 years. Further, this benefit was maintained even after the bargaining unit was formed in 1971 and the duties were changed. This benefit, under these circumstances, forms an implied term of the contract. Thus, in order to eliminate the benefit, the same standard exists as if it were a negotiated clause.[11]

[10] Id. Imes cited: Elkouri and Elkouri, How Arbitration Works, Third Edition, Page 398.

[11] Id., Page 5; underlining added for emphasis.

Having established that the practice is the status quo, it is incumbent upon the Employer to recognize this with compelling rationale for removal of the supplement and to offer a quid pro quo ante. The Employer is unable to demonstrate that they have done either. There is no sufficient rationale, considering that all the non-AFSCME bargaining units continue to have the supplement. There is no quid pro quo ante at all!

The Employer causes an unreasonable burden on the employees by not offering a quid pro quo ante. The loss of the supplement is a dramatic change of benefits for the employees, which should be compensated or the change should not occur. The Employer's position is to remove the benefit and this is contrary to the fundamental standard established by Arbitrator Reynolds, in Adams County,[12] it puts an unreasonable burden on the employees.

Based on Arbitrator Imes' decision that Employer, in School District of Wausau, did not provide justification for eliminating the practice not mentioned in the collective bargaining agreement, nor did the District offer a sufficient quid pro quo. The parallel here is striking.

> The District neither established a need for change nor provided an offer of buy out sufficient to create a quid pro quo for the benefit. The District argues primarily that both external and internal comparisons support its position. While the survey submitted by the District pertaining to duties and responsibilities of department chairmen indicates that some of the same duties are performed throughout the comparable districts, the undersigned questions the reliability of such a survey. It is clear in reviewing the exhibits the types of responsibilities assigned to department chairmen varied by individual school district. Further, there is no way to account for each school district's expectations of performance, demands placed upon the chairmen by the structures of their individual school district's expectations of performance, demands placed upon the chairmen by the structures of their individual school systems, etc. Thus, each school district's decision as to what is appropriate compensation for department chairmen duties necessarily is a function of the time and committment (sic) which is expected of the chairs by each district.[13]

[12] WERC Decision No. 25479-A, 11/22/88.

[13] Id.

Just as we have here, Imes concluded that there was insufficient reason to impose a change in the status quo rather than have the parties work out a negotiated settlement.

> Absent a showing of need for change or a showing of financial difficulties if the status quo were to be maintained, the undersigned finds no reason why she sould (sic) implement a change in working conditions which is more appropriate accomplished voluntarily by the parties. Further, the inconsistency of the compensation, together with the minimum amount offered to buy out the clause, leads the undersigned to conclude the Association's offer is more reasonable.[14]

[14] Id, Page 6.

The Employer provides no quid pro quo for elimination of the supplement. The Employer doesn't even offer that sick leave or other paid leave could be used to continue an employee's full wage. Even the City of Wausau provides for use of paid leave to supplement worker's compensation. The City of Wisconsin Rapids and the City of Marshfield provide a supplement without using other paid benefits. All of the internal comparables either are bargaining to continue the same practice this unit had prior to December 31, 2002, or still have the benefit under some arrangements with the Employer. The internal comparables all favor the Union.

Furthermore, the current collective bargaining agreement contains a clause, "Most Favored Nation" which automatically gives to this bargaining unit the same benefits as the other bargaining units. Therefore the supplement that the utility, police and the firefighters enjoy must be available to this unit. The clause states:

SECTION 27 – MOST FAVORED NATION

> The City hereby agrees that in the event one or all of the other collective bargaining units of the City (Clerical) receive either as a result of bargaining or interest arbitration, fringe benefits (retirement, insurance, sick leave, holidays, vacations), during the term of this Agreement which exceed those fringe benefits under

> this Agreement, said benefit or benefits shall also automatically apply to all employees who are covered by the terms and conditions of this Agreement.
>
> The language of this paragraph says "in the event that one or all of the other collective bargaining units of the City." This is plain enough. The word "(Clerical)" adds nothing to the understanding of this clause. This unit shall benefit from that clause and the Employer cannot claim that the supplement is not rightfully the status quo.
>
> In the case of Section 27, E., the Union is simply attempting to codify what it already has as status quo, but offering a limitation of forty-five (45) work days, to limit the Employer's exposure. The Union is simply asking for what the other City units have and adding a limitation on the City's exposure. The Union is simply asking for the continuation of the practice under Section 14, A., of the current collective bargaining agreement. The Employer offers no quid pro quo and illustrate no compelling need to remove the supplement.
>
> There is no additional cost to the supplement because it is the status quo. In fact, the Union's proposal will reduce each instance of worker's compensation leave that lasts more than forty-five (45) work days. Therefore, there is a savings to the City. [4]

For all of the above-mentioned reasons, the Union argues that its offer is superior in all respects and should therefore be implemented.

Employer's Position

The Employer takes issue with the Union's position that even though there was no contractual language which would require the City to continue the worker's compensation supplemental payment it is implied in law where over a long period of time a practice has occurred. Further, it is argued that the Union's reliance on the School District of Wausau case and Elkouri and Elkouri is misplaced.

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[4] The Union's brief pages 22-25.

Elkouri recognizes that principles of contract law apply like "offer and acceptance" and that there must be a "meeting of the minds" to form a contract. Here there was neither.

In the Wausau case, the Arbitrator found the benefit in issue formed an "implied term of the contract" because it was a long-time (20 years) practice. But, here, it is argued the City had reserved the right in its Administrative Policies to amend and repeal any portions of the same at any time it deemed fit. It is undisputed that it has done so in the past. There is no language in the Administrative Policies which would indicate that the policies form a contract or create any vested rights in an employee.

The Employer argues that the Union has not provided any precedent or principle of law which would formulate a contract under the facts of this case. All of the precedents cited involve unwritten past practices. Here, there is no ambiguity in the City's right to unilaterally change the Administrative Policies, and therefore, no past practice can arise. It is argued that to formulate a contract there must be a mutual understanding that a benefit is granted and cannot be unilaterally removed by either party. While Elkouri discusses at length in Chapter 12 Custom and Past Practices, the treatise does not discuss a situation where a reservation of the right to amend exists. In those cases, the language of the policies would govern and permit amendment.

However, if the Arbitrator were to find a past practice exists, it is the Employer's position that it should prevail based on its showing for a need for change and the fact it provided a quid pro quo.

The reasons and circumstances for changing the policy consisted of:

1. Budgetary constraints on the City considering the cost of the benefit.
2. Misuse of the benefit by members of the bargaining unit.
3. A disincentive for employees to return to work timely.

4. Financially beneficial for an employee to be on worker's compensation for an extended period of time since it resulted in full salary with two-thirds not taxable. [City Exhibit #7]

5. Income Continuation Benefits replaces supplement.

It is argued that today, municipal budgets are severely limited by statute, and with the advent of TABOR or a form thereof, will only create additional financial problems. The City, therefore implemented cost-reducing policies including the elimination of the worker's compensation supplement. The supplement in 2003 and 2004 would have exceeded $18,000.00.

The supplement as designated in the Administrative Policies by the City resulted in a large number of lost days due to alleged worker's compensation injuries. The City points out the dramatic decrease in claims since this policy was implemented on January 1, 2003. The days lost in 2004 through October 8 were 175 versus 446 in calendar year 2002, (Employer Exhibit 8).

Further, Employer Exhibit 7 depicts the lucrative result of being on worker's compensation together with the supplemental payment originally provided in the Administrative Policies. An employee earning $32,000 per year given the worker's compensation scenario would in effect be making $34,550. The City argues, as Jakusz testified, there is no incentive for an employee to return to work when there is a greater monetary return by staying home.

The City submits that it has shown:

1. A need for change exists;

2. A proposed change reasonably remedies the situation;

3. The change will not cause an unreasonable burden on the other party.

Under that scenario, arbitrators have determined that a quid pro quo may not even be required. [5]

In the event an arbitrator would determine that a quid pro quo is necessary, it is the City's position that it has provided quid pro quo in maintaining the health insurance premium contribution by the Employer at 94% for the family plan and at 100% for the single plan. Moreover, as testified by Eric Twerberg an insurance consultant from Virchow Krause, the City's the Stevens Point's health insurance plan overall was superior to the insurance plans of the City of Marshfield, City of Wisconsin Rapids and the City of Wausau, the City's external comparables.

The cost of the health insurance increase per employee over the term of the contract amounted to $2,362 per employee. This results from an 8% increase in the premium in 2003 and a 15% increase in the premium for 2004.

The City argues that the only concession made by the Union for the term of this agreement was an increase in the prescription drug co-pay, which amounts to $110.69 per employee.

The cost of the supplemental payment, (City Exhibit 3), amounts to a total of $355.50 per employee over the term of the contract. This calculation is made by adding $11,374.97 and $7,111.03 and dividing by the 52 bargaining unit employees at the expiration of the contract.

Even though the Consumer Price Index (CPI) provided for a cost of living change of 2.2% in the years of 2003 and 2004, the City has elected to offer a 3% across-the-board wage increase for the unit.

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[5] New Berlin Public Employees, Decision No. 29683-A, p. 17, Arbitrator Fredric Dichter, citing Adams County Highway Department, Decision No. 25479-A, Arbitrator Reynolds.

Wisconsin retirements rates have also increased for the years of 2003 and 2004 by .04, which under the current contract is totally paid for by the Employer and continues in the present offer.

Giving credit to the Union for the drug co-pay and the elimination of the supplemental payment, the contract offer of the City provides a quid pro quo of nearly $1,900 per employee.

With respect to external comparables, the City recognizes that its comparables have traditionally been Wausau, Wisconsin Rapids and Marshfield. The City of Wausau worker's compensation provision is not as generous as what the City of Stevens Point currently offers. Wausau provides for the use of such leave to supplement worker's compensation benefits.

The City argues that the City of Stevens Point allows the use of accrued sick leave or vacation to supplement worker's compensation benefits. The City of Stevens Point's worker's compensation benefit is therefore more generous than Wausau.

The City of Marshfield, Wausau and Wisconsin Rapids have bargained for the worker's compensation supplement payment and it has been reduced to writing within their contract. How, when and under what circumstances the worker's compensation supplemental benefit was bargained for in Marshfield and Wisconsin Rapids is unknown. Additionally, the record is void as to whether or not income continuation insurance, which is provided to City of Stevens Point employees, is provided in the other communities.

Most Favored Nations Provision

The "Most Favored Nations" provision contained in the AFSCME contract (Streets and Parks) is similar in language in the other AFSCME contract (Clerical and Related). The Union would argue that the addition of the word "clerical" adds nothing to the understanding of the clause. Each of the respective contracts refers to the other contract and therefore limit the affect

of this provision to "Clerical and Related" and "Streets and Parks," respectively. The Union would attempt by this tortured reading to implement a benefit that it does not now possess.

Should the offer of the Union be implemented, there would be an automatic implementation of the benefit to the "Clerical and Related" unit. This amounts to changing the status quo by their respective offer.

Based on the above, the City respectfully submits that its offer is more reasonable and should therefore be implemented.

Union's Reply Brief

The Union argues that while the Employer repudiated the worker's compensation supplemental practice on January 1, 2003, it continued the practice until August 2003. The Union asserts that there is arbitral case law that supports a finding that alteration of the City's policy and practice in August 2003 amounts to a change after the stated date of repudiation, and therefore a continuation of the policy and practice. Actual discontinuance in August 2003 amounts to an alteration after expiration of the previous contract and is not a timely effectuation of the refutation.

Furthermore, the Union contends, nothing in the City's policy was put into the record which makes clear to employees that policy can be unilaterally changed. Thus, it is argued, it is not stated in the policy. Therefore, employees had no notice of the City's claimed reserved right to unilaterally change what appears in the policy.

The Union admits that while the worker's compensation benefit was not bargained, the parties clearly knew of its existence when they negotiated the contract. Again, the Union argues that this case is similar to the School District of Wausau case in which the arbitrator found a practice regarding a benefit to be an implied term of the contract.

Nor, the Union avers, has the Employer established "changes of circumstances" or "budgetary constraints," or "misuse of the benefits by members of the bargaining unit" as justification for discontinuing the worker's compensation supplement benefit. The Union argues that the Employer has remedies under the worker's compensation statute to address misuse of worker's compensation or an employee's disincentive to return to work. Discontinuing the benefit is not the answer. Further, while the City claims budgetary constraints, it did not prevent the City from continuing the benefit with the other non-AFSCME City units.

The Union contends, contrary to the Employer, that the income continuation insurance does not replace the supplement. It does not for the first 180 days. It is also argued that the Employer's figures of use do not credibly establish that the elimination of the supplement in 2003 resulted in fewer worker's compensation days in 2003.

With respect to quid pro quo, it is the Union's position that the City's claim of same is really not a quid pro quo. It argues that the insurance contribution is at the same contribution as before and the same as received by the other non-AFSCME units. It is nothing more than what the internal comparables also get. The same, it is argued, is true with the wage proposals because the general wage increase for this unit is within the range of what other bargaining units received.

The Union argues that for all of the above reasons its final offer is more reasonable because while it seeks to continue the supplemental benefit it caps it at 45 days. Its offer will save the Employer money. The Employer wants to eliminate it altogether. There is neither internal nor external support for the discontinuance.

The Employer's Brief

The Employer disputes the Union's claim that there is nothing in the record to indicate that the City has unilaterally amended, repealed and adopted new Administrative Policies on a regular basis. The Employer argues that Lisa Jakusz, the Personnel Specialist, testified to this fact and her testimony stands unchallenged by the Union. The Union could have cross-examined her or put the policy into the record but the Union did neither. It is on this basis, the City claims, that the Union's reliance on the School District of Wausau case is misplaced.

The Union claims that the AFSCME units are the only ones being deprived of the worker's compensation supplement, but, the City argues, the other units unlike AFSCME bargaining for the benefit.

With respect to the Union's modified benefit of limiting it to 45 days, it is argued that said modification is really not substantial because most of the claims are for less than 45 days. The proposal would not have substantially changed the cost to the City for the supplemental benefit for 274 days of lost time over a three-year period.

Based on its original arguments and the above, the City submits that its offer is more reasonable and should therefore be implemented.

DISCUSSION:

Section 111.70(4)(cm)7 of the Wisconsin Statutes directs the Arbitrator to give weight to 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 expenditure 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 this 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 shall 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 employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.

e. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes 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 employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes 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 employed, (sic) including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization 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.

The Arbitrator in applying the above criteria must determine which offer is more reasonable based on the evidence presented.

The parties agree that there really is only one issue in dispute; the Union's worker's compensation proposal. There are two issues regarding two of the Employer's proposals, but they are so minor that they do not impact on the outcome of the case.

This case is rather unique. This is to because in addition to the primary issue itself, there is an underlying issue as to who it is that is proposing a change. This brings into issue the question of what the statue quo was at the time of the expiration of the parties' predecessor contract. It is the Employer's position that it had a unilateral right (with proper notice) to discontinue the worker's compensation supplement because it was unilaterally adopted by Administrative Policy and not negotiated as part of the collective bargaining agreement.

It is the Union's position that the benefit was a past practice and was the status quo at the time of the expiration of the 2001-2002 contract and as such it is incumbent upon the Employer to establish a compelling need for elimination of the supplement and offer a quid pro quo.

This very issue (the status quo issue) was the basis of a prohibited practice complaint before the Wisconsin Employment Relations Commission (WERC). [6]

The WERC Examiner, after considering the impact of Article 26 – Entire Memorandum of Agreement and the fact that the worker's compensation supplement was not in the contract but in the City's Administrative Policy, concluded as follows:

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[6] Wisconsin Council 40, AFSCME, AFL-CIO vs. City of Stevens Point, Decision No. 30911-A (Examiner Shaw), 5/16/05. The Arbitrator will consider the decision because it falls within criterion i "changes in any of the foregoing circumstances during the pendency of the arbitration proceedings." The Arbitrator takes notice that the City has appealed the decision to the Commission, but its appeal is limited to a portion of the remedy and not to the substantive issues.

> For the foregoing reasons, the Examiner has concluded that the Respondent's providing of the Worker's Compensation supplement was the *status quo* that existed at the time the agreement expired, which the Respondent was obligated to maintain during the contract hiatus. However, as is the case with any practice that is without a basis in the written agreement, the Respondent may place the Complainant on notice that it does not intend to continue the practice of providing the benefit in future agreements. The Complainant then has the right and the opportunity to bargain for continuation of the benefit in the parties' successor agreement; however, until the parties obtain a successor agreement, either through successful negotiations or through interest-arbitration, the Respondent is required to maintain the benefit as part of the *status quo*.[7] (footnote omitted)

The facts in the instant case establishing a bond fide past practice are consistent with the Examiner's Finding of Fact number 4 wherein he found:

> 4. For at least 20 years prior to 2003, the Respondent provided employees who qualified for Worker's Compensation with their regular salary from the time they were injured on the job through the period in which they qualified to receive Worker's Compensation, by supplementing the Worker's Compensation payment to make up the difference. All three of the collective bargaining agreements covering the employees in the Department of Public Works, Clerical and Transit units are, and have been, silent on the issue of Worker's Compensation or the supplement to Worker's Compensation. Prior to January 1, 2003, the practice of Respondent's providing the supplement to Worker's Compensation, so that employees in these bargaining units continued to receive their regular pay during the period they qualified for Worker's Compensation, was long-standing, unambiguous and mutually-accepted, and had continued in force and effect from contract to contract over the years.
> (Page 4)

Further, it is undisputed that the continuation of the worker's compensation supplement is a mandatory subject of bargaining.

Also, the Examiner in Finding of Fact number 9 found:

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[7] Id., page 17.

> 9. By unilaterally ending the practice of providing the Worker's Compensation supplement so that an employee would continue to receive his/her regular pay from the time an employee is injured on the job through the period the employee is eligible for Worker's Compensation, in the bargaining units in question, following the expiration of the 2001-2002 collective bargaining agreements covering the employees in those units, the Respondent has failed to maintain the *status quo* with regard to that benefit.
> (Page 7)

The undersigned concurs.

Given the facts of this case, the Arbitrator finds instructive two previous interest arbitration awards on point.

In Twin Lakes #4 School District, Decision No. 26592-A (Petrie) 3/94, Arbitrator Petrie in addressing the issue of status quo reasoned as follows:

> . . . In the event that one party or the other is faced with demands to significantly modify past practice, to eliminate or to significantly modify previous language or benefits, or to add new language or innovative benefits, the process of give and take bargaining takes place. In the absence of extraordinary negotiation pressures, neither party would normally give up significant language of benefits or practices gained in past negotiations, without a so-called "quid pro quo" from the other party. When a negotiation's impasse moves to interest arbitration, the arbitrator adopts the same rationale as the negotiating parties, and he will avoid changing the status quo by giving either party what they could not have achieved at the bargaining table. The proponent of change in the status quo has the burden of establishing a persuasive case for such change, and bears the risk of non-persuasion; if an interest arbitrator concludes that the proposed change would not normally have been acceptable at the bargaining table without a quid pro quo flowing from the proponent of the change to the other party, he will be extremely reluctant to endorse the proposed change. (Underlining mine)

Here, it is the Employer seeking to change the status quo, albeit that it is a bona fide past practice that is the status quo.

It is within the above framework that the Arbitrator will determine which of the parties' two offers is the most reasonable.

Arbitrators have consistently held that to change the status quo, the party seeking the change must show a compelling need for the change and, in most cases, a quid pro quo. The two are inversely proportional. In other words, the greater the need, the lesser the quid pro quo required.

With respect to compelling need, Arbitrator Imes in a strikingly similar case [8] in which the employer discontinued a long-standing practice of compensating high school department chairmen, held as follows:

> Absent a showing of need for change or a showing of financial difficulties if the status quo were to be maintained, the undersigned finds no reason why she sould (sic) implement a change in working conditions which is more appropriate accomplished voluntarily by the parties. Further, the inconsistency of the compensation, together with the minimum amount offered to buy out the clause, leads the undersigned to conclude the Association's offer is more reasonable. [9] (footnote mine)

Here, the City has not established a compelling need for the unilateral change in status quo by eliminating the worker's compensation benefit, or has it offered a quid pro quo.

The City argues that the compelling need is the increase in usage of the benefit. While there has been an increase in usage as alleged, the extent of the monetary impact is $18,000 for a two-year period. This alone simply does not constitute a compelling need for a change without

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[8] School District of Wausau (Professionals), Decision No. 18189-A (Imes) 4/82.

[9] The Employer argues that said case is unlike the instant case where the City of Stevens Point retained the right to unilaterally change its policies. The WERC Examiner found, and the undersigned concurs, "... the unilateral reservation of rights in the policies that Respondent may change them from time to time would also not constitute a waiver on Complainant's part." (Page 16)

offering a quid pro quo.[10] The Arbitrator recognizes that the City of Stevens Point like most municipal employers are faced with budgetary constraints, but the matter of saving $18,000 out of an approximate $2,500,000 budget for this unit, [11] does not constitute a compelling need to unilaterally discontinue the status quo. It is best left to the give and take of negotiations. The same can be said of the Employer's claim of misuse of the benefit by members of this unit; the disincentive for employees to return to work timely; and the fact that it is financially beneficial for an employee to be on worker's compensation because two-thirds of their full salary is not taxable.

Likewise, neither does a comparison with internal or external comparables establish a compelling need for unilateral change. All City units had the same benefit until negotiations of the 2003-2004 contracts at which time the benefit for the three AFSCME units was discontinued. The other units, Police, Fire and Water, continue to receive the benefit.

The Arbitrator finds that while the benefit may have been negotiated with the three other units, the benefit in this case, nevertheless, has been in existence for over 20 years. Thus, in the opinion of the Arbitrator, the internal comparables do not form a basis to establish a compelling need for change.

The same can be said of the external comparables. [12] The City of Marshfield pays the difference between worker's compensation and full salary capped at 45 days. The City of Wisconsin Rapids pays 90% of normal net pay for the first 90 days and 90% of net pay thereafter

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[10] The Arbitrator does not find the Employer's desire to control the abuse of the worker's compensation supplemental benefit to be unreasonable, only that whatever abuse and increase in usage that exists is not so great that it needs no quid pro quo.

[11] City Exhibit 3.

[12] The parties agree that the appropriate comparables consist of the cities of Marshfield, Wausau and Wisconsin Rapids.

for the duration of the claim. The City of Wausau pays a supplement to worker's compensation to provide full pay, but the supplement is charged against the employees' sick leave account.

Moreover, the Employer has not offered a quid pro quo. It argues that it has made such an offer by maintaining its health insurance contribution in place of an 8% and 15% premium increase in 2003 and 2004, respectively, and that the 3% increase in wages agreed to by the parties is above the CPI of 2.2% in 2003 and 2004.

But, importantly, a quid pro quo is something for something. It is above and beyond what the parties' normal settlement would be without the item in issue. Here, none of the quid pro quo items cited by the Employer are above and beyond what would otherwise have been settled upon. There is no evidence that the continued insurance pick-up and 3% increases were offered as a quid pro quo.[13] The internal comparables indicate otherwise since the offer in this unit is in line with that of the internal comparables.

Lastly, the Income Continuation Program is not an adequate quid pro quo standing alone. It offers some benefits to the employees, but it has an elimination period of 180 days.[14] The discontinued supplement is effective from day one.

Based on the above, I find the Union's final offer to continue the parties' past practice of providing a supplement to the worker's compensation, but modified to cap at 45 days and one that is in line with both the internal and external comparables to be the most reasonable of the two offers.[15]

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13 This is not to say the Employer's offer or tentative agreements are not generous, only that they do not constitute a quid pro quo.

14 This is so because the Employer pays 100% of the premium.

Based on the foregoing facts and discussion, the Arbitrator renders the following

AWARD

After full consideration of the criteria set forth in the statutes and after careful evaluation of the testimony, arguments, briefs of the parties and the record as a whole, the Arbitrator finds the Union's final offer more closely adheres to the statutory criteria than that of the Employer's and directs that the final offer of the Union along with the parties' tentative agreements be incorporated into the collective bargaining agreement between the parties for the 2003-2004 term.

Dated at Madison, Wisconsin, this 27th day of June, 2005.

Herman Torosian, Arbitrator

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15 In so finding, the Arbitrator does not find that the Union's offer adds anything to the present benefit. It does not create a compensatory time off benefit or the ability to accrue holidays as claimed by the Employer. The Arbitrator finds that the fact that the proposal refers to same does not create those benefits unless they are granted somewhere else in the contract.

Appendix "A"

REVISED FINAL OFFER

from

STEVENS POINT CITY EMPLOYEES, Local 309, AFSCME, AFL-CIO (Department of Public Works)

to

THE CITY OF STEVENS POINT

Printed on: March 3, 2004

The following are proposals for changes in the **2001 - 2002** collective bargaining agreement between the above mentioned parties for a successor collective bargaining agreement.

The union reserves a continuing right to add, delete, or modify its proposals.
Some current language is provided for context.
~~Overstricken~~ language is proposed to be deleted.
Highlighted language is proposed as new language to be inserted with existing language.
CAPITALIZED PROPOSALS are not in final language.
An ellipsis (***) stands for language simply not repeated here, for brevity
Overstriking, highlighting, italics and ellipses presented here are bargaining format annotations and are not to be inserted in the collective bargaining agreement.

SECTION 9 - JOB AVAILABILITY

LABEL THE CURRENT PROVISION OF SECTION 9 AS "A.", THEN CONTINUE THE FOLLOWING AS A CLARIFICATION:

B. .1. Limited Term Employees: A limited term employee (LTE) is a bargaining unit employee who is hired for a specified period of time for the purpose of substituting for another bargaining unit employee unable to work due to an extended absence due to injury, illness, or leave of absence, and for which there are no other unit employees who are willing to perform such work.

TA TR. P1

LTE positions Shall be limited to six (6) months, but may be extended with approval of the City Personnel Committee and the Union. LTEs shall be paid ninety percent (90%) of the minimum rate for the permanent employees in their job classification. LTEs who become permanent City employees without a break in service shall have that LTE time immediately preceding the change to permanent status count toward the probationary period and toward eligibility for fringe benefits; such benefits, however, shall not be retroactive.

.2. Parks and Recreation Seasonal Employees: Parks and Recreation seasonal employees may work more than one (1) season per year but may not exceed more than one thousand forty (1,040) hours per year. Parks and Recreation seasonal employees shall not be used to replace year-round employees. Equipment operated by seasonal employees shall be limited to operating only pick-up trucks, small lawn mowers, and the Water Tanker (in Summer); however, seasonal employees may be allowed to operate other equipment where bargaining unit employees are not available and said work is not expected to take more than two (2) hours.

RESPONSE TO EMPLOYER'S REPUDIATION OF WORKER'S COMPENSATION SUPPLEMENT

SECTION 17 - INSURANCE

***

E. Worker's Compensation. Injury leave shall be granted by the City for employees who suffer a loss of work because of a job related injury. Employees who are granted injury leave will receive, during such leave, the difference between the employee's regular salary and the worker's compensation payments up to a maximum of forty-five (45) work days. After the forty-five (45) work days, the employee will be allowed, upon written request, to use accrued vacation, personal or accrued holidays, sick leave or compensatory time to supplement the employee's worker's compensation benefits, up to the employee's regular gross bi-weekly pay and subject to all normal deductions.

The City will continue to contribute the City's share of the health and life insurance premiums through the end of the calendar month in which the forty-fifth (45th) work day occurs. If the employee supplements worker's compensation payments with other accrued benefits, the City will continue to contribute the City's share of the health and life insurance premiums during such time that accrued benefits are used by the employee. If accrued benefits are not used by the employee to supplement worker's compensation payments, and if the employee elects to continue coverage under the health and life

APPENDIX B

REVISED FINAL OFFER
BETWEEN
CITY OF STEVENS POINT &
AFSCME LOCAL 309
(Streets & Parks)
2003-2004 Contract Term

April 12, 2004

Change all "HE/SHE" reference to "the employee or other appropriate antecedent.

Correct indentations to conform to the sections in which they fall.

Change "SECTION" titles to "ARTICLE".

Section 1 – Recognition
The Employer...Recreation and Forestry, Assistant Superintendent of Streets/**Fleet Maintenance Supervisor**...

TA

Section 4 – Seniority Rights and Layoffs
E. Notice of recall. An employee is not ~~employed~~ **recalled** for one (1) year after having been laid off.

TA

Section 9 – Job Availability
...If the work is not available for any of the job classifications set forth in this agreement, nothing contained herein shall be construed as prohibition on the part of the City to make such reductions ~~in the Department of Public Works~~ **affecting the bargaining unit** as are required.

Dr Dave

Section 14 – Sick Leave and in Injury Allowance
.B. Time Allowed
Delete current sub-section 5. and substitute the following:
3. Bonus Days: If an employee does not utilize sick leave during the first six (6) months of the calendar year (January – June) the employee will be credited with an additional day of sick leave **or, at the employee's option, a personal day**. If an employee does not utilize sick leave during the second six (6) month of the calendar year (July – December), the employee will be credited with an additional day of sick leave **or, at the employee's option a personal day. Personal days shall be scheduled off in the same manner as a floating holiday**.

TA

Section 17 - Insurance
3. Prescriptions. ~~$3~~ **$5** for generic (or if no generic is available) and ~~$6~~ **$12** for brand name medications. Effective January 1, 2003.

TA

Section 23 – ~~Materials~~ Miscellany

.D. Safety-toed Shoe Allowance. The City will reimburse up to ~~one hundred dollars ($100)~~ **one hundred fifty dollars ($150) cumulatively** per calendar year upon submission of receipts for the purchase of safety-toed shoes, **work clothes, and prescription safety eye wear.** Employees are required to wear safety-toed shoes, unless they submit a certification from a physician indicating a medically related reason why they cannot wear them. Those employees obtaining a medical exclusion are not eligible for the ~~one hundred dollar ($100)~~ **safety-toed shoe** reimbursement.

The City will reimburse a new employee for up to ~~one hundred ($100)~~ **one hundred fifty dollars ($150) cumulatively** for the purchase of safety-toed shoes, **work clothes, and prescription safety eye wear,** after satisfactory completion of their probationary period. If the probationary period begins in one (1) calendar year and ends the following calendar year, the employee shall be eligible for a reimbursement of up to ~~$100.00~~ **one hundred fifty dollars ($150.00)** for each year upon satisfactory completion of probation.

In order to be reimbursed, the employee must submit the original customer receipt.

Section 29 – Duration

.A. This Agreement shall become effective as of January 1, ~~2001~~ **2003,** and shall remain in full force and effect through December 31, ~~2002~~ **2004,** and shall renew itself for additional one (1) year periods thereafter, unless either party, pursuant to this Section, has notified the other party in writing that it desires to alter or amend this Agreement at the end of the contract period.

Appendix A

Effective January 1, 2003, the following wage rates shall be increased to the indicated wage rate prior to any across-the-board increase:

Lead Person $.18 per hour

A 3.0% across the board increase effective January 1 of each year.*

ADD AFTER WAGE SCHEDULE:

Tri-Axle Truck Drivers: Operators of a tri-axle truck shall receive eighteen cents ($0.18) per hour in addition to the Large Truck wage rate for all time operating a tri-axle truck.

*NOTE: The cost of a 3% across-the-board increase per year may require the City to reduce staffing by a minimum 2 positions.

The City reserves the right to add to, delete or otherwise modify its proposals.

APPENDIX "C"

TENTATIVE AGREEMENTS ON UNION PROPOSALS

CHANGE ALL "HE/SHE" OR "HIS/HER" REFERENCES TO "the employee" OR OTHER APPROPRIATE ANTECEDENT.

CORRECT INDENTATIONS TO CONFORM TO THE SECTIONS IN WHICH THEY FALL (e.g. Section 13, A. and D.)

CHANGE "SECTION" TITLES TO "ARTICLE".

SECTION 14 - SICK LEAVE AND INJURY ALLOWANCE

***

.B. Time Allowed. ***

***

DELETE CURRENT SUB-SECTION 5. AND SUBSTITUTE THE FOLLOWING:

.5. Bonus Days: ~~Effective January 1, 2002, if~~ If an employee does not utilize sick leave during the first six (6) months of the calendar year (January - June) the employee will be credited with an additional day of sick leave or, at the employee's option, a personal day. If an employee does not utilize sick leave during the second six (6) months of the calendar year (July - December), the employee will be credited with an additional day of sick leave or, at the employee's option, a personal day. Personal days shall be scheduled off in the same manner as a floating holiday.

***

SECTION 23 - ~~MATERIALS~~ MISCELLANY

***

.D. Safety-toed Shoe Allowance. The City will reimburse up to ~~one-hundred dollars ($100)~~ one hundred fifty dollars ($150.00) per calendar year upon submission of receipts for the purchase of safety-toed shoes, work clothes, and prescription safety eye wear. Employees are required to wear safety-toed shoes, unless they submit certification from a physician indicating a medically related reason why they cannot wear them. Those employees obtaining a medical exclusion are not eligible for the ~~one-hundred dollar ($100)~~ safety-toed shoe reimbursement.

The City will reimburse a new employee for up to ~~one hundred ($100.00)~~ one hundred fifty dollars ($150.00) for the purchase of safety toed shoes, work clothes, and prescription safety eye wear, after satisfactory completion of their probationary period. If the probationary period begins in one (1) calendar year and ends the following calendar year, the employee shall be eligible for a reimbursement of up to ~~$100.00~~ one hundred fifty dollars ($150.00) for each year upon satisfactory completion of probation.

In order to be reimbursed, the employee must submit the original customer receipt.

***

SECTION 29 - DURATION

A. This Agreement shall become effective as of January 1, ~~2001~~ 2003, and shall remain in full force and effect through December 31, ~~2002~~ 2004, and shall renew itself for additional one (1) year periods thereafter, unless either party, pursuant to this Section, has notified the other party in writing that it desires to alter or amend this Agreement at the end of the contract period.

***

APPENDIX A

EFFECTIVE JANUARY 1, 2003 THE FOLLOWING WAGE RATES SHALL BE INCREASED TO THE INDICATED WAGE RATE PRIOR TO ANY ACROSS-THE-BOARD INCREASE.

Lead Person $0.18 PER HOUR

ADD AFTER WAGE SCHEDULE:
Tri-Axle Truck Drivers: Operators of a tri-axle trucks shall receive eighteen cents ($0.18) per hour in addition to the Large Truck wage rate for all time operating a tri-axle truck.

EFFECTIVE JANUARY 1 OF 2003 INCREASE ALL WAGE RATES BY THREE PERCENT (3.0%). EFFECTIVE JANUARY 1 OF 2004 INCREASE ALL WAGE RATES BY THREE PERCENT (3.0%).

TENTATIVE AGREEMENTS ON EMPLOYER'S PROPOSALS

Section 1 - Recognition

The Employer ... Recreation and Forestry, ~~Assistant Street Supervisor~~ **Fleet Maintenance Supervisor** ...

Section 4 - Seniority Rights and Layoffs

An employee is not ~~employed~~ **recalled** for one (1) year after having been laid off.

SECTION 17 - INSURANCE

***

.B. Health Insurance. ***

***

.3. Prescriptions. ~~$3~~ **Five dollars $5.00** for generic medications (or if no generic is available) and ~~$6~~ **twelve dollars ($12.00)** for brand-name medications.

*** Effective 1/1/03