WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE MEDIATOR-ARBITRATOR

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AUG 18 1978
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Arbitration Between

JUNEAU COUNTY HIGHWAY EMPLOYEES
LOCAL 569, AFSCME, AFL-CIO

and

JUNEAU COUNTY (HIGHWAY DEPARTMENT)

* *

ARBITRATION AWARD

Case XXVI
No. 22550 MED/ARB-28
Decision No. 16271-A

Appearances:

For the Union: Robert Chybowski, District Representative, Wisconsin Council of County and Municipal Employees

For the Employer: Jerome Klos, Esq., Special Labor Counsel

BACKGROUND

On January 26, 1978, Juneau County Highway Employees, Local 569, AFSCME, AFL-CIO (hereinafter referred to as the Union), filed a petition with the Wisconsin Employment Relations Commission (WERC) requesting that the Commission initiate mediation-arbitration pursuant to Section 111.70(4)(cm)(6) of the Municipal Employment Relations Act, to resolve a collective bargaining impasse between Juneau County (Highway Department) and the Union. The Union is the certified exclusive collective bargaining representative for a unit consisting of all regular full-time and regular part-time employees of the Employer but excluding the highway commissioner, supervisory personnel, confidential clerical employees and temporary employees. On March 29, 1978, the WERC found that the parties had substantially complied with the procedures set forth in Section 111.70(4)(cm) required prior to the initiation of mediation-arbitration and that an impasse existed within the meaning of Section 111.70(4)(cm)(6). On April 18, 1978, after the parties notified the WERC that they had selected the undersigned, the WERC appointed the undersigned as mediator -arbitrator to resolve the impasse pursuant to Section 111.70(4)(cm)(6)(b-g).

By agreement, the mediator-arbitrator met with the parties on May 31, 1978 at the Juneau County Courthouse, Mauston, Wisconsin, at 2:30 p.m. to mediate the dispute. When the parties failed to reach a settlement, an arbitration meeting took place at 3:30 p.m., pursuant to prior written notification given to the WERC, the parties and the public. The arbitration meeting was open to the public. At the meeting, the parties had a full opportunity to present evidence and make supporting arguments. Following the meeting, written summaries of arguments were received by the undersigned and exchanged with the parties.

THE ISSUE

Under Wisconsin's Municipal Employment Relations Act as recently amended, the mediator-arbitrator must resolve the impasse between the parties by selecting the total final offer of the Employer or the total final offer of the Union. In this dispute,

only one issue remains unresolved in order for the parties to conclude a collective bargaining agreement for a two year period commencing January 1, 1978. The sole issue in this proceeding relates to overtime pay for unit members during the period November 1 through April 30.

The Union's final offer is that, effective January 1, 1979, the fifth paragraph of Article VIII (Hours of Work) be amended to read:

> Employees shall be paid at the rate of one and one-half (1 1/2) times the normal rate of pay for all hours worked in excess of the normal work day or work week. Time and one-half (1 1/2) shall also be paid for any work performed on Saturdays, Sundays or Holidays, except rest area employees and winter nightmen who will be governed by the first sentence of this paragraph. Any employees called back to work on the same day after having completed their regular work day and before their next regular scheduled starting time shall be guaranteed a minimum of two (2) hours of call-in pay at the rate of one and one-half (1 1/2) times the normal rate of pay.

The Employer's final offer is that no changes shall be made to the language contained in the 1977 collective bargaining agreement. Paragraph five of Article VIII states that:

> Employees working in excess of the above hours during any week shall be paid at their regular working rate, except that during the six (6) month period commencing on or about May 1, employees shall be paid at the rate of one and one-half times the normal rate of pay for hours worked in excess of the normal work day. Time and one-half shall be paid for any work performed on Sundays and Holidays the year round, except rest area employees and winter nightman who will be governed by the first sentence of this paragraph. Any employees called back to work on the same scheduled starting time shall be guaranteed a minimum of 2 hours pay at their regular hourly rate, except that during the six month period commencing on or about May 1 employees shall be guaranteed said call-in pay at the rate of one and one-half (1 1/2) times the normal rate of pay.

As the above language indicates, the Employer already pays time and one-half for the six month period from May 1 through October 30 and on Sundays and Holidays the year round.

STATUTORY CRITERIA

In resolving this dispute, the mediator-arbitrator is directed by Section 111.70(4)(cm)(7) to consider and 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 and with other employees generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.

e. The average consumer prices for goods and services, commonly known as the cost-of-living.
f. 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.
g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
h. Such other factors, not confined to the foregoing, which are normally and traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

POSITIONS OF THE PARTIES

The Union

At the arbitration meeting, the Union argued that its final offer was more reasonable than that of the Employer for several, distinct reasons. First, the Union introduced undisputed evidence that the overwhelming number of counties near Juneau County provided year round overtime pay for their highway department employees. According to a Union exhibit, only Columbia County currently fails to provide time and one-half pay for highway employees working on Saturdays while sixteen remaining counties provide the Saturday overtime pay sought by the Union in this proceeding on a year round basis. In addition, the Union presented evidence to demonstrate that the six counties surrounding Juneau County (Monroe, Adams, Richland, Vernon, Wood and Sauk) provided in 1977 fringe benefits (such as holidays, sick leave accumulation, vacations, health insurance) which appeared to be substantially similar to those provided by Juneau County to members of the bargaining unit. It presented further evidence that 1978 and 1979 settlements for comparable employees in surrounding counties provided improved fringe benefits in addition to increased wages. The overall compensation packages represented by these settlements were generally in excess of the package agreed to by the Employer herein which only included a wage increase. Longevity pay was the only possible area where Juneau County's practice may be above average.

In addition, the Union submitted two articles from the Milwaukee Journal (April 28, 1978 and May 4, 1978) which noted that the March 1978 rise in the Consumer Price Index brought the annual rate through the first quarter of 1978 to 9.3% and that the largest gain in wholesale prices in three and one-half years took place in April 1978. The Union stated that these facts were not known when it agreed to modest wage increases only for the 1978-1979 two year agreement. Finally, the Union argued that the overtime benefit it now seeks had been received at one time by bargaining unit members and should be restored to them. (The Union is referring here to federal legislation enacted by Congress extending the overtime provisions of the Fair Labor Standards Act to municipalities. This legislation was held to be unconstitutional by the United States Supreme Court in Usury v. National League of Cities.). The Employer, unlike surrounding counties, had not put the overtime requirements of the FLSA into a collective bargaining agreement and therefore withdrew the benefit when the Supreme Court decided the National League of Cities case.

For all the above reasons, the Union concluded that its offer should be chosen because it satisfied more closely the statutory factors which the mediator-arbitrator must weigh.

The Employer

The Employer also made several distinct arguments at the arbitration meeting to support its position that its final offer was fair and reasonable and, therefore, should be selected by the mediator-arbitrator. First, the Employer contended that it compares favorably in the array of benefits it provides for members of this bargaining unit and suggested that a comparison should be made between Vernon County highway department employees and Juneau County highway department employees. In making this comparison, not only as to wages but also as to other contractual benefits, the Employer concluded that Juneau County highway department employees have advantageous conditions. Therefore, it is not reasonable to expect additional bargaining concessions from the Employer in the overtime pay area, particularly when in 1977 no full-time bargaining unit member received less than $10,200.00 with the many salaries reaching over $11,000.00. Second, the Employer noted that its wage offer, without considering additional roll-up costs, was 7% and that exceeded the 1977 cost of living increase which was 6.8%. It also exceeds the 6% salary increase for Juneau County courthouse employees.

Both at the arbitration meeting and in its brief, the Employer stressed a third point. It noted that the existing contract contained several features which were non-productive. These included portal to portal pay and summer work schedules which do not permit an efficient scheduling of road construction without overtime. The Employer stated its willingness to concede on the Union's demand for additional year round overtime pay if the Union were willing to make some bargaining concessions and give up some of the high cost, unproductive practices which it currently enjoys. Further, the Employer expressed its concern that even at existing cost levels, certain jobs performed by highway department employees could be performed by private contractors at lower costs and that there was increasing pressure to consider contracting out highway department work in view of an escalating gap between private and public costs and decreasing reimbursements from the state. The Employer did not argue inability to pay.

For these reasons, the Employer concludes that its final offer is fair and reasonable and should be selected.

DISCUSSION

When applying the criteria set forth in Section 111.70(4)(cm)(7) of the Municipal Employment Relations Act to the arguments made and facts presented in this case, it is readily apparent that the question is a close one. Both parties cite multiple statutory factors which the mediator-arbitrator must give weight to in support of their ultimate argument that their own final offer is the more reasonable one. Certainly neither final offer is unreasonable. The Employer's argument that it is willing to meet the Union's demands in this area of overtime pay in exchange for a bargaining concession by the Union which would increase productivity (such as eliminating portal to portal pay in whole or in part or permitting more efficient scheduling of summer working hours) is a powerful one. If the Employer had produced sufficient evidence at the arbitration meeting to demonstrate that its total overall compensation package, including all fringe benefits (economic and non-economic alike), was at least comparable to what other similarly situated employees receive, then the Employer's final offer would appear more reasonable. However, the Employer's evidence concentrated on one comparable, Vernon County. It sought to counter the Union's evidence that most other comparable counties not only paid overtime but also provided an overall compensation package which was at least as good as that received by Juneau County highway department employees by referring the mediator-arbitrator generally to data contained in the 1977 Wisconsin Survey of County Employee Salaries. The Union objected to such a procedure,

particularly noting the data's limitations and errors. In view of this objection and the additional problem that post-arbitration meeting research by the mediator-arbitrator would not provide the parties with an opportunity to know what evidence might be relied upon in the decision making process and to raise questions about that evidence, the mediator-arbitrator has concluded that she will not give any weight to the Survey data. Instead she will consider only what was presented at the meeting and in the briefs because that is both reliable and current. In carefully reviewing the evidence presented, the undersigned finds that the Employer did not prove its assertion that bargaining unit members receive wages and benefits which are at least as good or better than comparable public employees in comparable communities.

Accordingly, the undersigned concludes that the Union made a stronger case that the facts it presented at the arbitration meeting supported its final offer. First, other county highway department employees almost universally receive this benefit. Second, private sector employees, including employees of private contractors, receive this benefit because they are covered by the Fair Labor Standards Act. Third, recent and significant increases in the cost of living during spring 1978 were not known to the Union when it settled for average wage increases with no other contract improvements. Fourth, settlements elsewhere for comparable employees favor the Union position.

The mediator-arbitrator acknowledges that the Employer makes an important point to the Union when it notes that increasing labor costs may lead to the elimination of bargaining unit jobs and an increased use of private contractors. This is a serious argument but it is up to the Union to assess its priorities and determine the degree of risk it is willing to take in this regard. Since the Union has presented sufficient evidence to persuade the mediator-arbitrator that its final offer more nearly conforms to the statutory criteria which must be weighed, the possibility of increased use of private contractors and the elimination of some bargaining unit jobs while relevant to the mediation process is not a factor to be considered in the arbitration process.

AWARD

Based upon full and fair consideration of the statutory standards set forth in Section 111.70(4)(cm)(7), the exhibits, arguments, and briefs of the parties and for the reasons stated above, the mediator-arbitrator selects the final offer of the Union and orders that it be incorporated into the collective bargaining agreement between the parties.

Chilmark, Massachusetts
August 5, 1978

June Miller Weisberger
Mediator-Arbitrator