STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of CITY OF KENOSHA and THE CITY OF KENOSHA EMPLOYEES LOCAL 71, AFSCME, COUNCIL 40, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO To Initiate Mediation-Arbitration Between Said Parties	WERC Case LIV No. 22482 MED/ARB-15 Decision No. 16159-C

Appearances:

Lindner, Honzik, Marsack, Hayman & Walsh, S. C., Attorneys at Law, by Mr. Roger E. Walsh, appearing on behalf of the City of Kenosha.
Mr. Richard Abelson, District Representative, Wisconsin Council of County and Municipal Employees, appearing on behalf of Local 71, AFSCME.

ARBITRATION AWARD:

On March 9, 1978, the Wisconsin Employment Relations Commission appointed the undersigned as the Mediator-Arbitrator, pursuant to Section 111.70 (4) (cm) 6.b. of the Municipal Employment Relations Act, in the matter of a dispute existing between the City of Kenosha, referred to herein as the Employer, and the City of Kenosha Employees Local 71, AFSCME, Council 40, Wisconsin Council of County and Municipal Employees, AFL-CIO, referred to herein as the Union. Pursuant to the statutory responsibilities the undersigned conducted a mediation meeting between the Employer and the Union on April 24, 1978, during which time the undersigned attempted to effect a voluntary settlement of the issues between the parties. At the conclusion of the mediation meeting of April 24, 1978, no resolution of the dispute had been reached, and on April 28, 1978, the undersigned notified the Employer, the Union, and the Commission that he was proceeding to the arbitration phase of the proceeding, and that the parties had until May 5, 1978, to advise the opposing party, the Commission and the Arbitrator of their wish to withdraw their final offer. On May 4, 1978, pursuant to the provisions of Section 111.70 (4)(cm) 6.c., and within the time frame established by the undersigned, the Union advised the Employer, the Arbitrator, and the Commission, that it was withdrawing its final offer, and further advised all parties of their intent to strike, in the event the Employer also withdrew his final offer. The Employer did not withdraw his final offer, and pursuant to provisions of Section 111.70 (4)(cm) 6.c., which provides that unless both parties withdraw their final offers....., the final offer of neither party shall be deemed withdrawn and the mediator-arbitrator shall proceed to resolve the dispute by final and binding arbitration, as provided in this paragraph, the undersigned set hearing for May 25, 1978, to take evidence in this matter. Hearing was conducted on May 25, 1978, at Kenosha, Wisconsin, at which time the parties were present, and given full opportunity to present oral and written evidence, and to make relevant argument. A transcript of the proceedings was made, and briefs were filed in the matter, which were exchanged by the Arbitrator on July 10, 1978. Reply briefs were also filed by the parties, which were exchanged by the undersigned on July 24, 1978.

THE ISSUES:

The issues in dispute between the parties are set forth in the final offers of each party which have been filed with the Commission and are part of this record. The final offers of the parties filed with the Commission are lengthy, and contain many items not in dispute between the parties. The statement of issues will set forth only those items contained within the final offer of each party which are in dispute.

EMPLOYER FINAL OFFER:

(Disputed Items)

1. Revise 5.03 B to read:

In the event of a vacancy in any other position represented by the Union, the City retains the right to administer written and/or oral examinations to determine qualifications and aptitudes for the position. In these positions, the senior applicant who receives a qualifying score on the examinations and who desires the position shall be awarded the position. If another opening in the same classification occurs within six (6) months of the original posting, the new vacancy need not be posted. Employees previously awarded a vacant position from such original posting shall be contacted to determine if they desire the new opening, and the senior qualified applicant from such original posting who desires the position shall be selected.

2. Amend Section 11.01 to read:

Earned Leave. Employees with regular status who have completed the required number of years of continuous and satisfactory service shall earn annual leave for each month of employment during which they work at least half of their scheduled work days in accordance with the following tables based on anniversary dates of employment. For purposes of this section, time paid for shall be considered time worked.

3. a) Revise Section 16.01 to read:

The City agrees that an employee off work due to a work-related injury shall receive, in lieu of wages, payment equal to his normal net pay for a period of one (1) year from the date of the original injury or illness. Such payment shall not be considered wages and, as such, shall not be subject to Federal or State withholding taxes nor to Wisconsin Retirement Fund or Social Security contributions. The City further agrees to continue payment of the employee's hospital-surgical and the group life insurance premiums during this period.

b) Execute the following Memorandum of Understanding:

In connection with the revision to Section 16.01 in the 1978-1979 agreement between the City of Kenosha and Local 71, AFSCME, any employee who, during the period from January 1, 1978 through the date of execution of such 1978-1979 agreement, was off work due to a work related injury and who received payments pursuant to the provisions of Section 16.01 of the 1976-1977 agreement between such parties that he or she would not have been entitled to under Section 16.01 as revised in the 1978-1979 agreement, shall not be required to reimburse the City for any such payments made during such period.

4. Amend the first paragraph of Section 17.06 to read:

Any employee in the classification of Plant Operator I, Assistant Plant Operator, or Public Safety Dispatcher who is scheduled to work on a holiday shall receive payment at the rate of one and one-half (1-1/2) times his normal pay for the time actually worked plus the holiday pay.

5. Add new Section 21.04 to read:

> Notwithstanding the provisions contained elsewhere in this article, employees in the classification of Public Safety Dispatcher, Clerk-Matron, Sewage Plant Operator, Pumping Plant Operator, Filtration Plant Operator may at the discretion of the City be required to take their lunch period and coffee break at their work site and be responsive to duty during those times, and in such situations the regular eight (8) hour day will be paid for inclusive of the lunch and coffee break periods.

The Union opposes the inclusion into the 1978-1979 Agreement of all of the above items.

UNION FINAL OFFER OF ITEMS REMAINING IN DISPUTE:

1. Add the following to Section 3.03:

> In 1978 there shall be no sub-contracting or contracting of services which results in a layoff or reduction in work force or hours. In 1979 the City agrees to negotiate to the point of impasse the impact upon bargaining unit employees of any contemplated sub-contracting or contracting.

2. Add to Section 4.05:

> Employees shall be able to bump into higher position regardless of pay rates in the event of a layoff.

3. Add to Section 5.08:

> Employees shall not be required to work in a higher rated classification.

4. Add new Section 5.09:

> (a) Solid Waste Division Temporary Transfers: Six (6) employees shall be permanently designated for the purpose of temporary transfers to the Department of Public Works, Solid Waste Division. The list is to be established based on the least senior employee in the Department of Public Works Street Division, Department of Public Works Central Service, and the Department of Public Works Engineering Division; and shall consist of employees classified in equal or higher paying classifications.
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> (b) Temporary Transfers to the Solid Waste Division shall be up to two (2) weeks duration.

The City opposes the inclusion into the 1978-1979 Agreement of all of the above items.

DISCUSSION:

The discussion set forth below will evaluate each of the final offers of the parties separately, and will take into consideration the statutory criteria found at 111.70 (4)(cm) 7 in doing so. The undersigned will first consider the items in dispute which are contained in the Employer's final offer.

VACATIONS AND PAID LUNCH PERIODS (17.06 and 21.04)

Two of the items contained in the Employer final offer deal with earned leave (vacation) and with paid lunch periods for certain employees in the unit, and are identified at Section 17.06 and 21.04 of the Employer final offer. The record is clear with respect to the vacation and lunch period provisions in dispute, that the language proposed by the Employer merely clarifies the existing practice with respect to these two provisions, and would not produce any change in the current operating practices as they exist between the parties. Because the language proposed by the Employer on these items merely codifies the existing practice and clarifies

the provisions of the Contract, the undersigned concludes that it would be beneficial to both parties to have this matter clarified, and the undersigned would favor the inclusion of the clarifying language.

EMPLOYER'S PROPOSED MODIFICATION OF JOB POSTING (5.03 B)

The Employer has proposed a modification of the language which would permit a standing list of qualified applicants to remain in existence for a period of six months after the date of the original posting. Under the proposed Employer language, if a second vacancy occurs within a classification previously posted during a six month time period, the Employer would be free to fill the second vacancy from employees who had posted for the original job. The language that existed in the previous Collective Bargaining Agreement required that all vacancies be posted, except those which occurred in the same classification and department within a six month period. Thus, the Employer proposal would extend the provisions of the old Agreement so as to eliminate the departmental limitation of the six month exception to the posting provision and make the six month exception applicable to all positions which require testing, providing the second vacancy was within a six month period of time and within the same classification as the original posting.

The Employer has adduced evidence showing that the proposed modification would expedite the filling of vacancies under the job posting provision which has been troublesome to the Employer during the term of the previous Agreement. The Employer further introduced evidence purporting to show that the proposed modification would conform to practices existing in the comparable communities of Sheboygan, Wauwatosa, West Allis, Beloit and Racine. The practice in the aforementioned communities with respect to posting job vacancies was established in the record by the testimony of James Warzon, supervisor of Personnel for the Employer, who testified that he secured the information by communicating with representatives of the aforementioned communities. The Union opposes the consideration of Warzon's testimony on this point, alleging that all matters testified to regarding job posting constitute hearsay. The undersigned will give weight to Warzon's testimony over the objection of the Union in this matter. Survey information is such an established method of securing data in labor relations that this Arbitrator considers it to be acceptable in interest arbitration proceedings. The undersigned notes that the Union does not challenge the veracity of the practices which were testified to by Warzon, but only takes issue with whether it should be considered based on hearsay. It would follow, then, that in the absence of a challenge of the accuracy of the data testified to by Warzon, the undersigned accepts the testimony as being accurate.

The Union opposes the inclusion of the modification primarily because the Employer proposal would preclude any employee from bidding on a vacant position if a second vacancy occurred within a six month period of time, and that employee had not bid when the first vacancy was posted. The Union further points to provisions of collective bargaining agreements from the communities of Racine, Wisconsin Rapids, Madison, Eau Claire, Superior, Janesville, Stevens Point and Beloit which provide for posting of all positions without exception.[1]

From the evidence adduced at hearing it is clear that in comparing comparable communities no clear pattern has been established by either party which would persuade the undersigned to favor for his position. The Employer has been able to show communities which follow procedures of the type which he has proposed, and the Union has been able to show contract provisions which provide no exceptions to the posting provisions of the type he proposes. Consequently, the undersigned concludes that in evaluating the statutory criteria of working conditions for employees in comparable communities, said criteria is of little or no value.

The Employer has made, to the satisfaction of the undersigned, a satisfactory case that the posting provision which he proposed would alleviate an administrative problem which affects both the administration and the employees. The Union, on the other hand, has satisfied the undersigned that some employees may miss an opportunity

1) Both parties rely on Racine and Beloit in an effort to establish practice in comparable communities. The Union has supplied the specific contract language, whereas the Employer testified that practice has been worked out comparable to what the Employer has proposed here, in spite of the contract language in Beloit and Racine which appears to read to the contrary.

to post for a job vacancy if the Employer's proposal is adopted. In weighing the alternatives, the undersigned concludes that he has no preference as to position on this matter, and whether the job posting of the Employer is included into the Contract will be determined by the merits of other matters in dispute between the parties.

EMPLOYER PROPOSED MODIFICATION OF THE WORKER'S COMPENSATION PROVISION (16.01)

The Employer proposal would modify the supplementary pay to an employee off work due to a work related injury which now provides that an employee would receive his normal net pay for a period not to exceed one year per injury or illness, to a provision which would provide that the employee receive his normal net pay for a period of one year from the date of the original injury or illness.[2] The Employer proposal could drastically reduce the number of days to which an injured employee would receive full pay. Presently the language permits an employee to receive one full year of full pay, regardless of how long after the date of injury the employee might miss time. The proposed modification would limit full payment to the employee to a period of one calendar year. Under the Employer proposal one full year of supplemental pay to an injured employee could only be realized in the event the injured employee were totally disabled for the full year following the injury. The Employer has adduced evidence to show that none of the private sector employers provide a benefit of the type involved in this provision, and that in 18 communities in the state only the city of West Allis has a more liberal benefit of the existing language of the Contract, and the Employer's proposed modification would not disturb that comparison.

Further, the Employer points to the abuses which he asserts have occurred in the application of this provision in the past, and to the fact that the amount of supplement involved is limited to approximately $30.00 per week under the terms of the provision. The undersigned has carefully considered the evidence in this matter, and consistent with arbitral opinion, which holds that provisions to which parties have agreed previously should not be removed from an agreement by a third party, unless there is a very strong showing on the party proposing the removal that it is unworkable or inequitable; the undersigned concludes that there is insufficient proof in the record to show that it is unworkable or inequitable, and would, therefore, favor the Union position on this item that the language of the prior Agreement be maintained.

HOLIDAY PAY FOR PUBLIC SAFETY DISPATCHERS (17.06)

The record establishes to the satisfaction of the undersigned that the Employer proposal regarding holiday pay for public safety dispatchers would treat these employees in the same fashion that all other hourly employees working a seven day operation are treated with respect to holiday pay. The record further discloses that the present exception for public safety dispatchers for holiday pay arose because they accreted to the bargaining unit during the term of the prior Collective Bargaining Agreement, and no specific arrangement was made to treat them for holiday pay purposes like other seven day operation hourly employees. The undersigned can see no reason why public safety dispatchers should have more favorable holiday pay provisions than other seven day operation employees of the Employer, and for that reason favors the Employer proposal on this issue.

The Arbitrator will now consider the proposals advanced by the Union.

SUBCONTRACTING (3.03)

The Union proposal would further limit the right to subcontract on the part of the Employer. The prior Collective Bargaining Agreement at Article II, Section 2.05 of the Management Rights clause, provides that the right of contracting or subcontracting is vested solely with the City, provided that the City recognizes that the Union has an obligation to all its members and agrees that the right to

2) The Employer has further proposed a memorandum of understanding that no employee would be required to repay benefits paid during the retroactive portion of the new Agreement.

contract or subcontract work or services will not be used for the purpose or intention of undermining the Union or to discriminate against any of its members. Obviously, the proposal of the Union with respect to the year 1978 will prohibit any subcontracting which results in layoff, reduction in work force or hours; and for the year 1979 would require negotiating to the point of impasse the impact of any contemplated subcontracting. At hearing the Union adduced evidence intending to show comparable language to their proposal for the year 1978, in the City of Racine, in the City of Wisconsin Rapids, and in Walworth County. The Employer introduced 17 contracts from various units in the cities of Waukesha, Wauwatosa, Milwaukee, Beloit, Madison, Janesville, Oshkosh, Marathon County, Wausau, Manitowoc, Stevens Point, LaCrosse, Racine and Green Bay, which provide the right of the Employer to contract or subcontract. Of the 17 contract provisions introduced by the Employer, 11 of the contracts have some type of specific restriction on the Employer on the right to subcontract or contract out work. From the foregoing evidence, the undersigned concludes that in considering the working conditions in comparable communities, it is not unique that limitations be attached to the employer's right to contract out work. The undersigned, therefore, concludes that a restriction of the Employer's right to contract out is reasonable, based on the comparison of comparable employees and comparable employers.

While limitations on the right to contract out are reasonable, it remains to determine whether the specific proposal made by the Union in this matter should be adopted. The undersigned notes that the Union was able to show only three employers with similar provisions to the provision the Union proposes for the year 1978. The undersigned has studied the language of the provisions dealing with subcontracting found in the Racine, Wisconsin Rapids and Walworth County contracts, and notes that the provisions found in the contracts of the City of Racine and Walworth County are the same as the proposal of the Union in this case for the year 1978. The terms of the provisions dealing with subcontracting from the Wisconsin Rapids contract, however, are not as limiting as those proposed by the Union for 1978. Since the provisions for 1978 proposed by the Union in this matter are considerably more restrictive than the provisions found in other collective bargaining agreements which limit the right of the Employer to subcontract (except for Racine and Walworth County), the undersigned concludes that based on a comparison with comparable employees in comparable communities, the Union proposal with respect to 1978 is too limiting.

With respect to the Union's proposal for the year 1979, it would require the parties to reopen negotiations to the point of impasse prior to subcontracting out work. The Employer has argued that adopting the reopening language for 1979 would merely result in a postponed impasse under this item should the Employer elect to subcontract. The undersigned agrees that it would be preferable for the parties to come to an understanding of subcontracting language rather than leaving it openended as it pertains to 1979. Therefore, from the foregoing it would follow that the Employer's position on subcontracting is to be preferred.

UPWARD BUMPING (4.05)

The language of the prior Agreement has been interpreted in an arbitration proceeding to foreclose upward bumping in the event of a layoff. The Union proposes that employees shall be able to bump into higher positions regardless of pay rates in the event of a layoff. The Union argues that its proposal is one of equity, because a senior employee should not be denied access to a position to which he is qualified merely because that position is at a higher pay level. The undersigned agrees with the position argued by the Union that qualified employees equitably should be permitted to bump upward in order to avoid a layoff. The language of the Union proposal, however, makes no reference to qualifications of the employees and, therefore, in the opinion of the undersigned is too broad to be adopted. Had the Union limited its proposal on upward bumping to those employees who are qualified for the higher positions, or perhaps to those employees who had previously occupied the higher classification, the undersigned would have favored the Union proposal. Because there is no mention of qualifications in their proposal, the undersigned favors the Employer position that no further modification be made.

LIMITATIONS ON EMPLOYER RIGHT TO TRANSFER (5.08 and 5.09)

The Union has proposed two limitations on the right of the Employer to transfer employees in the unit. At section 5.08 the Union proposal provides that employees shall not be required to work in a higher rated classification. At section 5.09 the

Union proposes that temporary transfers to the solid waste division of the Employer be limited to six employees who are the least senior employees in the Department of Public Works Street Division, Central Service, and Engineering Division, and, further, that the six employees so designated must be in equal or higher pay classifications; and still further that the temporary transfers to solid waste shall be up to two weeks duration. The undersigned has reviewed all of the evidence and considered all of the argument with respect to these two proposals, and concludes that the Union proposals are too limiting to be adopted. Had the Union proposed that employees transferred out of classification be paid at the appropriate rate or their regular rate, whichever is higher, the evidence which the Union adduced with respect to comparable provisions in comparable communities would have been quite persuasive and the undersigned would have favorably entertained such a proposal. Since the Union proposed language could result in the Employer being unable to assign any employee to perform work duties for certain positions under certain situations, the undersigned can only conclude that the Union offer is so limiting so as to potentially restrict the Employer's ability to operate his business and, therefore, is rejected by the undersigned.

CONCLUSIONS:

After due consideration to each of the issues discussed above, the undersigned concludes that the Employer offer in this matter is preferred, based on the statutory criteria, the evidence submitted at hearing, the arguments of the parties, and makes the following:

AWARD

The final offer of the Employer is to be incorporated into the Collective Bargaining Agreement for the two year term beginning January 1, 1978, through December 31, 1979.

Dated at Fond du Lac, Wisconsin, this 14th day of August, 1978.

Jos. B. Kerkman /s/
Jos. B. Kerkman,
Mediator-Arbitrator

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