In the Matter of Mediation-Arbitration

Between

ASHLAND CITY EMPLOYEES UNION LOCAL 216, WCCME, AFSCME, AFL-CIO

and

CITY OF ASHLAND

Case XXX
No. 29599
MED/ARB-1625
Decision No. 19742-A

Appearances: James A. Ellingson, District Representative, for the Union

Scott W. Clark, City Attorney, for the Employer

BACKGROUND

This dispute concerns a proposed two-year contract, for 1982 and 1983, between the City of Ashland (hereafter City) and Local 216 (hereafter Union). The parties exchanged their initial proposals on the proposed new agreement on October 14, 1981. They met on four additional occasions in 1981 and 1982 but were not able to reach agreement on all matters. On April 13, 1982, the Union petitioned the Wisconsin Employment Relations Commission to initiate Mediation-Arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Relations Act. On May 19, 1982, Robert M. McCormick, a member of the Commission's staff, conducted an investigation. By that date the parties submitted to Mr. McCormick their final offers, as well as a stipulation on matters agreed upon, and thereafter on July 8, 1982, the Investigator advised the Commission that the parties remained at impasse.

On July 13, the Wisconsin Employment Relations Commission initiated Mediation-Arbitration to resolve the impasse. On August 11, 1982, the WERC informed Gordon Haferbecker of Stevens Point, Wisconsin, that he had been selected as the mediator-arbitrator in the matter.

Mediation-Arbitration was scheduled for September 29, 1982 at the Ashland City Hall. Mediation was not successful and the arbitrator and the parties agreed to proceed to a formal arbitration hearing on the same day. Witnesses were heard and exhibits were presented. It was agreed that briefs would be exchanged through the Arbitrator on or before October 29, 1982. The Arbitrator received the briefs and exchanged them on October 25, 1982.

The parties by May 19, 1982, had stipulated issues of agreement including salary increases, insurance, longevity, vacations, and a statement on the starting date of seniority.

The unresolved issues were two matters, a management rights clause and the grievance arbitration clause.

FINAL OFFERS

The Final Offer of Local #216-A, Ashland Department of Public Works and Parks was as follows:

1) All previously agreed-upon issues
2) Delete the last sentence in 6.02
   "Seniority rights or the exercise of said rights shall not interfere with the management rights preserved for the City by law and this contract"
3) Provide that the grievance procedure will end in arbitration by a staff member of the Wisconsin Employment Relations Commission (WERC)

The Final Offer of the City of Ashland was as follows:

1. All previously agreed-upon issues
2. Points of disagreement:
   City wants to retain present language of 6.02 and Article X, Step IV, Sub. 2 in 1981 contract.

I. THE SENIORITY-MANAGEMENT RIGHTS ISSUE

The City regards this as the most important of the two issues in this proceeding. The Union regards the other issue as more important.

Article 6.02 of the contract is as follows: "Interdepartmental seniority lists shall be maintained within the various departments of the City and said lists shall be kept up-to-date and posted on the bulletin boards. A copy of all up-to-date seniority lists shall be made available to the Secretary of Local No. 216. Seniority will cover all departments and will prevail at all times in all aspects of the contract."

On June 30, 1981, the parties, as part of a Consent Award, agreed to add a sentence to 6.02 as follows: "Seniority rights or the exercise of said rights shall not interfere with the managerial rights preserved for the City by law and this contract." This is the sentence which the City wishes to retain and the Union wants to delete from the 1982-1983 contract.

Position of the City. The City feels that the language is important in order for the City to properly exercise its powers and responsibilities. Management Rights have been preserved for the City by Article XXIV of the Agreement and by Wisconsin Statute 111.70(1)(d).

Seniority Rights have been preserved for the Union by provisions of the Agreement: Seniority (Article VI), Recall (Article VII), Promotions (Article VIII), Vacations with Pay (Article XI), Overtime Pay (Article XVI). The City's Management Rights are specifically limited by the above provisions.

The City must be able to conduct the necessary operations and distribute work without Union interference. The City could not attain its obligation to maximize efficiency and the effectiveness of its labor force if the Union's proposed contract change were accepted.

The arbitrator should consider the statutory factors of 111.70(4)(cm)(7) as they apply to the Management Rights-Seniority Rights language issue. Lawful authority of the Municipal Employer: the City is entitled to exercise those management rights preserved by Wisconsin Statute 111.70(1)(d): "In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and the good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction subject to those rights secured to public employees by the constitutions of this state and of the United States and by this subchapter."

Stipulations of the Parties. The language the Union seeks to delete was negotiated into the 1981 contract. It was a stipulation included after the give and take and compromise of the mediation process. The City had to "buy" the desired contract language with the increased monetary and economic benefits given to the Union during the negotiating process.

The interests and welfare of the public would suffer substantial disability by the further erosion of the City's management rights.

Comparables. There are no other collective bargaining agreements with language similar to that which the Union wants to delete. However, no other collective bargaining agreements contain the language of the sentence which precedes the contested clause: "Seniority will cover all departments and will prevail at all times in all aspects of the contract." The above language prompted the City to negotiate the contested language into the contract to protect its management rights.

There have been no problems arising from the language at issue. The City should not be impaired in the selection or work delegation process by seniority provisions.

The City also points out that there is a strong policy against contract language changes being proposed by an arbitrator. Arbitrator Edward Krinsky in Med/Arb between Northwest United Educators and School District of Barron, Case XII, No. 22481, Med-Arb 14 stated in part:

> ". . .The arbitrator holds strongly to the view that unless exceptional circumstances prevail, a fundamental change in layoff language or any other fundamental aspect of the bargaining relationship should be negotiated voluntarily by the parties, not imposed by an arbitrator. The parties voluntarily bargained the current layoff language and have lived with it through two contracts without apparent difficulty. . . Just as they bargained the current layoff language, the parties should bargain any changes in it."

Position of the Union. Since at least 1978-1979, the contracts between Local 216-A and the City of Ashland has included the clause "Seniority will cover all departments and will prevail at all times in all aspects of the contract." In 1981 the City sought to eliminate this provision. Mediator Shaw, a WERC staff member, indicated to the Union bargaining committee that if the words: "Seniority rights or the exercise of said rights shall not interfere with the managerial rights preserved for the City by law and this contract" were added to Section 6.02 that these words would be meaningless since the new Management Rights Clause had the following last sentence:

> "It is understood that any of the rights, power or authority the City had prior to the signing of this Agreement are retained by the City, except those specifically abridged, granted or delegated to others or modified by this agreement."

Shaw argued that since the Management Rights clause could not conflict with the contract that the new sentence in 6.02 could not possibly override the original language of 6.02.

However, Arbitrator Zel Rice in an October, 1981 grievance decision (Joint Exhibit 5) stated that the new sentence does modify Article VI, Section 6.02 and does preserve the managerial rights of the Employer.

The Union feels that due to the comment in the Rice decision that the language in the last section of 6.02 is in question and the Union must arbitrate the matter or concede that the Rice interpretation is correct.

Union Exhibit 7 presents a number of comparables in Management Rights language in the Lake Superior District. A number of the contracts contain no Management Rights clause. In no case is there a provision that negates a sentence in the contract.

The Union asks--if seniority does not govern all aspects of the contract can the City reduce earned vacation or longevity? Can the City lay off people outside of seniority?

The clause as interpreted by Arbitrator Rice appears to be a "time bomb" requiring further grievances to be processed at great expense to the Union through the American Arbitration Association.

Arbitrator's Analysis. The issue here involves a common and basic labor-management issue--the balance between seniority provisions in the contract and the employer's control of the work force.

At some time in the past the Union was able to secure an unusually broad seniority provision in the contract; "Seniority will cover all departments and will prevail at all times in all aspects of the contract" (Exhibit 12, 1981 Contract--Article VI, 6.02). In order to put some limitation on this sweeping statement, the City in 1981 succeeded in negotiating the clause which the Union now wants to delete; "Seniority rights or the exercise of said rights shall not interfere with the managerial rights preserved for the City by law and this contract."

The Union contends that it accepted the new clause in 1981 because Mediator Shaw indicated that it would not make any difference and would not override the original 6.02.

The Union is fearful that the new clause may endanger the seniority protection provided in clauses involving longevity, vacations, and layoffs. The City says these protections remain.

As indicated earlier, there was an October 1, 1981 grievance arbitration decision involving interpretation of the contract between the parties. The question was whether the Employer violated the collective bargaining agreement when it assigned two employees to the Parks and Recreation Department without posting the positions for bidding in February of 1981. Two employees were transferred temporarily--for a period of twenty days--from positions in the Public Works Department to positions in the Parks and Recreation Department. The Arbitrator upheld the Union in the dispute, stating that "the part of Article VI, Section 6.02, which states that seniority will cover all departments and will prevail at all times in all aspects of the work certainly modifies the Employer's management right to dictate the methods and distribution of work. The transferred employees by virtue of their seniority had the right to determine whether they preferred to transfer to the new department or remain in the old department." Arbitrator Rice stated in his decision that "if the new sentence (Seniority rights or the exercise of such rights shall not interfere with the managerial rights preserved for the City by law and this contract) had been in effect at the time that the grievance arose it would have been controlling and the issue in dispute would be resolved in favor of the Employer." The City understandably wants to retain the clause because under the Rice interpretation, it permits the temporary transfer of employees without regard to seniority. It should be noted that the wages and hours of all members of the bargaining unit remained unchanged during the transfer.

The City is not very specific as to what it can do under the new clause that it could not do previously. It states that it has "an operational necessity to assign its work force. . . not on the basis of seniority but on the basis of efficiency. . .The management must have the authority to select from among the pool of talent in the Union the particular individual or individuals who have the specific skills needed to do a particular chore. The City should not be impaired in the selection or work delegation process by seniority provisions." Apparently the City does not interpret the above as overriding the specific seniority protections in such areas as Recall, Promotions, Vacations with Pay and Overtime Pay (City Brief, p. 2).

It would have been helpful to the arbitrator if the City had spelled out specific examples of handicaps to efficient operations under the old provisions of the contract. For example, under the old provisions could the City make employee transfers for a few hours or a few days without regard to seniority--including posting and bidding? I would presume that it could not--under the origional provisions of 6A, as interpreted by Arbitrator Rice.

I therefore feel that retaining the clause in question seems at this time to be a useful balance to the very broad seniority clause that precedes it in 6.02. There is no evidence that the clause has been applied in an unreasonable manner or that the basic seniority provisions regarding lay-offs, promotions, and such matters have been weakened. I also agree with Arbitrator Krinski that it is better to have contract language changes resolved at the bargaining table rather than by an arbitrator. The parties can observe how the current language operates in 1982 and 1983 and can then consider the need for revisions in the 1984 contract. The parties may want to look at replacing both of the last two sentences of 6.02 with some compromise statement. They may want to have a section of the contract dealing with transfers if that is an important issue.

In conclusion, the Arbitrator finds that on the Seniority-Management Rights issue the position of the City is more reasonable.

II. GRIEVANCE ARBITRATOR SELECTION

The second issue in this case involves the selection of an arbitrator in grievance cases arising under the contract.

The present contract language is as follows:

> "The parties shall attempt to select a mutually agreeable arbitrator and should they be unable to do so within fourteen (14) calendar days from the date the Union notified the committee that they intend to proceed to arbitration, the parties, if they agree, shall petition the Wisconsin Employment Relations Commission to appoint an arbitrator from their staff. If the parties cannot agree, they shall petition the American Arbitration Association to provide the parties with a panel of arbitrators from which the parties shall select the arbitrator to hear the grievance" (Exhibits 4, 6, 12, Article X, 10.02, Step IV, 2).

This has been a part of this bargaining unit's collective bargaining agreement for many years. The City wants to retain the present language. The Union wants the language revised so that the final step will be arbitration by a staff member of the Wisconsin Employment Relations Commission. The present final step-arbitration by someone from the American Arbitration Association would be eliminated. The Union considers this issue the primary one in this arbitration. The City considers it secondary.

Position of the Union. Local 216-A is one of the earlier chapters founded by AFSCME. It was chartered in 1946. Until Edward Wagner became mayor in 1980 all grievances between the Union and the City were resolved short of arbitration. Beginning in 1980 according to Union records, the Union's half of costs of arbitration through the American Arbitration Association has been $2,142, which includes $750 paid to union officers during grievance arbitration.

The Union is concerned with the costs to the local. There are 19 members and the current dues are $10.40 per month; $1.05 per month goes into the local treasury. The primary concept of arbitration is to do away with unilateral contract interpretation by the Employer and to provide a system of equality between the City and the Union. That equality has been seriously disrupted by the current system of arbitration. The City has "deep pockets" in a financial sense while the Union has limited resources.

The Union has been able to pay its bills to date; however, it faces the prospect of having to drop meritorious grievances to save its resources for potentially more important grievances at a later date. The Union then risks suits by members who may have meritorious grievances dropped in the future.

In Union Exhibit 8 the Union has submitted an extensive list of locals in northern Wisconsin that have arbitration provided by staff members of the WERC. It is indeed safe to say that most contracts between municipal employers and unions in northern Wisconsin have arbitration provided by a staff member of the WERC.

There is no internal inconsistency within the three Ashland City locals represented by AFSCME. Local 216-H Police has an unusual provision that provides for arbitration by the WERC for contract interpretations and arbitration through the American Arbitration Association for disciplinary grievances with the loser paying the full costs of arbitration.

The contract for Local 216-K, City Hall employees, provides for permissive language to select arbitration through the American Arbitration Association. The key language is "the parties, if they agree, shall petition the American Arbitration Association to appoint an arbitrator from its staff." The Union contends that if the parties do not agree that the matter can be processed as a prohibited practice by a staff member of the WERC. No grievances have gone to arbitration for Local 216-K City Hall and one grievance went to arbitration before a WERC staff member for local 216-H while Wagner has been mayor.

City Position. The City contends that the present provision has been a part of this bargaining unit for many years and that it provides the parties with flexibility in the selection of an arbitrator.

At the first level a local judge, attorney, businessperson or educator could be selected. At the second level a WERC staff arbitrator may be selected. The most recent grievance filed by the Union saw the use of an arbitrator from this level. At the third level, the American Arbitration Association provides a panel of arbitrators and the parties alternatively strike candidates thought to be unfavorable until a single arbitrator remains.

Either party may feel that the specific question or issue involved in a grievance proceeding is not one which an appointed WERC staff arbitrator would give an unbiased and impartial consideration. In these cases either party may want to spend the time and money to use the AAA panel. The AAA arbitrators have provided prompt and professional services at a reasonable cost to the parties.

The City has not abused the arbitration process and has not pursued an arbitration case merely to put a burden on the Union. The City is in no better position to squander its assets on meaningless or frivolous cases. However, the City submits that the investment on AAA arbitrator services is totally warranted in selected cases.

The AAA option has instilled a sense of responsibility on the parties with respect to the nature, number and substances of grievances filed and pursued. The City feels that in several cases where grievances had arguable merit the parties reached voluntary settlements to avoid the time and expense of the arbitration process.

The City feels that if the AAA arbitrator option is removed from the contract, the Union might file too many senseless grievances. The present arbitration clause is within Wisconsin statutes and serves the welfare of the public.

The Union's Exhibit 8 is not a complete list of arbitrator selection clauses. At the hearing Mr. Ellingson admitted the existence of AAA arbitrator contract clauses of which he is aware which he chose not to include in Exhibit 8. The City infers that there may be as many, if not more, AAA arbitrator clauses or non-WERC staff arbitrator clauses than those noted in Exhibit 8.

The City also points out that the collective bargaining agreement of the most recently created City Union--Ashland City Hall Employees, Local 216-K--contains the AAA arbitrator option. The same AFSCME representative involved here was instrumental in the inclusion of that provision in the City Hall Employees contract.

The City also again calls attention to Arbitrator Krinsky's decision in which he argues that changes in fundamental aspects of the bargaining relationship should be bargained by the parties rather than imposed by an arbitrator.

Arbitrator's Analysis. Both sides have strong arguments on this issue. On the basis of comparables the Union has provided data which it claims show that most northern Wisconsin city and county contracts do provide for grievance arbitration by the WERC and do not include provisions for AAA arbitration. The City noted the Union's admission that some contracts which provided for AAA arbitration were not included in the Union's exhibit. However, the City did not come up with its own exhibit citing evidence of contracts with AAA arbitration so I find the Union data more persuasive.

The Union has shown that the cost of AAA arbitration can be a serious burden to small local unions such as Local 216. There is only minimal cost to a WERC grievance arbitration. As the Union pointed out the costs involved in an AAA arbitration could lead the Union to non-pursuit of a meritorious grievance.

The City has some good arguments also for its desire to retain the present language. The current clause has been in effect for many years and a change should come about by negotiation rather than imposition by an arbitrator. The City has not refused to use the WERC and the most recent grievance filed by the Union saw the use of a WERC arbitrator.

The other two local AFSCME units in their contracts with the City both provide for use of AAA arbitration, although the provisions are not identical to this contract.

The City does have a fear of possible excessive numbers of grievance cases if all grievances could go to WERC arbitration. The possible choice of AAA arbitration by the City can be a useful curb on the filing of unreasonable grievances. The arbitration hearing did not go into the details of recent Union grievances and this Arbitrator does not have any basis to judge the correctness of the City's view on this point. The Union did not indicate that up to this point it has rejected any meritorious grievance because of the potential cost. It is concerned about possible future costs. The City also has concern about costs. Even the WERC arbitrations involve significant attorney costs for the City.

Taking all of the above into account, I do not find a strong enough basis of evidence to impose a change in the grievance arbitrator selection process at this time. Both parties seem to agree that the clause worked well for many years. The mayor who was new in 1980 has a key role in personnel policy and the grievance procedure. As the mayor and the Union gain more understanding of each other and have more experience in working together, it may again be that the present arbitration selection clause will become less objectionable to the Union. The parties have reached agreement on major economic issues for 1982 and 1983 which is a commendable achievement in this time of recession and unemployment. The present arbitration selection clause has a good deal of flexibility and can be used to serve the interests of both parties.

At this time and on the basis of the evidence presented, I find the City's position on the issue of arbitrator selection to be a little more reasonable than that of the Union.

CONCLUSION

On the basis of the exhibits and testimony presented at the hearing and after carefully reviewing the briefs of the parties, and taking into account the statutory criteria for last offer arbitration, I find that the City's final offer is the more reasonable of the final offers of the parties.

AWARD

The Final Offer of the City of Ashland (the Employer), along with the previous stipulations of the parties, are to be incorporated into the 1982, 1983 collective bargaining agreement between the City of Ashland and Local No. 216-A, WCCME, AFSCME, AFL-CIO.

November 4, 1982

Gordon Haferbecker

Gordon Haferbecker, Arbitrator