BEFORE THE ARBITRATOR

In the Matter of the Arbitration of an Impasse Between

WAUSHARA COUNTY (HEALTH DEPARTMENT)

and

DISTRICT 1199W/UNITED PROFESSIONALS FOR QUALITY HEALTH CARE

Decision No. 26111-A

Appearances:
Mulcahy & Wherry, Attorneys-at-Law, by James R. Macy, for the Municipal Employer.
Cullen, Weston, Pines & Bach, Attorneys-at-Law, by Gordon E. McQuillen, for the Union.

ARBITRATION AWARD

The above-captioned parties selected, and the Wisconsin Employment Relations Commission appointed (Decision No. 26111-A, 8/24/89), the undersigned Arbitrator to issue a final and binding award pursuant to Sec. 111.70(4)(cm)6 and 7 of the Municipal Employment Relations Act resolving an impasse between the parties by selecting either the total final offer of the Municipal Employer or of the Union.

A hearing was held in Wautoma, Wisconsin on October 23, 1989. No transcript was made. Briefs were exchanged on December 29, 1989.

The collective bargaining unit covered in this proceeding consists of all regular full-time and regular part-time registered nurses. There are approximately ten employees in this unit, four of whom are designated as full-time.

The parties are seeking an agreement for 1989 and 1990.

THE PARTIES' FINAL OFFERS:

The parties' 1987-1988 agreement provided as follows:

> "10.02 - Employees shall receive compensatory time off or overtime pay at the rate of time and one-half for all hours in pay status beyond forty hours in a work week. Employees who are required to work between the general schedule hours of 5:00 p.m. Friday and 8:00 a.m, Monday for emergencies and unanticipated appointments,

shall receive time and one-half compensatory time or pay. Time off or pay shall be as agreed between the employee and the Department Head."

The Union, contrary to the Municipal Employer, would delete, "for emergencies and unanticipated appointments".

The parties' 1987-1988 agreement provided at section 13.02: "Holiday pay shall be computed at the employee's regular rate of pay for the employee's regular scheduled number of hours". The Union, contrary to the Municipal Employer would add: "Employees who are required to work on a holiday shall receive time and one-half (1 1/2) the regular rate of pay for all hours worked in addition to the holiday pay."

The Municipal Employer, contrary to the Union, would modify the Management Rights article of the 1987-1988 agreement. That article, in pertinent part, provided as follows.

> "2.01 - Except as otherwise herein provided the operation and control of the Waushara County Health Department is vested exclusively in the Employer and all management rights repose in it. These rights include, but are not limited to, the following: . . ."

The Municipal Employer would add a subsection "N" providing, "To contract out for goods or services as long as bargaining unit employees are not on layoff or reduced hours as a result of the subcontracting."

The 1987-1988 agreement, at Article 25, provided as follows.

> "ARTICLE 25 - OUTSIDE EMPLOYMENT
>
> 25.01 - Employees shall advise the department heads of plans to engage in outside work and the general nature of the work prior to the acceptance of such outside work.
>
> 25.02 - Outside work is to be regarded as secondary to regular County employment. Employees may not engage in any outside occupation, employment or business which might hinder the impartial objective or effective performance of their duties.
>
> 25.03 - In the event an emergency exists requiring an employee's services outside his/her normal hours, the employees shall report despite a possible conflict with other employment.

25.04 - Sick leave benefits shall not be available for illnesses or disabilities incurred as a result of other employment."

The Municipal Employer, contrary to the Union, would modify this article in several respects. First, the Employer would add to section 25.01, "They shall supply the department heads with full information about the planned work in such detail as specified by the department heads." Secondly, it would add to section 25.02, "An employee's failure to disclose that he/she is participating in outside employment may be grounds for disciplinary action, including suspension or dismissal."

Finally, the Employer would add new sections 25.05 and 25.06 providing as follows:

"25.05 - Should at any time the department heads determine that the outside work is interfering with the County employment in such a degree as to jeopardize the County interest, the employee will be requested to discontinue his/her outside work or be discharged from County employment.

25.06 - It is further agreed that a dispute regarding this article shall be appealed to Step 3 of the grievance procedure. The Personnel Committee shall respond to the grievance within thirty (30) calendar days."

The parties' 1987-1988 agreement provided the following wage structure and levels.

"1987

POSITION	MINIMUM	6 MONTHS	15 MONTHS	24 MONTHS
Public Health Nurse II	9.50	9.92	10.36	10.87
Public Health Nurse I	9.10	9.50	9.92	10.36

1988

Public Health Nurse II	$9.79	$10.22	$10.67	$11.20
Public Health Nurse I	9.37	9.79	10.22	10.67"

The Municipal Employer would maintain this structure and increase the wage levels by 3.5% as of January 1, 1989 and January 1, 1990.

The Union, on the other hand, would modify the structure and the wage levels as follows.

"1989

	Minimum	6 mo	1-2 yr	3-6 yr	7-10 yr	11 & Over
PHN I	$ 9.60	$10.05	$10.60	$11.10	$11.18	$11.23
PHN II	$10.10	$10.60	$11.10	$11.55	$11.63	$11.68
1990						
PHN I	$10.03	$10.50	$11.08	$11.60	$11.69	$11.74
PHN II	$10.55	$11.08	$11.60	$12.06	$12.15	$12.21

Effective January 1, 1989, all bargaining unit employees will be placed on the salary schedule in accordance with their seniority. Effective January 1, 1990, all bargaining unit employees shall receive a 4 1/2% across-the-board wage increase.

In addition, any employee reaching an anniversary date which would move them horizontally on the wage scale, shall have their base wage increased by the first pay period following that anniversary date."

THE PARTIES' POSITIONS:

The Union contends that its proposed deletion from section 10.02 would conform that provision to the parties' practice, and that if modified the provision would constitute "an appropriate disincentive to the County to schedule duties outside normal working hours and an appropriate reward for inconvenienced employees."

The Employer, on the other hand, emphasizes that the Union's proposal in this respect was also pursued, in effect, in the grievance procedure; but the Union determined not to proceed to grievance arbitration. Substantively, the Employer alleges that the practice to which the Union refers was a "mistake totally unknown to the County until the issue was discovered through negotiations for this contract", and that, "upon discovering the mistake, the County properly gave the Union notice that it was simply a mistake, and that the clear and unambiguous language would be reapplied as in the past and in the same application as the social services contract language." The Employer stresses that its agreements with the bargaining representative of the social services bargaining unit have included the same terms, and that "when the professional employees in that unit were regularly scheduled for hours during the weekend, they received straight time pay." The Employer's position continues, "However, if an emergency or non-scheduled appointment occurred during the weekend, then that professional employee received time and one-half for that work."

The Union replies that it should not be criticized for electing to address a contract interpretation conflict in the negotiations for a new agreement. The Arbitrator agrees that both the grievance procedure and such negotiations are legitimate arenas for resolving such a dispute. On the other hand, the Arbitrator

is impressed by the relative emphasis which the Union places on "past practice" as distinguished from general employment policy principles. This suggests that it is mainly urging that the section, as the Union would "clarify" it, would reflect historic mutual intent. That is a point best made in grievance arbitration and, in any event, not clearly supported in the instant record.

In the matter of holiday pay, the Union again suggests the need for disincentives to scheduling and rewards for inconvenience. It argues, "On the whole, the Union's language changes, although having some slight economic impact, have less of an adverse impact on the County than the County's proposals regarding Article 2 and 25 likely will have on bargaining unit employees". (The Arbitrator does not find this comparison persuasive.)

The Employer emphasizes a number of factors relative to this Union proposal. It stresses that the members of its social services and sheriff's department units, who also must routinely work on holidays, do not receive such a benefit. The record also discloses, the County urges, that the members of the instant unit have substantial input as to their schedules, and receive "special accommodations" when holiday work is scheduled.

In support of its subcontracting proposal the Employer argues as follows.

> "First, the language submitted by the County offers a significant protection to the nursing employees. In that regard, the County agrees that in regards to contracting out for goods or services, it will protect the nurses in that the nurses will not be laid off or have hours reduced as a result of subcontracting."

The Union contends that this proposal "has the (undesirable) potential effect of freezing the bargaining unit at its present size and, ultimately eliminating it entirely through the attrition of current employees who the County then need not replace."

As to its proposed outside employment revisions, the Employer offers two bases. First, it urges "the suggested changes . . . are not intended to have any substantive impact on the employees in this unit." Rather, "the language is intended to clarify the existing language and to coordinate language with the other four contracts". (The last point refers to the Employer's agreements covering other bargaining units.) The policies covering unrepresented personnel also include these terms. Clearly, it is uniformity which the County seeks by this proposal.

The Union contends that some "need" beyond the abstract matter of consistency must be evident to support a revision of terms in arbitration; and that consistency should not be judged, in any event, by comparing isolated elements of an agreement. It emphasizes that this proposal threatens intrusion in the employees private lives, and that the authority of supervisors to inquire "in such detail" as is subsequently specified is abusively vague.

The Arbitrator understands that there may be circumstances when it is legitimate for the Employer to be advised of, and even to disallow, certain other employment by its employees. The undersigned agrees with the Union, however, that such regulation of uncompensated time requires specific rationale. In this case the Employer seems to rely entirely on its desire for uniformity which does not, in the view of the undersigned, constitute sufficient justification.

On the wage issue the Employer also seeks consistency. Its 3.5% offer has been made to its other employees. The Union notes that that percentage increase is to be applied to a variety of actual wage levels, however; and that it, as well as the Union's own proposal, is less than the percentage increase in the cost of living.

The Union also compares the highest paid unit members to the highest paid nurses in the Counties to which the Employer compares itself, and notes that under the Employer's offer these unit members would compare even less favorably than in the past. It also contends that Winnebago County, which is contiguous to the Employer County, should be added to these "comparables"; and that when that is done the wage rates proposed by the Employer rank even lower.

The Arbitrator agrees with the Union position which would include Winnebago County as well as the other contiguous counties all of which both parties would consider. Even though, as the Employer emphasizes, Winnebago County has a much greater population and fiscal resources, its proximity strongly suggests that it shares a labor market with the Employer. That fact, rather than financial capacity or demographic or lifestyle factors, seems determinative of comparability.

The Arbitrator agrees with the Employer that the Union's comparison of highest wage levels distorts the analysis. It is the case that when entire wage schedules are examined the Employer is more "competitive". It is also true that the wage structure change proposed by the Union also focuses upon more senior employees, while the current structure elevates the earnings of less senior employees more rapidly. Apparently, the Union is particularly eager for improvements for the employees at the upper wage levels. The Employer notes that this is disadvantageous for others.

The Employer also emphasizes that its wage proposal is identical to its treatment of other units, not only with respect to the rate of increase, but also as to wage structure, and a separate longevity article. This proposal, it notes "allows the unit to maintain its current status when compared to other county salaries."

Regarding the Union's proposed wage increases the County argues as follows:

> "Aside from the severe structure change suggested by the Union, the Union also

inappropriately demands percentage wage increases far and above that agreed to by all other union employees in the County. In addition, the Union demands wage increases far above that received by comparable nursing units in the area. While all other Waushara County employees accepted wage increases of 3.5% for each year, the nurses improperly demand increases in excess of 4.5%, with absolutely no support rationale. While other nursing employees in comparable counties accepted less than 3.0% wage increases, the Waushara County nurses demand excesses of 4.5%, with no supporting rationale."

ANALYSIS:

This is a case in which both final offers include unappealing elements. The Union seems to be attempting to use a contract administration position to resolve a contract negotiation dispute in the matter of section 10.02.

The County offer, on the other hand, would confront the provocative matter of subcontracting when there is no particular relevant history or future contemplated, at least as revealed in the instant record.

In the matter of wages the Union seems somewhat excessive in its focus upon senior unit members at or near the top rate. However, that point of view serves present employees, and the rates at that level are admittedly less than standard. Moreover, the Employer seems virtually compelled by the concept of uniformity. Indeed its primary contention on behalf of nearly every element of its proposal is "internal" comparability. It is striving, apparently, for substantially identical collective bargaining agreements, revised only by measures that are also substantially identical.

In the view of the undersigned this "theme" in the County's position should be rejected. Its appeal to ease of administration and ease of presentation to political leadership is apparent. But it seems to value a certain tidiness over much more profound principles.

Thus, comparing percentages of wage increases ignores the fact that various categories of employees are already at various wage levels. Where relatively low paid employees receive an increase that is materially below the increase in the cost of living, it is form-over-substance to describe them as treated equally to higher paid employees who received the same percentage increase.

Secondly, such uniformity among various units ignores the differences among labor markets. Nurses and highway workers are not within a single labor market nor do they share the same supply and demand ratios. Presumably, labor market analysis is a primary factor in determining appropriate wage and benefit levels.

Third, the very essence of separate bargaining units is allowing employees with varying communities of interest to speak to wage, hours and working conditions distinctly. This may ultimately produce many similar and even identical agreements, but placing a very high value on uniformity subordinates the public policy that justifies the units to the desire for simplicity.

The Employer's pursuit of "consistency" seems especially excessive in the case of its outside employment proposal. For no other apparent reason it would intrude upon the employees' private circumstances, and even suggest disciplinary measures.

In the judgment of the Arbitrator the thrust of the County's principle and pervasive argument is that its proposals should be sustained because they reflect "how things are done" by the County. "Internal comparables" is, in such a case, merely a euphemism that obscures an approach that seems antithetical to sound collective bargaining.

AWARD

On the basis of the foregoing, the record as a whole, and due consideration of the "factors" specified in the Municipal Employment Relations Act, the undersigned Arbitrator selects and adopts the final offer of the Union.

Signed at Madison, Wisconsin, this 14th day March, 1990.

Howard S. Bellman
Arbitrator

HSB/sf