BEFORE THE ARBITRATOR

In the Matter of the Petition of FIRE EQUIPMENT DISPATCHERS LOCAL #4911, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO To Initiate Arbitration Between Said Petitioner and CITY OF MILWAUKEE	Case 558 No. 69166 INT/ARB-11392 Decision No. 33080-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Marianne Goldstein Robbins, on behalf of the Union.

Mr. Donald L. Schriefer, Assistant City Attorney, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "City," selected the undersigned to issue a final and binding award pursuant to Section 111.70(4)(cm)6 and 7 of the Municipal Employment Relations Act, herein "MERA." A hearing was held in Milwaukee, Wisconsin, on November 11, 2010, in Milwaukee, Wisconsin, which was transcribed. The parties subsequently filed briefs and reply briefs which were received by February 28, 2011.

Based upon the entire record and arguments of the parties, I issue the following Award.

INTRODUCTION

The Union represents for collective bargaining purposes a bargaining unit consisting of Fire Equipment Dispatchers, herein "Dispatchers," in the City's Fire Department.

The parties' prior agreement expired on December 31, 2006, and the Union filed its petition on September 8, 2009, with the Wisconsin Employment Relations Commission, herein

"WERC," which appointed Marshall L. Gratz to serve as the investigator. The investigation was closed on July 21, 2010, and the WERC on August 24, 2010, issued an Order appointing the undersigned as the Arbitrator.

BACKGROUND

After the predecessor agreement expired, the parties negotiated over the terms of two separate contracts – i.e., for 2007-2009 and 2010-2011 calendar year agreements. They agreed on July 23, 2007, that the provisions of the expired contract were to be extended "in full force and effect" until the execution of a successor agreement, and they subsequently agreed to a voluntary impasse procedure.

The parties agreed on all contract terms for both contracts except for how overtime is to be calculated and whether paid time-off is to be included in that calculation, which is the only remaining issue in dispute for both contracts. [1] The agreed-to terms include the following:

1. Salary increase of 2% for 2007 and 1% wage increases in Pay Periods 1 and 14 in 2008 and 2009.
2. A wage and step freeze in 2010-2011.
3. A small increase in health employee insurance contributions.
4. Employee pension contributions of 5.5% by employees hired after May 9, 2010.
5. A small early out pension incentive in 2010-2011.
6. Creation of a wellness program.

[1] The City agreed at the hearing to forego recoupment for any alleged overpayments made prior to Pay Period 20 of 2009. (Transcript, p. 149).

7. An agreement of up to four furlough days in 2010-2011 and a waiver of any claims challenging the 2009 scheduled furlough days.

8. An increase in the number of carryover vacation days.

9. Expanding the definition of "family members" for funeral leave purposes.

The disputed overtime language in Article 12, Section A. 1, relating to how overtime pay is calculated has remained the same since at least 1987. The City for about 20 years always included paid time-off when computing and paying overtime for over 40 hours, but the City stopped doing so in Payroll Period 20 in September 2009 and it has paid overtime based on actual hours worked since then.

FINAL OFFERS

THE UNION'S FINAL OFFERS:

The Union's Final Offers for both the 2007-2009 and 2010-2011 calendar year agreements are identical and state in pertinent part:

ARTICLE 12

OVERTIME AND SHIFT & WEEKEND DIFFERENTIAL

A. Overtime

1. An employee covered by this Agreement shall be compensated in cash at a straight time rate (1x) computed on the basis of his/her hourly rate of pay for the average work week in effect as established under the Hours of Work Article of this Agreement. The City shall compensate overtime performed by an employee at a rate of time and one-half (1.5X) computed on the basis of the employee's hourly rate of pay for the average work week in effect as established under the HOURS OF WORK Article of this Agreement for all time actually worked authorized by the Fire Chief in excess of his/her normal hours of work. Normal hours of work shall include all time worked as defined herein. "Time worked" means the time worked during the regularly scheduled

work periods, time taken off on authorized sick leave, vacation and any other periods for which the employee was compensated. Overtime will be paid according to practices followed before Pay Period 20, 2009. Employees will be compensated retroactively for overtime withheld as of Pay Period 20, 2009.

. . .

THE CITY'S FINAL OFFERS:

The City's Final Offers for both the 2007-2009 and 2010-2011 calendar year agreements are identical and contain the following language which was contained in the expired agreement:

ARTICLE 12

OVERTIME AND SHIFT & WEEKEND DIFFERENTIAL

A. Overtime

1. An employee covered by this Agreement shall be compensated in cash at a straight time rate (1x) computed on the basis of his/her hourly rate of pay for the average work week in effect as established under the Hours of Work Article of this Agreement for all time worked authorized by the Fire Chief in excess of his/her normal hours of work. Whenever the Fair Labor Standards Act (FLSA) requires the City to compensate overtime performed by an employee at a rate of time and one-half (1.5X) his/her base salary rate, the City shall comply with this requirement and compensate such work at a rate of time and one-half (1.5X) computed on the basis of the employee's hourly rate of pay for the average work week in effect as established under the HOURS OF WORK Article of this Agreement. Resolution of disputes involving application, interpretation or enforcement of Fair Labor Standards Act provisions applicable to employees covered by this Agreement shall be solely and exclusively reserved to the U.S. Department of Labor and the courts designated by the FLSA for review thereof.

. . .

POSITIONS OF THE PARTIES

The Union states that the "decisive criteria" consists of the parties' 20 years past practice of including paid time-off when calculating overtime, along with the internal and external comparables; that "The statutory criteria set forth in §111.70(cm)7. and 7g. relating to 'greatest weight' and 'greater weight' are inapplicable in this case"; and that the remaining statutory criterion "either supports the Union's proposal or have no impact on the present arbitration." The Union also contends that "The City's financial status does not establish a basis for selecting its offer over the Union's"; that the City's offer is unreasonable; that the "City misconstrues the Union's proposed language"; and that there is no merit to the City's claim that trades among the Dispatchers have increased overtime.

The City maintains that its proposal is supported by the "greatest weight" and "greater weight" factors because the City "has been in a state of deepening financial crisis for more than a decade" and that the Union's offer is unreasonable because it seeks an unneeded change in the status quo without offering any quid pro quo, and because the Union's proposal is "ill-timed." The City adds that the Union's proposal seeks to "undermine significant management rights and bar implementation of management actions that it opposes," and that the contract language as currently applied "has the effect of curbing a particular pernicious and manipulative type of overtime abuse that is possible under the Union's proposal." The City also states that the Union's proposal does "not mirror or even closely track language" found in any other City bargaining units or among the external comparables; that the Union's offer does not reinstate the overtime practice which existed before 2009; and that the Union's offer is aimed at regulating the possible hire of part-time employees.

DISCUSSION

Much of this dispute centers on whether there has been a change in the status quo and, if so, which party is required to offer a quid pro quo.

The Union contends that the City has changed the status quo because it in September 2009 discontinued the prior 20-year past practice of including paid time off in calculating overtime and that the Union's proposal restores that status quo, which is why it does not need to offer a quid pro quo. The City asserts that the Union needs to offer a quid pro quo because it is trying to change the status quo by changing the language in Article 12, Section A. 1 and by deleting all references to the Fair Labor Standards Act ("FLSA") which only includes actual hours worked for overtime purposes.

The Union has the better argument. For while it seeks a language change, the aim of that proposal is to restore a practice which always included paid time off in calculating whether the 40-hour work week threshold had been met. Changing the contract language to achieve that goal is the means of restoring the prior past practice.

It is true that the City since Pay Period 20 in 2009 no longer includes paid time off when calculating overtime and that the Union wants to change the way overtime is currently calculated. But the City made its change when the parties were negotiating over successor contracts to replace the one which expired in 2006 without the Union's agreement and over its strong objections, as the Union immediately filed a prohibited practice complaint with the WERC protesting that change.

No past practice thus supports the City's proposal because a past practice, by definition, must include mutuality which never happened here since the Union immediately challenged the City's unilateral change. [2]

The City claims that the Union is not really seeking restoration of the prior practice because the Union's failure to incorporate a 40-hour benchmark in its proposal is intended to dissuade the City from employing part timers and that if the Union wanted restoration of the prior practice, it simply could have proposed the second-to-last sentence in its proposal – i.e., that "Overtime will be paid according to practices followed before Pay Period 20, 2009."

This latter point is well taken because simply proposing the above-quoted phrase might have avoided some of the confusion here.

The Union proposed its language in response to the City's initial proposal to hire part-timers which the City subsequently dropped after the Union's objection. But the Union's proposal does not expressly state what the City claims it might mean. Furthermore, the Union's proposal refers to "normal hours" which is elsewhere defined in Article 11 of the 2007-2009 and 2010-2011 agreements which states that the normal work week "shall average 40 hours per week," and the parties' expired agreement also contained this same 40 hours language. The Union thus points out that "The forty hour per week reference therefore is maintained as before through reference to Article 11." [3]

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[2] See Elkouri and Elkouri, How Arbitration Works (ABA-BNA Books, 6th Ed. 2003), pp. 632-633.

[3] Reply Brief, p. 10. The Union adds that consistent with that prior practice, Dispatchers "will not receive an overtime premium under the Union's proposal as a result of trading shifts." (Brief, p. 20)

I have earlier stated that a party is bound to the representations it makes in an interest-arbitration proceeding,[4] and the Union's proposal here will be considered based upon those representations. The Union's proposal, if adopted, therefore shall be based upon a 40-hour week and the overtime pay practices followed before Pay Period 20, 2009.

The City contends that the pre-Pay Period 20, 2009, practices "are completely irrelevant to and shed no light upon how overtime will be paid to part-time employees because the City has never had part-time dispatchers before" and that the Union's language, which it calls a "poison pill," would enable part-timers to receive overtime anytime they worked more than 20 hours. The Union counters that the City's argument "is not only inaccurate, it is also irrelevant because the issue of part-time employees was mooted by its withdrawal of its proposal on this issue," and that "Part-time work is not an issue in this arbitration."[5]

If the Union's language, in fact, provided for what the City claims it means, I would reject it and adopt the City's proposal on this basis alone because it would be unconscionable to thwart management's legitimate efforts to help control in its labor costs through such a backdoor device.[6] But again, that is not what the language expressly states and that is not what the Union claims it means. Indeed, the Union throughout this proceeding never has made any representation that its proposal would apply to part-timers in that fashion.

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[4] See City of Wauwatosa and OPEIU Local 35, AFL-CIO, Decision No. 31613-A (2006), p. 20; AFSCME Local 990J and Kenosha County, Decision No. 33025-A (2011), p. 17.

[5] Reply Brief, p. 10; Brief, p. 23.

[6] See Kenosha County, supra, where I ruled that the employer could curb burdensome overtime practices which interfered with management's right to properly conduct its operations.

Having failed to do so, the Union is bound to its representation that its proposal is limited to situations involving 40-hour weeks. Its proposal, if adopted, therefore will be limited to those situations and have no applicability to part-time employees working less than 40 hours. [7]

The City claims that the Union's proposal could bring back "a particularly pernicious and manipulative type of overtime abuse" caused by employees who call in sick while on trades in order to build up their overtime. The City thus points to what it calls "a suspiciously high percentage of sick time at times when one is supposed to be filling in on a trade . . .," thereby creating the "strong suspicion that manipulation . . ." has occurred.

The Union states that the City's argument is based upon "meaningless" calculations because they fail to show that some employees were required to take sick leave while on trades because of sudden illnesses which made their sick leave percentages go up and that, "There is absolutely no evidence that trades have anything to do with sick leave utilization." It argues that some employees only used 2 days of sick leave on trades while only using 4 – 5 sick days for the entire year; that another employee only used a total of 4.38 sick leave days in a year; that another had 79 trades in a year and used sick leave on only 4 trades; that other employees happened to be sick on other days; and that such low usage does not constitute abuse.

The problem with the City's claim is that it rests almost entirely upon exhibits which merely list the dates that sick leave usage occurred without any direct evidence about why employees took that sick leave. There thus is no basis for finding that sick leave abuse actually occurred during those trades. Moreover, the City can curb any such alleged abuse since it has

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[7] If the City hires them, the parties will have to bargain over what overtime, if any, shall be paid to part-time employees working less than 40 hours a week.

the right to deny trades if they are being abused for sick leave purposes, and it apparently has the right under the agreement to insist upon a doctor's note and to visit someone's residence to make sure that person is at home while on sick leave. The City therefore can deal with this issue even under the Union's proposal.

I thus find no merit to the City's claim that the Union's proposal should be rejected because of this perceived, but unproven, abuse.

The City also claims that it could unilaterally alter the prior practice on the ground that: "An employer's right to disregard practices that are contrary to express contract language is an established principle in labor law."

That is not quite correct. For while some arbitrators may share that view, Arbitrator Richard Mittenthal points out in his seminal article on past practice that when a past practice is contrary to clear and unambiguous contract language, it may be "evidence of a subsequent modification of their contract." [8] He explains that if such a "practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force," which is why "practices may <u>by implication</u> become an integral part of the contract." [9] (Emphasis in original).

That happened here because the parties for about 20 years assumed that the practice of including paid time off for calculating overtime trumped the FLSA language in Article 12, Section 1. A.

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[8] Mittenthal, Richard, "Past Practice And The Administration Of Collective Bargaining Agreements, <u>Proceedings of the National Academy of Arbitrators</u> (BNA Books, 1961), pp. 30, 44.

[9] <u>Id</u>., pp. 48-49.

But it is unnecessary to determine whether the City's repudiation of that past practice in contract negotiations did or did not violate the predecessor agreement, as that issue is outside the scope of this proceeding.

The City also claims that the Union's proposal is "ill timed" because it comes "during a period of acute and deepening economic crisis."

If the Union were seeking an entirely new benefit, this point would be well taken because these are not the times to seek significant new benefits absent very compelling reasons why they should be granted in face of the City's very serious financial difficulties. But the benefit here is not new, having paid out in the past for at least 20 years. Moreover, the timing of the Union's proposal came about only in response to the City's unilateral repudiation of that practice in 2009, thereby leaving the Union with no choice but to make this an issue when it did.

The City claims that it has offered a quid pro quo because its proposal expands the definition of funeral leave to include domestic partners and increases the number of carryover vacation days, and that the health co-pays for the City's other represented groups "went into effect long before the health co-pays for the present group . . .," thereby enabling the Dispatchers to save on their co-pays.

Labor Relations Officer Joseph Alvarado testified, however, that these changes "made it more consistent with other units in the department," [10] thereby establishing that these changes represent catch-up. Delayed co-pays were beneficial, but they were the product of lengthy negotiations rather than any explicit quid pro quo from the City. The City therefore has not offered a sufficient quid pro quo for the change it seeks.

[10] Transcript, p. 143.

The City also argues that "The Union has not shown any need for modifying the language of Article 12, Section A. 1, because the Dispatchers have not lost any significant overtime as a result of the City's change since they continued to average about $563 in bi-weekly overtime in the final seven pay periods in 2009. The City adds that any subsequent drop in average overtime resulted from the City's decision to reduce staffing levels and not to the change in how overtime is calculated.

I disagree. Mr. Alvarado testified that the Union's proposal "would cost the City more in overtime . . ., [11] thereby showing that Dispatchers will lose money if the City's proposal is adopted. Furthermore, the past practice here existed for about 20 years during which time Dispatchers were always credited with hours paid regardless of whether that generated a little or a lot of additional overtime. It therefore is immaterial how much overtime they now are collecting because the current situation may change.

Seeking restoration of this past practice is supported by statutory Factor 7.r.j. because interest arbitrators consider past practices under "Such other factors," and because they are "likely to be accorded determinative importance when either or both parties are proposing changes in the status quo." See City of Schofield, Decision No. 29505-A (Petrie, 1999). See also Clark County, Decision No. 32090-A (Honeyman, 2008), where Arbitrator Honeyman ruled in favor of a union proposal calling for codification in the contract of a past practice governing overtime which had been unilaterally abrogated by the employer.

The Union states that its proposal is supported by the internal comparables because all other City bargaining units except for Firefighters (who work 24-hour schedules) receive credit

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[11] Transcript, p. 133.

for hours paid in determining how overtime is calculated. The Union adds that all of the external comparables except for the City of Appleton follow the same practices, and that it is immaterial that the external comparables do not utilize the City as their comparables because arbitrators in the past have used them as comparables in arbitrations between the City and its unions. It also argues that it is immaterial that the Dispatchers are more highly paid than their counterparts elsewhere because their base rate of pay is not in issue and because "It must be assumed that the parties had good reason for agreeing on the rates which they did." The Union also states that the City's proposal is "contrary to the provisions and practice of every comparable employer within the State of Wisconsin or the Milwaukee Metropolitan area."

The City contends that the Union's proposal contains language not found in the comparables; that the internal comparables do not support the Union's proposal because IAMAW District 10 employees are paid overtime "strictly in accordance with the FLSA language that is almost identical . . ." to the language here; because Firefighters also are paid in accordance with the FLSA; and because Dispatchers, unlike other City employees, have a "virtually unlimited capacity to trade," and are highly paid. It also asserts that "consideration of outside comparables is totally inappropriate" because the internal comparables are more important and because the City "differs profoundly" from other cities.

Contrary to the City's claim, little significance can be given to the Union's failure to not track word-for-word the overtime language found among the City's internal units or the external comparables, as the Union's proposal provides for the inclusion of paid time off when computing overtime based upon a normal 40-hour work week - which is the essence of what these other contracts provide.

I agree that the internal comparables are more important than the Union's proposed external comparables. The Firefighters, though, work 24-hour shifts and they are not really comparable to the Dispatchers who work 8-hour shifts. Furthermore, while the language in the District 10 agreement is similar to the one here, District 10 employees in fact are credited with hours paid for overtime purposes.[12] And, while Dispatchers are well paid and have generous trade privileges, that has little bearing on the separate question of whether their paid paid off should be credited for overtime purposes.

The City thus wants to extract an added concession from this bargaining unit while at the same time retaining it for all other City employees who have it. Arbitrator Zel Rice pointed out the unfairness of such an approach by stating: "If the Employer is to maintain labor peace with the many bargaining units with which it negotiates, changes in wages and benefits must have a consistent pattern." City of Milwaukee, Decision No. 25223-B, pp. 6-7 (9/1988).

As for the external comparables, I agree that they are different from the City. Nevertheless, all of them except the City of Appleton include paid time off for calculating overtime, thereby showing how universal this practice is.

This nearly universal practice among the internal and external comparables establishes that the Union's proposal is supported by statutory Factors 111.70(4)(cm)7r.d. and e. relating to internal and external comparables.

Turning now to whether the City can afford to pay for the Union's proposal, the City maintains that the City's economic situation "has become increasingly dire and its future prospects are dim," and that its proposal is supported by the statutory "greatest weight" and

[12] Union Exhibit 6, p. 3.

"greater weight" Factors 7. and 7g. It points out that its share of state revenues has dropped dramatically; that it has "a weak and declining tax base"; that it cannot raise its user fees to offset its general expenses; that it has significantly high health care and pension costs for its employees and retirees; and that it had to make a $47 million pension contribution in 2010. The City's financial difficulties are spelled out in a special report entitled "Between A Rock And A Hard Place" issued by the Public Policy Forum, an independent local government group, which concluded that even if the City limits its expenditures to the rate of inflation, "Expenditures and revenues will remain structurally out of balance."

The Union counters that the City has "not established that is proposal will, in fact, save any appreciable amount of funds" because the bargaining unit is small and because the City has not calculated what cost savings will be achieved by adopting its proposal. The Union adds that it already has made significant economic concessions to the City because of its financial difficulties, and that the City has failed to justify why it here refuses to pay overtime based upon hours paid when it continues to do so for almost all other City bargaining units. It also maintains that the "greatest weight" and "greater weight" statutory factors are inapplicable because the City has "not identified any state law or legislative or administrative directive . . ." which precludes the City from paying the overtime in dispute; that the City's need for fiscal restraint, standing alone, does not mean that local economic conditions preclude the adoption of the Union's proposal; and that the City had a budget surplus of about $23 million in 2009.

The City is, indeed, experiencing very difficult financial times largely caused by the greatest financial crises since the Great Depression which has resulted in a drop in property taxes and reduced state aids and a host of other difficulties, thereby making it necessary for the City to exercise great fiscal restraint. Indeed, the Union has recognized this fact by agreeing to a

numerous contract concessions which include a wage and step freeze in the 2010-2011 agreement; four unpaid furlough days; and having new hires contribute 5.5% towards their pension. The Union would not have made these concessions - which would have been unheard of several years ago - unless it recognized that the City is experiencing very difficult economic times.

On the other hand, the City has not identified any significant cost savings generated by no longer including paid time off in calculating overtime. While that may appear to be counterintuitive, Mr. Alvarado testified that part of the reason for that may be because Dispatchers now can avoid receiving straight time for working overtime by simply turning it down, thereby cutting down on the amount of overtime they otherwise would perform.

However, even if we assume that the City's proposal will generate some savings for this small bargaining unit consisting of 17 or so Dispatchers, it nevertheless cannot have any meaningful impact on the City's overall budget. I therefore find that the City can afford to pay for the Union's proposal and that the "greatest weight" and "greater weight" factors do not impact upon this proceeding.

The remaining statutory criteria relating to the City's lawful authority; to the stipulations of the parties; to comparisons to the private sector; to the CPI; to overall compensation; and to changes during the pendency of this proceeding have no impact in this dispute.

CONCLUSION

I find that the Union's proposal to restore the status quo is more reasonable than the City's proposal because it is supported by the internal and external comparables and "other factors," and because the City has not offered any quid pro quo for the change it seeks.

I therefore conclude that the Union's Final Offers, along with all tentative agreements, shall be incorporated in the parties' 2007-2009 and 2010-2011 agreements. [13]

Based upon the above, I issue the following

AWARD

The Union's Final Offers, along with all tentative agreements, shall be incorporated in the parties' 2007-2009 and 2010-2011 agreements.

Dated at Madison, Wisconsin, this 28th day of April, 2011.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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[13] As related above, the agreements shall be based upon a 40-hour work week and the overtime pay practices followed before Pay Period 20, 2009. They also shall not cover what overtime, if any, is to be paid to part-time employees working less than 40 hours.