STATE OF WISCONSIN

Before the Interest Arbitrator

In the Matter of the Petition	
of	**Case 293**
AFSCME Local 455	**No. 67619 INT/ARB-10082** **Decision No. 32530-A**
For Final and Binding Arbitration Involving Personnel in the Employ of Outagamie Highway Department	

APPEARANCES

For the Union:

Mary Scoon, Staff Representative Council 40

For the County

James Macy, Attorney

PROCEEDINGS

On September 9, 2008 the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission pursuant to Section 111.70 (4)(cm) 6. & 7. of the

Municipal Employment Relations Act, to resolve an impasse existing between AFSCME Local 455 of Outagamie County Wisconsin, hereinafter referred to as the Union, and Outagamie County, hereinafter referred to as the Employer.

The hearing was held on December 5, 2008 in Appleton, Wisconsin. The Parties did not request mediation services. At this hearing the Parties were afforded an opportunity to present oral and written evidence, to examine and cross-examine witnesses and to make such arguments as were deemed pertinent. The Parties stipulated that all provisions of the applicable statutes had been complied with and that the matter was properly before the Arbitrator. Briefs were filed in this case and the record was closed on January 30, 2009 subsequent to receiving the final reply briefs.

FINAL OFFERS

Union	Employer
Remove the 4th sentence in Article XIII, Section 4 which currently reads, "The department head may also request a doctor's certificate, for any sick leave used, before approving such leave with pay after 4 instances of sick leave, without a doctor's certificate, are taken in a calendar year."	**Status quo**

The Parties have agreed to a number of tentative agreements which will be included in the final Collective Bargaining Agreement.

XXXIII - Duration: The term of the agreement shall be for the period January 1, 2008 through December 31, 2010.

STATUTORY CRITERIA

7. "Factor given greatest weight." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of 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 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.

UNION POSITION

The following represents the arguments and contentions made on behalf of the Union:

The Union represents all full-time employees in the employ of the Outagamie Highway Department and the Solid Waste Department with the exclusion of department heads, engineers, superintendents and foremen, clerical employees and all confidential supervisory and managerial employees. This interest arbitration involves one issue. The issue relates to Article XIII - Sick Leave, which contains a contractual requirement for employees to provide a doctor's certificate before approving sick leave with pay. The Union seeks to modify this provision by removing the Employer's ability to request a doctor's certificate after four instances of sick leave used without a doctor's certificate. The language which provides for a doctor's certificate when three or more days are missed consecutively would remain intact.

The Union's proposal is not groundbreaking. There is internal comparable support among the other five units. Two of the units have a slight variation of the three-day threshold. The professional employees may be required to provide proof before the Employer approves any sick leave use. The remaining two units have identical language as this bargaining unit. The language that the Union seeks to strike has only been in the previous contract (2005/2007). The claim by the Employer that higher sick leave usage in this bargaining unit has occurred since 2005 is unsubstantiated as the record is void of any proof.

The Employer testified that the language change sought by the Union is problematic with the other units that possess similar language. If this were indeed true, why not pursue modifying the language which has been in existence for over 30 years? Once again the Employer's proof problem exists regarding this unit or any other unit.

The modification of the sick leave language in the 2005/2007 agreement met the needs of the Parties at the time, however, employees are now subject to health insurance plan changes which include additional out of pocket expenses. The Union has agreed to deductibles of $250 for single and $500 for family whereas in the past there were no deductibles. Employees also will be required to pay an office co-pay of $15 per visit. These office co-pays are new. These are substantial changes and the potential impact on the employees is significant. These changes are the very reason for this arbitration. It is the Union's position that there is very little effect on the Employer with respect to the Union's proposal.

With respect to the internal comparables there is a mixed result, however, the external comparables strongly support the Union's offer and should carry more weight in this dispute. Nine external units provide for three or more days. Only Calumet County requires a doctor's certificate after four instances of sick leave use. In addition three of the existing comparable units do not have any office co-pay requirement. In addition, if the Employer shall require such proof, it will be at the Employer's expense. Five of the external comparables have office co-pays in conjunction with similar language the Union is seeking. Sheboygan County requires a physician's certificate if absent more than two days, however, no office co-pay is required.

The Employer may argue a quid pro quo in this matter, however, the Union's offer is not seeking a huge change. In particular, given the strong support among the external comparables, the Union believes no quid pro quo is necessary. The Union provided a number of citations in support of this position. No quid pro quo is necessary when the change is reasonable and the change addresses the problem as it does in this case.

The Union also responded to the Employer's initial brief:

The County argued that its proposal of the status quo provides for internal consistency with a number of citations. The Union finds the citations by the Employer are not related to the instant case. There are no disputes concerning the changes to the health insurance plan

design, the quid pro quo or the overall general wage increases. In fact those items are identical for all bargaining units in Outagamie County. The Employer acknowledged that each settlement varied from one unit to the next with respect to specific issues that were unique to each bargaining unit. This unit is not a "hold out unit" in a health insurance or wage dispute.

The Union in this matter is not looking to discontinue the internal settlement pattern, only to seek a minor change to protect employees from the potential impact of the insurance plan design changes. Again, the Union provided a number of citations in support of this position.

With respect to the Employer's argument that the external comparables do not support the Union's offer, the Union stands by the arguments presented in its initial brief. The minor change the Union is seeking is not sweeping. As proven by the evidence in the record, the external comparables do strongly support the Union's offer. While it is not identical across the board, there is more support for the Union than not and, when taking into consideration the internal support, although mixed, coupled with the overwhelming support in the external comparables, a decision in favor of the Union is supported by the record.

The Employer also argued that the Union has not met its burden for changing the sick leave provision of the contract. It is the additional out of pocket expenses which clearly establish the need for a change. The need for this change is substantiated by the evidence in the record and testimony. It is clear that the employees are faced with more out of pocket

expenses with the agreed to insurance plan changes. This places a burden on employees and has a direct financial impact on all employees and their families where applicable. Therefore, the Union's offer is reasonable and necessary given the circumstances by this small change in the labor contract.

As expected, the Employer argued a quid pro quo. The Union must note an inaccurate statement in the Employer's brief. The Union did not claim the insurance concessions represented a quid pro quo for the proposed sick leave language change. The Union agreed that the 12 cent per hour increase constitutes that quid pro quo. Again, the citations cited by the Employer are not applicable in this case. The Union is not attempting to gain a new benefit and, therefore, no quid pro quo is necessary.

The Employer claimed that this was a "large ticket item" to this unit and that no other internal bargaining unit gained such an item during negotiations. This is not substantiated by any evidence offered in the Employer's record. What is important or monumental to one group may not be to the next.

Finally, the bargaining unit's decision to hold out unnecessarily increased the cost to both employees and the County. The Union finds this argument puzzling. The Union would note that other internal units have effective dates of 3/30/2008 and 7/01/2008 for health plan design changes. The Parties in this case have agreed to implement health insurance changes the first of the month following the Arbitrator's award and the quid pro quo three months

prior to the changes in the health insurance. The claim of inflated costs by the Employer is nothing more than an attempt to create a distraction, and the Union finds it appalling. The Union would also note that the Employer agreed to the implementation dates. If the Employer was in disagreement with the effective dates, then certainly it had the right to argue that point in this case.

Based on the above, the Union asked that the Arbitrator select its offer for inclusion in the successor agreement.

EMPLOYER POSITION

The following represents the arguments and contentions made on behalf of the Employer:

The County's offer provides for internal consistency. There is a general consensus and concern for the negative effect on morale for the inequitable treatment of all County employees. The only difference would be the implementation dates. Some arbitrators have supported the position that of all the other criteria, internal settlements traditionally carry the most weight. The County provided citations in support of this position.

The sick leave provision must not be altered by an interest arbitration. Article 13.04 was extensively changed in the 2005/2007 negotiations. The Union again proposes to revise the above recent contract language. Since 1972 the contract contained very broad language to

control sick leave. In 2005/2007 the Union looked to narrow that language and the Union again wishes to further narrow the language.

The external comparables do not provide compelling support for the Union's position. The City of Appleton is not an external comparable. There is no clear pattern for the Union to succeed in this matter among the external comparables.

The Union has not met its burden for changing the sick leave provision of the contract. The proponent of change bears the burden of proving that there is a need for change. The Union provided no explanation or documentation to support a change in the sick leave provision, nor has the Union provided a quid pro quo as the Employer did when it negotiated changes in the health insurance plan design and by providing a 12 cent per hour increase. Since the Union wishes to change the status quo, it must offer clear and convincing evidence of the need for the change and this was not done in this matter.

In addition the bargaining unit's decision to hold out unnecessarily increased the cost to both the employees and the County. The plan design changes which would allow the County and its employees to reduce the cost of insurance premiums have not been implemented causing a $3,165 increase in the Employer's cost per month in 2008 and a $4,672 increase in 2009.

The Employer had the opportunity to reply to the Union's initial brief:

The sick leave language has only been in the Parties' agreement for one contract term. The Union proposed that change in the provision with the County making the concession in that bargaining. Simply because the Union wishes to further restrict the County's ability to approve sick leave does not mean that the County should be required to further erode its rights.

The Union asserted that there was no proof with respect to higher sick leave usage by the Highway Department. The Director of Human Resources testified directly that the County has increased costs in the sick leave usage area. The Union provided no evidence to refute this testimony.

The Union argued that times have changed and that employees are now subject to health insurance plan design changes which include additional out of pocket expenses. It is the Employer's position that these changes have nothing to do with the sick leave proposal. The Parties agreed to the plan design changes and received a quid pro quo. This is clearly spelled out in the tentative agreements. The Parties agreed that a sufficient quid pro quo was agreed upon.

The Union placed a great deal of emphasis on the co-pays for office visits, however, Outagamie County employees pay less toward their deductibles. Union Exhibit 10 does not provide complete information and, based on the additional information, Outagamie County

deductibles are lower than other counties.

The Union further argued that this change is not huge or far reaching, therefore, no quid pro quo is necessary. The County refuted that by noting that sick leave usage has worsened since the prior change in the sick leave language. It is the Union that must prove the need for change whether a quid pro quo was offered or not. The Union has not put forth any evidence of its members having a problem with the existing sick leave provision. Since no need has been put forth by the Union, it has provided no evidence to support the need for the change in language. The facts are that the change requested by the Union is not minor, it is a difficult thing for the Employer to deal with.

Based on the above, the Employer would assert that its offer is the most appropriate and is the status quo, therefore, an award in its favor is appropriate.

DISCUSSION AND OPINION

The role of an Arbitrator in interest arbitration is substantially different from that in a grievance arbitration. Interest arbitration is a substitute for a test of economic power between the Parties. The Wisconsin legislature determined that it would be in the best interest of the citizens of the State of Wisconsin to substitute interest arbitration for a potential strike involving public employees. In an interest arbitration, the Arbitrator must determine not

what the Parties would have agreed to, but what they should have agreed to, and, therefore, it falls to the Arbitrator to determine what is fair and equitable in this circumstance. The statute provides that the Arbitrator must choose the last best offer of one side over the other. The Arbitrator must find for each final offer which side has the most equitable position. We use the term "most equitable" because in some, if not all, of last best offer interest arbitrations, equity does not lie exclusively with one side or the other. The Arbitrator is precluded from fashioning a remedy of his choosing. He must by statute choose that which he finds most equitable under all of the circumstances of the case. The Arbitrator must base his decision on the combination of 11 factors contained within the Wisconsin revised statute (and reproduced above). It is these factors that will drive the Arbitrator's decision in this matter.

Prior to analyzing each open issue, the Arbitrator would like to briefly mention the concept of status quo in interest arbitration. When one side or another wishes to deviate from the status quo of the collective bargaining agreement, the proponent of that change must fully justify its position, provide strong reasons, and a proven need. It is an extra burden of proof placed on those who wish to significantly change the collective bargaining relationship. In the absence of such showing, the party desiring the change must show that there is a quid pro quo or that other groups comparable to the group in question were able to achieve this provision without the quid pro quo. In addition to the above, the Party requesting change must prove that there is a need for the change and that the proposed language meets the identified need without posing an undue hardship on the other Party or has provided a quid pro quo, as noted above. In addition to the statutory criteria, it is this concept of status quo that will also guide

this Arbitrator when analyzing the respective positions.

As noted in the above paragraph, it is the Union that has requested the change from the status quo, a status quo that has existed since the 2005/2007 negotiations. The Union has provided no quid pro quo for its requested change but has based much of its argument on the external comparables and the changes in the health care plan design negotiated in the most recent negotiations for a 2008/2010 Collective Bargaining Agreement. There is no showing that the internal and external comparables are not pretty much the same in relation to the Outagamie Highway and Solid Waste Department employees since 2005. The only big difference would be the changes in the health care plan which has not been implemented to this time. The Employer has provided a quid pro quo for that change which will be implemented in advance of the changes involving the health care plan. The reason that these changes in the health care plan and the quid pro quo, which equals 12 cents per hour, have not been implemented is because of the bargaining unit's decision to contest this particular item.

Attendance is a critical concern for all employees and the Employer in Outagamie County, however, the Highway and Solid Waste Departments are of particular concern and critical to the public safety and welfare making attendance even more important to this group of employees. These employees are right up there with public safety employees and their effect on the public welfare and security, which is certainly not true of all internal comparables in this or other matters.

The record in this case does not show that the external comparables have similar

problems to this bargaining unit in the attendance area. Doctors' notes are not only of importance to verify the reasons for the time off, but also to make sure that returning employees are OK to work safely. The evidence offered by the Employer demonstrating a special need in this area due to excessive sick leave usage was not rebutted by the bargaining unit.

The statutory criteria of the factor given the greatest weight and the factor given greater weight are not determinative to this particular interest arbitration. The failure to promptly be able implement this new program does have costs associated with it and, while the bargaining unit certainly has the right to invoke interest arbitration, it is not without additional costs to the Employer. The Parties in this matter reached numerous agreements and to that end they should be congratulated. The Bargaining Unit agreed to changes in the health insurance plan in exchange for a 12 cents per hour increase. None of the other factors set forth in the statute and not discussed above would have any significant weight at all in the disposition of this case. Based on the above, the Arbitrator finds that it is the Employer's final offer that is most appropriate to this matter.

AWARD

On the basis of the foregoing and the record as a whole, and after full consideration of each of the statutory criteria, the undersigned has concluded that the final offer of the Employer is the more reasonable proposal before the Arbitrator and directs that it, along with the stipulations reached in bargaining, constitute the 2008/2010 agreement between the Parties.

Signed at Oconomowoc, Wisconsin this 11th day of February, 2009.

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Raymond E. McAlpin, Arbitrator