STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petitions of CITY OF RHINELANDER EMPLOYEES LOCAL 1226, AFSCME, AFL-CIO To Initiate Mediation-Arbitration Between Said Petitioner and CITY OF RHINELANDER	Case XXVII No. 32225 MED/ARB-2443 Decision No. 21231-A Case XXVIII No. 32226 MED/ARB-2444 Decision No. 21232-A

I. APPEARANCES

On Behalf of the Union: Daniel J. Barrington, Staff Representative
Wisconsin Council 40, AFSCME, AFL-CIO

On Behalf of the City: Philip I. Parkinson, City Attorney

II. BACKGROUND

This decision covers two separate petitions involving two separate bargaining units within the city. Both are represented by Local 1226. One bargaining unit includes all regular full-time and regular part-time employees of the City, Memorial Building, and Police Department, excluding sworn officers, managerial, supervisory, and confidential employees. The other bargaining unit covers all regular full-time and regular part-time employees of the Department of Public Works, Sewer and Water Construction, Water and Waste Treatment Plant, Cemetery and Parks Department excluding managerial, confidential and supervisory employees.

The Parties agreed to combine the matter before the Arbitrator because the final offers in both units are identical and it is noted the bargaining in each unit often and generally is parallel. In each case on August 22, 1983, the Parties exchanged their initial proposals on matters to be included in a new collective bargaining agreement. Thereafter the Parties met on three (3) occasions in efforts to reach an accord on a new collective bargaining agreement. On September 23, 1983, the petitioner filed petitions requesting that the Wisconsin Employment Relations Commission initiate Mediation-Arbitration pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act. On November 15, 1983, a member of the Commission's staff conducted an investigation which reflected that the Parties were deadlocked in their negotiations, and, by November 15, 1983, the Parties submitted to said investigator their final offers, as well as a stipulation on matters agreed upon. The investigator notified the Parties that the investigation was closed. The investigator advised the Commission that the Parties remained at impasse.

Subsequently the Commission ordered the Parties to select a Mediator/Arbitrator. The undersigned was selected and appointed to serve in both disputes. A mediation session was held on April 4, 1984. The Parties were unable to resolve their differences during mediation. The Arbitrator then advised the Parties of his intent to proceed to arbitration. Both Parties waived their respective rights to written notice of such intent and waived their respective right to withdraw their final offers. An arbitration hearing was held the same day. Post-hearing briefs were due May 11, 1984. Based on the evidence, the arguments of the Parties, and the

criteria set forth in Section 111.70(4)(cm)6 of the Wisconsin statute, the Mediator/Arbitrator renders the following award.

III. ISSUE

There are several aspects of the final offers not in dispute. Both Parties' final offers propose to increase wages by .38¢/hour. In addition, both Parties' final offers propose to add to the contract identical clauses providing for "sick leave payout." Under the provision, any employee age 62 or over may choose to apply unused sick leave against hospital and surgical insurance. The retired employee will be granted a dollar credit equal to one third of the 120-day accumulation maximum at the employee's rate of pay at the time of retirement.

The only difference in the Parties' final offers is the following language found in the Employer's final offers:

> "Sick Leave Payout - The City offers this sick leave payout option with the written provision to be included in the contract that the actual cost of each taking of sick leave payout be costed into the next year's contract. Cost to be actual cost of sick leave credit divided by the gross base salary of the unit from which the eligible employee retires."

IV. ARGUMENTS OF THE PARTIES

A. City

First, the City notes that presently this fringe benefit is not costing either party anything as no one has taken advantage of it. However, it is the City's intent, by including the specific language, to promulgate negotiations for costing during subsequent contractual years should an employee utilize the benefit. They believe this to be consistent with their reading of the Wisconsin Statutes providing that the total cost of bargaining including fringe benefits is to be considered by the Arbitrator in the decision-making process.

Their argument implies that their proposal is reasonable because:

> "1) The City has finally conceded a benefit to these two units that it has steadfastly resisted for many years. That alone makes this concession valuable.
>
> "2) Attempting to place an actual cost on the benefit is difficult if not impossible to fairly determine because neither the City nor the Union can dictate when this benefit will be used in advance of its use. It is up to the employee and his/her particular circumstances."

Moreover, they believe the City's proposal not to cost this year's agreement for sick leave pay out and to negotiate the cost in subsequent years depending upon the use by Union employees is the reasonable contract proposal considering all of the circumstances. In this respect, they cite Northwest United Educators and School District of Turtle Lake, Case XXI, No. 30587, Med/Arb-1974, Decision No. 20707-A. The arbitrator, Sharon K. Imes, determined that the proposal of the School District, which sought a one-year contract versus the annual request for a two-year contract, was more reasonable in that the union's request for a two-year contract would require the School District to be responsible for health insurance costs in the second year, which at the time the arbitrator needed to make her decision, were unavailable to either party.

The potential liability under the sick leave payout must be considered in their view as well. They computed the potential liability it could face and therefore drafted the language in question to maintain an open door for bargaining the cost of said benefits. Based on calculation of the total number of sick days accumulated by the employees of each unit, multiplied by the daily average wage of that unit, multiplied by one-third (the actual payout), and divided by the total gross wage of the unit, the potential liability carried by the City for the City Hall unit and the Public Works unit is 2.8% and 6.7% respectively.

With respect to the Union's reference to the fact that the police union does not have similar language to cost the benefit's use annually, the City notes it was costed the year it was granted based upon a police officer who was retiring that year in accordance with the 55 year-old mandatory retirement law. Moreover, the benefit has not been utilized since by the police unit. Furthermore, although uniform labor contracts are generally considered a desirable goal, "uniformity should not be achieved at the cost of fairness." They cite Case XLII No. 3079-2055, Decision No. 20449-A, The Matter of the Petition of Local 360, Wis. Council of County & Municipal Employees, AFSCME, AFL-CIO v. Sauk County Highway Dept. In review of the potential cost to the City, fair labor practices would dictate giving the Parties the opportunity to negotiate the costing annually.

The City also anticipates that the Union will argue that the inclusion of this language could potentially be construed unfairly or become burdensome. The City's response is that any imagined hardship that the Union might argue would not appear until a future time. At the time of costing the use of the benefit, the Union would have the opportunity to bargain with the City as to the appropriate method of costing this benefit and include it in the contract. If they are dissatisfied with the method in which the Employer presented its costing determination, and were unable to resolve the issue at the bargaining table, then that could be made part of a subsequent arbitration proceeding. They contend the ability to negotiate in the future the impact of this Arbitrator's decision has been recognized as a factor in determining whether or not one offer is more reasonable than the other. In this connection they cite Local 133, District Council 48, AFSCME, AFL-CIO and the City of Oak Creek, Case XXXVIII, No. 30059, Decision No. 20087-A, MED/ARB-1811.

Lastly, the City asserts that to accept the Union's position would be to give much greater financial impact to their contracts than the City has given to the police officers or the firefighters. To grant the Union's position, which results in no costing of the sick leave payout provision that the two Parties have bargained would disturb the parity the City attempts to maintain among the relative positions of the four unions employed by the City of Rhinelander. To accept the Employer's position would be to defer the costing of this benefit to a future time when the Union could give quid pro quo in exchange for the rights of their members to have sick leave payout. The trade off of fringe benefit costing versus direct wage benefit is a recognized bargaining strategy.

B. The Union

The Union notes as factual background that the labor relationship between the City of Rhinelander and its various employee groups can be divided into five component parts:

1. Elected, administrative, managerial, confidential, and supervisory employees which are not represented by any labor organization due to statutory exemption;

2. Law enforcement employees (sworn officers with the power of arrest) represented by the WPPA;

3. Fire protection employees represented by the IAFF;

4. DPW employees, Local 1226;

5. City Hall and white collar employees, Local 1226.

Four of the five components are represented by labor organizations and are governed by the respective collective bargaining agreements between the City and these organization. The fifth is governed by local ordinance. Of these five groups, two groups already enjoy the sick leave payout provision proposed by both Parties. These are the non-represented employees and the employees under the WPPA labor agreement. The stipulation of the Parties to incorporate sick leave payout in the agreements with the DPW and City Hall units clearly establishes a majority of employees employed by the City eligible to utilize such benefits. Thus, they believe the question as to whether or not there should be sick leave payout provision is not at issue. The issue is to the extent of the cost of the provision as it relates to future agreements.

The Union basically advances five arguments. First, they make the observation that the costing proposal is not current City policy. They note the sick leave payout upon retirement benefit is presently enjoyed by two segments of the Rhinelander City employment force. In response to the questions posed by the Union to Mr. Parkinson during the proceedings, it was admitted by Mr. Parkinson that certain department heads enjoyed the sick leave payout upon retirement benefit, over the last three or four years, on at least three occasions, in a fashion similar to the stipulated portion of the provision with exception to the disputed area. The City was unable to provide evidence or testimony that the proviso sought by the City in its final offer was ever established by ordinance or otherwise, to be the policy of the City. The City was unable to produce any evidence or testimony that when such sick leave provision was utilized by department heads at their retirement, that the following year the cost of such utilization was deducted from the wage and benefit increase granted to the remaining employees in that group in the fashion sought by the City in this proceeding.

Similarly, the second group enjoying this benefit, the WPPA Police Unit, has identical language, as proposed by both Parties regarding sick leave payout, embodied in its Labor Agreement. One exception must be noted however, that being the maximum number of sick days accumulation allowed. However, no such additional provision relating to future cost impact as proposed by the City is part of that Labor Agreement. Mr. Parkinson stated that this payout benefit, as presently found in the WPPA Agreement has been a part of that agreement for approximately five or six years. The City has had ample time to negotiate into the WPPA Agreement the same proviso that it seeks with Local 1226. Such proviso has not been negotiated with the WPPA. Mr. Parkinson stated that he really wasn't sure how the City would cost the impact of utilization by WPPA employees of the payout benefit if it were used.

Second, the Union contends that the costing proviso is not only not City policy, but not public policy. They believe sick leave payout upon retirement is not an uncommon benefit enjoyed by public employees. The Union submitted nine exhibits relating to sick leave payout provisions which were entered as joint exhibits. The Union admits these exhibits are a brief sampling, but contend they do provide some cross-section reference to substantiate this Union claim. In none of these exhibits can the proviso be found that is sought by the City. While the Union admits the credence of this argument may be challenged by the City, it would be far easier to refute this theory than substantiate it. No objection to this theory was offered by the City at the hearing nor was evidence offered that any municipality or other governmental body providing

such a retirement payout benefit also requires the proviso sought by the City.

The Union's third assertion is that the method of costing impact as proposed by the City is inconsistent with past methods of costing employed by the Parties. As previously stated, the City was unable to prove that the costing proviso sought by the City for the Local 1226 Units is the policy for the other units receiving the benefit. To cost this benefit in a manner differently than that presently done is inconsistent. Further, it is inconsistent with costing methods which have been historical bargaining postures of the City and the posture assumed in this round of collective bargaining. The Union notes Mr. Parkinson stated that when the two 1226 Locals successfully negotiated an increase of sick leave accumulation maximum in 1981, the additional days were not costed as part of the contract. The Union won't argue with the right of the City to attempt to cost or not cost certain benefits. The City did argue at the hearing that when the WPPA negotiated their sick leave payout benefit, there was a purported wage concession, in that the WPPA received a lesser amount in wages. No evidence was offered to substantiate that allegation. However, the WPPA only had to pay a one-time cost for the right to receive the benefit at retirement. Under the proposal offered by the City to Local 1226, each unit will pay each and every year the benefit is utilized.

The Union explores further the Parties method of costing other benefits. In this respect they draw attention to the testimony of Pat Brown, President of Local 1226, who testified that for calendar year 1983, a new "sick leave bonus" benefit was negotiated between the Parties. The "bonus" provides that if employees limit use of their sick leave accumulation, employees can receive up to two days off with pay as a reward. The cost impact of such a new benefit was not a part of the negotiations for 1983, nor was the cost of the use by employees in 1983 a part of the 1984 negotiations, according to Mr. Brown. No attempt was ever made by the City to incorporate a proviso to cost this benefit in the same fashion as that being sought by the City for the retirement benefit. In fact no such provision can be found in any of the City's labor agreements with any of its employees for any of the benefits enjoyed by the employees requiring the cost of the utilization to be considered a mandatory factor in subsequent years' negotiations by contract.

Fourth, the Union believes that the method of costing impact as proposed by the City is unreasonable. They see this to be the case for three reasons. First, the City argues that there was no quid pro quo similar to that which allegedly was a factor in the negotiations with the WPPA regarding this benefit was offered by the Unions. The City does not cost the present use of sick leave by employees in such a fashion. The City does not offer to reduce the impact of the cost of the payout benefit by the amount of "lost" sick days as a result of employees reaching the maximum of 120 days accumulation, nor by the amount "lost" by the employee upon retirement because of the restriction that only one-third of the sick leave days available at retirement can be utilized as the payout benefit. Secondly, in the Union's view, as employees retire, the fiscal liability of the City is reduced by the following factors:

1. Sick leave accumulation liability

2. Vacation accumulation liability

3. Insurance cost liability

4. Holiday liability

5. In short, the reduction in fiscal liability of the City due to the retiring employee at upper level of benefits and pay scale, while being replaced by a

probationary employee receiving lower wages and little or no benefits until completion of probation, and then receiving benefits at a lower scale level due to length of service.

Notwithstanding, the fact the gross wages of the affected unit will be reduced because of the loss of the higher paid retiring employee, the Employer doesn't propose to cost these matters. Finally, under the proposal of the City, the cost of the utilization of the benefit would result in "double-costing," in that there would be no way to determine what the cost of the settlement would have been for any given year had the benefit not been utilized. For example, if the cost of the payout, using the City's method, resulted in a 1% figure, and the cost of the settlement for the following year was 6%, they ask how can anyone be sure that the Union got 7%?

Lastly, the Union contends the City is attempting to impose bargaining strategies upon the Union that more properly should remain unilaterally with the City. By mandating costing analysis and/or methods through the embodiment of the language as proposed by the City, both Parties are giving up one of the most important tools of collective bargaining, the art of persuasion. There would be no collective bargaining. It would simply come down to the City taking a position that "X%" is all you get and that will be reduced by last year's costs. They believe this to be ludicrous. One of the most important aspects of collective bargaining is the posturing of the parties and the jockeying they go through as they try to convince each other that their own respective methods of "creative costing" are the best methods. Sometimes, it is that "creative costing" that allows the parties to "sell" voluntary settlements to their constituents, especially non-palatable settlements.

V. DISCUSSION

The Union suggests in their argument that the merits of a sick leave payout plan, as an additional benefit, aren't really in dispute. The dispute could be viewed simply as a costing dispute. However, upon closer examination, the merits of this "additional" benefit are in reality quite disputed. This is because the Employer's proposal doesn't result in an additional benefit. The Employer's sick leave proposal in essence isn't any more than a salary redistribution proposal which effectively ends up granting no new economic benefit above and beyond present and future wage settlements. The Employer's proposal really isn't merely a costing proposal, i.e. one which would measure the value of the Parties' proposals in the future, but a proposal whose impact would affect or reduce the wages of employees in future bargaining by an amount equal to that paid employees who retire or receive sick leave payout in the previous year. It is clear to the Arbitrator that this was the intent of the Employer's proposal. For instance, if in 1984, the Parties or one of the Parties felt a 5% increase was appropriate--for the sake of argument because the pattern of internal and external comparable settlements was 5%--the sick leave payout in the previous year would be costed against their proposal. The Employer is simply saying instead of granting the Union a wage increase equal to what they normally would, their proposal or settlement would be reduced by an amount which would then be paid in the form of sick leave payout.

In this sense the issue of sick leave payout as the Union has proposed it is in dispute. The Union is proposing a sick leave payout plan that is undeniably, and in spite of the Employer's unusual proposal, a new benefit. The Employer's proposal is viewed as a proposal which basically and simply does not grant a new benefit. At best it can be viewed as a proposal which grants a new benefit with a cost offset feature. Thus, the Arbitrator will view this case as he would any dispute in which one party is proposing a

totally new benefit. It is the Union's burden in this case to support their proposal for a new benefit.

A review of the evidence convinces the Arbitrator that the Union has justified their proposal for sick leave payout; moreover, the Employer has failed to overcome this justification.

The Union presented evidence that a sick leave payout program is in effect for the police department and non-organized City employees. More importantly, they have shown that neither program has an operational feature similar to that in the Employer's final offer. This is strong justification for the benefit in the form proposed.

The City, on the other hand, has failed, based on comparability, to show any support for their proposal to cost the value of the sick leave payout benefit, dollar for dollar, against the next year's contract. On the contrary, the Union produced examples of many sick leave payout provisions which did not contain "cost against" provisions.

Thus, based on internal comparables, the Union has made their case. Their proposal must be preferred when viewed from this perspective because it results in a more consistent treatment of employees in the various employee groups. The Employer acknowledges the importance of uniform treatment, but contends an award for the Union would be unfair. It would be unfair in their opinion because it gives greater value to Local 1226 contracts than to police or firefighters and would actually disturb the parity among the groups. Moreover, they believe their proposal gives the opportunity for a quid pro quo.

The problem with the Employer's argument as noted above, is that there are no similar "cost against" proposals in the police sick leave payout provision. Accordingly, there is no reduction in the following contract negotiations in the value that might otherwise be received. Thus, if the Arbitrator were to award for the Employer, it would in reality give the police greater value to their sick leave payout provision because there is no evidence on record that there is a cost offset feature which would reduce the value of their future contract or that there was some kind of equivalent dollar for dollar quid pro quo at the time it was negotiated.

The Arbitrator appreciates the difficulty the Employer finds itself in when negotiating a benefit which can be exercised somewhat unexpectedly subsequent to contract negotiations. The Employer is in the difficult position of then incurring cost which they could not fully anticipate in negotiations, one which they feel as a result should be accounted for in the negotiations at a later point in time. While it is a difficult position for the Employer to be in, there was no difference shown between this future benefit and other increases in optional/future benefits which are not costed in negotiations voluntarily, let alone costed vis-á-vis an imposed contract provision. On the other hand, this decision is not meant to imply that fringe benefits or total compensation should not be considered when considering the value of a proposal at a future time or that a quid pro quo for a major benefit isn't, generally speaking, appropriate. It would have been different if the City could have simply said the Union proposal wasn't justified because Local 1226 did not offer the same kind of quid pro quo that the police did when the benefit was bargained there or that they failed to offer an adequate quid pro quo at all.

This award should be interpreted to mean that the Union has shown that their form of the new benefit with no cost offset features is more consistent with the other internal units, one organized and one unorganized.

It is also to say that the preferred result is one which results in the most consistent treatment among internal employee groups. In this respect, if a quid pro quo is appropriate in future bargaining based on increased use of the benefit, both units are on equal footing, both subject to proposals from the Employer for quid pro quos. Further, in this respect, the Employer's proposal is less preferred because it seeks to have the Arbitrator impose an automatic fixed quid pro quo to be applied in the future, irrespective of the bargaining environment and the dynamics that may be present at that time. This is less than reasonable.

VI. AWARD

The 1983-84 Collective Bargaining Agreement between the Rhinelander City Employees, Local 1226 and the City of Rhinelander shall include the final offer of the Rhinelander City Employees, Local 1226 and the stipulations of agreement as submitted to the Wisconsin Employment Relations Commission.

Dated this 25th day of September, 1984, at Eau Claire, Wisconsin.

Gil Vernon, Arbitrator