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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE ARBITRATOR

In the Matter of the Mediation/ Arbitration of a Dispute Between	
THE CITY OF MIDDLETON	
and	AWARD AND OPINION
WISCONSIN COUNCIL OF COUNTY & MUNICIPAL EMPLOYEES, AFSCME, LOCAL 60, AFL-CIO	Decision No. 16440-B

Case No.	XI No. 22612 Med/Arb 39
Hearing Dates:	
Mediation	September 18 and October 10, 1978
Arbitration	January 26, 1979
Appearances:	
For the City	Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, by MR. JACK D. WALKER
For the Union	MR. WALTER J. KLOPP, Representative
Arbitrator	ROBERT J. MUELLER
Date of Award	May 30, 1979

BACKGROUND

By decision dated June 29, 1978, the Wisconsin Employment Relations Board found that the parties had reached an impasse in the negotiation of a first Labor Agreement covering the calendar year 1978, and ordered that mediation/arbitration be initiated. By order dated July 13, 1978, the undersigned was appointed to serve as mediator-arbitrator to endeavor to mediate and/or arbitrate the dispute pursuant to the Wisconsin Statutes. The initial mediation session was scheduled for September 18, 1978. No petitions for public hearing were filed on behalf of the public. Mediation efforts were extended and efforts made to settle the dispute on September 18 and on October 10, 1978. At the conclusion of the mediation session of October 10, the undersigned determined that there remained the possibility of further settlement on various of the large number of separate issues still remaining, and the undersigned thereupon requested the intervention by a mediator from the Wisconsin Employment Relations Commission pursuant to ERB 31.16(4) of the Wisconsin Administrative Code. A Commission mediator thereafter engaged in mediation efforts with the parties and was successful in obtaining settlement between the parties on a number of issues. The parties thereafter submitted their final offers to the undersigned of the remaining issues which then constituted the final offer of each party.

The matter was then presented to the undersigned in arbitration

on the basis of the final offers of each of the parties, and the arbitrator is charged with the duty of resolving the impasse by selecting either the total final offer of the City of Middleton or the total final offer of the Union pursuant to Section 111.70(4)(cm)6, c through h of the Municipal Employment Relations Act.

In consideration of the respective final offers, the undersigned will consider the factors specified in Section 111.70(4)(cm)7 of the Municipal Employment Relations Act, which provides as follows:

> "7. 'Factors considered.' In making any decision under the arbitration procedures authorized by this subsection, the mediator-arbitrator shall 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 employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services and with other employes 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 employes, 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 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."

At the hearing, both parties presented oral testimony and documentary evidence relating to some, but not all of the factors designated by the Wisconsin Statutes for consideration. Each party was given full opportunity to present such testimony and evidence as they deemed relevant. Written briefs were submitted to the undersigned and copies of each party's respective brief was mailed to the opposing party on April 11, 1979.

THE FINAL OFFERS

1. Fair Share

Union Proposal:

"1.02 Fair Share Agreement. The City recognizes the 'Fair Share' principle as set forth in Wisconsin Statutes 111.70 as amended. A deduction from each employee shall be made from the paycheck each month in the amount as certified by Local 60 treasurer, as the uniform dues of the Union. Deduction of fair share payment, equivalent to the dues, shall commence after six (6) months of employment. The initiation fee, if any, as certified by the Local 60 treasurer, shall be deducted for new employees."

City Proposal:

The City proposes that there be no fair share provision in the Labor Agreement.

2. Seniority

Union Proposal:

"4.01 Seniority - Definition and Probation. New employees shall be on a probationary basis for a period of six (6) calendar months. Probationary employees may be terminated without recourse to the grievance procedure. If still employed after such date, their seniority shall be established as their most recent date of hire. Probationary employees will receive paid holidays during their probationary period and insurances as allowed by the carrier.

Upon completion of probation, the employee shall receive all benefits provided for in this Agreement effective as of their starting date.

Probationary employees will be paid twenty cents (20) per hour less than the regular rate until the completion of probation.

The length of service of the employee with the City shall determine the seniority of the employee.

The principle of seniority and qualifications will apply in all cases of promotion within the City, transfer, decrease, or increase of the working force as well as preference in assignment to shift work (when a vacancy occurs) and choice of vacation period, except as otherwise provided for in the Agreement. In the filling of vacancies, where qualifications of the applicants are relatively equal, the senior employees shall be given preference.

"4.02 Continuous Employment is interpreted to mean year-round employment. Continuous employment shall not be construed to be interrupted by absence of an employee while receiving from the City of Middleton Worker's Compensation payments or full salary in lieu thereof for temporary disability, paid leaves of absence, military leave, or any paid for time, as set forth in the Agreement.

City Proposal:

"7.01 All newly hired employees shall be on probation for the first six months of their employment. Upon satisfactory completion of the probationary period, said employee shall become a regular employee.

"7.02 Employees defined. A regular employee is defined as a person hired to fill either a regular full-time or a regular part-time position; full-time meaning a regular schedule of forty (40) or more hours per week; part-time meaning a regular schedule of hours of work each day or each week.

"7.03 Seasonal and temporary employees are employees who are hired to fill a position for a period normally not to exceed 120 calendar days; however, the employer may extend the period an additional 30 days where the services of such employees are needed.

"10.01 The principle of seniority shall be taken into account only on layoff and recall. In the event that there shall be a layoff of employees, the employee with the least seniority within a classification shall be the employee laid off provided that the remaining employees shall have the capabilities to perform the available work. Recall from layoff shall be by seniority within a classification provided the employee recalled is capable of performing the available work.

"10.02 Seniority shall accrue from the most recent beginning date of employment by the Employer. Credit for total seniority will be given in the event of layoff in the employee's classification. An employee's seniority shall be terminated for any of the following reasons:

1. If the employee quits.

2. If the employee is discharged.

3. If the employee is laid off for a period equal to accumulated seniority or one year, whichever is shorter.

4. If the employee is laid off and fails to notify the Employer of his intention to return to work within three (3) working days after issuance of a recall notice and fails to report for work within five (5) working days of the date of issuance of the recall notice, unless such failure to report is beyond the employee's control.

5. If the employee is absent from employment for three (3) consecutive working days without notice to the Employer, unless such failure to give notice is beyond the employee's control.

6. If the employee incurs a disability which prevents him from properly performing his work, and there is no other work available which he can perform, unless the employee is on a leave as provided by any other provision of this Agreement.

7. If the employee retires."

3. Job Posting

Union Proposal:

"5.01 A vacancy is defined as an unfilled position due to the retirement, quit, death or termination of an employee, or the creation of a new position. All vacancies will be posted.

"5.02 When a position covered by this Agreement becomes vacant, such vacancy shall be posted in a conspicuous place listing the pay, duties and qualifications, shift and work area. This notice of vacancy shall remain posted for a five (5) work day period. Employee(s) making application for the vacancy will sign the posting.

"5.03 Where qualifications and abilities are relatively equal among the applicants, the senior employee will be assigned to the vacancy.

"5.04 The successful applicant shall be given a ninety (90) day trial period in the new position. If, prior to or at the end of the trial period it is determined that the employee is not qualified to perform the work, he/she shall be returned to his/her old position and rate. If the employee satisfactorily completes the trial period, he/she shall receive the rate of pay for the position.

"5.05 If no employee(s) apply for the vacant position or no employee can qualify, the City may fill the position from outside. This Article shall be subject to Equal Employment Opportunity rules and regulations."

City Proposal:

"5.01 When a position covered by this Agreement becomes vacant, such vacancy shall be posted in a conspicuous place listing pay, duties, qualifications, shift and work area, if any. This notice of vacancy shall remain posted for a five (5) day period. Employees applying to fill the vacancy shall openly compete against others applying for the position. The Employer shall award the position to the person most qualified."

4. Hours of Work and Shift Premium

Union Proposal:

"6.01 Work Hours

. . .

B. Dispatchers & CSO's

The work day shall consist of eight (8) consecutive hours on the following shift schedule:

Day shift: 6:40 am to 3:00 p.m. (20 minute lunch break)
2nd shift: 2:40 p.m. to 11:00 p.m. (20 minute lunch break)
3rd shift: 10:40 p.m. to 7:00 am (20 minute lunch break)

Dispatchers and CS)'s shall be on the same work schedules as sworn officers. Any change to shift assignment shall be according to present practice. A ten day notice will be posted for a change in shift assignment.

. . .

D. Shift Premium.
The City will pay the additional sum of one dollar ($1.00) per shift per employee for all shifts starting and worked between the hours of 2:40 p.m. in the afternoon and seven o'clock (7:00) in the morning, Court Clerk and Custodian excluded.

City Proposal:

"8.03 Except for dispatchers and CSO's: The workweek shall consist of five (5) consecutive eight (8) hour days, Monday through Friday. The workday shall consist of eight (8) consecutive (except for breaks) hours to be scheduled by the Employer somewhere between the hours of 7:30 A.M. and 5:30 P.M. (45 minute unpaid lunch break). Such employees shall be paid at the rate of one and one-half times their regular rate of pay for all work required to be performed in excess of eight hours per day. There shall be no pyramiding of overtime. The work schedule of the Court Clerk and Custodian may vary based on service needs.

5. Overtime

Union Proposal:

"7.01 Employees covered by this Agreement shall be paid at the rate of time and one-half (1½) times their regular rate of pay for work performed:

A. On a Saturday, Sunday or holiday (plus holiday pay), except Dispatchers and CSO's.

B. For all hours worked by an employee outside of his/her regular work schedule. In computing 'hours worked', all time paid for shall be considered 'hours worked'.

C. On a holiday (plus holiday pay) for Dispatchers and CSO's.

D. Over eight (8) hours in a twenty-four (24) hour period (Monday through Friday), whose work schedule may vary during the week.

City Proposal:

"17.01 Overtime Pay. Employees required to work over eight (8) hours per day or forty (40) hours per week shall receive one and one-half their regular hourly rate for all such time worked. Overtime shall be paid for in cash no later than payday for the pay period following the pay period in which it is earned. Employees (except dispatchers and CSOs) covered by this Agreement required to work on a Saturday, Sunday or holiday, shall receive time and one-half for all time worked, in addition to any holiday pay.

6. Wages and Classifications

Union Proposal:

"8.01 In this Agreement and made part of it as Appendix 'A', shall be established as the Classification and Pay Plan. It shall list all positions covered by this Agreement by title along with the wages for each position. Any new position that is created shall be added, with the salary to be negotiated.

"APPENDIX A
CLASSIFICATION AND PAY PLAN

"The following wages and classifications shall be effective January 1, 1978

DEPARTMENT & JOB TITLE	LABOR GRADE	INCUMBENT EMPLOYEE	MINIMUM RATE	EMPLOYEE 1978 RATE	MAXIMUM RATE
Clerk/Treas. Dept.					
*Account Clerk	14	John Stamler	3.77	5.92	4.82
Secretary	13	Diane Nichols	3.59	3.77	4.59
Public Works Department					
Eng. Tech. III	22	James Wald-schmidt	5.58	6.19	7.12
Eng. Tech. I	18	Denis Koehler	4.59	4.93	5.85
Secretary	13	Marilyn Haag	3.59	3.77	4.59
Custodian	15	C.W. Zimmerman	3.96	4.93	5.06
Police Department					
Community Services Ass.I	15	Vacant	3.96	--	5.06
Community Services Ass.II	17	Ron Lahaie	4.37	4.93	5.58
Police Dispatcher	14	Leroy Graves	3.77	3.96	4.82
Police Dispatcher	14	Vacant	3.77	--	4.82
Police Dispatcher	14	Lori Rhodes	3.77	3.77	4.82
**Police Dispatcher	14	Dave Hohoney	3.77	3.77	4.82
Police Dispatcher	14	Jerry Jansen	3.77	3.77	4.82
Admn. Secretary	14	Joan Olafson	3.77	3.77	4.82
Secretary	13	Vacant	3.59	--	4.59
***Clerk Typist II	11	Pamela Cummings	3.26	3.44	4.16
Recreation Department					
Clerk Typist I		Ruth Wood	3.10	3.44	3.96

* Red Circle Rate - Formerly Deputy Clerk-Treas.
** To receive twenty (20) cents per hour less than minimum rate 1/1/78 and $3.77 per hour upon completion of probation.
*** To receive current rate of pay until completion of probation and $3.44 per hour remainder of 1978.

City Proposal:

"17.02 Wage Rates and Job Classifications. The employees covered by this Agreement are those regular employees working in the classifications described in Appendix 'A' attached hereto. The hourly wage rates shall be as described in Appendix 'A'.

"APPENDIX A

"The following classifications and minimum wages shall be effective January 1, 1978:

	Hire	6 Months	18 Months
ENG TECH III	5.60	5.90	6.26
ENG TECH I	4.50	4.70	4.91
CSO II	4.30	4.60	4.91
CSO I	3.96	4.24	4.52
CUSTODIAN*	3.96	4.24	4.52
DISPATCHER	3.52	3.70	3.88
ACCOUNT CLERK **	3.52	3.70	3.88
SECRETARY	3.48	3.66	3.84
CLERK-TYPIST II	3.26	3.42	3.59
CLERK-TYPIST I	3.10	3.26	3.42

* The present employee shall be red-circled at $4.91 for 1978.
** The present employee shall be red-circled at $5.97 for 1978.

Except for red-circled employees, employees who have transferred to a new classification shall be deemed to have been 'hired' in that classification on the date they began working in the classification (for wage progression purposes only).

7. Severability

Union Proposal:

"20.01 Severability. Should any provision of this Agreement be found to be in violation of any Federal or State law by a court of competent jurisdiction, all other provisions of this Agreement shall remain in full force and effect for the duration of this Agreement, and any benefit, privilege or working condition existing prior to this Agreement not specifically covered by this Agreement shall remain in full force and effect and if proper notice is given by either party as to the desirability of amending, modifying or changing such benefit, privilege or working condition, it shall be subject to negotiation between the parties.

City Proposal:

"22.01 Should any provision of this Agreement be found to be in violation of any Federal or State law

by a court of competent jurisdiction, all other provisions of this Agreement shall remain in full force and effect for the duration of this Agreement.

8. Discipline and Discharge and Management Rights

Union Proposal:

"2.01 It is agreed that the management of the City and its business and the direction of its working forces is vested exclusively in the Employer, and that this includes, but is not limited to, the following: To direct and supervise the work of its employees; to hire, promote, transfer or lay off employees or demote, suspend, discipline or discharge employees for just cause; to plan, direct, and control operations; to determine the amount and quality of the work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other employer; to introduce new or improved methods or facilities, or to change existing service practices, methods and facilities; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules.

City Proposal:

"2.01 It is agreed that the management of the City and its business and the direction of its working forces is vested exclusively in the Employer, and that this includes, but is not limited to the following: to direct and supervise the work of its employees: to hire, promote, transfer or lay off employees or demote, suspend, discipline or discharge employees; to plan, direct, and control operations; to determine the amount and quality of the work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other employer; to introduce new or improved methods or facilities, or to change existing service practices, methods and facilities; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules.

"20.01 It is agreed that the exercise of proper and reasonable disciplinary measures belong to management and it, therefore, is agreed that the employer may in its discretion discharge employees without prior warning or notice when the following offenses have been committed. The employer shall personally deliver to the employee or send by certified mail to his last known address within twenty-four (24) hours of the time of discharge, a written notice of such action with the reasons therefor, a copy of which shall be sent to the Union.

a. If an employee shall during working hours be under the influence of intoxicants or drugs not prescribed by his physician to the point that his work is materially affected, or while on the employer's premises or during working hours, possesses or consumes any intoxicant or drug not prescribed by his physician and which can potentially affect his performance of his work.

b. If an employee shall engage in an act to steal or otherwise illegally acquire anything of value from the employer, or from anyone else during hours of work.

c. If an employee shall willfully damage employer's property.

d. If an employee shall willfully violate a posted major safety rule.

e. If an employee shall use any City vehicle for unauthorized purposes or to transport persons in violation of a posted rule.

f. If an employee shall fail or refuse to carry out any work assignment for which the employee is qualified and capable of performing, except work which exposes the employee to unwarranted danger for his own safety.

g. If an employee shall become involved in an employment related conflict of interest and continues after being given ten (10) days notice to cease.

h. If an employee shall become convicted of any crime or serious misdemeanor, relevant to his employment as a public employee.

i. If an employee shall assault any City official or supervisor or any other person while on duty.

j. If an employee shall falsify material facts in records or applications of employment.

"20.02 The following offenses shall call for progressive discipline:

a. If an employee shall be absent or tardy without a good reason or without being excused by the employer.

b. If an employee shall engage in acts of misconduct during hours of work which adversely reflect on the image of the City.

c. If an employee shall be negligent or inefficient in the performance of his assigned duties.

d. If an employee shall violate one or more of the posted work or safety rules.

e. If an employee shall use profane or indecent

language in the presence of other employees or the public under circumstances where they are likely to be offended.

f. If an employee hazes or taunts a fellow employee.

g. If an employee solicits or collects contributions for any purpose in working area and during working hours, except during break time.

"20.03 An initial offense, as listed in 5.02 above, shall be cause for written reprimand which shall be given to the employee with a copy to the Union; a second offense shall be cause for suspension without pay (not to exceed ten (10) days) with notice to the employee and the Union; a third offense shall be cause for discharge but only when the two previous actions were taken within a period of six (6) months prior to date of discharge and when all such previous actions were not grieved or, if grieved, sustained.

"20.04 In the event that any reprimand or disciplinary action taken by the Employer shall give rise to a grievance and such grievance is submitted to arbitration, the arbitrator shall have the authority to determine if the Employer has followed the agreed upon procedure and, if the employee is guilty as charged; and if he finds such not to have been the case, he shall order the employee made whole and without prejudice. If the arbitrator finds that the employee is guilty of the alleged violation as charged by the Employer, then the arbitrator shall have no authority to modify the reprimand or disciplinary action which has been imposed by the Employer.

"20.05 Any discipline not covered above shall be subject to a 'cause' standard of review."

DISCUSSION

With respect to the Fair Share issue, the Union presented exhibits showing that fair share provisions are contained in numerous collective bargaining agreements between Wisconsin Council #40 and county and municipal employees in the State of Wisconsin (Union Exhibit #2). Also presented was an exhibit (Union Exhibit #3) revealing fair share agreements in effect in the Madison Metropolitan area.

The employer also presented a large number of exhibits consisting of labor agreements between various unions, and employers in the Madison area that did not contain fair share. In addition, the Employer presented evidence that a number of area municipal employees have no labor agreement and thus, no fair share.

In addition to the statistical arguments presented, the Employer argued that under the case of Abood v Detroit Board of Education, 431 US 209, 52 L.ed 2d 261 (1977), a number of legal concerns are raised which places in issue the legality of the fair share provision as drafted and proposed by the Union. Under such case, the Employer contends that serious constitutional questions are raised concerning what amount constitutes a true

fair and legal share. They contend that the Union proposal does not address itself to such concerns as expressed in Abood, supra, and that the Employer should not therefore be required to become a party to a contractual provision which contains potentially illegal provisions and thus be placed in the probable situation of incurring subsequent costs of litigation that may arise therefrom.

The Employer additionally argues that the fair share provisions that are found in various labor agreements do contain language that is addressed to the concerns referred to in Abood, supra and that many refer to the fact that they are subject to the duty of the Wisconsin Employment Relations Commission. The Employer further contends that the Union's proposal does not clearly hold the City harmless in the event of any fair share dispute, and that it contains no provision for proration of fair share payments for part-time employees.

As a final argument, the Employer contends that the Union has shown no need for such provision, that they have made no showing as to how many employees are voluntary members or how many are not presently dues paying members.

The Union contends that their evidence reveals that on the basis of numbers alone, fair share has come to be recognized as more or less the order of the day. In addition, they point out that the Wisconsin legislature provided that fair share agreements were permissible purely on the basis of their being negotiated between the parties, and set no requirement for there being any majority or greater vote in the form of a referendum prior to their being included in a collective bargaining agreement. They contend that such action by the legislature clearly indicated that fair share was recognized as a legitimate and proper matter to be negotiated and included in labor agreements.

The undersigned has considered this issue and the evidence presented thereon with respect to the statutory factors of 7a, c, d, f and h. The exhibits presented by both parties of labor agreements where fair share provisions are contained and those where they are not, do not yield any definite conclusion. It does establish that fair share has been successfully negotiated as a provision to be contained in a labor agreement in a number of employer-employee relationships and in others that it has not.

The obligation on the arbitrator is to determine, based on the evidence submitted, taking into consideration the statutory factors to be applied, which of the two proposals is the more reasonable. From an evaluation of the evidence in that respect, the undersigned is of the considered judgment that the Employer has presented more persuasive evidence containing legitimate concerns and objections to the provision as drafted and submitted

that a fair share provision is desirable from a Union's standpoint for the reason that it adds to the security of a bargaining representative and makes the administrative job of collecting dues easier, the record does not contain any direct evidence addressed to such matters. It is recognized that a Union gains recognition as bargaining representative of employees as a result of the majority of employees in a bargaining unit favoring such representation. Under our democratic system, such principle recognizes the majority rule. While a bargaining representative is presumed to represent the majority wishes of employees with respect to demands presented across the bargaining table, and it could reasonably presume that with respect to a fair share provision, the same majority wish is represented, it would appear that in an evidentiary type proceeding such as final offer arbitration, that direct evidence establishing such majority desires would be helpful. For instance, if slightly more than a majority of the employees in a bargaining unit were absorbing the cost of collective bargaining and administration of the contract, absent any specific and direct testimony that the minority in the unit were failing to contribute to such cost for other than the simple reason of obtaining a free ride, one would have for consideration, an evidentiary reason supporting the provision.

Again, if the vast majority of employees were supporting the cost of such proceedings and only a few were not, one would then have such factual evidence in the record upon which to apply consideration.

On the basis of the total record in this case concerning the fair share issue, it is the considered judgment of the undersigned, that the concerns as supported by the evidence expressed by the Employer, lead to the conclusion that on the fair share issue, the Employer's position is the more reasonable.

With respect to the issue designated "seniority" the Union's proposal specifically provides that probationary employees are to receive holiday pay for holidays which fall during their probationary period. The City's proposal does not specifically refer to such holiday situation, but a reading of the agreed upon holiday clause of the contract would appear to indicate that probationary employees would receive holiday pay under those circumstances and the arbitrator concludes that there is therefore no difference in the two proposals of the parties on that point.

The Union's proposal also specifically refers to insurance coverage of probationary employees. While the City's proposal makes no specific reference to insurance coverage as such, a reading of the insurance provision that has been agreed upon by the parties, would appear to be to the same effect and provide for coverage of probationary employees as provided by the policy of the carrier.

The major differences between the proposals of the two parties under "seniority" involves the scope of seniority, the Union's proposal being that seniority be applied as unit wide seniority and be recognized in all cases of promotion, transfer, decrease or increase of the working force, choice of vacation, and shift preference where vacancies exist. The City's proposal would provide for seniority to be applicable only in cases of layoff and recall and that the exercise of such seniority would be by classification and not unit wide.

The arguments and principles advanced by both parties contain merit. First, the City contends that because the bargaining unit contains a wide range of very different classifications ranging from engineering technicians to clerk typists, with many positions being filled only by one or two employees, seniority is not and cannot be considered a factor. In most instances, employees in one classification have no qualifications to perform the work required in a different classification.

The City's proposal would confine seniority to occurring only in classifications. While the City's arguments in favor of such concept contain certain merit, likewise does the Union's proposal for unit wide seniority. For instance, if a layoff was found to be necessary in a particular classification, under the City's proposal, the least senior in that classification would be laid off. There may be circumstances where such employee slated for layoff has been an employee of the City for a number of years and has previously worked in one or more other classifications. If, at the time of the scheduled layoff, a relatively new employee was filling a position in a different classification, even though it may be in one of the classifications in which the employee scheduled for layoff had previously served, such new employee would not be subject to layoff and the much more senior employee would be laid off merely because at the time of the layoff, such employee happened to be in that particular classification in which the reduction of forces was scheduled to occur. Clearly, the Union's concern for preventing such type occurrence is reasonable and proper.

With respect to the exercise of unit wide seniority concerning promotions, such matter is more properly considered in conjunction with the issue of posting which will be discussed later in this award. In the other seniority applications provided in the Union's proposal, such as choice of vacation or shift work, again, the Union's concern in that respect is reasonable. If one takes the case where three employees apply for a particular vacation period in a given year, and any of such three employees can reasonably be placed on vacation at the time requested without adversely affecting the Employer's operations, it is most reasonable that the most senior employee should be given first preference. If the Employer is able to permit all three employees to be absent

responsive to legitimate concerns of the employees than is that of the Union to those concerns of the City. The Union's proposal while affording exercise of the principle of seniority in a number of areas, does provide that qualifications are also to be applied in all such cases. While it does not contain specific reference to how and in what circumstances the qualifications are to apply, the general recognition such as the Union's proposal herein, is not uncommon. Frequently, the parties leave the administrative application of such principles open and phrase them in general terms, so that the parties can adapt the application of the principles to their particular operation based on the necessities of the operation and on the basis of reasonable and equitable application. In the final analysis, it is the considered judgment of the arbitrator, that the proposal offered by the Union on the seniority issue is the more reasonable.

With respect to the "job posting" issue, the major differences in the proposals of the two parties are centered on basically two areas. First, the Union's proposal would contemplate that the posted job would be limited to those present employees who bid for the job and that where more than one employee bids and signs the job posting, that where qualifications and abilities are relatively equal, the senior employee would be assigned and awarded the job. The City proposal would open the job to those present employees who signed the job posting along with any other outside applicatns for the job and require that all persons be considered for the job based only upon qualifications. The second major difference between the two proposals concerns the presence of a 90 day trial period in the Union's proposal. The City's proposal contains no provision for any type trial period.

Again, on this issue, neither party has accommodated their offers to the concerns of the other party. The City's proposal contains no recognition of seniority. Clearly, seniority of applicants is a legitimate concern to the Union and employees and is frequently afforded preferential recognition where as between two applicants, the applicants are "equal", "relatively equal", "substantially equal", or some similarly described status as to qualifications.

On the other hand, paragraph 5.03 of the Union's proposal does not appear to afford any opportunity where a single employee may apply on the job posting, for the Employer to secure an outside applicant. Such provision does not address itself to the situation where the employee who bids on the job clearly does not possess the level of qualifications desired for the job. In that case, even though the City may have an outside applicant who possesses superior qualifications for the particular posted job, the incumbent employee who bid on the job would appear to be contractually entitled to the vacancy.

In considering the arguments of the parties and the final offers with respect to job posting, the arbitrator is of the jdugment that neither proposal is reasonably responsive to the legitimate concerns expressed by the opposite party, and on that basis, no preference can be discerned for either proposed provision with respect to the "job posting" issue.

With respect to the issue labeled "hours of work and shift premium", the major differences between the two proposals involve the matter of flexibility of schedule changes and the matter of shift premium. The Employer's proposal would leave the schedule for dispatchers and CSO's unregulated with the exception that

under the previously agreed upon provision of 8.01 of the Employer's draft of the contract, their schedules are to be comprised of consecutive work hours except for lunch interruptions. The City's proposal contains no provision for payment of shift premium.

The Union's proposal specifies the hours to be worked in the various shifts and provides that the schedules of dispatchers and CSO's are to be the same as the work schedules of sworn officers.

The City contends that dispatchers and CSO's are in fact not working the same work schedules as police officers. Secondly, they do not work a 6/3 schedule as do police officers and dispatchers work a 40 hour week while CSO's work a 39½ hour week. Dispatchers work holidays and weekends, while CSO's apparently do not. In addition, the City contends that they employ part-time dispatchers and that in some cases some part-time dispatchers are limited as to the hours they are available to work.

The Union contends that by their request, they are merely placing into the contract the schedules as they are presently in effect and that the Union is not asking the Employer to do anything different from what they are presently doing.

The subject type issue is frequently a subject that is bargained upon between employers and unions. On the one hand, employees desire to have some contractual limitations upon the employer's right to unilaterally and indiscriminately schedule and change schedules so that employees may plan their private lives with some degree of certainty. From the Employer's standpoint, especially where a Union is relatively small and 24 hour, 7 day per week coverage is necessary, an employer desires a great amount of flexibility in order to make whatever changes as may be necessary from time to time to meet the needs of the operation. More often than not, those opposing aims create substantial conflict.

The undersigned notes that the language proposed by the Union, while providing for a 10 day notice in the event of change in shift assignment, does not provide for changes that may be required in case of emergencies, under circumstances where a 10 day notice would not be possible. Section 8.04 of the City's proposal also provides for a 10 day notice in the event of change in shift assignment, but makes such notice an exception in case of emergencies.

As to shift premium, the Union contends that it is only requesting the same benefit that sworn police officers are receiving under their current contract with the City and that dispatchers particularly, who work in close conjunction with and share similar duties and responsibilities as police officers, should be entitled to the same benefit.

The City addresses itself to the shift differential issue in its brief as follows:

> "...The practical effect is to pay $1.00 per day more to two of the three present dispatcher shifts, and perhaps to pay it on some CSO hours. (Tr. 64) Nobody else works such shifts. (Tr. 42) Dispatchers, of course, knew when they applied that shift work was involved. The part-timers who work these shifts in fact can't work the day shift. (Tr. 69-70) They certainly

shouldn't get a premium for not working the day shift. The one CSO who doesn't always work day hours (Tr. 64) does not work the hours of the present 2nd or 3rd shift, either. Does he get the premium: Is it prorated?

"The Union's premium proposal is a case of wanting something solely because the police have it. This is at least $730 ($2 times 365 days) which would have been better spent elsewhere."

In conclusion on the issues under this heading, the undersigned is of the judgment that the Union's proposal with respect to hours of work for dispatchers and CSO's, is too restrictive when one considers the very small group of employees involved and the necessities of the operation. While the City's proposal involving those employees could have gone farther to accommodate in part the desire of such employees to have some degree of certainty in their work schedules, the City's proposal is, nevertheless, deemed the more reasonable of the two under the existing operation of the City. With respect to shift premium, the undersigned is of the judgment that the Union's proposal is the more reasonable for the reason that shift premium is generally recognized and frequently provided to employees who are required to work shifts that are deemed less desirable.

With respect to the next issue referred to as "overtime", the City, in its brief, suggests that there is no difference between the proposals. The arbitrator is also unable to determine from the record what difference, if any, the Union discerns between the two proposals. On reading the Union proposal, however, the arbitrator is of the opinion that there exists a direct conflict between paragraphs a and c. Paragraph a provides that time and one-half is to be paid for all work performed on a holiday, with the exception of dispatchers and CSO's. Paragraph c, on the other hand, would appear to call for time and one-half pay on a holiday for dispatchers and CSO's by virtue of the introductory paragraph of Section 7.01. It would appear therefrom that on such basis, the language proposed by the City is less ambiguous and is therefore subject to slight preference.

The issue involving wages and classifications is a somewhat difficult issue to analyze and evaluate in this case.

First, with respect to the foremat of the classification and pay plan proposed by each party, such matter is one principally of choice between the parties and is not a matter of major substance for consideration. While one or the other may be regarded as more simplified or workable than another, it is primarily a matter of personal choice. As between the two proposed foremats, it would appear that the City's proposal is less cumbersome and reflects merely the classifications and the various steps and rates applicable to each classification.

The Union's proposal, on the other hand, contains reference to labor grades, which in the absence of any labor grade foremat being contained in any other part of the agreement, is meaningless. The meaningful part is the wage rate attributable to each classification and both foremats contain such data. Further, the Union proposal contains the departments and lists the current employees by name. Under any other contract provision, the listing of departments is not material and it would appear that

department listing is therefore unnecessary. Additionally, the listing of employee names is not the manner that is utilized in the majority of other contracts that both parties have presented in evidence. Where incumbent employees are specifically listed in the various classifications, the listing would be accurate for only as long as the work force did not change and no employee moved or transferred to a different job. At the point that any employee left employment or any new employee was hired, the listing would then be inaccurate and obsolete.

The increases reflected by the proposals of each of the parties is somewhat difficult to analyze. The Union presented comparative data which utilized the increases granted for 1977 combined with the increases proposed by the two proposals for 1978 and made a comparative analysis based on a combination of the increases for the two years. The City's analysis involves only the increases proposed by the two parties for the year 1978. The arbitrator is of the judgment that the primary consideration with which he is charged in this case is to determine which of the two proposals is the more reasonable for 1978. The previous rates that were in existence in 1977 are material only to determine whether or not the end rate for any of the classifications is reasonable in comparison with other similar type employees in other areas of employment.

In its brief, the City computed the percentage impact of each of the proposals and concludes that such percentages are as follows:

> "The result is that the City's offer amounts to an average of 7.6% without step increases, and 9.6% with step increases, while the Union averages 6.9% and 9.6% (Employer 22). The step increases are new in this contract, so they should be considered as 'new' money."

Under both proposals, the increases proposed on the various classifications differ. The Union's proposal contains increases ranging from 5.2% to 16.2%. The Employer's proposal consists of increases ranging from 6.7% to 15.5%. Based on an evaluation of the specific percentages applicable to the different classifications as shown by Employer's Exhibits 20 and 21, it is shown that both parties have provided for adjustments to be made in basically the same classifications. The slight variations in amounts proposed by each with respect to the various classifications is not deemed material herein. Neither party presented specific evidence addressed to that differential nor advanced any reasons or justifications therefor. The undersigned is therefore unable to specifically consider such matter.

Based on an overall analysis and evaluation of the statistical data concerning the two proposals and giving consideration to the factors provided in the Statute, and recognizing the cost of living factor, the undersigned is of the judgment that the Employer's proposal is the more reasonable.

With respect to the issue labeled "severability", the major difference between the proposal of the two parties is that the Union's proposal in addition to stating the normal severability language, contains a maintenance of standards type provision.

From an evaluation of the numerous contracts presented by both parties from other localities, it appears that a maintenance of standards clause is not present in the majority of such contracts.

The arbitrator recognizes that a maintenance of standards clause is desirable from the Union's standpoint and is not desirable from an Employer's standpoint. Neither party presented any specific evidence that would tend to identify any specific type practices to which such provision was intended to apply. In the absence of such type evidence, the arbitrator is unable to make any evaluation or determination concerning the existence of any reasonable necessity for its inclusion. Presumably, those matters of major concern involving wages, hours and working conditions, are specifically covered by specific provisions of the contract.

On this particular issue, the undersigned does not deem the proposal of either party to be without merit, but that the inclusion or exclusion is not deemed controlling or substantially critical to an overall evaluation of the offer to be selected in this case.

With respect to the issue titled "discipline and discharge and management rights", the major differences between the proposals of the two parties is that of foremat.

The Union would include within the management rights article the phrase "just cause." The Union's proposal would provide that the Employer has the right to make and enforce reasonable rules but would not contain any listing of such rules or specificity thereof.

The City's proposal, on the other hand, contains a detailed listing of the discipline that may be imposed with respect to various matters and specifies in substantial detail the major offenses for which severe discipline may be imposed and those less serious matters that would be subject to progressive discipline. The City's proposal makes the enforcement of such matters subject to the "cause" standard of review. Arbitrators have not distinguished between the standard "just cause" and "cause." The two terms have been generally given the same affect.

Even where rules are not specifically set forth in the contract, arbitrators have generally held that such rules must be reasonable, related to legitimate concerns of the employer-employee relationship, and must be reasonably, fairly and even-handedly applied. Such principles are followed by arbitrators whether such rules are specifically enumerated and incorporated into the labor agreement or whether they are promulgated and placed in effect unilaterally by the Employer and not as a part of the contract. The end result is that there is no basic difference between the review applied by arbitrators in either case.

The Employer contends that it is desirable to have some specificity of the rules contained in the contract for the reason that it serves to better advise both the Employer and employee what is expected of them so that both can be better guided and responsive to such matters.

The Union, on the other hand, generally objects to inclusion of rules in labor agreements, for the reason that they wish to reserve any right to challenge a rule as being unreasonable in the event it is ever imposed on an employee and discipline meted out thereon. Where rules are included in a contract, the unions feel that it may be construed that the union has agreed upon such specified rules as being reasonable and that they therefore are deprived from the defense of objecting to the rule at a later time on the basis that it is unreasonable. Generally, however, it is not whether or not a rule on its face is reasonable, but whether or not the application of a particular rule in a given set of circumstances is fair, equitable or reasonable. In such instances,

arbitrators generally undertake the same full review, and arrive at the same end result.

With the subject issue, the undersigned would find that both proposals would be acceptable and reasonable.

On the basis of the above review of the individual issues, and on the basis of an overall composite review of the total packages of each party herein, it is the considered judgment of the undersigned that the weight of reasonableness favors the final proposal advanced by the Employer.

It therefore follows on the basis of the above facts and discussion thereon, that the undersigned renders the following decision and

AWARD

That the final offer of the City of Middleton be awarded and the parties are directed to implement such final offer for the contract year of 1978 pursuant to the terms thereof along with those previously agreed upon provisions.

Dated at Madison, Wisconsin, this 30th day of May, 1979.

Arbitrator
Robert J. Mueller