BEFORE THE ARBITRATOR

In the Matter of the Petition of	Case 258 No. 63158 INT/ARB-10000
CITY OF EAU CLAIRE	Dec. No. 31275-A
To Initiate Arbitration Between Said Petitioner and	Heard: 6/1/05 Record Closed: 7/20/05
LOCAL 1310	Award Issued: 9/19/05
	Sherwood Malamud, Arbitrator

APPEARANCES:

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Stephen L. Weld, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Municipal Employer.

Birnbaum, Seymour, Kirchner & Birnbaum, LLP, Attorneys at Law, by James. G. Birnbaum, Jessica T. Kirchner and Aaron D. Birnbaum on the briefs, 300 Second Street North, Suite 300, P.O. Box 308, LaCrosse, Wisconsin 54602-0308, appearing on behalf of the Union.

ARBITRATION AWARD

Jurisdiction of Arbitrator

On March 30, 2005, the Wisconsin Employment Relations Commission appointed Sherwood Malamud to serve as the Arbitrator to issue a final and binding Award pursuant to Sec. 111.70(4)(cm), 6.c., Wis. Stats., to determine this interest dispute. Hearing in the matter was held on June 1, 2005, at City Hall in Eau Claire, Wisconsin, at which time the parties presented testimony and documentary evidence. Original and reply briefs were received and exchanged through the Arbitrator through July 20, 2005, at which time the record in the matter was closed. Upon reviewing the evidence, testimony, and arguments presented by the parties, and upon application of the criteria set forth in Sec. 111.70(4)(cm)7., 7.g., 7.r., a.-j., Wis. Stats., to the issues in dispute herein, the Arbitrator renders the following Award.

THE ISSUE IN DISPUTE

The City Offer

Create a side letter to amend a 1990 side letter to read as follows:

> The parties agree that, during the term of this contract, the Combination Serviceman shall work a 5:00 a.m. to 1:00 p.m. shift or a 4:00 p.m. to midnight shift. Combination Serviceman working the 4:00 p.m. shift shall be paid a premium of 30¢ per hour worked. On Saturdays, the full time incumbent Combination Serviceman (as of July 1, 2003) will work 12:30 p.m. to 8:30 p.m. on an alternating week basis.
>
> The parties agree that the Mechanics shall work a 7:00 a.m. to 3:00 p.m. shift or a 9:00 a.m. to 5:00 p.m. shift. Mechanics will work alternating Saturdays from 7:00 a.m. to 3:00 p.m. with the Monday following the work Saturday scheduled off.

The Union Offer

1. All provisions of the 2002-2003 C.B.A. shall remain except following amendments.

2. Incorporate all Tentative Agreements.

3. Local 1310 reserves the right to add to or modify this proposal.

The Union, by its proposal to retain the status quo, incorporates a July 30, 1990 grievance settlement that establishes the schedule for Mechanics and Combination Serviceman. The July 30, 1990 side letter reads as follows:

> After several meetings, management has agreed to adopt the following schedule for mechanics and combination servicemen:

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
WEEK 1						
Mechanic	OFF	7-3	7-3	7-3	7-3	7-3
Mechanic	1-9	1-9	1-9	1-9	1-9	OFF

Serviceman	5-1	5-1	5-1	5-1	5-1	12:30-8:30
Serviceman	1-9	1-9	1-9	1-9	1-9	OFF
WEEK 2						
Mechanic	7-3	7-3	7-3	7-3	7-3	OFF
Mechanic	OFF	1-9	1-9	1-9	1-9	7-3
Serviceman	5-1	5-1	5-1	5-1	5-1	OFF
Serviceman	1-9	1-9	1-9	1-9	OFF	12:30-8:30

> In addition, it is agreed that the part-time shop employee can work his/her contractual hours at any time assigned by management. Any hours in addition to the contractual hours must be offered to full-time personnel before assigning the part-time employee.
>
> The union agrees all attached grievances are withdrawn and will no longer be pursued.

The basis for the Union's position that the settlement agreement continue as part of all successor agreements until amended or eliminated is based upon a finding made by the Wisconsin Employment Relations Commission in a Prohibited Practice decision, Local 1310/Ed McGeorge, President vs. City of Eau Claire, (WERC) Dec. No. 29346-C (12/17/02) in which the Commission concluded, as follows:

> As we held in Milwaukee Board of School Directors, Dec. No. 24287-A (WERC, 3/89) where, as here, parties enter into an agreement of unspecified duration that resolves a dispute arising under their overall contract, that agreement has a duration co-extensive with the overall contract and is subject to renewal, amendment or elimination each time the parties bargain the terms of their successor overall contract. Here, there is no evidence that the parties ever amended or eliminated the settlement agreement. Thus, although first reached in 1990, we conclude the settlement agreement in question was renewed each time the parties bargained their overall contract and remained in effect during the term of the 1995-1997 contract.

The City, through its Final Offer, attempts to amend the substance of the settlement agreement, namely the hours of one Combination Serviceman from 1:00 p.m. to 9:00 p.m. to 4:00 p.m. to midnight.

STATUTORY CRITERIA

Sec. 111.70(7), Wis. Stats., provides that:

> 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 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 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 and 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.

BACKGROUND

The labor agreement at issue in this interest arbitration proceeding, the July 1, 2003-June 30, 2005 contract, has expired. The parties' tentative agreements cover wages and benefits. This dispute over the change in hours of one employee originates in the City's unilateral decision to change the schedule of shop employees, the Combination Serviceman and Mechanics, in August 1997 during a contract hiatus. The City unilaterally changed the shop schedule, after the expiration of the 1995-1997 agreement without bargaining with the Union over the substance of the change. The Employer altered the shop schedule in response to an agreement between Eau Claire Transit and the University of Wisconsin Eau Claire to expand bus service in Eau Claire into the evening hours from 6:15 to 10:32 p.m. Although the City notified the Union of its intent, Gilbert, the Combination Serviceman

whose schedule was changed from 1:00 p.m.-9:00 p.m. to 4:00 p.m.-midnight, was informed of that change on the Friday before the Monday in August 1997 that it went into effect.

In response to the City's unilateral implementation of the change in hours during the hiatus, the Union filed the Prohibited Practice complaint City of Eau Claire Dec. No. 29346-C (12/17/02). Ultimately, in 2001, the parties settled the successor to the 1995-1997 agreement. They executed a contract covering July 1, 1997 through June 30, 2002. Then, in November 2002, the parties reached agreement on a one-year contract for July 1, 2002 to June 30, 2003. The parties did not resolve the dispute underlying the Prohibited Practice complaint in the course of negotiating two successor agreements to the 1995-1997 contract.

Then, on December 17, 2002, the Commission (WERC), issued its decision on the Prohibited Practice complaint. In addition to its findings concerning the continuation of the 1990 settlement letter in all successive contracts, the Commission concluded, as well, that:

> . . .
>
> 2. When implementing changes in work schedules on August 25, 1997, the City of Eau Claire violated its duty to bargain obligation to maintain the status quo as to all matters primarily related to wages, hours and conditions of employment following the expiration of the 1995-97 agreement. (Local 1310/Ed McGeorge v. City of Eau Claire, supra, at page 6)

At page 7 of the decision, the Commission ordered the following affirmative relief to effectuate the purposes of the Municipal Employment Relations Act which includes the following order pertinent to the within proceeding:

> 2. b. 1. Make employees represented by Amalgamated Transit Union, Local 1310 whole with interest . . . for any losses in wages and benefits incurred during the contract hiatus when the City of Eau Claire: . . . (b) changed the work schedule for shop employees contrary to the terms of the July 30, 1990 settlement agreement.

In its accompanying memorandum, at page 19, the Commission said the following about the matter of remedy:

> It is appropriate that affected employees be made whole for losses suffered as a consequence of the Respondent's illegal conduct. However, we acknowledge that it may be difficult to verify what those losses were. Further, as also argued by Respondent [the City], it is conceivable that the result produced by the interest arbitration process (in this instance the parties' voluntary settlement of their successor contract) has some relevance to the level of monetary remedy that is appropriate.
>
> It is our hope the parties will reach a voluntary agreement on the loss of wages and benefits caused by Respondent's illegal conduct. If such agreement does not occur, then supplemental hearing will be needed as to remedy.

The parties did not reach agreement on the monetary amount that would serve to remedy the violations committed by the City. The Commission then sue sponte clarified part of its declaratory ruling tangentially related to the matter in dispute, here. It also held a hearing on the dispute over remedy. The Commission received the parties' written arguments. As of the date of the interest arbitration hearing, June 1, 2005, the Commission had not yet issued its decision on the method of calculating monetary relief. Just prior to the June 1 interest arbitration hearing, the Union contacted the Commission's General Counsel. He indicated that a decision on remedy might issue in August 2005.

The Union argues that the Employer continues to violate the Commission's order, in that, it did not change the Combination Serviceman's schedule back to 1 to 9 p.m., the hours set out in the 1990 grievance settlement. Instead, the City continued to schedule the Combination Serviceman 2 to work from 4 p.m. to midnight. The Union views this as a continuing violation. As such, whatever remedy the Commission orders should continue through the two-year term of the 2003-2005 contract at issue in this interest arbitration proceeding. The Union argues that the City should have scheduled Grievant to work from 1 p.m. to 9 p.m. Instead of changing his schedule to 9 p.m. to midnight, it should have kept his schedule at 1 P.M. to 9 P.M. and schedule overtime to obtain coverage in the shop from 9 P.M. to midnight. In so doing the City would have made overtime available to full-time employees. Any overtime opportunity not taken by full-time employees would then be available to the part-time shop employee.

From the City's perspective and in its arguments on remedy before the Commission, the remedial relief should end on the date that the parties entered into the first successor agreement to the

expired 1995-1997 contract, i.e., in 2001. The City argued to the Commission that even if the Commission considered this a continuing violation case, the only pay loss suffered by the Combination Serviceman was the loss of a shift differential. The City argues such differential should be 30¢ per hour for the entire 4 p.m. to midnight shift, because the internal comparable, the AFSCME blue collar unit represented by Local 284, pays a 30¢ shift differential in its contract with the City. The City proposes the same shift differential in its final offer, quoted above.

Furthermore, the City argues that this is the first opportunity it had to stem the "bleeding," the City's characterization of the present situation it finds itself. Through its final offer, it attempts to amend the 1990 settlement. If the Arbitrator were to select the City's final offer for inclusion in the 2003-2005 contract, even if the Commission applied its remedial formula during the term of the 2003-2005 contract without regard to the Arbitrator's award, the selection of the City's offer would stem the bleeding.

At this writing, the Arbitrator is unaware whether the Commission issued its remedial decision or not. The parties agreed at the arbitration hearing to close the record as of June 1, 2005. The Arbitrator inquired if the parties wanted to provide for the opportunity to submit the Commission's remedial decision into the record should it issue prior to the Arbitrator's issuance of this Award. The parties elected to close the record as of June 1 without exception.

Both parties argue at great length about the impact of the Commission's Prohibited Practice decision, two declaratory rulings, and the pending decision on remedy. So much of the record is tied up with the proceedings before the Commission, including the briefs submitted by the parties, there is little evidence in this record that would enable the Arbitrator to apply each of the statutory criteria. Only two of the statutory criteria have been cited by either party. The Union cites 111.70(4)(cm)7 and the City argues internal comparability which this Arbitrator considers under 111.70(4)(cm)7, j. Both the City and the Union apply the "Such other factor" criterion, the status quo analytical framework adopted by this Arbitrator, D.C. Everest School District, Dec. No. 24678-A (Malamud, 2/88) in support of their respective positions.

POSITIONS OF THE PARTIES

The City Argument

The City argues that there is a clear need for the change in schedule. It offers a quid pro quo for the change. It provides for a shift differential of 30¢, where there has been no shift differential in this contract. The need for a change and the quid pro quo are both clearly established. The status quo analytical model, therefore, supports the selection of the City's final offer for inclusion in the 2003-2005 contract.

With regard to the need for change, the City emphasizes that it is the expansion of bus service that necessitated the schedule change. Prior to August 1997 buses did not run after 6:15 p.m. In August 1997, after agreement was reached between Eau Claire Transit and the University of Wisconsin Eau Claire, bus service continued in the city until 10:32 p.m. When buses return, they are serviced. The Shop Supervisor, Bruehner, testified that when a bus is returned, the Combination Serviceman records the mileage, changes the fare boxes, cleans the inside of the bus, checks fluid levels and tire pressures, fuels the bus, and runs it through an exterior washer. The Serviceman then parks the bus. There is insufficient time in the morning for the Combination Serviceman 1 to perform all these functions before the buses are out on the street. In addition, if a bus breaks down, the Combination Serviceman transports a substitute bus from the spares kept in the shop. If no Serviceman is scheduled past 9 o'clock, that would leave approximately an hour and a half without coverage in the shop should a bus break down.

The City notes that it does not need a Combination Serviceman between the hours of 1 and 4. There are two Mechanics on duty at that time. That is sufficient staffing for those hours. In addition, the City does not require 19 hours of service from the Combination Serviceman plus 16 hours of Mechanic work during a weekday. It is expensive paying overtime each day.

The City notes further that if it were to cover the 9 to midnight hours with overtime, it must offer overtime by seniority. The most senior Combination Serviceman McGeorge testified at the hearing that he had no interest in working overtime. Then the overtime would be offered by seniority to the other full-time employees. It would be administratively burdensome to schedule overtime for each Monday through Thursday. The City may not schedule the part-time employee in excess of 16 hours per week. The part-time employee may work if full-time employees reject overtime opportunities. The City proposed the expansion of the number of hours that part-time employees may work. The Union resisted amending the contractual limitation on the number of hours worked by the shop's part-time employee in order to make more overtime available to full-time employees. The City concludes that under the language of the Agreement and the limitations on the hiring of

part-time employees to work more than 16 hours per week, it would be cumbersome staffing the needed 9 to midnight hours to service the buses.

The City maintains that a 30¢ shift differential is an adequate quid pro quo. The payment of the differential is retroactive to July 1, 2003. The payment of a shift differential in the amount of 30¢ is supported by an internal comparable. The AFSCME blue collar unit represented by Local 284 provides for the payment of a 30¢ differential for employees who work the 4 to midnight or second shift.

In its reply brief to many of the Union arguments, the City emphasizes that the Commission addressed the Union's complaint and applied an analytical framework in its decision consistent with a hiatus analysis. The Commission determined that the 1990 side letter, that had not been included in the collective bargaining agreement and which was never referenced in the parties' bargaining between 1990 and 1997, established the status quo. The expanded service created a necessity to reschedule. This necessity argument was rejected by the Commission. However, that argument was rejected in the context of a refusal to bargain hiatus analysis.

The City addresses the Union argument that it bought the 1990 schedule by resolving six grievances in which the Union presented legitimate claims for overtime pay amounting to $1150. The City emphasizes that if the Arbitrator were to adopt the Union's final offer and since the 2003-2005 contract has expired, it would mean that the City would be obligated to pay 12.5 hours pay for 8 hours work. Gilbert worked from 4-12. The Union seeks time and a half or 4.5 hours at straight time rate for the hours not worked by Grievant, from 1-4 p.m.

The City maintains that the arbitration decision will not intrude on the WERC remedial decision. The selection of the City offer would stem the bleeding. The City quotes this Arbitrator's observation in Green County (Pleasantview Nursing Home), Dec. No. 29853-A (9/00):

> In applying the status quo paradigm, the party who rejects the proposed change, without making a counter proposal to include a provision that it deems appropriate for inclusion, does so at its peril.

The City urges the Arbitrator to select its final offer for inclusion in the 2003-2005 contract.

The Union Argument

The Union emphasizes that the City unilaterally implemented a change to the established schedule to avoid the payment of overtime. The Commission observed in its decision No. 29346-C at page 18 that:

> As both parties acknowledge, we have previously concluded that the opportunity to obtain operational cost savings cannot be equated with "necessity."[Citations omitted.] Here, the Respondent City was simply trying to avoid overtime costs. Thus, we conclude a valid necessity defense is not present here.

The Union maintains that the Commission decision rejecting the necessity defense amounts to a conclusive finding by an administrative agency that should be accorded the greatest weight under Sec. 111.70(4)(cm)7. The Commission's rejection of the necessity defense precludes the City from demonstrating a need to change the shop schedule. Absent a need for the change, the City cannot meet the status quo analytical paradigm. The Arbitrator should reject the City's final offer.

The Union notes that the City unilaterally altered the schedule to minimize overtime without bargaining and without offering a quid pro quo at the time it took its action in August 1997. The Union maintains that it can staff the necessary hours through overtime, and should full-time employees refuse proffered overtime, then the City's needs may be met through the scheduling of the part-time employee(s).

The Union argues that this Arbitrator's status quo paradigm supports its position. It argues there is no need for the change. The Employer merely took its action to avoid paying overtime. That is not a basis for establishing a necessity or a need for the change. If nothing else, this analysis suggests that the City's reason for making the change is not clear and convincing evidence of the need for the change.

Furthermore, the schedule established by the 1990 side letter was bought by the Union through its voluntary agreement to resolve the grievances and forego the $1150 in overtime pay due and owing employees, at that time. The thrust of the Union's concern is that the adoption of a wholly inadequate 30¢ per hour shift differential would undermine the substantial back pay demand pending before the Commission. The Union maintains that this Arbitrator should avoid making a decision that would undermine the proper remediation of the losses suffered by members of the unit through the unilateral action of the Employer. The back pay due and owing the Combination Serviceman amounts to $15,408 annually and to the Mechanic $17,364. The City proposes to buy

out this liability with an offer of a shift differential that would pay $600 to the Combination Serviceman and $800 to the Mechanic.

The Union argues that the City rejects AFSCME Local 284 as a comparable to Local 1310. There is a substantial difference in wages between the two contracts. The Local 284 contract provides between $1.50 and $2.00 per hour higher wage for a Mechanic than the Mechanic covered by the Local 1310 contract. The 284 agreement provides for longevity. The contract at issue in this proceeding contains no longevity provision. The Union asserts that members of Local 284 do not work nights and weekends, although the City contradicts that assertion in its reply brief. The Union maintains that the Arbitrator lacks jurisdiction to make and issue an award that would undermine the remedy pending before the Commission.

The Union notes in its reply brief that the unilateral change to the shift of one of the Mechanics was not implemented by the City, because it could not hire a Mechanic to work that schedule. The fact that employees may not want to work overtime does not mean that the Employer would be unable to staff as necessary in the event one or two full-time employees reject overtime. There is a process in place which has been used and which does provide sufficient staffing to meet the Employer's staffing needs.

The Union concludes that the City has failed to establish a needto change the shop schedule, nor does it offer an adequate quid pro quo to justify its offer which changes the status quo. The Union requests that the Arbitrator select its final offer for inclusion in the 2003-2005 contract.

DISCUSSION

Introduction

The WERC appointed this Arbitrator "to issue a final and binding award pursuant to 111.70(4)(cm) 6.and 7." The Arbitrator is not a Hearing Examiner or an Administrative Law Judge charged with the responsibility to fashion relief to remedy a Prohibited Practice violation. Such activity falls outside the jurisdiction of this Interest Arbitrator. Nonetheless, the parties have dedicated a good deal of the record in this matter to the Prohibited Practice proceedings before the Commission including the briefs they submitted on the substantive and remedial issues.

Neither party submitted: a list of cities comparable to Eau Claire that operate bus systems, cost of living data, agreements between the employees of suggested comparable municipal bus operations and their represented employees, costing data, exhibits indicating the schedules of shop employees in comparable operations. There is no evidence in this record as to how other municipal bus operations cover hours of operation that extend beyond 6 P.M. Whether they do so through overtime or by paying a shift differential.

Both the evidence submitted and the evidence routinely submitted but absent from this record indicate to the Arbitrator the importance to the parties of the Commission's pending remedial decision. As of the close of the record in this matter on June 1, 2005, the Commission had not issued its remedial decision. Both parties anticipate that the award in this proceeding will impact the remedy fashioned by the Commission. However, the Arbitrator observes there is a difference in statutory authority and purpose between the remedy to be fashioned by the Commission and the interest award that will issue here.

The Arbitrator summarizes how both parties link the Commission's remedial decision to the outcome of this interest arbitration. From the Union's perspective, the purpose of the remedy is to restore lost wages and benefits to the employees harmed by the Employer's unilateral change of the status quo during a contract hiatus. The extension of the hours of bus operation, provided in the first instance, an opportunity for shop employees to obtain additional overtime. With that opportunity came Union bargaining strength to make compensatory demands in the negotiations for a successor to the 1995-97 contract on wages or on a shift differential in exchange for a reduction in the number of hours of overtime available through an agreement to change the schedule of hours. The Employer unilaterally changed the scheduled hours and closed off that avenue of bargaining. It is the Commission's task to address the harm done by the Employer's unilateral action under the rubric of the make whole remedy it fashioned at page 7 of its decision in City of EauClaire, Dec. No. 29346-C (WERC 12/02).

Under these circumstances, the Union's demand for overtime is based on the assumption that absent agreement or an interest award to the contrary, the Serviceman 2 would have worked his 1to 9 P.M. shift, and the Employer would offer full-time staff overtime. If the full-time employees rejected the overtime opportunities offered, the Employer would assign the hours to part-time employee(s). The Employer's presumptuous argument that bargaining would have yielded a shift differential consistent with the benefit in place for AFSCME Local 284 employees assumes the

parties would have bargained to agreement to include a benefit not in place at the moment the City committed the Prohibited Practice.

The Interest Arbitrator has a much different task to perform than the Commission. The Interest Arbitrator applies the statutory criteria to the parties' offers to determine which should be included in the 2003-2005 contract. The Union's status quo offer continues the 1990 side letter as the document that governs the work schedule in the shop. The side letter continues the 1-9 P.M. hours for the Serviceman 2. Since the City scheduled the Serviceman 2 from 4P.M. to midnight, the Employer should pay overtime for the three hours the Serviceman 2 should have been scheduled but did not work by operation of other contractual language in the expired 2002-2003 contract. In this manner the remedy not yet issued by the Commission would continue into the 2003-2005 contract.

The City argues that selection of the Union's offer pays the Serviceman 2 for 12 hours per week at overtime rates for the term of the contract for work not performed. It is for the Commission to determine the appropriateness of this pay pattern as part of a remedial framework. That is the function of the Commission's exercise of its remedial function.

The question remains and the one resolved in the analysis that follows is whether the application of the statutory criteria support the selection of the Union's or the City's final offer for inclusion in the 2003-2005 contract. That function is wholly independent of the Commission's exercise of its remedial function. For the above reasons, the Arbitrator issues this award without consideration of the Commission's remedial function.

With regard to the Arbitrator's exercise of his jurisdiction, the Union argues:

> **THIS ARBITRATOR DOES NOT HAVE THE AUTHORITY OR THE JURISDICTION TO UNDERMINE THE PENDING ACTION BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION PROHIBITED PRACTICES COMPLAINT.** (Emphasis in the original)

In Union Exhibit 15, the Commission indicated that it would issue its remedial decision in August 2005. Presumably, it has done so. This award should have no impact on the remedial decision that has issued. If the Commission's decision has not yet issued, in the above analysis, the Arbitrator suggests that the Commission and the Arbitrator are deciding different matters. The

Arbitrator has the jurisdiction to select either final offer and his appointment requires that he do no more nor less.

The Serviceman 2 Work Schedule

j. Such other factors- Status Quo

Through its final offer, the City attempts to change the hours of the Serviceman 2 from a 1P.M. to 9 P.M. shift to 4 P.M. to midnight. The Union maintains there is no need for the change. It argues that the Commission made that finding in its Prohibited Practice decision, 29346-C.

The Union confuses "necessity" as a defense to a Prohibited Practice charge and the "need" for a change in the context of an interest arbitration proceeding. Indeed, the Commission concluded that the City's attempt to avoid paying overtime did not make out a case of necessity to excuse the City's failure to bargain with the Union to change the shop schedule.

The term need, as used in this Arbitrator's paradigm for analysis of a proposed change to the status quo, is intended to ascertain whether there is a good reason for the proposed change. The better the reason, the more compelling the demand for change. The City expanded the hours of service. It has a need to staff the shop to service the busses and prepare them so they are ready to roll the next day. The Commission's determination that the "necessity" defense is unavailable to the City in the Prohibited Practice setting is not accorded greatest weight consideration under Sec. 111.70(4)(cm)7. Necessity and need are different and unrelated terms of art.

The Union correctly notes that part of the predicament the City faces is due to its failure to hire a second Mechanic willing to work the second shift, either 1 to 9 or 4 to 12. However, the City's attempt to regularly schedule the Second Serviceman to minimize the administrative hassle of continuously scheduling overtime for 4 days per week and paying overtime provides two reasons for the change. In this case, the need is greater, because of the reluctance of the senior full-time employee to work overtime.

On the other hand, Gilbert, the Serviceman 2 whose schedule was changed by the City, finds the changed schedule burdensome to his personal life. The change of hours negates the effort made by Gilbert's girl friend to arrange her hours to coincide with his after four years of trying. This

demonstrates the importance hours of work play in an employee's life and the substantial upheaval that may result from a change in hours.

The change in hours to meet the needs of expanded service and to address those needs in a manner that is less administratively cumbersome than scheduling overtime every week for 4 of the 6 days busses are in operation sets out a sufficient need for the City's proposed change in schedule. The Arbitrator concludes that the City has shown a need for the change, by clear and convincing evidence.

That brings the analysis to the question of whether the City proposes an adequate quid pro quo? It proposes a shift differential of 30 cents per hour paid for all hours of the 4-12 shift, $2.40 per day, 4 days per week. The Union calculates it amounts to just under $600 per year.

The Union argues that the City attempts to negate two years of back pay under a WERC remedial order at $15,000 plus per annum for $600 per year. The Arbitrator addressed this argument, above. This award does not preclude or replace whatever the WERC orders. Each arises under different statutory authority and accomplishes a different purpose.

The Union proposes to address coverage through the use of overtime. There is no evidence in this record from which the Arbitrator may conclude that overtime or a shift differential is the most frequently used method for encouraging employees to work a less desirable shift. The parties provided the Arbitrator with no comparability data.

However, the Union's proposal that overtime should be used would provide Gilbert with a windfall, 12 ½ hours pay for 8 hours of work. Such pay may be appropriate to remedy a Prohibited Practice violation, but the Arbitrator can find no statutory interest arbitration criterion under 111.70(cm)6 or 7 that would justify selection of an offer that pays 4.5 hours of pay for 3 hours neither scheduled nor worked.

The remaining choice, the payment of a shift differential may be appropriate, provided the amount of the differential is adequate. The Union argues that it is inadequate. The Arbitrator determines the adequacy of the quid pro quo under two of the "Such other factors" criterion, internal comparability and labor market realities.

A 30 cent shift differential appears in the Labor Agreement between the City and AFSCME Local 284 that represents other City blue collar employees who work a second shift. The Union asserts without contradiction from the City, that Local 284 has never been used by the City as a comparable to Local 1310. The Union continues. Local 284 mechanics who work in the same facility as the bus mechanics, receive much higher wages and longevity.

The Union argument would hold more sway, if the Arbitrator had to choose between the City's 30 cent shift differential and a much higher Union proposal for a shift differential. Absent a Union proposal for a shift differential, the Arbitrator finds that the presence of a shift differential of 30 cents in another contract covering City employees provides some support for the City's offer.

The other factor under the "Such other factors" criterion provides further insight into whether the quid pro quo offered is adequate. The City changed the schedule of one Mechanic to 4 to 12. Yet, it was unable to hire a mechanic to that shift. This strongly suggests that in order to get Mechanics and Serviceman 2 to work this 2nd shift it may be necessary to pay a substantial premium. It is unclear that the City's 30 cent offer meets that test.

The Arbitrator concludes from the above evidence that a demand for the payment of a much higher shift differential may be justified to address the Serviceman 2, Gilbert's, reluctance to work this shift, in the first instance, and to be able to recruit a Serviceman and Mechanic to work the 4 to12 shift. However, the Arbitrator cannot conclude that the City's offer is so inadequate that it does not meet the demands of the status quo mode of analysis. The City's offer may be low, but it pays that premium under the Local 284 contract. Acceptance of a 30 cent shift differential in a different bargaining unit suggests that 30 cents is **not** so low that it is meaningless. In the absence of a counter proposal from the Union for the payment of a shift premium, the Arbitrator concludes that the City's 30 cent offer is sufficient to meet the status quo mode of analysis.

SELECTION OF THE FINAL OFFER

The Union proposes that the City schedule the Serviceman 2 from1 P.M. to 9 P.M and meet its need to have a Serviceman on duty 3 hours per day on Monday through Thursday by scheduling overtime. The City has established that it does not require a Serviceman 2 on duty between 1 P.M. and 4 P.M. Neither Serviceman wants to work second shift from 4P.M. to midnight. It is administratively cumbersome to schedule 3-hours of daily overtime. The City has established a need to change the status quo and it offers a quid pro quo for the change. This evidence when considered

under the "Such other factors" criterion together with internal comparability support the selection of the City offer.

The City encountered a problem recruiting a mechanic to work the 4 P.M. to midnight shift. It was unable to attract an appropriate candidate to work that shift. It indicates the need for a substantial financial incentive to get employees to work this shift. The recruiting problem the City encountered suggests it may be necessary to pay a much higher shift differential than 30 cents to recruit employees to work that 2nd shift. The Union offer, which generates greater income for the Serviceman 2 through the use of overtime, may overcome the recruitment problem. This market factor, which falls within the scope of the "Such other factors" criterion supports the selection of the Union's offer.

The Arbitrator concludes there is insufficient evidence in this record to apply criteria "a-i" to the parties' final offers. The Union's offer does not include a shift differential proposal. Its use of overtime to meet scheduling needs is cumbersome and costly. On balance, the status quo paradigm, internal comparability and the use of a shift differential outweighs the recruitment problem that surfaced when the City's attempt to hire a Mechanic on the 2nd shift met with lack of success. For the reasons set out above, the Arbitrator finds that the "Such other factors" criterion "j" supports the inclusion of the City's final offer in the July 1, 2003-June 30, 2005 Collective Bargaining Agreement.

Based on the above Discussion, the Arbitrator issues the following:

AWARD

Upon the application of the statutory criteria found at Sec. 111.70(4)(cm) 7, 7.g., and 7.r., a.-j., Wis. Stats., and upon consideration of the evidence and arguments presented by the parties, and for the reasons discussed above, the Arbitrator selects the final offer of the City of Eau Claire for inclusion

in the labor agreement between the Amalgamated Transit Union, Local 1310 and the City of Eau Claire for July 1, 2003 through June 30, 2005.

Dated at Madison, Wisconsin, this 19th day of May, 2005.

Sherwood Malamud
Arbitrator