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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN

BEFORE THE ARBITRATOR

* * * * * * * * * * * *

* In the Matter of the Petition of *

* CITY EMPLOYEES, LOCAL 60, *
AFSCME, AFL-CIO (LIBRARY UNIT)

* * Case CXVI
No. 33237

to Initiate Mediation-Arbitration
* Between Said Petitioner and * MED/ARB-2720
Decision No. 22001-A

* CITY OF MADISON (LIBRARY) *

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I. APPEARANCES

For the Union: Jack Bernfeld, Staff Representative, Council 40

For the Employer: Timothy C. Jeffery, Director Labor Relations - City of Madison

II. BACKGROUND

On November 30, 1983, the parties exchanged their initial proposals on matters to be included in a new collective bargaining agreement to succeed the agreement which expired December 31, 1983. Thereafter, the parties met on six occasions in efforts to reach an accord on a new collective bargaining agreement. On May 1, 1984, the Union filed the instant petition requesting that the Commission initiate Mediation-Arbitration pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act. On July 3, July 7 and August 9, 1984, the Chairman of the Commission, conducted an investigation which reflected that the parties were deadlocked in their negotiations, and, by October 1, 1984, the parties submitted to the Investigator their final offers, as well as a stipulation on matters agreed upon. The Investigator then notified the parties that the investigation was closed; and the Investigator advised the commission that the parties remain at impasse.

The parties were then ordered to select a Mediator/Arbitrator. The undersigned was notified of his selection on October 23, 1984. Mediation was conducted in the matter on December 11, 1984. Mediation was unsuccessful and Arbitration was scheduled for December 27, 1984, but was postponed until January 11, 1985. The hearing was conducted on that date, and the parties filed briefs and reply briefs. The exchanges of briefs was completed April 23, 1985. Based on the evidence, the arguments of the parties, and the relevant statute, the Arbitrator renders the following award.

III. ISSUES AND BACKGROUND

The primary issue before the Arbitrator, is the respective parties' proposals to amend and change Article IX (Promotion, Trial Period, Transfer Job Posting), of the predecessor contract. These proposals on wages are identical. The only other difference relates to the Employer's proposal to amend Section 5.01. B. The Union's final offer is attached as Appendix "A". The Employer's final offer is attached as Appendix "B".

It is pertinent to note that Article IX, as it appears in the predecessor contract, was placed there as the result of an arbitration award issued by Arbitrator Byron Yaffe (Case XCIV, No. 31254, MED/ARB-2195, Decision No. 20807-A). The award was issued on March 28, 1984, noteably a very short time before the instant petition for Mediation/Arbitration was filed, and approximately seven months prior to the certification of the final offers.

The principal issue in the Yaffe case was Article IX. Obviously, the Union's final offer in that case, was the present Article IX. The City had no final offer on promotions, etc, except to maintain the status quo in the forms of their transfer policy, then in effect.

Not all aspects of the former Article IX are disputed. It is important, for contrast's sake, to summarize the aspects of the former article which are subject to change under the final offers. The old language basically dealt with four types of vacancies and the manner in which they would be filled. The vacancies were, generally speaking:

> (1) vacancies subject to lateral transfer by employees in the same class which were created as the result of termination, promotion, transfer or the creation of a new position.
>
> (2) vacancies that remained unfilled by lateral transfers and subject to being filled from employee's in a lower classification. These were promotions.
>
> (3) vacancies that were created by reallocation or restructuring of divisions and/or staffing levels which remained unfilled by lateral transfers by employees in the same class. These were referred to as involuntary transfers.
>
> (4) temporary vacancies.

The manner in which these vacancies, under the former language, would be filled, was, generally speaking, as follows. Vacancies due to termination, etc., would be posted and subject to lateral transfer "on the basis of qualifications provided if two or more applicants are relatively equal in qualifications, seniority shall be the determining factors". Vacancies due to the fact there was no lateral transfer would be considered a promotion, and filled on the basis of criteria not in dispute. Temporary vacancies, under the old language, could be filled by transfer, or a junior employee could be assigned. There are some relatively minor differences in this area in the final offers.

The last type of vacancy was those created by a reallocation of staff. Under the present Article IX, volunteers would be solicited first. If the reallocation could not be accomplished solely by volunteers and positions were to be reduced, people could be involuntarily transferred. Under the language,

an employee being involuntarily transferred, could bump the junior employee within their classification in any division or branch. The bumping would continue, until the desired reallocation was accomplished.

It was the above summarized language, and the absence of a proposal from the City on transfers, that faced Arbitrator Yaffe. It is pertinent to note and/or summarize, several of his comments. First, he stated that the final offers represented "rather extreme positions on a single issue, neither of which really merits selection in this proceeding". He believed that the employees, in their proposal, were addressing a legitimate concern in asking for predictable standards and procedures for dealing with transfers. This was underlined by the "Organizational changes which appear to be on the horizon in the City's library system". He next stated:

> "In this regard, while comparability often is given significant weight in proceedings such as this, where, as here, legitimate employee concerns affecting their conditions of employment exist, in the undersigned's opinion an employer has some responsibility to address those concerns in a reasonable fashion. The Employer's failure to do so here in its final offer seriously jeopardizes the reasonableness of its position."

On the other hand, he expressed reservations about the manner in which the Union proposed to address their concerns. He thought they had gone "too far" and stated in general:

> "Although many of the concepts proposed by the Union appear to be relatively non-controversial and essentially sound, particularly in a unit such as this which is composed of employees assigned to clerical and paraprofessional positions, the Union has failed to incorporate those concepts in a procedure which is administratively efficient and which will minimize disruption."

This related mainly to the bumping procedures. This was, in his opinion, neither "customary nor reasonable" and he implied that it detracted from other reasonable aspects of the proposal. He expressed these thoughts thusly:

> "Thus, while it may be perfectly reasonable for such employees to expect that seniority will be given consideration assuming that two or more employee applicants for transfer are relatively equally qualified to fill a vacant position, and that qualified volunteers for transfers will be given first consideration when filling position vacancies, and that in the event involuntary transfers become necessary, the least senior qualified employees shall be so transferred providing the remaining employees are capable of performing the available work, it is neither customary nor reasonable to provide for the potential of multiple bumping among the employees who are subject to involuntary transfer, which is essentially what the Union has proposed herein."

More specifically, his reservations about the Union's offer were expressed thusly:

> "While the City has raised several arguments regarding the ambiguity and unworkability of the Union's proposal, the undersigned is persuaded by this record that on its face the proposal poses only two significant problems. As indicated above, in the undersigned's opinion the proposed bumping procedure is much too complex and burdensome to be a legitimate part of a transfer policy. In addition some of the Union's proposed restrictions on

the Employer's right to make temporary assignments appear on their face to be unwarranted and unreasonable, particularly where, for example, due to circumstances beyond the Employer's control, such assignments would have to exceed the time limits contained in the Union's proposal. In addition, the proposal which provides for the right of employees who have voluntarily laterally transferred to move back to their original positions could have significantly disruptive consequences, particularly if such transfers were accompanied by other involuntary transfers and multiple employee bumping."

Arbitrator Yaffe's penultimate paragraph read as follows:

"Based upon the foregoing considerations the undersigned is forced to choose between two positions which will present continuing problems for the parties which will need to be addressed in future rounds on negotiations. Under such circumstances, conventional wisdom would dictate that the undersigned preserve the status quo, allowing the parties to tackle the problem again in the next round of negotiations. Had the City incorporated into its final offer minimal assurances addressing the issue at hand, that would have been the undersigned's approach herein. However, in view of the City's unwillingness to do so, and in view of the undersigned's belief that the Union's approach, though seriously flawed in some respects, is basically sound conceptually, the undersigned believes that it will foster more meaningful negotiations of the issue if the Union's proposal is selected herein and is used as a basis for such future negotiations. In this regard it should be noted that this dispute involves the parties' 1983 collective bargaining agreement, and that as soon as it is resolved, the parties will be negotiating a successor contract. It is anticipated by the undersigned that in such negotiations the parties will be able to address the issues raised herein and to correct the problems resulting therefrom. In the interim, this award and the parties' 1983 Agreement will legitimize the issues raised by the Union, and hopefully, the legitimate concerns raised by both parties herein will more effectively be addressed in the parties' future collective bargaining agreements".

Accordingly, he held for the Union.

The Yaffe award is detailed here, because it looms large in the parties justification for their respective final offers. Before identifying those arguments, it is helpful to summarize generally, the final offers, by contrasting them with each other, and with the language awarded under the Yaffe decision. It is noted that both offers incorporate many aspects of the original Article IX.

In general, the City's offer does recognize that vacancies will be posted subject to lateral transfer as does the original Article IX. However, under the present Article IX, if there were two or more qualified bidders seniority would prevail if they were relatively equal. This, the Employer proposes to change. They propose that "such lateral transfer shall be filled on the basis of qualifications provided that if two (2) or more applicants are relatively equal in qualifications, seniority shall be the determining factor". This is one of the major changes in the language proposed by the City.

The other major change proposed under the City's offer, is the elimination of all standards and procedures related to involuntary transfer due to reallocation of staffing levels, etc.

The other difference relates to the manner in which temporary vacancies are filled. However, they are viewed to be less substantive than the lateral transfer standards and the elimination of involuntary transfer procedures. Thus, they are not necessarily determinative. Beyond this essentially, the City proposes to retain and the filling of promotional vacancies. However, they propose to limit trial periods to promotions instead of lateral transfers and promotions under the old language.

The Union, while retaining the main thrust of Article IX, proposes certain changes to Article IX as well. They are generally, and significantly, speaking changes in the temporary transfer area, and they limit the number of bumps in the case of an employee who is transferred involuntarily, to five. It is noted, that they also changed the trial period to apply only in the case of promotions, whereas before, it also applied to voluntary lateral transfers. Last, they made changes in the temporary vacancy procedures.

IV. ARGUMENTS OF THE PARTIES

A. Employer

By way of background, and in reference to the Yaffe award, the City contends that the issues in the instant case are separate and distinguishable from that heard by Yaffe. Moreover, they assert, that contrary to the Union's assertions, the final offers before the Arbitrator are significantly different than those submitted to Arbitrator Yaffe for decision. They note that Arbitrator Yaffe had faulted one city for offering no language on transfer. They draw particular attention, in this regard, to the following excerpt from one award:

> "Under such circumstances, conventional wisdom would dictate that the undersigned preserve the status quo, allowing the parties to tackle the problem again in the next round of negotiations. Had the City incorporated into its final offer minimal assurances addressing the issue at hand, that would have been the undersigned's approach herein". (Emphasis added by the Employer)

In general, the Employer submits that it has fully cured the fault noted by Arbitrator Yaffe by submitting a final offer which represents a substantial improvement to the rights of employees in matters of transfers. They next believe it significant to note, that Arbitrator Yaffe chose the Union's offer because it was more likely to result in future negotiations. They contend that he did not select the Union's offer because it was more reasonable.

In the context of the subsequent negotiations, the Employer contends that the Union has not adequately addressed the concerns Arbitrator Yaffe raised about their previous proposal. The most serious flaw, in the City's view, is the burdensome bumping provisions. It is for this and other reasons, that the Union's offer is "seriously flawed". Comparatively, the City believes they have followed Arbitrator Yaffe's advice.

Against this background, the Employer makes a number of arguments. First, they argue that the transfer language proposed by the Union is without support when compared with contracts between the City and its other bargaining units. This relates to the criteria of the statute and the so called "internal comparables". They note, in this respect, that the City has a total of 12 bargaining units representing some 1,691 employees. Based on their examination of the contracts, they

assert that none contain language which even approximates that found in Section 9.05(A)(2) (Temporary Assignments) of the Union's final offer. They also submit, that such examination also reveals that no other City labor contract contains language which even approximates that found in Section 9.05(C) -- which indicates that seniority prevails in lateral transfers where qualifications are relatively equal -- or Section 9.05(D) -- which regulates involuntary transfers and confers bumping rights.

Further, it is in this connection that they note another AFSCME unit dropped bargaining demands for language similar to Section 9.05(C). They believe this to be significant, in light of the fact that a number of employees represented by that Union, had participated in major departmental reorganizations without any of the so-called protections contained in the Union's final offer, and that the reorganization was accomplished without precipitating a grievance and without leading to a major confrontation at the bargaining table over transfer rights. They also believe it is significant to note that AFSCME Local 60 voluntarily entered into a labor agreement covering professional librarians, which does not contain any of the objectionable language found in the Union's final offer.

With respect to what could be referred to as external comparables, they next argue that the transfer language contained with the Union's final offer is without precedent in other library labor agreements within the state. Their focus here, is particularly on the Union's "5-Bump Rule". They contend that it is so bizarre that it cannot be found in any other labor agreement in the state. Specifically, the City introduced labor agreements from 11 other Wisconsin library systems. An examination of those agreements shows that none of them contain language which even approximates that found in either Section 9.05(A)(2) or Section 9.05(D) of the Union's final offer. This is supported, in their opinion, by the testimony of one of the Union's witnesses. This is also the case with respect to Section 9.05(D), compared to the Brown County agreement, which the Union argues supports their case. The Union witness who testified regarding the Brown County contract, acknowledged that there was no language similar to Section 9.05(D). He also indicated the transfer rights they did have were negotiated, and that Brown County had the unilateral authority to effectuate layoffs by selectively abolishing positions. This is in contrast to the Employer's authority under Article IX. Under this, the City, in effectuating layoffs, cannot selectively abolish positions, but rather must lay off the most junior employee in the classification selected for layoff. Also, under the Brown County contract, if the Employer should desire to transfer a function, with its attached employees, from one division to another within the main library building, it could do so unilaterally. This is also under sharp contrast to Article IX. Under Article IX, the transfer of a function and employees from one division to another, would trigger the "5-Bump Rule". Thus, it is clear to the City, that the Union seeks to enforce upon the City a far more restrictive and cumbersome transfer policy than is in place in Brown County.

The Employer next argues that the Union's offer should be rejected because the operation of the Union's transfer language could adversely affect handicapped employees. In connection with this argument, the City cites the testimony of Ms. Cynthia Wagner, the City's Section 504 Coordinator, who testified that none of the branch libraries were barrier free to handicapped employees, while the main library was barrier free. The City thus suggests, that a handicapped employee who works in the barrier free main library could, under the Union's language, be bumped to a work location which would not be barrier free, or which would present physical obstacles to their employment as a productive library assistant.

The City also takes the position that the language changes should be reached through voluntary collective bargaining and not by an Arbitrator's decision. In this respect, they cite several Arbitrator's awards which, upon the principle that language changes should be reached at the bargaining table and not imposed by an Arbitrator's decision. They cite WERC Decision Nos. 20952-A, 20826-A, 20760-A and 20600-A. It is the City's opinion, that it is unmistakably clear, that the Union seeks to secure through arbitration, radical language changes it could never have obtained at the bargaining table. Moreover, they suggest that the Union seeks major contract changes without establishing that a legitimate problem exists, which requires such radical and contractual attention. They cite the testimony of Library Director Peter Niemi who indicated that there has never been an involuntary transfer at the Madison Public Library. He further testified that the Library had recently undertaken certain reorganizational efforts which had been effectuated without controversy and that the filling of temporary vacancies had occurred routinely and in accordance with current practice and contractual language without any problems. Accordingly, they submit there exists no factual basis for a need to place a radically unusual and unprecedented transfer policy into the labor agreement. Further, the Union's inability to set forth evidence of past or current problems stands as testimony to the fair and reasonable manner by which the City has administered its transfer policy, a policy that until 1984, was unfettered by contractual language. Now the City offers more than the previous policy, and they believe it to be more reasonable.

It should also be noted, that to illustrate that the Union's final offer seeks to establish a highly cumbersome, mechanistic and potentially disruptive procedure governing the transfer and assignment of employees. The Employer presents three schematic diagrams. These show the relative results under each offer due to a layoff, a resignation and an involuntary transfer. This shows, in the opinion of the City, that the Union "has designed a bewildering quagmire intended to replace managerial discretion with a mechanistic bumping procedure driven by seniority", which "has the potential of disrupting substantial number of employees".

The City's last argument relates to the proposal regarding Section 5.01(B). In support of their proposal, they note the language proposed by the City concerning Section 5.01(B) is identical to that language found in the other AFSCME City labor agreements. These three agreements cover 583 City employees. Moreover, they draw attention to the fact that all other City agreements contain no requirement that notice of disciplinary action be sent to the Union. Most of the labor agreements submitted for comparable library systems likewise, contain no such requirement. Accordingly, it is their position, that in the face of few, if any, comparables, the Union's final offer must be considered as unreasonable in light of the statutory criteria set forth in Wisconsin Statute 111.70.

B. The Union

As an introduction to their arguments, the Union also discusses the Yaffe award. In the context of this case, it is their position that the City is trying to relitigate the Yaffe decision. They assert that the final offers of the parties differ little from the case argued last year. More specifically, they suggest that the Union's current offer contains some substantive changes to the language it proposed before Arbitrator Yaffe. On the other hand, the City has offered no provision before Arbitrator Yaffe, and this year's offer is an empty, if not regressive, proposal. In their opinion, the only reason that the instant case is before the Arbitrator, is because the City wants to get "another kick at the cat", and that they are shopping for another Arbitrator's decision.

Since they believe that little has changed since the Yaffe decision, the Union relies heavily on the record in the original case. However, they do present additional evidence and arguments.

Historically, the Union argues that other City employees have not had the same historical "guarantees" that employees of the library have had. Thus, the 1983 contract, through the Yaffe decision, did not alter or enhance these rights, but in a sense, partially codified them. Thus, the primary thrust of the Union's final offer before Arbitrator Yaffe was to establish understandable procedures by which these rights would be exercised. In response to the Yaffe decision, they constructed their final offer in the instant case. They had several objectives. These were: (a) To maintain the integrity of Article IX and the procedures established by the Yaffe decision; (b) Clarify several of its provisions; (c) Attempt to meet the concerns raised by Arbitrator Yaffe, and; (d) Attempt to address the concerns raised by the City.

In modifying Article IX, they contend that they have made three changes, each of which is a concession to the Employer. First, they conceded -- as the City and Yaffe opposed -- a trial period for voluntary transfers. Second, they reduced the number of bumps under Section 9.05(1) from a possible 15 to two-thirds of that. Third, in terms of temporary assignments, they made two concessions in response to Yaffe's award. First, they adopted the procedure proposed by the City in negotiations. Secondly, they have added a provision that allows for extension of the established time frames in response to Arbitrator Yaffe's concerns.

In view of these changes, they believe their offer to be "constructive". On the other hand, they contend that the City's final offer is more regressive than their offer last year, as it again fails to "...adequately or effectively address legitimate employee concerns regarding their conditions of employment..." and again fails to provide "...any degree of predictability as to how transfers will be handled..." In this regard, they express several concerns about the City's final offer. First, they are concerned that according to the definition of lateral transfer in Section 9.03 in the City's offer, an employee could not transfer from a position to another position in the same salary range within the same division or branch. Thus, this not only rewrites the concurrent contractual provision, but also reduces the rights that workers had in the 1982 contract and the practices prior to the Union. They also suggest that the City's proposal would bar employees from changing classifications within the same classification in the same division.

They are also concerned about the City's proposed Section 9.04(A)1. They contend that there is no identifiable standard as to how employees will be judged. In fact, they believe there to be no criteria at all. They direct attention to testimony which they believe indicates the City could not define "first consideration" or the role of seniority, if any, under their proposal. Their next concern relates to temporary vacancies. They assert that the City's proposal fails to establish identifiable criteria and procedures in which temporary vacancies of any length will be filled, and that it neglects to establish procedures for filling temporary vacancies for reasons other than the time cited.

The Union believes that their proposal is conservative, and gives the City a management oriented transfer system. The standard system allows for unlimited bumps and is not restricted to the junior employees. They believe that their proposal is also supported by the Brown County Public Library (paraprofessional unit). That contract, according to the Union, is much closer to the Union's goal of an unfettered seniority based system than is the City's proposal.

In terms of internal comparables, such as the general AFSCME local 60 unit, they believe that the distinctions are well established. This was detailed in the Yaffe case. To summarize, the employees in that unit have always had different rights. Yet, the City offers inferior rights. The general unit has a standard by which transfers are made and under the City's proposal, there are none.

In reference to the City's comparables, the Union contends that they actually support their case. They suggest that most of the contracts offered by the City do provide the outlines of job rights much closer to the Union's position than the City's position. Beloit, Brookfield, New Berlin and Muskego each fill positions through a modified seniority provision like the Union proposes here. Portage fills positions on the basis of seniority. Although they contend that one would have to go beyond the language of the contract to see how such things as involuntary transfers work. Even then, they note that Arbitrator Yaffe concluded that comparability is not necessarily a significant factor in a dispute like this.

In view of Arbitrator Yaffe's award, the Union argues that the City has the responsibility and the burden of proof to show that the Union's language has failed. They submit that the City has not demonstrated that there is a need to change the basic concepts implemented in the 1983 contract. To the contrary, the evidence demonstrates that the procedures have worked. There have been voluntary transfers and long-term temporary vacancies filled pursuant to the 1983 contract and there were no problems raised concerning these.

With respect to the City's offer to change Section 5.01(B), they argue that here too, they have failed to demonstrate any need for changing the current agreement at Section 5.01(B). For instance, they produced no evidence in support of their case. It is their opinion, that mere uniformity with other City contracts is not sufficient cause to find the proposed reasonable or relevant to this unit.

V. DISCUSSION AND OPINION

A major thrust of each of the parties arguments, for different reasons, relates to Arbitrator Yaffe's decision and the significance to be drawn from it. Indeed, the decision, and particularly some of the dicta contained therein, makes this a rather unique case.

If Arbitrator Yaffe had limited his analysis, and more particularly his comments, to statements which effectively and simply said that all things considered the Union's offer, in spite of its problems was more reasonable than the City's, there would be little hesitation on this Arbitrator's part as to how to approach, or what kind of conceptual framework to apply, to this case. Had his approach been more traditional, and had the normal air of finality, this Arbitrator would not at all be concerned with his award and would have approached Article IX on its face. In other words, the Arbitrator would not be concerned with how it got in the contract.

Instead the Arbitrator would simply have approached it as any other matter in which one party or the other was proposing to change the status quo. This is because it would have assumed that the provision was, on its face, reasonable, since it was subject to previous arbitral scrutiny and had satisfied the statutory criteria. In a sense, in view of the fact that the language met the test of a previous arbitration, the Union has established a prima facie case. In this respect, it is well established that the party proposing to change, in a

substantive way, the status quo must sustain the burden of showing a compelling need to make such a change. This is the traditional approach, and there is good reason to consider this kind of framework.

However, Arbitrator Yaffe's award did not have an air of finality, and his dicta gives reason to consider an approach other than the traditional approach. The dicta which specifically causes this consideration is the language which had provisional overtones. He talked about the future, and in fact he at one point commented that awarding for the Union might hopefully cause the parties in the "interim" to more effectively bargain. When this is coupled with his comment that had the employer given minimal assurances related to transfers he would have consistent with conventional wisdom preserved the status quo, it is understandable why the City is approaching the case in the manner in which they are.

While the City argues this case is separate and distinguished from the Yaffe case, they, in essence, treated this case as an extension of the first case. They argue that they have corrected the faults of their first case by now giving some assurances as to the manner in which transfers will occur. On the other hand, they argue that the Union's offer "continues" to be flawed. Thus, in their view this is the "stage" which had been set for these final offers. Against this stage, they make, in essence, many of the same arguments they made in the first case, and those which would normally be made when a Union is seeking the inclusion of brand new language into a contract.

On the other hand, the Union argues that the City is trying to relitigate the transfer issue. They attack the final offers on this basis. Although they also, in the alternative, argue that their final offer is most consistent with the Yaffe award.

Thus, there are basically two ways to approach the final offers in this case. One way is to do so isolated from the Yaffe award, and simply question whether the City has fulfilled their burden to change the contractual status quo. The other way, is to view the case as an extension, so to speak, of the Yaffe award, and inquire now that the "interim" has passed as to which is presently most consistent with his analysis and dicta.

On one hand, the Arbitrator is strongly inclined to approach the dispute in a more traditional way accepting the language of Article IX as reasonable on its face in view that it was substantially already subject to arbitration. The considerations that would ensue as a result, were mentioned above.

There is a very persuasive reason to adopt this approach. The primary reason is that not to, would be a perversion of the final offer arbitration process and would do little to encourage serious collective bargaining or voluntary settlements.

The approach the Employer suggests here, essentially ignores any final and binding effect of the Yaffe award. For instance, they wish to ignore that Yaffe dismissed the importance of comparables and that Yaffe found many of the Union ideas conceptually sound, and awarded for the Union. On the other hand, they do not want this Arbitrator to ignore that there were problems, in Yaffe's opinion, with the Union's offer. Their approach is to say now that the parties have had a chance to correct their "faults", let's reload and see who corrected their faults better, and who is most reasonable based on Yaffe's original analysis and the statutory criteria. In this respect, their arguments imply the Union has the burden, in this case, to show their offer is most reasonable. For instance, they argue that the changes the Union seeks should be done in bargaining, not arbitration.

The Employer's approach is flawed, and has serious negative implications and is based on a misconception of the proper effect of a previous interest arbitration award. If the Arbitrator were to ignore that the Employer lost and that the Union won, and little significance were attached thereto, serious bargaining might be jeopardized. An Employer who was faced with a new bargaining demand might be encouraged not to make any proposal to address a legitimate need hoping they might win on one hand, and hoping even if they lost on the other, that they would have another opportunity later to change the Union's proposal under the guise of correcting their "faults" and issuing "minimal assurances."

In addition, to adopt the Employer's view would necessarily imply that the Union again had to satisfy the burden, and would again have to overcome arbitrators' reluctance to make major changes in arbitration as opposed to bargaining. In the Yaffe case, the Employer took the calculated risk not to offer anything on transfers and they lost. This was at their own peril. There is good reason not to let them off "the hook" and give them another chance to defeat the thrust of the Union's Article IX, because of the relative faults of the original Union language. The burden should not now, after the Yaffe award, as the Employer argues, be on the Union to show the need for change. Having lost before, the burden is on the Employer, not the Union. It is now, in reality, the Employer who wishes to make changes through arbitration.

Thus, under this potential approach, the Employer must, due to having lost the issue initially, face the burden of showing the need to change what now must be considered the contractual status quo.

Even though the Arbitrator favors the first approach, the Yaffe award cannot be ignored. Arbitrator Yaffe had a difficult and unique set of facts in front of him, and to totally ignore it would, under these circumstances, not necessarily be appropriate either. Thus, the Arbitrator is reluctant to embrace either approach in total.

In either event, and in the final analysis, it is not necessary to embrace one approach or the other. This is because based on either approach, or based on a combined approach, it is the Arbitrator's opinion that the Employer's case cannot prevail.

Under the first approach, which would require a showing that there was a need to change the contractual status quo, the Employer has not demonstrated such a need. It would be difficult to do so in view that these final offers were certified only six months after the Yaffe award, and in view that there has been no substantive experience under the present Article IX. To demonstrate, under these unique facts and circumstances, that there was a sufficient compelling need to justify changing the language in arbitration, the Employer would have to show through actual application that the language was onerous in impact or operation. This cannot be done because there has been no experience of any kind under the language. Indicative of this, is the fact that the plans that Arbitrator Yaffe mentioned are still on the horizon.

The most reasonable approach would be to give the basic thrust of Article IX time to operate and give the parties a chance to address whatever problems might develop. Then, if problems still remain after actual experience, it would be more appropriate for the Employer to attempt to demonstrate a need to modify the language in Arbitration.

The Employer did raise the question of handicapped employees. While this is a legitimate concern, it cannot be given controlling weight. It is best to handle this situation on a case by case basis. In this respect, it is believed that if a collective bargaining agreement is an impediment to the Employer's duty to make a reasonable accomodation for a handicapped employee, the Union also has a duty to make such accomodations.

Even if the Arbitrator were to view this case as an extension of the Yaffe case, the Employer cannot prevail. If it was Arbitrator Yaffe's intention that his decision provide some kind of framework for future bargaining, and even if this were to carry some weight under the statutory criteria, it is this Arbitrator's opinion that the Union's revisions to Article IX are more consistent with his cautions and comments.

Above all else, Arbitrator Yaffe expressed that the concepts of Article IX were "basically sound conceptually". The main problem under his award was the disruptive effect of multiple bumping.

In this case, the Union has moved in the direction of limiting the number of bumps. In addition, they have made some other modifications. In comparison, the Employer makes a proposal that for the most part guts the backbone of Article IX. They make no proposal on involuntary transfer, and on voluntary transfers offer a standard which gives no controlling weight to any degree of seniority.

If Yaffe's award and the parties' response to it is to carry any weight in this proceeding, the Union's proposal is much more consistent with its central findings. It is clear enough that he found the Union language on transfers, weighed against none, more reasonable. It is also clear enough that he hoped that future bargaining would address those problems he found with the Union language -- which could best be described as peripheral. There is no evidence it was his intent that future bargaining would have the effect of striking at the core of Article IX which he had found to be sound.

The only other issue to be considered is the Employer's proposal on Section 5.01. The consistency with other internal units convinces the Arbitrator that the City's proposal, in this regard, is justified. However, it cannot be given more weight than the other issue.

In summary, there is strong reason to accept, in view of the Yaffe award, Article IX on its face, and as a result, limit consideration whether the Employer has demonstrated the need to modify the contractual status quo. Even if the instant case is viewed in terms of the Yaffe decision, and in terms of the "flaws" in each of the previous offers, the Union's offer is more consistent with the original Yaffe decision.

AWARD

The January 1, 1984 through December 31, 1985 contract shall include the Union's final offer in addition to the stipulations of Agreement.

Gil Vernon, Mediator/Arbitrator

Dated this 3RD day of September, 1985, at Eau Claire, Wisconsin.

APPENDIX A

Final Offer Of
AFSCME Local 60 (Paraprofessional Library Unit)
To
City of Madison
August 29, 1984*

1. Amend Article IX - Promotion, Transfer, Trial Period, Job Posting as follows:

9.01 Promotion: A promotion shall be defined as the advancement of an employee to a higher vacant position within the bargaining unit with a higher salary range.

9.02 In the event the Employer eliminates, creates new, or merges existing divisions or branches, the provisions of this article shall apply consistent with the terms of the labor agreement.

9.03 Lateral Transfer: A lateral transfer shall be defined as the movement of an employee from a position to another position in the same salary range within the library.

A) Voluntary Lateral Transfer: A voluntary lateral transfer is the movement of an employee from one position to another position within the same salary range, in the same or a different division or branch of the library that is due to a vacancy caused as the result of a termination, promotion, transfer or the creation of a new position.

B) Involuntary Lateral Transfer: An involuntary lateral transfer is the movement of an employee from one position to another position within the same classification that is caused by the permanent reallocation of existing staffing levels between divisions and/or branches of the library.

9.04 Trial Period: In cases of promotion, the employee shall serve a trial period of six (6) months following the date of promotion during which time the employee shall be entitled to return to his/her former position if either the employee or Employer so decides. Upon successful completion of the trial period, the employee shall be "permanent" in the new position. This provision shall also apply to employees promoted or transferred to positions outside of the bargaining unit.

9.05 Job Posting and Filling:

A) 1. The Employer shall post notices of all position vacancies. The Employer may decide not to fill a vacancy or pending vacancy and shall notify the Union of such intentions. Vacancy notices shall be posted on all bulletin boards used by unit employees and such other places as the Employer decides. Such notices shall be posted for at least five (5) working days which days shall be in two (2) separate weeks before the final date of acceptance of applications. Notices shall be as informative as are reasonably possible.

When minimum qualifications are required of applicants, such information shall be provided on the job position notice. Minimum job qualifications must be reasonably related to the job.

2. In the event that an employee shall have secured a leave of absence of at least three (3) months, or if a temporary vacancy is created for some other reason for at least three (3) months, or in the event that it is anticipated that an employee may be absent because of illness or injury for sixty (60) days, such vacancy thus created, either directly or indirectly, shall be posted as a temporary vacancy consistent with Paragraph 1 above. In filling temporary vacancies for less than three (3) months or sixty (60) days, as the case may be, the Employer may temporarily reassign existing staff, subject to the following conditions:

   a) Prior to making such assignments, the Employer will provide employees an opportunity to indicate their preference for an assignment.

   b) Assignments will be made with due consideration given to the interests of the affected employees, as well as their seniority.

   c) The Employer shall make every reasonable effort to provide the affected employee with written notice at least ten (10) workdays prior to any such assignments.

   d) If an employee's preference for an assignment is not accommodated, the Employer will so advise the employee on a timely basis. The reason(s) for same shall not be arbitrary or capricious.

   The Employer shall have the option to fill or not fill such vacancies. The time limits set forth herein may be extended upon mutual agreement.

3. Such temporary vacancies shall be filled by "acting" employees. "Acting" employees shall be hired consistent with the provisions of this Agreement and shall be eligible for the same rights and benefits as the employee on leave or consistent with the provisions of this agreement if not replacing an employee on leave, except that if the vacancy results in a new classification, the salary shall be subject to the collective bargaining process. Should the employee on leave return to work in that position or should the position be terminated, the "acting" employee, if said employee held a position with the City immediately prior to the temporary appointment, shall be returned to their position and pay and other benefits as though no temporary appointment had taken place. In the event that it is determined that the employee on leave will not return or a new position is made permanent, the "acting" employee will have the title "acting"

removed from their job title. While it is recognized that an acting employee in a new position may be made permanent, it is not intended that these provisions shall be used in a manner that circumvents the normal job posting and filling procedure.

B) Employees applying for a promotion or lateral transfer vacancy shall direct written application to the Employer's personnel office. Date of receipt of the application or date of stamp cancellation when mailed shall be considered the date of receipt in the event of any question concerning deadlines.

C) In filling vacancies, the Employer shall first make voluntary lateral transfers to accomplish same if bargaining unit employees make application pursuant to "B" above. Such lateral transfer shall be filled on the basis of qualifications provided that if two (2) or more applicants are relatively equal in qualifications, seniority shall be the determining factor.

D) If the City desires to reallocate existing staff between divisions and/or branches, the City shall first attempt voluntary lateral transfers as described in 9.05 (C). If, after attempting such voluntary transfer, the desired staff allocation is not accomplished, the City may make involuntary lateral transfers as follows:

1. The City shall identify the division(s) or branch(es) with excess staffing and solicit qualified employee volunteers from among the employees in the classification to be reduced. If the City does not obtain a sufficient number of volunteers through solicitation, then the junior employee(s) within the classification in the division(s) or branch(es) being reduced shall be transferred, provided the remaining employees are capable of performing the available work. Any employee so transferred shall be entitled to exercise his/her seniority rights by bumping the junior employee within their classification in any other division or branch. Solicitation and bumping shall continue in like manner until the desired allocation is achieved, however, no more than five (5) bumps shall result from the reallocation of a position. If the reallocation of a position is not accomplished after five (5) bumps, the City may assign the last displaced employee to the vacancy.

E) If a lateral transfer is not possible or if no qualified employees apply, the vacancy shall be filled as a promotion according to the following criteria:

1. All applicants who meet the minimum training and experience requirements for the vacancy shall be considered. The Employer shall consider for appointment the applicants with the four (4) highest composite scores.

2. The Employer shall establish eligibility lists of qualified ranking candidates selected in accordance with this article for a period not to exceed six (6) months unless there are less than four (4) qualified candidates in which case there will be no eligibility list.

3. Candidate evaluation as provided below shall be conducted in a manner designed to evaluate the applicant's qualifications relative to the vacant position.

   a) Testing, written, oral and/or performance. Maximum points - 50.

   b) Evaluation of experience and training (Appendix B). Maximum points - 50.

   c) Maximum points - 100. Veterans' points to be added as provided by law.

   d) Upon complaint from an employee applicant concerning this section (E 3), the Union shall be entitled to examine all materials and tapes related to this section ("a" through "c" above). The intent of this provision is to ensure a fair and equitable selection procedure.

F) The Employer shall have the option of restricting the areas of examination and may choose one of the following plans:

   1. Open and Competitive: Open to City and non-city employees;

   2. City-wide: Open to all City employees but not to non-city employees;

   3. Unit-wide: Open only to employees within the bargaining unit.

   In any event, the test procedure outlined shall be used.

2. Amend Appendix A as follows:

A) Effective January 1, 1984, all wage rates shall be increased by $8.16 bi-weekly.

B) Effective December 30, 1984, all wage rates then in effect shall be increased by four percent (4%).

APPENDIX B

09/13/84

FINAL OFFER
OF THE CITY OF MADISON
LIBRARY -- PARAPROFESSIONAL UNIT

1. WAGES.

   A. Effective January 1, 1984 all wage rates shall be increased by $8.16 bi-weekly.

   B. Effective December 30, 1984, all wage rates then in effect shall be increased by four percent (4%).

2. Amend Section 5.01.B. by adding:

   The Union agrees that the Employer's failure to provide said copy shall not constitute failure to have disciplined for just cause.

3. Amend Article IX, PROMOTION, TRIAL PERIOD, TRANSFER, JOB POSTING, to read as follows:

   9.01 PROMOTION:

   A promotion shall be defined as the advancement of an employee to a higher vacant position within the bargaining unit with a higher salary range.

   9.02 TRIAL PERIOD:

   In cases of promotion the employee shall serve a trial period of six (6) months following the date of promotion during which time the employee shall be entitled to return to his former position if either the employee or Employer so decides. Upon successful completion of the trial period, the employee shall be "permanent" in the new position. This provision shall also apply to employees promoted or transferred to positions outside of the bargaining unit.

   9.03 LATERAL TRANSFER:

   A lateral transfer is the movement of an employee from one position to another position in a different division or branch of the library and within the same salary range, that is due to a vacancy caused as the result of a termination (other than layoff), promotion, transfer, demotion, or the creation of a new position.

   9.04 JOB POSTING AND FILLING:

   A. 1. The Employer shall initially post all vacancies as lateral transfer opportunities and such notices shall be posted for a period of at least five (5) working days. The Employer may decide not to fill a vacancy or a pending vacancy and

shall notify the Union of such intentions. Employees interested in the transfer opportunity shall file a written notice of such interest to the Library Director or his/her designated representative. The Employer shall give first consideration to employees who serve notice of their interest in a transfer opportunity. The Employer shall give due consideration to the order of the employee's seniority. In cases where the Employer chooses not to effect a lateral transfer, the vacancy shall be posted pursuant to Section 9.04(A)2.

2. The Employer shall post notices of all promotional vacancies. The Employer may decide not to fill a vacancy or pending vacancy and shall notify the Union of such intentions. Vacancy notices shall be posted on all bulletin boards used by unit employees and such other places as the Employer decides. Such notices shall be posted for at least five (5) working days which shall be in two (2) separate weeks before the final date of acceptance of applications. Notices shall be as informative as are reasonably possible. When minimum qualifications are required of applicants, such information shall be provided on the job position notice. Minimum job qualifications must be reasonably related to the job.

3. In the event that an employee shall have secured a leave of absence of at least three (3) months or in the event that it is anticipated that an employee may be absent because of illness or injury for sixty (60) days, such vacancy thus created either directly or indirectly shall be posted and filled as a temporary vacancy consistent with the provisions of this Article. The Employer shall have the option to fill or not fill such vacancies. Such temporary vacancies shall be filled by "acting" employees. "Acting" employees shall be eligible for the rights and benefits as provided by this Agreement. Should the employee on leave return to work in that position, the "acting" employee, if said employee held a position with the City immediately prior to the temporary appointment, shall be returned to their position and pay, and other benefits to that employee shall be as though no temporary appointment had taken place. In the event that it is determined that the employee on leave will not return, the "acting" employee will have the title of "acting" removed from his/her job title.

B. Employees applying for a promotion vacancy shall direct written application to the Employer's personnel office. Date of receipt of the application or date of stamp cancellation when mailed shall be considered the date of receipt in the event of any question concerning deadlines.

C. 1. All applicants who meet the minimum training and experience requirements for the vacancy shall be considered. The Employer shall consider for appointment the applicants with the four (4) highest composite scores.

2. The Employer shall establish eligibility lists of qualified ranking candidates selected in accordance with this Article for a period not to exceed six (6) months unless there are less than four (4) qualified candidates in which case there will be no eligibility list.

3. Candidate evaluation as provided below shall be conducted in a manner designed to evaluate the applicant's qualifications relative to the vacant position.

   a. Testing, written, oral and/or performance. Maximum points - 50.

   b. Evaluation of experience and training (Appendix B). Maximum points - 50.

   c. Maximum points - 100. Veteran's points to be added as provided by law.

   d. Upon complaint from an employee applicant concerning this section (C.3.), the Union shall be entitled to examine all materials and tapes related to this section (a. through c. above). The intent of this provision is to ensure a fair and equitable selection procedure.

D. The Employer shall have the option of restricting the areas of examination and may choose one of the following plans:

1. Open and Competitive. Open to City and non-City employees.
2. City-Wide. Open to all City employees but not to non-City employees.
3. Unit-Wide. Open only to employees within the bargaining unit.

In any event, the test procedure outlined above shall be used.