STATE OF WISCONSIN
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF WISCONSIN RAPIDS

Employer,

v.

Case 142
No. 64129
MIA-2619
Dec. No. 31284-A

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

Union,

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the Wisconsin Employment Relations Commission. A hearing was held on July 26, 2005. The parties were given the full opportunity to present evidence and testimony. At the close of the hearing, the parties elected to file Briefs and Reply Briefs. The arbitrator has reviewed the testimony of the witnesses at the hearing, the exhibits and the parties' briefs in reaching his decision.

ISSUES

The parties reached agreement on most of the terms to be included in the successor agreement. All of those tentative agreements are incorporated into this Award. The remaining open issues are:

Employer
Wages
2.75% across the Board increase January 1, 2005
2.75% across the Board increase January 1, 2006

Sick Leave
a. Change the current sick leave language to grant officers 12 days of sick leave each January for minor illness/injuries and grant unlimited "paid leave" for officers with major medical illnesses/injuries, with an appropriate doctor's certification and application for paid leave of absence.
b. Change the definition of "extended sick leave" to cover any sick leave in excess of three working days;
c. Substitute "paid leave" for "sick leave" in the paragraph in the Collective Bargaining Agreement that describes when an officer's leave may be discontinued; and
d. Modify the language to clarify that the City incurs the expense of a physician examination if the City believes an officer is abusing the sick leave privilege or may not be physically or mentally fit to return to work.

Union
Wages
3% across the Board increase January 1, 2005
3% across the Board increase January 1, 2006

Sick Leave
No change in current Language

BACKGROUND

The City of Wisconsin Rapids is situated in Central Wisconsin, and is located in Wood County. There is a heavy presence of the paper industry in the local area and this industry provides much of the City's financial and tax base. There have been substantial layoffs in the paper industry over the last few years. The City through attrition has lowered its costs during this same period of time to offset the reduction in revenue.

The Police bargaining unit has approximately 33 employees. Most of them have been with the City for a considerable length of time. The average length of

employment is over 13 years and the median length of employment is approximately the same.[1]

The Wisconsin Statute that provides for Interest Arbitration in Police Bargaining Units sets forth certain statutory criteria to be utilized by arbitrators when deciding interest disputes. As is often true, not all statutory criteria are relevant in this dispute. The parties here have argued that the Interests of the Public, Internal and External Comparisons and Other Factors not specifically enumerated in the Statute apply here. The City while discussing its current fiscal situation is not arguing it has an inability to pay the increase sought. Thus, this factor will not be addressed. The Arbitrator will discuss the relevant factors as they apply to each outstanding issue, and will begin the discussion with the City's sick leave proposal.

Sick Leave

The City under the current contract provides unlimited sick leave to employees in the bargaining unit. It has the right to "periodically" request "medical information from employees who are absent for 30 days or more." An absence over thirty days is defined as "Extended Sick Leave." Currently, employees may substitute sick leave for leave under the State Family and Medical Leave Act to cover absences needed to care for a family member that is ill or for the birth of a child. The amount of permitted leave under the Act for illness is 2 weeks and for the birth of a child it is six weeks. Thus, an employee can use his or her unlimited leave to cover all of the allowable time under the State FMLA.

[1] Employer Exhibit 20a.

The City introduced exhibits that show how many employees have used sick leave to cover absences due to illness of a family member or the birth of a child over the last few years. The exhibits show the number of absences and the length of each absence since 2002. Six employees were absent due to the birth of a child. They were off for a total of 28 weeks. On several occasions the absence necessitated overtime. The total overtime cost incurred was $12,442. Employees were absent 46.5 days due to the illness of a family member. There is no indication any overtime was required because of these absences.

The City seeks to shorten the definition of "extended sick leave" to three days. It wants to credit an employee with twelve days sick leave in January of each year that is to be used to cover an illness that lasts less than three days.[2] The leave days would also have an additional purpose. Absences that are needed to attend to an ill family member as defined under the FMLA or the birth of a child would require the use of one or more of the twelve days. Employees would not accumulate sick days under the proposal so the maximum number of sick days that could be used for this purpose in any year would be twelve.[3] The City also notes that the current sick leave provision predated the passage of the FMLA and that the language was never intended to cover absences due to the illness of someone other than the employee. Thus, it believes its proposal does not change the original intent of the language.

The Association argues that the language proposed by the City is ambiguous and that adopting that language would lead to confusion and

[2] The City in its brief contends that an illness that requires intermittent absences would be considered a single illness under its proposal. When the total number of days absent for that illness exceeds three, it would be treated as an extended absence and none of the sick leave days would have to be used for that illness.

[3] Under the Employer proposal the term used to describe these days is not actually sick days, but "paid leave" days.

possible litigation. It believes an Interest Arbitrator should not adopt language that on its face is unclear. It does note that the City attempted during the hearing to clarify the language. It feels that the Arbitrator should not consider such verbal information in his deliberations. It is the words themselves that should be reviewed and not the City's interpretation of those words. The City obviously disagrees and argues that the language clearly states what is meant by the changes it proposes.

The Association also argues that the Employer proposal would diminish the rights employees have under the FMLA and that it, as an Association, cannot "conspire" with the Employer to take away those statutory Rights. Conversely, the Employer believes that once the WERC certified the final offers of the parties that it is not for the Arbitrator to determine legality. It contends that any such argument should have been made to the WERC and that the argument at this point is moot. This last issue shall be addressed first.

Discussion

The Arbitrator agrees with the City and other Arbitrators that it is too late for the Association to raise a legality question. The Arbitrator is to select one of the two offers certified by the WERC. Any argument of illegality should have been raised there. As noted by Arbitrator Miller in City of Antigo (DPW), Dec. No. 29425-A (Miller, 5/31/99):

> It is clear also that if either of the Parties to the dispute believes that the other side's final offer is defective, such objections must be made before the WERC has certified the final offers and declared an impasse. As Arbitrator Kerkman noted in Shorewood Professional Firefighters "Once the offers were certified by the WERC and the Arbitrator was appointed the questions of the propriety of the offers are moot.[4]

[4] Dec. No. 26625-A, 7/21/91.

Furthermore, the Arbitrator does not believe that the Association is correct, even if the issue could be decided through arbitration. The FMLA allows parties to negotiate the amount of leave available to each employee. It can be limited. As will be discussed later, the Engineering Unit at this Employer and the Police Unit in Wausau each limit the amount of leave that is available for FMLA purposes. The Arbitrator does not see why the same could not be done here. Therefore, this argument is rejected on several grounds.

The Arbitrator shall next address the ambiguity issue raised by the Association. The proposed language changes the definition of "extended sick leave" to three days. It categorizes illnesses as either "minor" or "major." The sick leave days are to be used to cover "minor illnesses." Use of sick or personal days is not required for "officers with major illnesses." All of that is clearly spelled out in the proposed language. The City also wishes to limit the use of sick leave for family illness or for the birth of a child to twelve days. The proposed Section does not specifically describe what happens when a family member is ill. However, the use of the term "officer" when defining a major illness by implication excludes an illness, even one over three days, to someone other than the officer.[5]

From the above, the Arbitrator concludes that while the language is not as clear as it is in the Engineering Unit, it is sufficiently clear to allow consideration by this Arbitrator. If all language were as clear as the Association believes this language should be, there never would be grievance arbitration over contract interpretation. That certainly is not the case. Language often

[5] The new language for the Engineering Bargaining Unit, does specifically limit sick leave for the employees "own minor illness or to care for a sick child." That additional provision is not in this proposed language.

requires subsequent interpretation. Bargaining history is relevant when interpreting that language. The City has provided that history in this proceeding and that history could aid either party in any subsequent dispute. Whether arbitration in the future over this language will occur is something this Arbitrator cannot know. The Arbitrator does find that the intent is sufficiently clear and the language as drafted reflects that intent.

Internal Comparables

There are four other bargaining units in the City. The City argues that the current provision in this agreement is more generous than that contained in any other City bargaining unit, except fire. With regard to fire, it points out that historically fire is one year behind the police in terms of negotiations. The Police unit changed health insurance contributions and received an extra 1% in wages to compensate for the change. One year later the fire made the same change and received the same increase the police had obtained a year earlier. If this proposal is adopted, it intends to make the same proposal to the Fire Bargaining Unit in the next round of negotiations. None of the other three contracts allow for unlimited sick leave.

The City also argues that internal comparability is the most critical factor when evaluating its proposal. It notes that this Arbitrator wrote in City of Monroe (Nonprofessionals), Dec. No. 29014-A (9/22/97):

> Internal comparables are always a more persuasive factor when evaluating benefits. There is a desire and a need for uniformity of benefits within a public employer. The need the proposal would address would be the disparity in benefits among the bargaining units.

It also cited Rio School District (Support Staff), Dec. No. 30092-A (10/30/01), where Arbitrator Torosian wrote:

> Arbitrators have almost uniformly recognized the importance of internal comparability, especially when it comes to benefits such as health insurance, holidays, vacations, longevity pay, etc. At the core of the issue is the concern of fairness and the impact on the morale of employees who work for the same employer but not treated the same. Thus, unless there is a good reason to deviate, the uniformity of benefits among employees of the same employer, internal comparables, clearly outweighs external comparables.

The Association does not believe that internal consistency is present in this case. It notes that all the other bargaining units provide for the accumulation of days in the sick leave bank. There is no such provision here. It points out that the fire unit does still have the same provision as the Police and that adoption of the City proposal could impact not only this unit, but that unit as well.

Discussion

The parties disagree as to whether the language in the other bargaining units supports or fails to support the change proposed by the City. The Arbitrator has prepared a chart showing the current sick leave provisions for the other bargaining units:

Clerical	1 day per month with accumulation to 150 days Secondary bank for any excess
DPW	1 day per month with accumulation to 150 days Secondary bank for any excess
Eng	130 days per illness if hired before 1/1/04 12 days for FMLA dependent care, 65 days for major illness if hired after 1/1/04
Fire	Unlimited

When analyzing the language in these units, it is apparent that one unit did not have any limit on accumulation previously and agreed upon a limit in its most recent negotiations. The Engineering Unit changed from unlimited to a two-tier system based upon date of hire. Both tiers, however, limit sick leave where it did not previously do so. Thus, this one change would favor the City

proposal. The City is also correct that all the other units, but fire do not give employees unlimited days for a major illness and this one does. Conversely, while the other two units have a limit, they have always had a limit. They did not recently change. The morale issue discussed by Arbitrator Torosian cannot be the factor it was there when the disparity has always existed. Morale does not all of sudden become an issue. Usually, the argument is made for conformity when all of the units have made the exact same change as proposed to the remaining unit and that unit is the lone holdout. This Arbitrator has most recently seen that trend in health insurance language. When all the units have agreed to a change in contribution or coverage and a single unit resists the change, Arbitrators have followed Arbitrator Torosian and found for the Employer. Those are not the facts here and thus the cases cited have less application here.

The Association is correct that even though the other units do limit the number of sick days, there are also some substantial differences between what each of the units has. One of those differences is how employees can use some of their leave days. Even under the City proposal in this unit, sick days need not used for all illnesses, only minor ones and family illnesses. The other units, except fire, must use their available days for every illness, major or minor, employee or family member. One unit limits the number of days that can be used for family illness. Others do not limit them. A provision allowing for the creation of a bank is consistent. Police, however, under the proposal have no accumulation. Neither does fire. Nor is there consistency in the bank itself among the internal comparables. Only the Clerical and DPW have the same limits. Engineering has a totally different provision. Given these differences,

how can an argument be made that there is internal consistency? Simply showing that everyone else has a limit on sick days is not enough in the Arbitrator's mind to create an internal pattern when there are major differences in how those sick days are used and in accumulation.

The Arbitrator must agree with the Association for the reasons stated that there is not real consistency within the internal units. Therefore, it is the Arbitrator's finding that while this factor to a small degree favors the City based upon the change made in the Engineering unit, it does not do so nearly to the extent argued by the City. While this factor when discussing benefits is normally critical, it is only critical when a clear pattern has been established. It is not determinative when that pattern is lacking, as it is here.

External Comparables

The parties agree on the list of comparables to be considered by the Arbitrator. They are Marshfield, Stevens Point, Wausau, Portage County (deputies) and Wood County (deputies). The Arbitrator has prepared a chart that highlights the sick leave provisions in the agreements of the comparables:

Marshfield	1 day per month- accumulation allowed
Stevens Point	12.25 days per year-accumulation allowed
Wausau	16 days per year, 5 max for family illness- 1108 hours maximum accumulation
Portgage	12 days per year –accumulation w/o limit
Wood	12 days per year- accumulation to 120 days

The current provision in this agreement is by far the most generous of all the comparables. Were the Association seeking to change sick leave to its current provision from something similar to the provisions in the agreements of the comparables this factor would unquestionably disfavor that change. That is not the case. The current language already exists and it is the City that wants to change it to conform to the others. What the City has not shown is that any of

the external comparables have recently changed from what this City now has to what they now have. That would be significant. If the others have always had their current provisions or something similar to it, then this City would have voluntarily chosen to give something more to its employees. This Arbitrator has often noted in the past that any party that voluntarily agrees to a provision that is different than what the external comparables are doing presumably did so knowing full well what it was doing at the time. An Interest Arbitrator should not change that voluntary agreement absent changed circumstances. The Arbitrator finds no new factors presented here that would warrant upsetting what was voluntarily done. Given that fact, as Arbitrator Krinsky noted in Chilton Schools, Decision No 22891-A:

> This arbitrator has said in many prior interest arbitration decisions that in his view major changes in the parties' contracts should be bargained rather than accomplished through arbitration, whenever possible."

Unless circumstances change before the next round of negotiations, it is in this manner that the City should again seek to attain the change it has proposed here to try to conform to the external comparables.

Interests of the Public

The Association contends that morale will be impaired if the City's proposal is adopted. The City counters by arguing that financially its proposal if adopted would be in the best interests of the public and that there is no evidence that morale would be affected if the City proposal prevailed. The Arbitrator finds little evidence that the adoption of either proposal would somehow favor or negatively impact on the welfare of the public. Therefore, the Arbitrator finds that this factor plays no significant role in the outcome here.

The Need for a Change

The Association believes that the City must meet certain criteria before its change can be considered. It notes those criteria are:

> The proponent of change to establish a very persuasive basis for such change, typically by showing that a legitimate problem exists which requires attention, that the disputed proposal reasonably addresses the problem, and that the proposed change is accompanied by an appropriate quid pro quo.[6]

It believes none of these factors have been met and that at the very least a quid pro quo had to have been offered by the City in order to achieve the reduction in sick leave benefit that it proposed. None has been offered. The City disagrees and argues that no quid pro quo is needed at all, and that it has proven that there is justification for the change even in the absence of a quid pro quo.

The City primarily relies upon its contention that its proposals are in line with the comparables to support its position. It cites Arbitrator Vernon in Rhinelander School District (Teachers), Dec. No. 27136-A (9/21/92):

> On the merits of the Employer's proposal, both Parties discuss the necessity or non-necessity of a quid pro quo. Essentially, the Association says that the changes sought by the Employer are too great and costly to expect that they should be bargained away for nothing in exchange. On the other hand, the District makes an argument with which, in principal, the Arbitrator must agree. They contend that when the comparables fully support the position of the Party seeking the change, the need for a quid pro quo is minimized, if not eliminated.

The Arbitrator agrees with that premise and has so held in the past. However, for the premise to apply the comparables must "fully support the position of the Party." The Arbitrator has already noted that he has found that they do not. While there was some similarity, the comparables certainly do not "fully

[6] Village of Fox Point (Public Works Department), Dec. No. 30337-A, 2002, (Petrie, 2002)

support" its position. There is simply too much variation among the internals and too little change among the externals. Therefore, the Arbitrator finds the holding of Arbitrator Vernon to be inapplicable here.

The Arbitrator is also not satisfied that a need for the change has been fully shown. It is true that employees over the last 3 years have taken 28 weeks of leave for childbirth and an additional eight weeks because of family illness. When considering the fact that there are 33 officers and 52 weeks in a year and the weeks that were used were spread over three years, that is not a significant total. Overtime was required in some instances, but again the $12,000 in overtime over 3 years is not a very high percentage of the total wage costs. Last year total wage costs for the Police Department were $1.9 million. For three years that is over $5.5 million. $12,000 is not a large sum of money when looking at this wage total.

The Association is also correct that the proposal of the City is more extensive than simply limiting days available for FMLA purposes. It also limits sick days for minor illnesses. There is no showing that there has been an abuse of sick leave by Officers. A proposal seeking to address a need must "reasonably address the problem" and not overreach to cover events for which no need has been shown. The City proposal overreaches by addressing an issue for which no need has been demonstrated at all.

Conclusion

The City is the party seeking to make a change from the status quo. It has the burden of justifying that change. While it certainly has shown some basis for its proposal, it has not shown enough justification to warrant the adoption

of its proposal. It has not met its burden. Therefore, the Arbitrator finds that the Association proposal for status quo is favored.

Wages

The difference in wage proposals is ¼ of 1% in each of the two years. The Association proposal would cost the Employer approximately $4800 more in 2005 and just under $10,000 in 2006 for a total extra cost of approximately $15,000. As a percentage of total wages this is not a large amount, but it is not insignificant either. This extra cost must be weighed against the various statutory factors to ascertain whether that additional cost is justified.

External Comparable

There are five other jurisdictions that make up the comparable. Of those five, only two have settled for 2005 and 2006. Police employees in Portage received a 3% increase in both years. Police employees in Wausau received a 2% increase in 2005 and a split increase in 2006. They will get a 2% increase on January 1 and an addition 1% on July 1. The additional 1% corresponds to a change in health insurance contribution rates. The City contends that the additional 1% is a quid pro quo for the change. That is probably accurate as it does conform to a trend that has been seen in various jurisdictions over the last few years to pay more in wages to obtain a health insurance change. For purposes here, Wausau shall be treated as if the police employees received a 2% increase in each of the two years.

The City is offering a 2.75% increase in 2005 and 2006. The Association proposes a 3% increase. The City proposal is higher than one of the two settled jurisdictions and less than the second. The Association proposal is in keeping

with one and more than the other. It is difficult to ascertain a pattern with only 2 of 5 jurisdictions having reached an agreement for the years in question. To the extent anything can be learned from such a small sample, there appears to be no uniform pattern at all. For that reason, it is impossible for the Arbitrator to conclude that this factor favors either party.

Internal Comparables

There is a much clearer pattern established for the internal comparables. The Clerical and Engineering units each accepted 2.75% for the two years in question. DPW accepted the same increase in 2005, but is to receive a 3% increase in 2006. The Fire Department is not settled for 2006, but received a 2.5% increase on January 1 and another 2% increase on July 1, 2005. Fire Department employees also increased their health insurance contribution in 2005. That matched the increase in contribution by the Police Unit in 2004. The Police got that same raise in 2004 because of their agreement to increase contributions. It was a quid pro quo. That is what occurred with the Fire Department in 2005.[7] They simply made the change one year later. They got less of an increase than the Police in 2004 because of the delay in their making the change in health insurance.

Based on the above, a pattern for 2005 has been clearly established. A 2.75% increase was the norm. In 2006, DPW varied from that pattern and there is no indication as to why. Two units received the same as the Employer proposal and one unit received the same as the Association proposal.

[7] The Association argues that the fire employees received other benefits such as payment for certain certifications as part of the quid pro quo that were not offered to the Police. The City notes that these were critical transport certifications that enabled the City to increase its revenue for Critical Care Transports. Given that explanation, the Arbitrator does not find that the City did offer more to the Fire in 2005 than it did to the Police in 2004 as a quid pro quo.

Notwithstanding this exception, the Arbitrator finds that internal comparables favors the City proposal.

Economic Conditions

The City notes that the County and the City are undergoing some difficult financial times. The paper industry is a large employer in the area. It has been experiencing a downturn in recent years. While the City is not arguing that it cannot pay the increase sought by the Association, it believes that the extra money sought by the Association is not warranted given these difficult financial conditions. Had the other factors clearly favored one party over the other, this argument would not carry enough weight to outweigh the other factors. It would not outweigh the external or internal comparisons. As noted, external factors do not favor one side over the other in this dispute. Internal factors favor the City. Thus, the City's argument regarding its financial condition is coupled with internal comparability to tip the scales in favor of the Employer proposal.

Conclusion

For the reasons stated, the City's wage proposal is favored.

Summary

The Arbitrator has found that the City sick leave proposal that seeks to change the status quo is not favored. Its wage proposal is. The Association contends that of the two proposals the sick leave proposal is the primary issue. It believes that whoever prevails on that issue should ultimately prevail. The City does not see the argument the same way. It sees both proposals as significant and of equal value. Were there a substantial difference in the wage proposals the Arbitrator might be inclined to agree with the City. The fact that

they are so close in terms of dollars and that the change in sick leave could significantly impact the employee causes the Arbitrator to agree with the Association. The sick leave change must carry more weight than does the extra cost of the wage proposal. The Arbitrator is faced with the dilemma often faced by Interest Arbitrators in this State. He cannot accept part of one offer and part of the other Party's offer. It is all or nothing and in this case that means the Association proposal in its entirety must prevail.

AWARD

The proposal of the Union together with the tentative agreements is adopted as the agreement for the parties for 2005 and 2006.

Dated: October 21, 2005

Fredric R. Dichter,
Arbitrator