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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE MEDIATOR-ARBITRATOR

In the Mediation-Arbitration Proceeding Between	ARBITRATION OPINION AND AWARD
SHEBOYGAN COUNTY COURTHOUSE EMPLOYEES, LOCAL 1749C, AFSCME, AFL-CIO	Case XXXIV
and	No. 23441
SHEBOYGAN COUNTY (COURTHOUSE)	MED/ARB-204
	Decision No. 16585-A

Appearances:

For the Union: Michael J. Wilson, District Representative Wisconsin Council of County and Municipal Employees

For the Employer: Alexander Hopp, Corporation Counsel

BACKGROUND

On August 23, 1978, Sheboygan County Courthouse Employees, Local 1749C, AFSCME, AFL-CIO (hereafter referred to as the Union) filed a petition with the Wisconsin Employment Relations Committee (WERC), pursuant to Section 111.70(4)(cm)(6) of the Municipal Employment Relations Act, requesting that the Commission initiate mediation-arbitration to resolve a collective bargaining impasse between Sheboygan County (hereafter referred to as the Employer or the County) and the Union. The Union is the certified exclusive collective bargaining representative for a unit of approximately 135 employees consisting of all regular employees employed by the County in the Courthouse and in auxiliary departments and buildings, but specifically excluding all elected officials, public officials, supervisors, professional employees of the Welfare Department, all employees of the Unified Board, all deputized employees of the Sheriff's Department, all nurses, and all confidential employees.

On October 2, 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 further found that an impasse existed within the meaning of section 111.70(4)(cm)(6). On October 12, 1978, after the parties notified the WERC that they had selected the undersigned, the WERC appointed her as mediator-arbitrator to resolve the impasse pursuant to Section 111.70(4)(cm)(6)(b-g). No citizens' petition pursuant to Section 111.70(4)(cm)(6)(b) was filed with the WERC.

By agreement, the mediator-arbitrator met with the parties on December 1, 1978, at the Sheboygan County Courthouse, Sheboygan, Wisconsin, to mediate the dispute. The parties were unable to reach a settlement. After notification to the parties of her intent to resolve the dispute by arbitration, the mediator-arbitrator held an arbitration meeting (hearing) pursuant to Section 111.70(4)(cm)(6)(d) on January 12, 1979, at the Courthouse. The arbitration meeting was open to the public. During the arbitration proceeding, the parties had a full opportunity to present evidence by means of witnesses and exhibits and to make supporting arguments. A total of 61 exhibits were marked and admitted. Following the meeting, briefs were received by the mediator-arbitrator from the parties and exchanged. Replies from each party were also received and exchanged.

THE ISSUES

Under Wisconsin's Municipal Employment Relations Act, as recently amended, in the absence of an agreement to the contrary, the mediator-arbitrator must resolve a bargaining impasse between the parties by selecting the total final offer of the Employer or the total final offer of the Union. In this dispute, four issues remain unresolved and prevent the parties from concluding a collective bargaining agreement for a two-year period commencing January 1, 1978. The four issues are:

(a) Work week*

(b) Time and one-half*

(c) Vacations

(d) Fair Share Agreement

The final offers of the parties on each of these issues are attached to this Opinion and Award as Exhibit A.

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.

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*These two items are interrelated and are discussed and considered together in this Opinion.

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 (hearing) and in its brief, the Union supported its final offer as the more reasonable one primarily because the Union offer was identical in all respects to the June 19, 1978, tentative agreement negotiated by the parties' bargaining committees with the assistance of a WERC mediator and recommended for ratification by both bargaining committees. This tentative agreement was thereafter ratified by the Union's membership. The County Board of Supervisors' Personnel Committee and Finance Committee also recommended ratification. On August 15, 1978, however, the tentative agreement was rejected by a formal vote of the County Board of Supervisors. In view of this past history, the Union argues that heavy weight should be given in this proceeding to the Union's final offer on the issues in dispute since it is exactly what was contained in the tentative agreement reached between the parties' negotiating committees. Pointing to the eighth listed statutory criteria, Section 111.70(4)(cm)(7)(h), the Union argues that this is a "catch-all" factor which permits an arbitrator not only to consider but also permits the arbitrator to give great weight to the special bargaining history in this case.

The Union also argues for the adoption of its final offer on additional, specific grounds. As to the combined work week and overtime proposals, the Union notes that its more specific wording is to be preferred since its proposal spells out past practices and thus will prevent future disputes between the parties, including grievances over interpretation or application of contractual language.

In regard to its vacation proposal, the Union notes that its proposal is comparable to vacation benefits already received by County employees in the Sheriff's Department and nurses' units. It also points out that its vacation proposal must be considered in light of the entire collective bargaining settlement between the County and this bargaining unit. In particular, the Union notes that the wage settlement, already

agreed to between the parties (and thus not an issue in this arbitration proceeding), is 7% for 1978 and 6.8% for 1979. It then introduced evidence indicating that the 1978 wage increase of 7% was significantly below the increase in the cost of living, a distinct factor which must be given weight by an arbitrator in this type of proceeding. The Union also argues that other County employees received higher wage increases except for County nurses who received the same wages as agreed to by this bargaining unit and also received the improved vacation benefits in dispute herein.

Finally, as regards its fair share proposal, the Union points out that its language is similar to other fair share agreements found in other County collective bargaining agreements, as well as in the surrounding counties' collective bargaining agreements.

The Union concludes by suggesting a ranking of classes of comparable data which should be considered by this arbitrator. Beginning with the most important, the rank order is: other employees of the County, other courthouse employees in surrounding counties, other municipal employees in the County and surrounding counties, and finally private sector employees in the County. Based upon these priorities, the Union believes that overall its offer is more reasonable.

The Employer

At the meeting (hearing) and in its brief, the County raised an important threshold question. It vigorously objected to the admission in this proceeding of any evidence relating to the past history of bargaining for the collective bargaining agreement in dispute on the grounds that it is not relevant, is prejudicial, is not accepted arbitral practice, and is not a factor included in any of the statutory criteria listed in Section 111.70(4)(cm)(7). After the arbitrator permitted the Union's evidence to come in with the understanding that the parties would specifically brief the issue of how much weight should be appropriately given to this type of evidence, the County proceeded to give its justifications for concluding that its final offer was the more reasonable one.

As to the twin issues of work week and time and one-half, the County stated that there really was no difference between the Union's and its proposals in these areas. (Its proposal continues prior contract language.) It expressly stipulated at the arbitration meeting that, if the County's offer was accepted, the County agrees to interpret its language to mean that it will pay to all bargaining unit employees who are normally scheduled to work 37-1/2 hours per week time and one-half when in fact they work in excess of that time.

As to the vacation issue, the County argues that its proposal is in line with relevant comparables while the Union's proposal is way out of line with such comparables. Particularly in regard to private sector employees, and comparable counties, the County argues that there is no justification for the Union's overly generous vacation proposal.

In regard to its fair shareproposal, the County states its concern for those members of the bargaining unit who will be forced to contribute to the Union's expenses under the Union's proposal. It points to its special procedures protecting such objectors as a very important distinguishing feature between the parties' fair share positions. It also points to the final paragraph of its proposal and the limitation of the County's liability as a desirable feature of the proposal.

The County concludes that proper application of the statutory criteria requires that the arbitrator select its final offer.

DISCUSSION

As has been noted, at the arbitration meeting (hearing), the County raised the threshold question of whether the pre-arbitration negotiations history may properly be considered by the arbitrator in this arbitration proceeding. The arbitrator ruled that she would initially admit the Union's evidence, but requested the parties to brief the basic issue and the important related issue of how much weight she should give to this type of evidence, if it is properly admissible.

After considering all the arguments, the arbitrator concludes that the Union's evidence on pre-arbitration negotiations history has some relevancy to the issues before her and there is little danger that such evidence will taint the arbitration proceeding and prevent the decisionmaker from being impartial. She believes that rules relating to the inadmissibility of compromise or settlement offers are inapplicable to matters of public record being discussed herein. The Union has a right to explain the origins of its final offer and to use the contents of the tentative agreement as evidence of what reasonable parties might agree to,

> "It may not often be possible or desirable for the arbitrator to make a strict application of the standards. Rather, they must be applied with the end in view of providing a solution that will be satisfactory enough to both sides to be workable. The circumstances of the parties must always be kept in mind by the arbitrator. His (her) task is to determine what the parties before him, as reasonable men, should have agreed upon by negotiations." Elkouri and Elkouri, How Arbitration Works, 747-8

(In this connection, the arbitrator notes that the issue of whether the County's failure to ratify the tentative agreement constitutes a failure to bargain in good faith is not relevant to this proceeding. It is an issue for the Union to pursue before the WERC, if it so wishes.)

Having concluded that the Union's evidence and arguments concerning the tentative agreement rejected by the County may be properly considered in thisproceeding, the arbitrator further concludes that such evidence should not be given heavy weight. She reaches this additional conclusion because of her concern that a contrary rule or finding would inhibit the collective bargaining process. A rule giving substantial weight in a subsequent arbitration proceeding to agreements tentatively made by the parties' negotiating committees but which later are not ratified by one or both principals would definitely chill future negotiations between parties. Therefore, in light of this conclusion, the arbitrator turns to consideration of other evidence and arguments of the parties to determine which offer should be selected.

As to the specific issues in dispute, there is obviously little difference between the parties' positions in regard to work week and overtime pay in light of the County's express stipulation at the arbitration meeting on these matters. However, in view of some past conflicts over interpretation of the existing contractual language, the Union's position is slightly preferred because it expressly spells out in contractual language detailed implementation of policies.

As to the sole economic issue before the arbitrator, vacations, it should be noted that the County has not raised an inability to pay argument. First, the vacation issue requires a scrutiny of comparables. Looking at comparables, the County's position appears on the low side; the Union's proposal is on the high side. Without considering other factors, the County's position is to be preferred. However, the arbitrator's preference for the County's position is not a strong preference because the Union has some significant countervailing arguments which must be considered. Specifically these include Union arguments that the vacation benefits it proposes are not out of line when one considers its already agreed to wage settlement of 7% in 1978 and 6.8% in 1979 and the fact that some other County employees already enjoy this benefit. Although the arbitrator accepts the County's argument that employees in the Sheriff's Department, because of their unique work and work week, should not be considered in the same position as members of this bargaining unit, the County has failed to distinguish satisfactorily the position of other employees. The arbitrator is unclear why the "status" of nurses and what 'pressures accompanying their work responsibilities" detract from the Union's point that some other County employees (in the Nurses' unit) enjoy the generous vacation benefits that constitute the Union's final offer. Accordingly, while the arbitrator concludes that the County's offer on vacations is to be preferred, and this conclusion would be determinative if there were no other issues in dispute, that preference is not a strong one and is not necessarily determinative in this proceeding.

As to the final issue in dispute, fair share, it should be initially noted that both parties propose some version of this type of union security, although there are significant differences between the parties' proposals. In particular, the County's proposal as to fair share contains a special waiver for certain already hired members of the bargaining unit who are not members of the Union and a limitation on liability provision. The Union's proposal contains a referendum requirement before the fair share is implemented. Once the referendeum indicates that a majority of those voting favor a fair share agreement, it applies to all present and future bargaining unit members.

Of the various specifics contained in the parties' fair share proposals, one is of special concern to this arbitrator. The County proposes that:

> Waiver of Fair Share Contribution to Union. Any present employee hired prior to the above referred to effective date who, because of religious convictions, conscientious objection or serious personal commitment, cannot join the Union and desires to obtain a waiver with regard to the Fair Share Contribution required may petition the County Board Personnel Committee and the Executive Board of the Union as to such matter and present his or her case. If the parties determine a valid basis exists for such objection to payment it may authorize waiver of such payment to the Union but an equivalent amount shall be paid by such employee to such charitable organization located in Sheboygan County as the Union and County may mutually agree to be appropriate.

While the County argues that such a provision is similar to Section 19 of the National Labor Relations Act, as amended, such is not the case.* This federal law applies only to health care institution employees who are members of a bona fide religion or sect which "has historically held conscientious objections to joining or financially supporting labor organizations." In contrast, the County's proposal herein covers a much broader group of objectors. There are no precedents or guidelines to help the parties to make the important decisions required under the County's proposal. The proposed procedures also involve public officials in inquiries into religious or personal beliefs of individuals. Such entanglements or intrusions by public officials are to be avoided unless absolutely necessary to obtain expressly mandated legislative objectives. In addition, there is no procedure contained in the proposal to determine what happens if the parties disagree about a case presented to them. The arbitrator, therefore, concludes that the Union's fair share proposal is preferable.

(Other features of the County's or the Union's proposals are not critical and the Union's proposed language is identicial to language voluntarily negotiated in another County collective bargaining agreement.)

Since the arbitrator has not been given authority to split her award in this dispute, she must decide which offer overall is more reasonable in the light of the statutory factors and the above conclusions.. As discussed already, there is little difference between the parties on the issues of work week and overtime pay. The County's position on vacation pay is preferred, but the preference is not a strong one. The arbitrator believes that the fair share issue (particularly the problems concerning the County's waiver proposal) must be determinative of the outcome of this proceeding.

AWARD

Based upon a full and fair consideration of all the evidence and arguments presented by the parties and the statutory criteria contained in the Municipal Employment Relations Act, and for the reasons stated above, the arbitrator selects the Union's final offer and directs that its terms be incorporated into a collective bargaining agreement between the parties for the period commencing January 1, 1978, through December 31, 1979.

June Miller Weisberger
Mediator-Arbitrator

DATED: April 9, 1979
Madison, Wisconsin

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*Sec. 19. Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a non-religious charitable fund exempt from taxation under section 501 (c)(3) of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization or if the contract fails to designate such funds, then to any such fund chosen by the employee.

COUNTY OFFER

7.

WORK WEEK

The normal work week for full time employees shall be guaranteed at thirty seven and one-half (37 1/2) hours per week, except for the maintenance personnel whose work week shall be forty (40) hours per week.

The work schedules for the various departments shall be determined by the department head and said work schedule, except for emergency situations, shall not be changed without three (3) work days prior notice to the employees affected thereby.

Overtime in the various department shall be equally divided among the employees in their respective departments insofar as it is practical to do so among the employees called to do the work which requires said overtime.

UNION OFFER

ARTICLE VII
WORK WEEK

The work week shall consist of five (5) consecutive work days Monday through Friday in a pre-established work schedule. The work day shall be seven and one-half (7½) hours per day except for custodian, maintenance man and assistant building superintendent whose work day shall be eight (8) hours.

Employees scheduled to work thirty-seven and one-half (37-½) hours shall continue to have a minimum of thirty-seven and one-half (37-½) hours and custodian, maintenance man and assistant building superintendent shall continue to be scheduled for a minimum of forty (40) hours in every normal work week. All full time employees shall be guaranteed the full work schedule.

Each office's work schedule shall be determined by the department head upon approval of the Personnel Committee. The Employer shall have the greatest degree of flexibility in scheduling hours as it determines necessary.

Work schedules for each office setting forth the work days and hours shall be established as above and assigned on the basis of seniority within the department with the most senior employee qualified to do the work being entitled to select the shift schedule desired. In the event of a change in the schedule from the established schedule to a new regular schedule the shift preference again shall be awarded on the basis of seniority so long as the selecting employee is qualified to carry out the work responsibilities. The work schedule shall be posted in each office and shall not be changed, except for emergency situations, without three (3) work days' prior notice to the employees affected thereby. Voluntary temporary exchanges of shifts that in the determination of the department head are not disruptive of office procedures may be permitted on an occasional basis to accommodate the personal needs of the employees.

Overtime may be scheduled at any time as deemed necessary by the Employer. Overtime shall be distributed as equitably as possible among the qualified employees within the department. The first consideration for overtime will be given to those employees who are permanently assigned to the job involved. Employees assigned to work the overtime shall be required to carry out such assignments, except that an employee may upon request be released from an overtime assignment if a qualified replacement is available and willing to work.

Exhibit A (page 1)

COUNTY OFFER

VACATIONS

4. Eligibility: After completion of the first twelve (12) months in a permanent position, employees shall be granted noncumulative vacation based on accumulated continuous service as follows:

Years of Service	No. of Vacation Days
1	10 days
8	15 "
13	16 "
14	17 "
15	18 "
16	19 "
17	20 "

12.

TIME AND ONE HALF

Time and one half (1 1/2) shall be paid for all hours worked outside of the employees' regular shift of hours on regularly scheduled workday and for all hours worked on the employees' day off.

UNION OFFER

VACATIONS

4. Eligibility After completion of the first twelve months in a permanent position, employees shall be gran noncumulative vacation based on accumulated continuous vice as follows.

Years of Service	No. of Vacation Days
1	12 days
2	15 days
8	21 days
13	22 days
14	23 days
15	24 days
16	25 days
17	26 days
18	27 days

ARTICLE XII
TIME AND ONE-HALF

Time and one-half (1½) shall be paid:

a) for all hours worked in excess of seven and one- (7½) hours per day or in excess of thirty-seven one-half (37½) hours per week except for custodi maintenance man and assistant building superinte positions when such maximums shall be eight (8) per day or forty (40) hours per week.
b) for all hours worked on the employee's day off.

Exhibit A (...)

COUNTY OFFER

6.

DUES DEDUCTION AND FAIR SHARE PAYMENTS

To assist the Union in collecting dues from its member and a like from non-members for their contributions towards the services provided the Union the parties agree.

1. Dues Deductions. Effective on the first day of the month after this agreement is approved the County will deduct from the pay of the employees their Union membership dues provided that at the time of such deduction there is in the possession of the County a current written assignment signed by the employee authorizing such deduction.

2. Payment for Representation Expenses. All employees working for Sheboygan County are not required as a condition of employment to belong to the Union. However, the Union has been certified by the Wisconsin Employment Relations Commission (WERC) as the exclusive bargaining agent for the employees in the Court House. In consideration for the services of the Union and its costs of representation collective bargaining and contract administration any non-probationary employee hired after the above referred to effective date who is not a member of the Union (Local 2481) shall, as a condition of continued employment, pay to the Union each month, in the form of a payroll deduction, a sum equal to that paid as regular monthly union dues by employees in the bargaining unit who are union members (Fair Share Contribution).

3. Waiver of Fair Share Contribution to Union. Any present employee hired prior to the above referred to effective date who, because of religious convictions, conscientious objection or serious personal commitment, cannot join the Union and desires to obtain a waiver with regard to the Fair Share Contribution required may petition the County Board Personnel Committee and the Executive Board of the Union as to such matter and present his or her case. If the parties determine a valid basis exists for such objection to payment it may authorize waiver of such payment to the Union but an equivalent amount shall be paid by such employee to such charitable organization located in Sheboygan County as the Union and the County may mutually agree to be appropriate.

4. Remittance. The County shall remit all membership dues and Fair Share payments withheld by it to the Local Union Treasurer once each month. Changes in the amount to be deducted shall be by written notification from the Union at least one (1) month before the effective date of any change. Such notification shall also be given to all non-members. The Employer shall provide the Union with a list of all employees from whom such deductions are made with each monthly remittance to the Union.

5. Responsibilities of the Employer and the Union Representative If, through inadvertence or error, the County fails or neglects to make a deduction which is properly due and owing from the employee's pay check, such deduction shall be made from the next pay check of the employee and submitted to the Local Union Treasurer. The County shall not be liable to the Union, employee or any party by reason of the requirements of this section of the Agreement for the remittance or payment of any sum other than that constituting actual deductions made from employee wages earned.

3

UNION OFFER

ARTICLE VI
FAIR SHARE AGREEMENT

The Employer shall deduct once each month from the earnin of each non-probationary employee in the collective barga ing unit an amount equal to the monthly dues certified by the Union as the monthly dues required of each Union memb and pay said amount to the Treasurer of the Union on or b fore the end of the month in which said deduction was mad

Changes in the amount to be deducted shall be by written notification from the Union at least one (1) month before the effective date of any change.

The Employer shall provide the Union with a list of all e ployees from whom such deductions are made with each mont remittance to the Union.

If an error is discovered with respect to any deductions under this provision, the Employer shall correct said err by appropriate adjustment in the next paycheck of the employee or the next submission of funds to the Union.

Referendum to Authorize Fair Share Agreement. The Fair Share provisions herein set forth shall become effective binding on both parties when such agreement has been rati fied by a referendum conducted among all employees in the bargaining unit. Unless one-half (½) plus one (1) of the voting employees vote in favor of the Fair Share Agreemen this Fair Share Agreement shall be null and void and the Fair Share Agreement shall not be implemented during the term of this contract. This referendum shall be conducte by the Wisconsin Employment Relations Commission accordin to the stipulation of the parties. Only one (1) such referendum shall be conducted during the term of this Agree ment and failure to obtain the necessary vote as specifie above shall make ineffective the herein Agency Shop provisions.

Exhibit A (page 3)