ARBITRATION OPINION AND AWARD

In the Matter of Arbitration)
)
Between)
)
VILLAGE OF GREENDALE)
(POLICE DEPARTMENT))
)
And)
)
LOCAL UNION 505, LABOR)
ASSOCIATION OF WISCONSIN)
)
)

Case 49
No. 37631
MED/ARB-4067
Decision No. 24406-A

Impartial Arbitrator

William W. Petrie
1214 Kirkwood Drive
Waterford, WI 53185

Hearing Held

June 16, 1987
Greendale, Wisconsin

Appearances

For the Village

LINDNER & MARSACK, S.C.
By Roger E. Walsh, Esq.
700 North Water Street
Milwaukee, WI 53202

For the Association

THE LABOR ASSOCIATION OF WISCONSIN, INC.
By Patrick J. Coraggio
Labor Consultant
2825 N. Mayfair Road
Wauwatosa, WI 53222

BACKGROUND OF THE CASE

This is a statutory interest arbitration proceeding between the Village of Greendale Police Department and Local Union 505 of the Labor Association of Wisconsin, which represents a bargaining unit consisting of all regular full time and regular part time Clerk Dispatchers employed by the Village. The matter in dispute consists of the contents of the two articles to be contained in the parties' initial labor agreement, Article II, entitled Management Rights, and Article XXI, entitled Grievance Procedure.

The parties were unable to reach a full agreement in their preliminary negotiations, after which a petition was filed by the Association on September 9, 1986, requesting mediation-arbitration of the dispute. After preliminary investigation by a member of its staff, the Commission on April 14, 1987, issued certain findings of fact, conclusions of law, certification of the results of investigation and an order requiring mediation-arbitration. After selection by the parties, the undersigned was appointed by the Commission on May 19, 1987, to act as mediator-arbitrator.

Unsuccessful preliminary mediation took place between the parties and the undersigned on the morning of June 16, 1987, after which the matter moved into arbitration and a hearing took place on the same day. Each party received a full opportunity at the hearing to present evidence and argument in support of their respective positions, and each closed with the submission of a post-hearing brief.

The Final Offers of the Parties

The final offer of the Employer on the two articles in dispute consists of the following:

"ARTICLE II - MANAGEMENT RIGHTS

2.01. The Association recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility and in the manner provided by law, and the powers or authority which the Employer has not specifically abridged, delegated or modified by other provisions of this Agreement are retained as the exclusive prerogatives of the Employer. Such powers and authority, in general, include, but are not limited to, the following:

(a) To determine its general business practices and policies and to utilize personnel, methods and means as it deems appropriate.

(b) To manage and direct the employees of the Employer, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be

performed by the work force and each employee, and to determine the competence and qualifications of the employees.

(c) To determine the methods, means and personnel by which and the location where the operations of the employer are to be conducted.

(d) To take whatever action may be necessary in situations of emergency.

(e) To utilize temporary, provisional, part-time or seasonal employees when deemed necessary.

(f) To hire, promote, and transfer and lay off employees and to make promotions to supervisory positions.

(g) To suspend, demote or discharge employees

(h) To establish or alter the number of shifts, hours of work, work schedules, methods or processes.

(i) To schedule overtime work when required.

(j) To create new positions or departments; to introduce new or improved operations or work practices; to terminate or modify existing positions, departments, operations or work practices; and to consolidate existing positions, departments or operations.

(k) To subcontract or contract out work when deemed necessary.

2.02. The exercise by the Employer of any of the foregoing powers, rights and/or authority shall not be reviewable by arbitration except in case such are so exercised as to violate an express provision of the Agreement.

ARTICLE XXI - GRIEVANCE PROCEDURE

21.05. Upon completion of a review and hearing, the arbitrator shall render a written decision as soon as possible to both the Employer and the Association which shall be final and binding upon both parties. In making his decision, the arbitrator shall neither add to, detract from, nor modify the language of this Agreement. The arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself to the precise

issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination. In any arbitration award, no right of management shall in any manner be taken away from the Employer, nor shall such right be limited or modified in any respect excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the Employer of such right."

The final offer of the Association on the two articles in dispute consists of the following:

"ARTICLE II - MANAGEMENT RIGHTS

Section 2.01: The Association recognizes the prerogatives of the Employer to operate and manage its affairs in accordance with its responsibility and in the manner provided by law. The authority and powers not removed by this agreement are solely retained by the Employer. Such powers and authority, in general, include, but are not limited to the following:

A. To determine its general business practices and policies.

B. To manage and direct the employees of the Employer, to make assignment of jobs, to determine the size and composition of the work force, to determine the work to be performed by the work force and each employee, and to determine the competence and qualifications of the employees.

C. To determine the location where the operations of the Employer are to be conducted.

D. To take whatever action may be necessary in situations of emergency.

E. To hire, transfer, and lay off employees.

F. To suspend, demote or discharge employees for just cause.

G. To establish shifts, hours of work and work schedules.

H. To schedule overtime work when required.

I. To create new positions or departments; to introduce new or improved operations or work

practices to terminate or modify existing positions, departments, operations or work practices; and to consolidate existing positions, departments or operations.

J. To promulgate reasonable rules and regulations for the conduct of its business and of its employees.

K. To contract out for goods and services, provided such subcontracting does not result in a lay off of employees during the term of this agreement.

ARTICLE XXI - GRIEVANCE PROCEDURE

[illegible] be binding on the parties shall render a written decision as soon as possible to both the Employer and the Association which shall be final and binding upon both parties. In making his decision, the arbitrator shall neither add to, detract from, or modify the language of this Agreement."

THE STATUTORY CRITERIA

The merits of the dispute are governed by the Wisconsin Statutes, which in Section 111.70 (4)(cm)(7) direct the Mediator Arbitrator to give weight to the following factors:

"a) The lawful authority of the municipal employer.
b) The stipulations of the parties.
c) The interest and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
d) Comparisons of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.
e) The average consumer prices of goods and services commonly known as the cost-of-living.
f) The overall compensation presently received by the municipal employees, including direct compensation, vacation, holiday and excused time, insurance and pensions, medical and hospitalization benefits, and continuity and stability of employment, and all other benefits received.
g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, or arbitration or otherwise between the parties in the public service or in private employment."

POSITION OF THE EMPLOYER

In support of the contention that its final offer rather than that of the Association should be selected by the Arbitrator, the Village emphasized the following principal arguments.

(1) Preliminarily, that an interest arbitrator should operate as an extension of the bargaining process, should attempt to arrive at the same settlement that the parties would have adopted had they been able to achieve a settlement across the bargaining table, and should normally avoid giving to either party that which they could not have secured at the bargaining table.

That the fact that the other bargaining unit at the Police Department has for approximately 15 years successfully worked and lived under language identical to that proposed by the Village in this matter, is sufficient proof that this new bargaining unit would never have been able to accomplish its proposal at the bargaining table.

(2) That the Village proposed clauses are supported by certain internal and external comparables.

(a) In addition to the same language appearing in the Village's collective bargaining agreement covering the police, that internal comparison with the agreement between AFSCME and the Village covering the DPW and Clerical Employees, and that between the Village and the Firefighters also support the adoption of the Employer's final offer.

(b) That external comparisons with other labor agreements also support the position of the Village. In this respect it emphasized the agreements covering the West Bend Dispatchers, and those covering employees of the Cities or Villages of Greenfield, Franklin, Glendale, Brown Deer, Germantown, Hales Corners and Elm Grove.

(3) That various of the agreements cited by the Association contain more restrictions upon arbitral authority than is contained in the language proposed by the Association in the case at hand. In this connection, that the language in the Brookfield, the Greenfield, the Glendale, the Brown Deer, the Germantown and the Hales Corners agreements should be noted.

(4) That the above cited comparisons indicate that almost all of the management rights and the grievance procedure provisions proposed by the Village exist in the exact same form or in a very similar form in other Village of Greendale contracts or in contracts covering Police Dispatchers in other municipalities in the area. That while the Village's proposal contains strong management rights protection, this is a proper objective of the Village.

(5) That the Association's work rules and its just cause proposals could create confusion and conflict.

(a) That Article X, Section 10.01 already contains a just cause proposal which is appropriately limited to those employees who have completed their probationary periods. That Article XXIII, Sections 23.01 and 23.02 provide for Chief of Police authority to make new rules and regulations and for such future rules and regulations to be subject to reasonableness review under the grievance and arbitration provisions of the agreement.

(b) That the Association's proposal for a general just cause requirement to be added to the management rights clause sets up a direct conflict between this provision and the just cause requirement of Section 10.01 which applies only to those who have completed their probationary periods. Although probationary employees do not have recourse to the grievance procedure under Section 9.02 of the agreement, that the Association's just cause provision would appear to facilitate their filing of prohibited practice charges under Section 111.70(3)(a)(5) of the Wisconsin Statutes.

(c) That the Association's proposed addition to the management rights provision relating to rules, is inconsistent with the agreed upon language of Section 23.01 and 23.02; that the proposal could

force the Village to arbitrate over whether an existing and agreed upon rule is reasonable.

(6) That the subcontracting proposal of the Village is favored on various grounds.

(a) That it is identical to the language which appears in the management rights provisions in the Greendale Police and in the Greendale Firefighters agreements.

(b) That the Greendale AFSCME agreement contains the right to subcontract subject to limitations upon layoff or hours reductions for those employees on the Village payroll as of January 1, 1977; that this provision was adopted as part of a strike settlement agreement and has been added to each subsequent agreement.

(c) That when compared to all other represented employees of the Village, the Dispatchers are treated no differently; adoption of the Association's proposal would be unique among Village employees. That the Arbitrator should not secure more protection to this new bargaining unit than the three other bargaining units have been able to achieve through voluntary collective bargaining, including a strike situation.

(d) That the final offer of the Village is also favored by comparison with other municipalities. That the West Bend agreement contains the same provision proposed by the Village, while those in Greenfield, New Berlin, Glendale and Hales Corners contain restrictions against layoff which are not as broad as those proposed by the Association.

(e) At the hearing that the chief concern of the Association appeared to be over the possible impact of a 911 system on the bargaining unit. That the earliest such a system would take effect would be June of 1988, after the expiration of the collective agreement in question which would expire on December 31, 1987.

(f) That the Association's expressed concern over the adoption of a 911 system was first expressed at the arbitration hearing, and had not previously been addressed by either party during the negotiations process. That the case should not be decided on the basis of a concern over a matter which will

> not come into existence, if at all, until after the instant contract has expired, or over a matter which has never been discussed by the parties during negotiations.

In summary and by way of conclusion, that the Village's management rights and grievance procedure proposals are almost identical to those in effect for fifteen years in the Greendale Police Officers contract. That they reflect a strong management rights position that is reflected in all of the Village's collective agreements; that they are comparable to other area contracts covering police dispatchers; that the internal comparables strongly support the position of the Village and reflect what the parties would have reached in voluntary collective bargaining. That interest arbitration is simply not the place to impose a settlement upon the parties which grants more favorable treatment to a new bargaining unit than other well-established bargaining units have achieved in voluntary collective bargaining.

POSITION OF THE ASSOCIATION

In support of the contention that its final offer was the more appropriate of the two before the Arbitrator, the Association emphasized the following principal arguments.

(1) It submitted that there was no dispute as to the lawful authority of the employer to accept and abide by the terms of the final offer of the Association, and urged that this criterion had never been discussed or disputed by the parties.

(2) It urged that the stipulations of the parties were not in issue in the proceedings, and that arbitral consideration of this criterion should not have a major impact upon the final offer selection process.

(3) It alleged that the interest and welfare of the public would be better served and met by the Association's rather than the Employer's final offer.

  (a) It emphasized that the Association's offer better addressed the need to maintain the morale of the covered employees, than did the Village's offer. In this respect, it urged that the Village's sub-contracting proposal created significant job security concern for those in the bargaining unit.

  (b) It emphasized that in seven of eleven comparables cited by the Association, the employer did not have the ability to subcontract to the extent proposed by the Employer.

(c) It urged that the Association had addressed the Employer's subcontracting concerns, by proposing retention of such right conditional upon no resulting layoffs of bargaining unit employees during the term of the agreement.

(4) It urged that ability to pay was not in issue in the proceedings.

(5) It submitted that its selection of comparable communities and comparison with these communities favored the selection of the final offer of the Association.

(a) It submitted that dispatchers were an unusual or "bastard" position. In this connection it argued that the position was in the process of undergoing a fifteen year long and continuing metamorphosis, going from dispatching being handled by sworn officers to the use of non-sworn, civilian help in this area.

(b) It submitted that the above described changes had resulted in a variety of benefits, in low pay, in many of the unpleasant working conditions of law enforcement officers, and in a semi-military life style without the level of benefits as their police co-workers.

(c) It urged that the modern dispatcher position had an elevated level of stress comparable to that of an air traffic controller, with all of their actions monitored and subject to later review.

(d) It argued that the above considerations were quite important in considering the selection of appropriate external comparables.

(e) It urged that the starting point for determining which communities were comparable was the initial selection of twenty-four area departments in the same geographic area as the Village of Greendale which shared the same job market; it then urged exclusion from the group, of those who used sworn officers for dispatching purposes, those who used part-time rather than full-time dispatchers, and those which were not covered by collective bargaining agreements. On this basis, the Association urged that the most appropriate comparables consisted of the Cities of Brookfield,

New Berlin, Franklin, Muskego and Glendale, and the Villages of Whitefish Bay, Brown Deer, Germantown, Hales Corners and Elm Grove.

It additionally urged that the cited communities were predominantly residential in nature and comprised bedroom suburbs of Milwaukee, and emphasized that Greenfield, Franklin and Hales-Corners were contiguous to the Village of Greendale.

(f) It urged the only external comparison urged by the Employer was the City of West Bend, which is located in Washington County, some thirty-two miles north of the Milwaukee metropolitan area.

(6) It urged that an initial examination of the parties' management rights proposals followed by their consideration against comparables, favored the selection of the final offer of the Association.

(a) It urged that there were no substantial differences between the parties' proposals relative to the retained powers and authority of the Employer, and that the inclusion or exclusion of a just cause test was insignificant because such a test is provided for elsewhere in the agreement.

(b) It submitted that the Association proposal relating to the Village's retention of the right to promulgate reasonable rules and regulations was an appropriate one, was consistent with the contents of Article XXIII, Sections 23.01 and 23.02, and was supported by consideration of comparable management rights provisions in Brookfield, Greenfield, Franklin, Muskego, Glendale, Germantown and Hales Corners.

(c) It urged that the adoption of the Association's offer was also supported by internal comparables, in that the AFSCME agreement covering the largest bargaining unit in the Village, provides for employer promulgation of rules subject to union challenge on the basis of reasonableness.

(d) It submitted that the Association's subcontracting proposal was more appropriate,citing the lack of any subcontracting limitation in seven of eleven external comparables, and also citing internal comparison with the AFSCME contract with the Village covering other civilian employees.

(e) It urged that the Employer's paragraph A proposal relating to utilization of personnel, methods and means as deemed appropriate, is superfluous and redundant, based upon the agreed upon contents of paragraph B. Additionally it urged that the Association proposal relative to management's right to determine general business practices and policies was sufficiently broad as to already encompass the additional language proposed by the Village.

(f) It urged that the Employer's paragraph C proposal relating to determining methods, means, personnel and location where operations are to be conducted is superfluous and redundant when considered in light of the paragraph B provisions reserving to the employer the right to manage and direct the employees, to make assignment of jobs, to determine size and composition of the work force, etc.

(g) It urges that the Employer proposed first portion of paragraph A is made unnecessary by the Association proposed reservation to the Employer, of the right to determine its general business practices and policies.

(h) That the Employer's paragraph E proposal relating to the use of temporary, provisional, part-time or seasonal employees is inappropriate. That the Association cannot reasonably agree to non-unit employees doing bargaining unit work, and that the Village offered no testimony or evidence in support of this proposal. It urged that only two of eleven comparables provided for similar language in their agreements, with nine of the eleven not allowing the Employer to utilize non-bargaining unit personnel in the manner contemplated by the Employer. Further, it urged that the position of the Association is also supported by internal comparables in the Village Employees and the Firefighters contracts.

(i) That the Employer proposed paragraph F retention of the rights to promote and to make supervisory promotions is unnecessary because there is only one classification of employees in the bargaining unit.

(j) That the Employer proposed paragraph H discretion

relating to altering the number of shifts, hours of work, work schedules, methods or processes is overly broad and vague, and is unnecessary in light of the Association proposal which would allow the employer discretion to "...establish shifts, hours of work and work schedules." That the right to alter the number of shifts is a mandatory subject of bargaining which should be handled in a specific rather than a general manner. That police agencies are open twenty-four hours per day and seven days per week, making shift preference an important condition of employment.

That both external and internal comparisons favor the position of the Association in that only one of eleven comparables retains the right to alter shifts, and that neither the Village Employees nor the Firefighters agreements contain language allowing the employer to alter shifts without negotiations.

(k) That the Employer's subcontracting proposal simply shocks the conscience of the Association; that while employers frequently try to solidify a contract with as many management rights as possible, this proposal goes beyond the bounds of reasonableness and should not be allowed by the Arbitrator.

That such a subcontracting provision cannot be found in any of the external comparables, except for Hales Corners, and does not appear in the Village Employees or the Firefighters agreements.

(7) It urged that the Association's grievance procedure language was favored by consideration of the comparables.

(a) That the main items in issue are the employer proposed limitations upon arbitral authority which begin in the third sentence of Section 21.05.

(b) That the final sentence of the employer proposal is a Pandora's box, which would hinder the grievance process, and which would threaten an appeal on virtually every award issued by an arbitrator.

(c) That comparables do not support the position of

> the Employer on this matter. That none of the external comparables support the Employer's proposal and that the only internal contract with comparable arbitral limitations is in the Police Officer's agreement.

In summary and by way of conclusion, that the final offer of the Association is particularly favored by arbitral consideration of the interests and welfare of the public and utilization of the comparable communities urged by the Association. That the Association's management rights and grievance procedure proposals are more reasonable and more comparable than those of the Village, and that its final offer, when considered in its entirety, is more reasonable than that of the Employer.

FINDINGS AND CONCLUSIONS

This dispute poses certain rather unusual circumstances, in that the only items in dispute are the contents of the management rights and the grievance and arbitration provisions to be included in the parties' initial one year labor agreement. While language disputes occasionally accompany disputed levels of wages and benefits, it is highly unusual to have only language considerations before an interest arbitrator. Although the same statutory criteria are applicable to such language disputes, they pose particular difficulties to an interest arbitrator in applying the criteria. In the area of comparisons, for example, the relative merits of the parties' final offers cannot readily be quantified and costed-out against the comparables, and the resulting comparisons must involve assessing the substance of and the future implications arising from adoption of one final offer versus another, rather than merely comparing language which is relatively uniform in content and organization. In other words, the diversity of form and terminology in management rights and in grievance procedure clauses, complicates the comparison process.

In addressing the contents of the final offers of the parties, it is apparent to the undersigned that some items represent disputes of form rather than substance, and some areas contain duplicate or excess verbiage which could well have been eliminated by the parties without affecting the overall acceptability of the respective final offers. In this final offer interest arbitration, however, the Arbitrator does not have the power to unilaterally modify the final offer of either of the parties, and one of the offers must be accepted in its entirety.

Section 111.70(4)(cm)(7)(h) of the statutes provides that arbitrators should give weight to other factors which may not be specifically identified as statutory criteria where such factors are normally taken into consideration in voluntary collective bargaining, mediation, fact-finding or arbitration. The negotiating parties and interest neutrals will normally address and evaluate the meaning and the substance of language disputes, prior to arriving at a negotiated, a recommended or a directed settlement, and this evaluation process falls well within the

scope of the general provision referenced above. Accordingly, the Arbitrator will first evaluate and compare the final offers of the parties to determine the substance of their differences.

The Final Offers of the Parties and the Scope of Their Disagreement

For the purpose of clarity, the Arbitrator will first address the substance of the parties' final offers in the management rights area, after which their differences in the grievance and arbitration area will be explored.

Management rights clauses in labor agreements normally contain two major components. A general reservations of rights provision is typically followed by an enumeration of those specific rights which are reserved for exercise by management during the life of the agreement. Management rights clauses are, by nature, general provisions, and the exercise by management of its generally or specifically reserved rights are subject to limitation as spelled out in more specific provisions which appear elsewhere in the labor agreement.

Within the framework described above, Section 2.01 describes the rights generally reserved by the Employer, while the lettered sub-paragraphs appearing thereunder contain the specifically enumerated rights, and Section 2.02 of the Employer's proposal addresses the relationship between the reserved rights and other provisions contained in the labor agreement. The differences between the final offers of the parties may be summarized and preliminarily evaluated as follows:

(1) In Section 2.01 the Employer has elaborated upon its reserved right to operate and manage its affairs by adding the terms "...in all respects." Both parties recognize and address their agreement that the powers and authority not limited or modified in the agreement are retained by the Employer, but the Village has been somewhat more specific in describing this agreement.

While there may be a bit of verbal overkill in the Employer proposed language, the Arbitrator finds that the final offers do not substantially differ from one another in their apparent intended meaning and application. The Employer has proposed generally and specifically reserved rights which may be limited by other more specific provisions contained elsewhere in the labor agreement, and both parties agree that in the absence of such limitations, the reserved authority and powers are to be retained by management. Accordingly, the Arbitrator has preliminarily concluded that the differences contained within this component of the

final offers should not be accorded determinative importance in the final offer selection process.

(2) In paragraph (a) of their respective proposals both parties recognize that the Employer has specifically reserved the right to determine its general business practices and policies, but they differ in the Employer's insistence upon additional language providing for the right "...to utilize personnel, methods and means as it deems appropriate."

Since paragraph (b), which has been agreed upon by both parties, references the reserved right to manage and direct employees, to make job assignments, to determine size and composition of the work force, to determine the work to be performed, and to determine the competence and qualifications of employees, the Arbitrator has preliminarily concluded that the two offers do not substantially differ from one another. The additional language demanded by the Employer has already been reserved in general and reserved in specific in the immediately following paragraph. Accordingly, the Arbitrator has preliminarily concluded that the differences contained within this component of the final offers should not be accorded determinative importance in the final offer selection process.

(3) In paragraph (c) both parties agree that the Employer has the right to determine the location where operations of the Employer are to be conducted, but the Village additionally proposes that it determine "...the methods, means and personnel by which the operations of the employer are to be conducted."

Since the right to manage and direct employees and to determine the work to be performed by the work force and by each employee has already been agreed upon by both parties in paragraph (b) above, it is clear that the inclusion or exclusion of the additional language proposed by the Employer does not significantly affect the intended meaning of paragraph (c). Accordingly, the undersigned has preliminarily determined that this component of the final offers should not be assigned determinative importance in the final offer selection process.

(4) In paragraph (e) of its proposal, the Employer proposes retention of the right to utilize temporary, provisional, part-time or seasonal employees when

deemed necessary, and the Association offers no proposal in this area.

Since the parties already utilize part time employees, and since this utilization has already been addressed in the seniority article of the agreement this portion of the Employer's demand does not reflect a dispute in substance. Since the unilateral utilization of temporary, provisional, or seasonal employees during the life of a labor agreement by an employer would normally be a mandatory item of bargaining, and since it may impact upon the rights of those in the bargaining unit to a major extent, it represents a significant difference in the final offers of the parties.

(5) In paragraphs (f) and (e) of the Employer's and the Association's respective proposals, the parties agree to the retention by the Village of the right to hire, to transfer and to lay off employees. The Employer additionally proposes that it retain the right "to...promote, ..and to make promotions to supervisory positions."

Since the supervisory employees are not part of the bargaining unit the Employer would have the contractual right to unilaterally undertake supervisory promotions unless the right is limited by the agreement. Limitations upon an employer's right to undertake promotions within a bargaining unit is a mandatory item of bargaining and a dispute in this area would normally represent a significant difference between the parties. In the case at hand, however, there are two reasons why the promotion language is not significant: first, there is only one classification in the bargaining unit, and no promotions can presently be undertaken within the unit; secondly, the parties already provide in Section 9.07 that permanent vacancies within the unit may be applied for by employees covered by the agreement, and that such vacancies will be filled on the basis of seniority and qualifications. If higher level classifications were created during the life of the agreement the parties would normally have to negotiate relative to the wage rates to be applicable thereto, but the current language already provides that in filling any such newly created vacancies the Employer must consider seniority and qualifications.

On the basis of the above, the Impartial Arbitrator has preliminarily determined that the promotion component of the Employer's final offer should not be assigned determinative importance in these proceedings.

(6) In Sections (g) and (f) of their offers, the parties agree that the Employer has the right to suspend, demote or discharge employees, with the Association additionally insisting that such actions be supported by just cause.

While the proposed presence or absence of a just cause standard in a labor agreement would normally represent a substantial difference between the parties, it must be noted that Article X, which has already been agreed upon, provides that no employee who has completed his or her probationary period "...will be disciplined or discharged except for just cause."

On the basis of the above, the Arbitrator has preliminarily concluded that the presence or absence of just cause language in the management rights provision is immaterial, due to the fact that the application of this standard in discipline and discharge situations is already provided for elsewhere in the labor agreement. Accordingly, this component of the final offers cannot be accorded determinative importance in the final offer selection process.

In the above connection, the Arbitrator will observe that despite the Employer's arguments relative to the potential application of a just cause standard to a probationary termination under the Association's proposal, such a possibility would normally be foreclosed by the more specific, and the clear and unambiguous provisions contained in Section 9.02 of Article IX of the provisions which have already been agreed upon by the parties.

(7) In Sections (h) and (g) of their offers the parties agree that the Employer retains the right to establish shifts, hours of work and work schedules, while the Employer proposes specific reservation of the rights to "alter the number of shifts" and to "alter...methods or processes."

Without unnecessary elaboration, it seems clear that the right to establish shifts, hours of work and work schedules would also include the right to establish

them, or to alter them. Certainly the agreed upon portions of the management rights provisions would reasonably be interpreted as already reserving such rights to the Employer, except to the extent limited elsewhere in the agreement. Accordingly, the Arbitrator has preliminarily concluded that this element of disagreement in the final offers of the parties should not be assigned determinative weight in the final offer selection process.

(8) In Section (j) of its offer, the Association proposes that the Employer retain the right "To promulgate reasonable rules and regulations for the conduct of its business and of its employees." The Employer makes no such proposal.

When an employer retains the right to operate its business in general, when these rights are described in considerable specific detail, and when it agrees to discipline or to discharge only for just cause, it implicitly retains the right to promulgate reasonable rules and regulations for the conduct of its business. Application of the just cause test in discipline or discharge situations anticipates the existence of rules or regulations and their reasonable application by the Employer, and there is normally an implicit obligation on the part of each party to a labor agreement that they act in a reasonable manner even in the exercise of rights reserved for their unilateral use.

On the basis of the above, the Arbitrator has preliminarily determined that the contents of Section (j) of the Association's proposal should not be assigned determinative weight in these proceedings.

(9) In Section (k) of its proposal the Employer urges that it retain the right "to subcontract or contract out when deemed necessary," while the Association proposes that the Employer have the right "to contract out for goods and services, provided such subcontracting does not result in a lay off of employees during the term of this agreement."

The subcontracting of work normally performed by bargaining unit employees is a mandatory item of bargaining, and the parties remain apart on this issue. This issue represents a signficant area of dispute between the parties.

(10) In Section 2.02 the Employer proposes that the exercise of the rights contained in Section 2.01 would not be

> reviewable in arbitration except in the event that the rights were exercised in violation of an express provision of the Agreement. The Association makes no proposal in this area.
>
> The Employer's proposal would somewhat limit the scope of arbitral review of the application of the labor agreement and represents a significant dispute between the parties.

On the basis of the above the Impartial Arbitrator has preliminarily concluded that the major areas of difference between the parties under Article II include: the Employer's proposal for retention of the right to use temporary, provisional or seasonal employees; the Employer's proposal that it retain the right to subcontract during the life of the agreement; and the Employer's proposal which would limit the scope of arbitral review as described in Section 2.02.

Arbitration clauses define those disputes which the parties agree may proceed to final and binding arbitration, and the degree of authority which an arbitrator will have in deciding disputes referred to him for resolution.

In Sections 21.05 and 21.04 of Article XXI of the Employer's and the Association's final offers, they are in full agreement with respect to the first two sentences, these sections provide for the preparation of a written disposition after the completion of the hearing, indicate that the process shall be final and binding upon both parties, and preclude an arbitrator from adding to, subtracting from, or modifying the language of the agreement. Thereafter the final offer of the Employer adds the following language:

> "..The arbitrator shall have no authority to grant wage increases or decreases. The arbitrator shall expressly confine himself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination. In any arbitration award, no right of management shall in any manner be taken away from the Employer, nor shall such right be limited or modified in any respect excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the Employer of such right."

In examining the above excerpt from the final offer of the Employer the Arbitrator will first observe that rights arbitrators normally lack the ability to grant wage increases or to order wage decreases unless the labor agreement or the parties' submission

agreement so provides; accordingly, the first sentence merely emphasizes a limitation that is already present. Similarly, the first portion of the second sentence merely describes what is an arbitrator's normal authority; arbitrators have only the authority granted to him by the parties, and a failure to limit himself to the confines of the labor agreement and/or any submission agreement, constitutes one of the few grounds for which an arbitral decision may be vacated or modified upon appeal. The second phrase of the second sentence, however, imposes substantial additional limitations upon arbitral authority; although the language is ambiguous in certain respects it would appear to limit dicta and explanations in arbitral decisions, by purporting to prohibit an arbitrator from offering observations or declarations of opinion which are not directly essential to reaching a decision on the merits of the dispute submitted for determination. The final sentence contains some ambiguities also, but it proposes to limit the authority of an arbitrator in dealing with cases which involve the exercise of management rights.

On the basis of the above, the Arbitrator has preliminarily determined that the second portion of the second sentence and the entire third sentence of the Employer proposed additions to Section 21.05, contain the major areas of difference between the parties in the grievance procedure clause.

Preliminary Considerations Relating to the Handling of Interest Arbitration Disputes

Prior to getting into a specific consideration and application of the statutory criteria against the substance of the parties' final offers, the Arbitrator will preliminarily address the arguments of the Employer relating to arbitral approaches to changes in the status quo, to innovations, and to the degree to which arbitrators should avoid granting to either party those items which would not reasonably have been available to it across the bargaining table.

The Employer is quite correct in its general argument that interest arbitrators should and normally do avoid innovation, and in so doing they avoid giving to either party those innovative matters which they could not reasonably have expected to achieve across the the bargaining table. In public sector impasses where the parties do not have a bargaining history, however, and where an employer is merely attempting to perpetuate the same degree of control that may have existed prior to unionization, this arbitral reluctance must be somewhat tempered. These considerations are addressed in the following excerpt from an address given by Arbitrator Howard Block:1./

> "One of the most compelling reasons which makes it necessary for neutrals in public interest disputes to strike out on their own is the dearth of public bargaining history. The main citadels of unionism

in private industry have a continuity of bargaining history going back at least to the 1930s. Public sector collective negotiations, on the other hand, is still a fledgling growth. In many instances its existence is the result of an unspectacular transition of unaffiliated career organizations responding to competition from AFL-CIO affiliates. As we know, a principal guideline for resolving interest disputes in the private sector is prevailing industry practice--a guideline expressed with exceptional clarity by one arbitrator as follows:

> 'The role of interest arbitration in such a situation must be clearly understood. Arbitration in essence, is a quasi-judicial, not a legislative process. This implies the essentiality of objectivity--the reliance on a set of tested and established guides.
>
> 'In this contract making process, the arbitrator must resist any temptation to innovate, to plow new ground of his own choosing. He is committed to producing a contract which the parties themselves might have reached in the absence of the extraordinary pressures which lead to the exhaustion or rejection of their traditional remedies.
>
> 'The arbitrator attempts to accomplish this objective by first understanding the nature and character of past agreements reached in a comparable area of the industry and in the firm. He must then carry forward the spirit and framework of past accommodations into the dispute before him. It is not necessary or even desirable that he approve what has taken place in the past but only that he understand the character of established practices and rigorously avoid giving to either party that which they could not have secured at the bargaining table.'

Viewed in the light of the foregoing principles, the public sector neutral, I submit, does not wander in an uncharted field even though he must at times adopt an approach diametrically opposite to that used in the private sector. More often than in the private sector, he must be innovative; he must plow new ground. He cannot function as a lifeless mirror reflecting pre-collective negotiation practices which management may yearn to perpetuate but which are the target of multitudes of public employees in revolt."

As is apparent from the above discussion, the fact that an employer merely alleges that it never would have agreed to a particular proposal across the bargaining table is insufficient alone to justify its denial by an interest arbitrator. As is described by Arbitrator Block in his articulate and thoughtful observations, theno innovations principle must sometimes be questioned in its application to certain types of public sector disputes.

In the situation at hand, there is a history of collective bargaining between the Village and various other unions, and there are also available comparisons with the language negotiated between other comparable employers in various of their labor agreements. Accordingly, neither the general reluctance of interest neutrals to innovate, nor the occasional need to depart from this general principle, need be assigned determinative weight in these proceedings.

Consideration of the Specific Arbitral Criteria

As explained in greater detail above, the Impartial Arbitrator has preliminarily concluded that the major substantive differences between the final offers of the parties fall within the following areas.

(1) The right to subcontract during the term of the labor agreement; the Employer proposes to retain this right, while the Association proposes that any such right be conditioned by a no layoff commitment during the term of the labor agreement.

(2) The right to utilize temporary, provisional or seasonal employees; the Employer proposes that it retain the right to utilize such employees while the Association offers no proposal in this area.

(3) Limitations upon arbitral review of disputes involving the exercise of management's reserved rights; the Employer proposes to limit arbitral authority to offer dicta and/or explanations of the deliberation process utilized in arriving at a decision, while the Association proposes relatively standard language of limitation precluding an arbiter from adding to, subtracting from or otherwise modifying the terms of the written agreement.

The Comparison Criterion

In first addressing the comparison criterion it must be emphasized that this is generally regarded as the most important and persuasive of the statutory criteria. This generalization does not, however, resolve the question of which comparisons should be the most persuasive in a given case, and in the matter at hand each side offered those comparisons which it felt best supported the arbitral selection of its final offer.

(1) The Employer urged consideration of internal comparisons with collective agreements covering other organized groups of Village employees, and cited other external comparisons.

(2) The Association emphasized external comparisons with allegedly comparable city or village employers, in their collective agreements covering employees engaged in dispatching duties.

In disputes which involve wage levels and fringe benefits, the external comparisons with similar employers in the same labor market are generally regarded as the most persuasive comparables. While an employer may argue that internal comparisons with wages and fringes extended to other employees of the same governmental unit should be accorded primary weight, it is difficult to defend the proposition that wage and benefit levels or increases should be the same for laborers, policemen, firefighters, teachers, clerical employees, etc.

In policy or language disputes, such as those in issue in the matter at hand, an employer can make a more persuasive case in support of internal consistency. External comparisons, while important, cannot be assigned the same level of relative importance as is the case in economic disputes which are more market place oriented!

While the external comparison group urged by the Association either might or might not have been the most appropriate for economic comparisons, it is appropriate for the language comparisons herein in dispute. The principal problem is not, however, the selection of a comparison group, but rather the mechanics of the comparison. Some of the language which appears in various of the management rights provisions, for example, may be sufficiently broad as to include the right to subcontract and/or the right to utilize temporary, provisional or seasonal employees. By way of example are the following:

(1) The City of Greenfield agreement limits subcontracting to non-layoff situations and to emergencies not exceeding 45 days, and makes no specific reference to the use of temporary or seasonal employees. The contract, however, refers to broad and general control over methods, operations and use of personnel. The intended meaning of this language is not fully apparent from the face of the agreement.

(2) The City of New Berlin agreement makes no reference to subcontracting or to the use of temporary, provisional or seasonal employees. It refers to delegating work to others, conditional upon no hours reduction or layoffs, and also refers to the general right to adopt different methods of doing the work and to installing new machines and devices, with

regard for the rights of employees and not for the purpose of discrimination. The intended meaning of this language is not completely clear from the face of the agreement.

(3) The City of Glendale agreement is both broad and general. It makes the right to subcontract conditional upon no layoffs of those presently in the unit, and provides that the exercise of management rights will not be exercised in an arbitrary, capricious or discriminatory manner.

(4) The Village of Brown Deer agreement contains very broad reserved rights, including the increase or decrease of operations, the removal or installation of machinery and equipment, the determination of work processes and procedures, and the determination of the size and the composition of the work force.

(5) The Village of Germantown agreement contains very broad reserved rights language, including the right to layoff for legitimate reasons, the right to introduce new or improved methods or facilities, the right to change existing methods or facilities, and to determine methods, means and personnel by which operations are to be conducted.

(6) The Village of Hales Corners agreement contains extremely broad reserved rights language, including the use of temporary, part time or seasonal employees if no layoffs or hours reductions are involved, and the use of subcontracting if it is not for the purpose of layoff.

(7) The Village of Elm Grove agreement contains extremely broad language which includes the right to introduce new or improved methods or facilities, the change of existing facilities, etc.

(8) The agreements for the Cities of Brookfield, Franklin, and Muskego are broad but not as detailed as some of the others. They make no specific reference to the right to subcontract, or to the use of temporary, provisional or seasonal employees.

On the basis of the above, it is clear that few of the comparables have specific language identical to or substantially similar to that proposed by the Village in the areas of subcontracting, and the use

of temporary, provisional or seasonal employees. Additionally, only the Hales Corners agreement has limitations upon arbitration which are similar in substance to those proposed by the Village. As a matter of form, therefore, it would appear that a consideration of comparables favors the adoption of the final offer of the Association. When the provisions are examined on the basis of substance, however, the comparisons are inconclusive. Various of the management rights provisions are extremely comprehensive and detailed, and, in their interpretation and application, they may well be as broad or broader than the proposal of the Village in the case at hand.

An examination of the external comparables does clearly show, however, that the Employer proposed limitations upon arbitral authority are in excess of those which have been adopted by the bulk of comparable employers.

Without unnecessary elaboration it is necessary for the Arbitrator to conclude that the adoption of the Village's final offer is strongly favored by internal comparisons with the police, the firefighters and the village employees agreements. The weight to be placed upon these internal comparisons is somewhat increased in the case at hand, due to the fact that the only impasse items before the Arbitrator consist of contract language.

At this point the Arbitrator will merely add that the Association's arguments which compared police dispatchers with air traffic controllers was imaginative and innovative. It must be understood, however, that there is a significant difference between assertions relating to the comparable worth of dissimilar jobs and the application of the comparison criterion as described in the Wisconsin Statutes. It is not appropriate for an arbitrator to evaluate and to establish the comparable worth of police dispatchers by comparing them against, for example, air traffic controllers, and then placing significant weight upon this subjectively established worth in the final offer selection process. The comparison criterion as described in the Wisconsin Statutes merely anticipates that a market level for employment services may be established by an objective analysis of comparable employers and employees, and that the comparable wages, hours and terms and conditions of employment apparent from this analysis, should weight heavily in the final offer selection process.

On the basis of all of the above, the Impartial Arbitrator has reached the following preliminary conclusions with respect to the comparables.

(1) Consideration of the external comparables is inconclusive relative to the parties' management rights clause disputes. The external comparables favor the selection of the final offer of the Association in the area of limitations upon arbitral authority.

(2) Consideration of the comparables internal to the Village of Greendale clearly favor the selection of the final offer of the Village.

The Interests and Welfare of the Public and The Bargaining History Criterion

First it will be emphasized that the interest and welfare of the public is specifically identified as an arbitral criterion in Section 111.70(4)(cm) of the statutes, and bargaining history consideration falls well within the general coverage of sub-section (h) of the same section. Both of these criteria were cited by the parties in connection with their arguments relating to the Employer's right to subcontract during the term of the labor agreement in question.

The Association emphasized the concern of those in the unit with the possibility of their job security being threatened by the adoption of a 911 system with dispatching being handled in whole or in part on a basis external to the present dispatching system for the Village. It submitted the employee morale was negatively affected by job security considerations, thereby adversely impacting upon the interest and welfare of the public. The Employer disagreed with this argument and cited the fact that adoption of a 911 system could not take place during the life of the agreement in question, and emphasized that the 911 argument was first raised at the arbitration hearing, and it had not been the product of preliminary negotiations between the parties.

The interest and welfare of the public can mean a variety of things depending upon the perspective of the parties advancing the arguments. The Arbitrator can understand and appreciate the job security concerns of those in the bargaining unit and can also understand the desirability of addressing such considerations through face-to-face negotiations prior to utilizing the interest arbitration process.

Since the Employer has offered assurances that the 911 emergency number would not be considered for adoption during the life of the current labor agreement, and in consideration of the fact that contract renewal negotiations will take place prior to any such action, the Arbitrator has preliminarily concluded that the arguments relating to the possible adoption of a 911 system should not be accorded significant weight in these proceedings. If the parties had addressed this situation in their preliminary negotiations, and/or if the possible use of a 911 system was imminent, these considerations would weight more heavily in the final offer selection process.

The Remaining Arbitral Criteria

While the Wisconsin Statutes mandate arbitral consideration of all of the statutory criteria, the undersigned has determined that they cannot appropriately be assigned determinative weight in these

proceedings. The lawful authority of the Employer is not in issue in the proceedings; the stipulations of the parties have already been considered in connection with certain aspects of the application of the comparison criterion; cost-of-living and overall level of compensation considerations have primary application to economically based impasses; and no changes of circumstances have been advanced and argued in these proceedings.

Summary of Preliminary Conclusions

As addressed in greater detail above, the Impartial Arbitrator has reached the following summarized, principal preliminary conclusions.

(1) The major substantive differences between the final offers of the parties fall within the following areas:

(a) The right to subcontract during the term of the labor agreement;

(b) The right to utilize temporary, provisional or seasonal employees;

(c) Limitations upon arbitral review of disputes involving the exercise of management's rights.

(2) Neither the general reluctance of interest neutrals to innovate, nor the occasional need to depart from this general principle, need be assigned determinative weight in these proceedings.

(3) Consideration of external comparables is inconclusive relative to the parties' management rights clause impasse. The external comparables favor the selection of the Association's final offer in the area of limitations upon arbitral authority.

(4) Consideration of comparables internal to the Village of Greendale clearly favor the selection of the final offer of the Village. Internal comparisons should receive relatively greater weight in language based impasses, than in wage and benefits based impasses, the latter of which depend more significantly upon the external labor market.

(5) The interest and welfare of the public considerations do not definitively favor the selection of the final offer of either party; this is particularly true in light of the Employer's assurances relative to the non adoption of a 911 system during the term of the labor agreement. Certain negotiations

history considerations favor the adoption of the final offer of the Village.

(6) Neither the lawful authority of the Employer, the stipulations of the parties, cost-of-living considerations, the overall level of compensation, nor changes of circumstances during these proceedings can be assigned significant weight in the final offer selection process.

Selection of the Final Offer

After a careful consideration of the entire record before me, including a review of all of the statutory criteria, the Arbitrator has determined that the final offer of the Village is the more appropriate of the two final offers. The choice is principally based upon arbitral consideration of the internal comparisons, the fact that the parties have the opportunity to return to the bargaining table in connection with the subcontracting question prior to any changes being undertaken by the Employer in this area, and bargaining history considerations. While the external comparisons somewhat favored the position of the Association on the arbitral authority question, and while certain other of its arguments were individually persuasive, the final offer of the Village is the more appropriate of the two offers.

1./ Howard S. Block, "Criteria In Public Sector Interest Disputes", Arbitration and the Public Interest, The Bureau of National Affairs, 1971, reprinted University of California, Institute of Industrial Relations 1972. pp. 164-165.

AWARD

Based upon a careful consideration of all of the evidence and argument, and a review of all of the various arbitral criteria provided in Section 111.70 of the Wisconsin Statutes, it is the decision of the Impartial Arbitrator that:

(1) The final offer of the Village of Greendale is the more appropriate of the two final offers before the Arbitrator.

(2) Accordingly, the final offer of the Village, hereby incorporated by reference into this award, is ordered implemented by the parties.

William W. Petrie

WILLIAM W. PETRIE
Impartial Arbitrator

November 3, 1987