BEFORE THE MEDIATOR-ARBITRATOR

In the Matter of the Petition of DISTRICT 1199W/UNITED PROFESSIONALS OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES RWDSU/AFL-CIO To Initiate Mediation-Arbitration Between Said Petitioner and CITY OF RACINE	Case CLXXV No. 31563 Med/Arb-2255 Decision No. 20940-A Arbitrator: Stanley H. Michelstetter II

Appearances:

Thomas DeBruin, Organizer, appearing on behalf of the Union.

Mulcahy & Wherry, S.C., Attorneys at Law, by Michael L. Roshar, appearing on behalf of the Employer.

MEDIATION/ARBITRATION AWARD

District 1199W/United Professionals of the National Union of Hospital and Health Care Employees RWDSU/AFL-CIO, herein referred to as the Union, having petitioned the Wisconsin Employment Relations Commission to initiate mediation/arbitration proceedings in the above-entitled matter between it and City of Racine, herein referred to as the Employer, and the Commission, having appointed the Undersigned as mediator-arbitrator, and having notified him of that appointment on September 14, 1983, and the Undersigned, having conducted mediation followed by an arbitration hearing October 19, 1983, in Racine, Wisconsin. After hearing, the parties each filed post-hearing briefs, the last of which was received December 12, 1983. The standards applied in this case are those specified in S. 111.70 (4)(cm), Wis. Stats.

ISSUES

The following is a summary of the issues:

1. Term of Agreement
   (a). The Employer proposes a one-year collective bargaining agreement effective January 1, 1983, through December 31, 1983, with a wage increase of 3.5% over 1982 wages, effective January 1, 1983.
   (b). The Union proposes a two-year collective bargaining agreement effective January 1, 1983, through December 31, 1984, with a wage increase of 3.5% over 1982 wages, effective January 1, 1983, and a wage increase of 3.5% over 1983 wages, effective January 1, 1984.

2. Management's Right - Subcontracting
   (a). The Employer proposes to include the following language in the Management Rights clause: "To contract out for goods or services."
   (b). The Union proposes to include the following language in the Management Rights proposal: "To contract out for goods or services; however, there shall be no layoffs or reduction in hours due to any contracting out of work."

3. Overtime - Compensatory Time

(a). The Employer proposes: "Employees may keep any compensatory time earned prior to January 1, 1983, provided they use all of their compensatory time prior to January 1, 1984. Any time earned beyond the basis eight (8) hours shall be paid at time and one-half."

(b). The Union proposes: "Employees may keep any compensatory time earned prior to January 1, 1983, provided they utilize all their compensatory time prior to January 1, 1984. Employees may also earn up to eight (8) hours of compensatory time annually during each year of this Agreement at straight time. Any time earned beyond the basis eight (8) hours shall be paid at time and one-half."

POSITIONS OF THE PARTIES

Subcontracting

The Union argues that the internal comparisons showed that the Employer has given language protection as strong as that requested by the Union herein to Local 67, fire unit, fire staff, police, police staff, City Hall, police department, wastewater, and water works. It notes that the Employer is contemplating alternatives for a planned county-wide restructuring of public health services, one of which would result in subcontracting the unit's work to the County. It takes the view that adoption of its language would not unduly restrict the consideration of these alternatives, but instead would provide minimum protection to long-time city employees. It also relies on the parties' tenative agreement in which the Employer had accepted the Union's proposal with respect to subcontracting, and later rejected its settlement. It sees adoption of the Employer's final offer as improperly reinforcing this inappropriate conduct. Its view is that the tenative settlement should be admitted into evidence and should be given great consideration. It denies the Employer's argument that the small size of this unit is relevant to the issue because the Employer has adopted similar restrictions for the fire staff unit (nine employees) and the police staff unit (37 employees).

The Employer takes the view that this unit ought to be compared to similar units in other municipalities rather than with dissimilar units in this City because this unit is small. Bigger units, assertedly, have more flexibility to absorb excessive employees while subcontracting at the same time. It argues that of the ten similar units from other municipalities which it argues are comparable, five specifically have the right to subcontract without restriction, or have no specific provision limiting the right and only Milwaukee restricts the right to subcontract. Most importantly, it argues that the City is currently studying ways in which the County might establish a county-wide public health nursing program. One of the alternatives under consideration would involve the County establishing a county-wide program with the City paying the County for the service. The Employer concedes that this one proposal, if adopted, would constitute subcontracting.

DISCUSSION - Subcontracting

On June 17, 1983, the parties reached a tenative agreement in which they agreed to a one-year collective bargaining agreement for calendar 1983, with a wage increase of 3.5% effective January 1, 1983, and the subcontracting and compensatory time issues as the Union proposes herein. The Union ratified this agreement on June 21, 1983, and the Employer rejected the agreement on June 28, 1983. It should be noted that the final offers of neither party are entirely consistent with the tenative agreement of both parties.

S. 111.70 (4)(cm) 7h. provides that mediator -arbitrators should consider "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 the private employment."

The course of bargaining, including tenative agreements, almost literally falls within the meaning of this language. Therefore, the terms of tenative agreements are properly admissible evidence in mediation/arbitration proceedings. The weight to be given such evidence in mediation/arbitration proceedings presents a dilemma to mediator/arbitrators. If mediator/arbitrators merely enforce the terms of tenative agreements, parties would be discouraged from entering into such agreements for fear that a failure to have them adopted by their principals would result in a loss in mediation/arbitration. On the other hand, such tenative agreements may be very strong evidence of what the parties would or should have voluntarily settled for. In this case, the Union has adopted a position which is significantly different from that which the parties tenatively agreed to. Because it is very possible that the shorter term was a major factor in securing the agreement of the Employer's representives, I have determined that the tenative agreement in its entirety should be given no weight in the determination of this case.

The City of Racine has subcontracting restrictions in its collective bargaining agreements with all of its major units at least as strong as that provided by the Union[1/] In two units which are of comparable size to that of this unit, the fire staff and the police staff units, the Employer has language which is more restrictive of its right to subcontract than that proposed by the Union. Of the cities and counties with public health nursing units similar to this which the Employer relies on as being comparable to the unit, only Madison, Milwaukee, West Allis, and Kenosha, Rock County and Waukesha County are organized. Of these six comparison groups, two have no language on the subject. One, the City of Milwaukee, states that subcontracting cannot affect employment status of non-probationary employees. Madison has language which makes it unclear the degree to which subcontracting is restricted, and Waukesha County mildly limits subcontracting to situations to "when it is not feasible or economical for county employees to perform." Kenosha County permits subcontracting. I find that the internal and external comparisons tend to favor the Union's position.

1/ Only the crossing guard's unit agreement provides for an unfettered right to subcontract.

.The Employer is considering alternatives in the restructuring of county-wide public health services which may involve the establishment of a county public health department which could replace the City program. The Employer admits that one of the alternatives would constitute subcontracting. 1/ Collective bargaining restrictions on subcontracting balance the social and labor relations considerations long service employees have in retaining their positions against the economic advantages which exist in subcontracting established unit work. With respect to the subcontracting proposals made herein, the mediator/arbitrator is presented with the alternative of no protection for employees' jobs in the face of subcontracting and the Union's proposal, which on its face is a strong restriction, but under the circumstances is significantly weaker protection. Under the circumstances of this case, the adoption of the Union's proposal would require the City to consider the social concerns of its employees in the consideration of its alternatives with the County. Accordingly, pursuant to S. 111.70 (4)(cm)7 c,d, and h, I find the weight of the evidence heavily favors the Union's position.

POSITIONS OF THE PARTIES

Term

The Union takes the view that a two-year agreement for calendar 1983 and 1984 is appropriate because the mediation/arbitration process takes place so close to the expiration of a one-year agreement, that a two-year agreement is the only practical solution. It notes that five other City units negotiated two-year agreements with wage increases in 1983 and 1984 at the time principal negotiations were conducted with respect to this unit. Thus, it argues that a voluntary settlement at that time would have been as the Union proposed. Although the Union had tenatively agreed to a one-year agreement then, circumstances now require a two-year agreement. It argues that all but one of the external comparables cited in this case have multi-year agreements.

The Employer seeks to have the opportunity to bargain wages for 1984 after its economic circumstances are more clearly defined, and when a clear settlement pattern emerges internally and among comparable communities. It argues the April settlements with three of twelve City units are not indicative of a pattern particulary when inflation has subsided since those agreements were reached. It argues that of the three external settlements in units it deems comparable, the settlement pattern has lowered with the reduced rate of inflation. It notes that private sector settlements are far lower than the increase proposed by the Union, and thus arbitrators are currently approving one-year agreements. Finally, it notes that since the April settlements, the City's financial position has deteriorated. It relies on the testimony of Financial Director and Treasurer Maller, who testified that when he began preparing for the 1984 budget in July and in August, he sent a letter to the Mayor outlining that all previous 1984 agreements must be reopened and all further 1984 agreements be held to no wage increase at all because: (1) state aids were drastically cut (2) Wisconsin property tax credits were less than in 1983 (3) federal revenue sharing was not yet approved and (4) state shared revenues would decrease.

1/ For the purposes of decision only, I assume that this proposal does constitute subcontracting prohibited by the Union's proposal herein. The proposal involves a "merger" of City and County departments.

DISCUSSION - Term

The better view is that the standard expressed in S. 111.70 (4)(cm) 7c and h is the factors which should ordinarily should be given weight in resolving disputes with respect to the length of a collective bargaining agreement. Ordinarily, where, as here, the agreement would be expired upon an award if one party's proposal for the length of an agreement would be adopted, but would continue for a reasonable period under reasonable conditions if the other party's proposal for the length of the agreement were adopted, the public interest is better served by the stability of the longer term. However, this view can be outweighed by factors which make immediate bargaining more desirable. There can be no doubt that when an employer is in a position that it could not, as a practical matter, reasonably be expected to be able to engage in meaningful bargaining, the shorter term should be preferred.

The principal issue with respect to term is the wage increase, although the Union would also significantly benefit by the longer term protection against subcontracting. City Finance Director Maller gave forthright testimony to the effect that in July and August, 1983, as he prepared the City budget, he discovered City revenues expected from state and federal sources would create a major fiscal problem for the City. It is unclear from his testimony the extent to which other City officials were aware of this problem at the time final offers were submitted in this case. By letter dated August 24, 1983, the Employer submitted its final offer herein which contained no proposal for a second year. The following day, the same Employer representative signed a final offer for mediation/arbitration with respect to the crossing guard unit, providing for a 1983 and 1984 calendar year agreement, with wage increases effective April 1, 1983, of 3.5% and effective April 1, 1984, of 3.5%. No testimony suggesting special justification of this latter offer has been offered. On August 30, 1983, Mr. Maller sent a letter to the mayor advocating that no wage increases be granted to any City employees in 1984, and that the City seek union waivers of increases in 1984 in previously concluded collective bargaining agreements which provided for wage increases for 1984. He based his conclusions on lower City revenues from state and federal sources, lack of growth in assessed valuation, and the poor economic circumstances which prevented tax increase. The Employer, thereafter, made efforts which thus far have been unsuccessful to get those units which have agreements covering 1984 to reopen and reduce the provided wage increases. These agreements are: waste water unit, water works, City hall clerical, and police department clerical. Local 67, fire staff, police, and police staff units have agreements expiring at the end of 1983 and successor agreements have not been negotiated.

The forthright testimony of Mr. Maller unquestionably demonstrates that in July and August circumstances had changed for the Employer because it had discovered its revenues for 1984 were going to be far less than anticipated. Whatever may have been the stated knowledge of the Employer at the time final offers were submitted in this case, the unexplained final offer in the crossing guard unit for a 1984 wage increase suggests that the City did not believe that the economic circumstances prevented meaningful bargaining with respect to a 1984 increase.

Mr. Maller credibly testified that, if anything, the City's expected revenue situation worsened after August 30. However, Mr. Maller's testimony demonstrates that as of the date of hearing, he was in a position to make a very sound judgment as to what that revenue situation was very likely to be. Accordingly, it does not appear that the Employer's financial circumstances, although bad, were so unpredictable that the Employer could not make meaningful judgments and engage in meaningful collective bargaining. Accordingly, I find that the public interest is served by a two-year, rather than a one-year term, under the circumstances of this case.

POSITIONS OF THE PARTIES

Wages

The Union urges the mediator/arbitrator to rely on the facts as they were when the parties should have voluntarily settled. On this basis, it argues that its 1984 wage position should be adopted because the Employer was entering into two-year agreements with similar 1984 wage increases among other units of the City at the time the negotiations took place. It also relies on the cost of living data, internal comparisons, and external comparisons. It denies the Employer's position that the financial crisis necessitates freezing wages. It notes that the day after the Employer's final offer was submitted in this matter, namely August 25, 1983, the Employer submitted a final offer to the crossing guards with a 3.5% wage increase effective April 1, 1984.

The Employer continues its view that the negotiation of a wage increase for 1984 is inappropriate. It alternatively argues that the Union's wage proposal is excessive. It makes its external comparisons of wage rates to the cities of Beloit, Jamesville, Kenosha, Madison, Milwaukee, Waukesha (no nurses), Wauwatosa, and West Allis, primarily on the basis of population. It also relies on Racine and Kenosha Counties primarily on the basis of proximity, and Waukesha County substituting for the City of Waukesha. It argues that these comparables should be used because they have been used in two previous awards involving the City and other bargaining units. While it continues its argument that neither the external nor internal comparisons are sufficiently developed to be reliable indicators of a settlement, its position also indicates that from the three of ten comparable units outside the City which have settled for 1984, there is a pattern of declining rate of settlement which it relates to the decline in rate of increase for cost of living. The Employer also argues that the settlements which have occurred with other City units are not reliable because they occurred under different circumstances, a higher rate of inflation, and when the City had not experienced financial difficulty. Thus, its principal position is that the City currently would have difficulty paying a wage increase of the size the Union has requested for 1984, and the current annual rate of inflation does not warrant an increase of the size requested by the Union.

External Comparisons

The Union offered public health units in Racine County, Sheboygan County, City of Kenosha, City of Milwaukee, and City of Beloit as comparable units without explanation. The Employer offered a set of comparable communities based on cities of comparable population, including Madison and Milwaukee, and the counties containing those cities, except Milwaukee, Dane and Sheboygan Counties. Of those, only West Allis, Kenosha County, Rock County and Wauwatosa have 1983 settlements. The Employer's comparisons appear more reliable because they are systematic. However, because there may be significant variations in labor market conditions, certain comparisons should be given greater weight because they share a closer relationship to the Racine labor market. I have grouped them as follows:

Group 1

	1983 year-end monthly wage rate min.	max.
City of Kenosha	$1,824	$2,024
Kenosha County	$1,850	$1,950
Racine County	$1,633	$2,025
Average	$1,769	$2,000

Group 2

	1983 year-end monthly wage rate min.	max.
City of Milwaukee	$1,609	$2,000
West Allis	$1,720	$1,804
Wauwatosa	$1,697	$1,859
Average	$1,675	$1,888

Group 3

	1983 year-end monthly wage rate min.	max.
Beloit	$1,352	$1,726
Rock County	$1,557	$1,723
Average	$1,454	$1,724
City of Racine	$1,595	$1,918

Based upon the wage rate alone, City of Racine public health nurses appear to be significantly behind the average of the most closely comparable group at the end of 1983, and well ahead of the less comparable groups.

Only three of these units have settled for 1984. They are as follows:

	percentage increase	date of ratification
City of West Allis	3.5%	April, 1983
City of Milwaukee	0	June, 1983
Rock County	2.27%	July, 1983

Contrary to the position of the Employer, the date of settlement does not suggest any declining rate of increase with later settlements.

The following is the cost of living data available for 1984 wage increase comparison.

1984	U.S. City	Milwaukee
January	3.8%	4.7
February	3.5	
March	3.6	5.4
April	3.9	
May	3.5	5.4
June	2.6	
July	2.4	4.5
August	2.6	

By either index, the rate of inflation has subsided over the 1983 year. It appears to have stabilized in the 2.6% range for the U.S. City average and 4.5% in the Milwaukee average. Depending on which index is used, 4.5% or 2.6% would most likely be the increase necessary to preserve unit employees' purchasing power lost in 1983.

Internal Comparisons

The following is the status of other City units:

Bargaining Unit	Contract Term	Settlement Amount	Wage Increase Date	Date of Settlement
Local 2239, City Hall	1983-84	$.37/hr	4/1/83	4/83
Police Dept., Unsworn	1983-84	$.37/hr	4/1/83 2/	4/83
Wastewater	1983-84	3.5%	1/1/84	4/83
Waterworks	1983-84	3.5%	1/1/84	4/83
Crossing Guards	1983-84	Emp. / Union		
		3.5% / $.37/hr	4/1/84	8/25/83
Public Health Nurses	1983-?	3.5%	1/1/84	8/26/83

Local 67, Fire unit, Fire Staff, Police, and Police Staff all cover at least calendar 1982 and 1983. No agreement has been concluded for 1984. It appears that the Employer's initial position in these units is that wages and benefits should be frozen for 1984.

It is clear that no city-wide pattern has yet developed. Further, in August, 1983, and thereafter, the Employer has suffered a change in its ability to pay. Disregarding these latter factors for a moment, the internal comparisons, to the extent that they are established, tend to support a wage increase of 3.5%.

Difficulty in Paying

Finance Director Maller testified that revenues from federal and state sources would be down for 1984. In his view, the poor economic conditions of the City made a tax increase impractical. This left the City with the choice of layoffs and/or wage and benefits freezes. Mr. Maller's testimony leaves no doubt that the Employer will have difficulty paying for wage increases in 1984. One of the methods that the Employer has used (commencing in 1983) is to budget for a position in this bargaining unit which it has not filled. Thus, the Employer has already made the savings necessary to offset this unit's share of the revenue shortfall.

Summary of Wage Position

Overall, the Union's wage proposal for 1984 is appropriate both in respect to external and internal comparisons. With respect to the rate of inflation of 1983 as it affects a 1984 increase, the Union's proposal may be too high or appropriate depending on whether the Milwaukee or U.S. City average is used. The evidence with respect to the Employer's ability to pay suggests that the Employer will have difficulty in obtaining enough funds to continue to provide services at its current level while granting employees wage increases. It does appear that a proportionate cost savings necessary to pay for the wage increase has already been made with respect to the instant bargaining unit. I conclude that the wage factor favors the Union's position.

POSITIONS OF THE PARTIES
Overtime Payment

The Union relies on the tenative agreement reached as the basis for its position on this admittedly minor issue. It also notes that the previous practice has been that all overtime was paid as compensatory time off.

The Employer argues that it is trying to eliminate compensatory time in its bargaining units city-wide. It argues that as of now, only police units have some form of compensatory time off. Finally, it argues that as a result of layoff in 1981, it lacks sufficient manpower to allow compensatory time off. Also it denies that the rejected tenative agreement should be considered by the mediator/ arbitrator because it would discourage negotiations.

DISCUSSION - Overtime Payment

This issue is minor in comparison to the other issues in this case. The parties offer little evidence with respect to this matter. The Employer's position is to be preferred if, in fact, it will have difficulty in providing services if employees are granted compensatory time off, rather than paid for their overtime work. Thus, the evidence tends to favor the Employer's position.

SUMMARY

Based upon the foregoing as considered under the statutory standards, I find that the Union's final offer is to be preferred.

AWARD

The parties' 1983-1984 collective bargaining agreement should include the final offer of the Union.

Dated this 24th day of January, 1984, in Milwaukee, Wisconsin.

Stanley H. Michelstetter II

Stanley H. Michelstetter II
Mediator/Arbitrator