In the Matter of Arbitration	:	
Between	:	**AWARD**
TWO RIVERS CITY EMPLOYEES LOCAL 76, AFSCME, AFL-CIO	:	WERC Case 66
	:	No. 43769 INT/ARB-5629
and	:	**Decision No. 26465-A**
CITY OF TWO RIVERS		

I. HEARING. A hearing in the above entitled matter was held on July 12, 1990, beginning at 10 a.m. at the City Hall, Two Rivers, Wisconsin. Parties were given full opportunity to give testimony, present evidence and make argument. A reply brief and reply letter were exchanged on September 7, 1990.

II. APPEARANCES.

MICHAEL J. WILSON, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appeared for the Union.

MULCAHY & WHERRY, S.C. by DENNIS W. RADER, Esq. appeared for the City.

III. NATURE OF THE PROCEEDING. This is a proceeding in final and binding final offer arbitration pursuant to Section 111.70 (4) (cm) 6 of the Municipal Employment Relations Act. The Two Rivers City Employees, Local 76, AFSCME, AFL-CIO on March 1, 1990, filed a petition with the Wisconsin Employment Relations Commission alleging that an impasse existed between it and the City of Two Rivers in collective bargaining. Commission staff member Edmond J. Bielarczyk, Jr. investigated and found that the parties were deadlocked and remained at impasse. The Commission found that the parties had substantially complied with procedures set forth in Section 111.70 (4) (cm) of the Act prior to initiation of arbitration. The Commission certified that conditions precedent to arbitration as required by Section 111.70 (4) (cm) 6 of the Act had been met and ordered on May 1, 1990, final and binding arbitration on final offers. The parties having selected Frank P. Zeidler, Milwaukee, Wisconsin, as arbitrator, the Commission issued an Order appointing him on May 23, 1990.

IV. FINAL OFFERS.

A. The final offer of the City of Two Rivers is as follows:

Article XI - Insurance Pension Termination

F. Termination Pay

Delete: "or for any other reason".

B. The Union final offer is:

"Modify the terms of the 1988-89 contract per the TENTATIVE AGREEMENTS."

V. FULL CONTRACT LANGUAGE INVOLVED. In order to more easily comprehend the meaning of the offers, the full contract language from the previous grievance which is involved here is given:

ARTICLE XI - INSURANCE, PENSION AND TERMINATION.

F. Termination Payment: Any employee who, after five (5) years of employment retires, dies, becomes disabled, or for any other reason leaves the service of the city in good faith, shall receive a termination benefit equal to one (1) days pay (8 hours of base pay) for each year of service completed with a maximum of One Thousand Five Hundred Dollars ($1,500.00). All years of service shall be computed from his/her original date of employment. A two week notice is required for employees retiring or leaving their job in order to qualify for the benefits outlined under this subsection.

VI. FACTORS TO BE WEIGHED BY THE ARBITRATOR. Section 111.70 (4) (cm) 7, Wisconsin Statutes is as follows:

"7. Factors Considered. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall give weight to the following factors:

"a. The lawful authority of the municipal employer.

"b. Stipulations of the parties.

"c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

"d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.

"e. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in the public employment in the same community and in comparable communities.

"f. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes in private employment in the same community and in comparable communities.

"g. The average consumer prices for goods and services, commonly known as the cost-of-living.

"h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

"i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

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

VII. LAWFUL AUTHORITY. There is no question here about the lawful authority of the municipal government to meet the terms of either offer.

VIII. STIPULATIONS. All other matters and tentative agreements have been stipulated to and are to be incorporated in the new agreement.

IX. COMPARISON OF CONDITIONS IN OTHER MUNICIPALITIES. Only two exhibits relating to a retirement or termination payout were introduced, both by the City concerning governmental units other than the City itself. In an agreement between Manitowoc County and Manitowoc County Highway Department Employees, Local 986, AFSCME, AFL-CIO, 1989-90, there are provisions for a retirement payout for accumulated sick leave, for a death benefit payout for unused sick leave, and for the County to pay the Wisconsin Retirement System an amount equal to 6% of the employee's gross wages. There is no provision for payout for leaving the service. (City Ex. 10).

In an agreement of 1989-91 between the City of Manitowoc and the City of Manitowoc Public Works Employees, Teamsters Local No. 75, there is sick leave payout after involuntary layoff, retirement or death. No other type of payout for leaving the service is in this agreement.

Positions of the Parties Summarized. The City takes the position that in external comparables, the language of the Manitowoc County Highway Department contract and the City of Manitowoc Public Works employees contract support the City of Two Rivers position. The benefit enjoyed by the City of Two Rivers public works employees is not found elsewhere.

The Union holds that little weight, if any, should be given to external comparables in this case. Historical comparables have not included Manitowoc City or County, but other cities of comparable population. While there is a dearth of comparable settlements, arbitrators are likely to give other factors more weight. The Union further argues that even if the governmental units in the external comparables do not have the provisions in termination of Two Rivers, the parties in Two Rivers in the past did bargain such a benefit which existed at the same time the benefit did not exist elsewhere.

Discussion. There is indeed a scarcity of exhibits with information on contracts with like termination provisions such as has existed in the City of Two Rivers employees contract. Yet the two exhibits lend a modicum of weight to the City offer. The arbitrator cannot conclude however that the City's type of contract provision is general among other governments in the area that might be comparable.

X. COMPARISON OF CONDITIONS WITHIN THE CITY OF TWO RIVERS EMPLOYMENT. The language of the preceding agreement which the City offers to change in Article XI, F in the 1988-89 agreement has been cited above.

In an agreement between the parties beginning January 1, 1969, a clause on termination payment provided that "any employee who retires, dies, or becomes disabled shall receive a termination benefit equal to one (1) day's pay (8 hours) for each year of service completed." (Union Ex. G)

In the 1970 addendum to the 1969 agreement the language of Article VII is in pertinent part, "Any employee who after years of employment retires, dies, becomes disabled, or for any other reason leaves the service of the city in good faith, shall receive a termination benefit equal to one (1) day's pay (8 hours) for each year of service completed, with a maximum of $1,000." (UX-H) This language was included in the 1971 agreement (UX "EYE") The same language was still in the 1978-80 agreement with the same dollar ceiling. (UX-J)

In the 1981 agreement, the language was the same except that the ceiling was set at $1,500 (UX-K). This is the same language in the current agreement.

In the 1987-88 agreement between the City and the Two Rivers Fire Fighters, I.A.F.F. Local 423, AFL-CIO, under Article 21, Severance Payment, there was a provision that any employee "after five years of employment retires, dies, becomes disabled, or for any other reason leaves the services of the city in good faith" would receive a termination benefit of one day's pay for each year of service completed, but for employees hired after January 1, 1982, the maximum benefit was $1,500. (CX VI)

In the I.A.F.F. Local 423 agreement for 1989-91 Article 21, Severance Payment, no longer has the phrase "or for any other reason." The maximum benefit remains at $1,500 for employees hired after January 1, 1982. (CX VII)

In the 1987-88 agreement between the City and the Two Rivers Professional Police Association, LEER, Article XI, 5 reads in pertinent part, "Any employee who after five (5) years of employment retires, dies, becomes disabled or for any other reason leaves the services of the City in good faith, shall receive a termination benefit equal to one (1) day's pay (8) hours for each year of service completed." There is a cap of $1,500 for employees hired after January 1, 1982. (CX-IV)

In the 1989-91 agreement between the Police union and the City, in Article XI, 5, Severance Pay, the phrase "or for any other reason" is deleted. A sentence is added: "After December 31, 1989, any person who leaves the service of the City for reasons other than retirement, death, or disability shall not receive severance pay." (CX-V)

In the City's 1987 policy statement for non-union employment, a termination benefit was provided for any five year employee who left the service of the City in retirement, death, disability, "or for any other reason" would receive the benefit of one day's pay for each year of completed service with a cap of $1,500 for employees hired after January 1, 1982. (C II)

Union Position on Internal Comparisons Summarized. The Union contends that the internal comparables, namely Police and Fire union contracts, support the Union offer. The Union asserts that the Police and Fire union contracts have a cap for employees hired after January 1, 1982, but employees hired earlier are grandfathered in without any cap. This provides a significant benefit for long term Police and Firefighters not enjoyed by other City employees.

Further there were differences in the Fire and Police union contracts in the past as compared to the City employees' contract, so that the most persuasive comparison is found in what the parties negotiated in the past contracts.

City Position on Internal Positions Summarized. The City asserts that the central issue in this matter is whether the Union can through interest arbitration, depart from the voluntary settlement pattern established among the other bargaining units of the City. The City cites the changes which have occurred in the Police and Firefighters units, and says that the City's proposed language in the matter here is identical to language negotiated in other bargaining units. These units settled voluntarily. The Union offers no evidence to justify its retention of the former language. Employees who retire, become disabled, or die will be entitled to the benefit. The proposed language affects only those who quit or are fired. In the past five years only one person received this benefit. There is no need for this benefit. The language is intended to "reward" the employees for continued service to the City. The City cannot be expected to reward employees who leave the City to work for another employer, and the City should not reward those who are discharged. The City's offer is the more reasonable.

The City notes that the City's position was adopted by the other bargaining units without any concessions or quid pro quo. These bargaining units received the same basic wage increase as City employees. The City cites portions of nine awards in arbitration in which arbitrators gave great weight to internal comparisons.

Discussion. As far as the absence of the phrase, "or for no other reason" in the termination provision of an agreement internally in Two Rivers, the pattern in the Firefighters and Police union clauses establish a predominance for the City's position on the phrase itself. However, the arbitrator notes that the termination or severance pay clauses in both Police and Fire union clauses, establish superior benefits for the members of these two unions. There is an uncapped benefit for those employees who have been hired before January 1, 1982. For those hired afterward there is a cap of $1,500 for this benefit. In the case of the City employees, all employees are capped at $1,500 in benefits. In the City employee union 37 of 49 employees are at a disadvantage in severance pay benefits as compared to Police and Fire union benefits. Thus, though the City achieved an omission of the disputed phrase as a reason to receive severance pay in the Fire and Police union contract, the arbitrator is of the opinion that one must look at the unique characteristics of each severance pay clause, because they represent a different balancing of the parties' interests and are therefore not fully congruent, and the amount of weight which accrues to the City's claim for comparability is diminished.

XI. COMPARISON OF CONDITIONS WITH OTHER EMPLOYEES GENERALLY. The parties did not address this issue.

XII. COST OF LIVING. Only the Union addressed this factor. In 1989 the CPI-W was up 5.1% from the previous year. In January 1989 it was up 2.8%. In January 1990 it was up 4.2%. (UX O, P, Q) In 1988 City employees received a 3% increase and in 1989 a 4% increase. In the portion of the 1990-91 agreement, there is a 3-1/2% increase for 1990 and a 4% increase for 1991. The Union argues that the City increases in salary have not kept up with the cost of living and that the City has taken a hardline on wages. Now the City is trying to take away another benefit. Cost of living in this case may be of small consideration, but according to the Union it tends to support the Union position.

Discussion. The cost of living changes are a factor to be considered, and lends again a modicum of support for the Union offer.

XIII. OVERALL COMPENSATION. This factor was not addressed by the parties.

XIV. OTHER FACTORS - TENTATIVE AGREEMENT ISSUE. The parties addressed matters that relate to other factors which are considered in arbitration. One of these is the weight to be given to a tentative agreement between the parties. The City emphasizes that the negotiating terms of the parties had agreed to eliminate the "or for any reason phrase," but the Union membership rejected it. The City holds that this tentative agreement gives considerable authority to the concept that if the parties voluntarily reached this agreement, therefore a deletion of such a phrase must be viewed as a fair base line. In reaching the tentative agreement, the Union bargaining team did not indicate that they would not fully recommend the settlement. Now, according to the City, the City employees are attempting to get a benefit through arbitration which no other Two Rivers employee has. The City cites seven awards in arbitration in which the arbitrator found that a tentative agreement established a reasonable basis for settlement.

The Union argues that the rejection of a tentative agreement by Union membership should not be given significant weight, if any, and cites 12 identified cases in which arbitrators have not given a determining weight to a tenative settlement which is later rejected by one or the other principals in a matter.

The Union notes that a tentative agreement must be distinguished from an agreement itself, and asserts that the parties as such did not reach agreement. Further the tentative agreement had to be ratified.

Discussion. It is the opinion of the arbitrator that there is a problem in giving great weight to the bargaining history and to tentative agreements. While the probative value of such agreements should not be ignored, yet the practice of arbitrators accepting the results of tentative agreements on which to base awards has inherent danger of shutting out effective voices of the principals in the dispute in favor of the bargaining teams. In this matter, the arbitrator does not consider the tentative agreement to be a major factor in determining the outcome of this matter.

XV. OTHER FACTORS - QUID PRO QUO. Another factor to be given consideration is the contention of the Union that the City offered no quid pro quo for taking away a benefit. The Union says that 37 out of 49 City employees with more than five years of service are eligible for a benefit which is worth up to $1,500. The Union cites Arbitrator Reynolds in Adams County (Highway Department), (25479-A) 11/22/88 to the effect that for a party to change language which has been previously agreed to, the party has the burden to show that the existing language has given rise to conditions that require amendment, that the language may be expected to remedy the situation, and that the alteration will not impose an unreasonable burden on the other party. The Union contends that the City did not meet these tests. According to the Union, the claim that the Union would enjoy a benefit that is inequitable because non-union personnel do not have it is not a critical factor. The idea of conformity advanced by the City is a self-induced proposition.

Further the Union says no need was demonstrated for a change, and the City did not provide any quid pro quo.

The City, on its part, notes the need for internal equity and also the fact that the Police and Fire Union contracts accepted language the City sought without any quid pro quo. Further the Union has no need for this type of benefit since only one employee in the last five years quit. Also the City emphasizes it should not have to reward people for quitting or when they are fired.

Discussion and Opinion. Many arbitrators, perhaps most, give some weight to the concept of quid pro quo when deciding on whether a change in previous contract language should be supported. The concept of quid pro quo has its value, but in final offer arbitration it should not stand as a bar to the parties bringing up any issue they wish. In the instant matter, while the arbitrator does not feel that the City would have to show any quid pro quo for its proposed offer, he nevertheless is not persuaded by the City's

argument advanced that there is a compelling need for uniformity. The existing benefit is not a major one, it has not been abused, and it is supported by a long acceptance of the present language. It would adversely affect a considerable proportion of the present employees in case of their seeking other employment or being laid off for whatever reason. The arbitrator therefore is of the opinion that the City has not experienced an urgent need to change the existing provision.

XVI. ABILITY OF THE UNIT OF GOVERNMENT TO MEET THE COSTS. There was no question raised as to the ability of the City to pay.

XVII. INTEREST AND WELFARE OF THE PUBLIC - ISSUE OF CONTINUATION OF THE BENEFIT. Certain arguments were advanced by the parties as to the interests and welfare of the public. The City argued that the interests of the public were against the continuing of the benefit upon termination for reasons other than retirement, disability or death. The City in effect was rewarding an employee who quit to work somewhere else. The Union's intention to retain the language is unreasonable and is disproportionate with voluntary Police and Fire settlements. The City considers it unreasonable to expect the City to pay out benefits to any one who quits or is fired.

The Union argues that the City has the view that termination pay to those who quit is an "unholy" provision and so in effect all bargaining units in the City are being held hostage to the City's concept of "righteousness." This is contrary to the elements of bargaining which require that the City demonstrate a need for change, offer a quid pro quo and show clear and convincing evidence of a need for change. The City has made a moral judgment on employees termination pay and by doing that risks the public interest and welfare by developing a code of arbitration based simply on personal preference. Not many employee benefits are liked by City officials, and if arbitration standards conform to what one or the other parties deems moral, decent, or desirable, the process of bargaining is diminished.

Discussion and Opinion. As the arbitrator views this matter, it is a question of whether a benefit such as termination pay after years of work is a deferred benefit based on longevity, or an unjust enrichment to employees which should be abolished. The arbitrator is of the opinion that it is a deferred benefit, since it has been contractually defined and agreed to in the past. Though the City may regard it now as an unreasonable award, yet the arbitrator is not persuaded that this is the case if an employee quits to improve his condition or is laid off. The interests of the public are not being injured by the continuation of the provision as the Union offer asks.

XVIII. INTERESTS AND WELFARE OF THE PUBLIC - ACTUAL LANGUAGE OF CITY OFFER. The Union makes the argument that the City offer is flawed, is open to misinterpretation and will lead to grievances. The Union points out the problem is in the way the language of the City offer would read. This is as follows: "Any employee who, after five (5) years of employment retires, dies, becomes disabled, leaves the city in good faith, shall receive a termination benefit..." The Union argues the remaining language, especially

"leaves in good faith" leads to absurdities and bizarre construction if it applies for example to dying. The Union further argues that the amended language can be interpreted to mean the same as the original. Despite the City contention, anyone who leaves the City employment in good faith will be able to grieve for the benefit. Arbitrators would attribute meaning to the words "leaves the service of the City in good faith." The Union cites arbitration awards in which the arbitrators decided not to accept ambiguous language.

The City says that the City's proposal changes no language but only deletes it, and it has been in the contract for many years, without any record of a grievance over it.

Discussion and Opinion. It is the arbitrator's conclusion that the proposed language of the City is ambiguous and can be interpreted to mean the same as the original.

The arbitrator concludes that owing to the ambiguity of the language, it is not in the interest of the public to adopt the City's offer as presently worded.

XIX. CHANGES DURING THE PENDENCY OF THE PROCEEDINGS. No changes have been brought to the attention of the arbitrator during the pendency of the proceedings.

XX. SUMMARY AND CONCLUSION. The following are findings and conclusions of the arbitrator:

1. There is no question as to the lawful authority of the unit of government to meet the terms of either offer.

2. The parties have stipulated to all other matters for a new agreement.

3. In comparisons with provisions in other units of government, though the arbitrator cannot conclude that the City's type of offer is general in the area, yet two exhibits of other governments lend a modicum of weight to the City's offer.

4. In internal comparison, within the City of Two Rivers union contracts, the absence of the phrase, "or for any other reason" is existent in the Fire and Police union contracts, and favor the City offer. However the termination benefits in these two contracts are superior to the City employees' contracts and the termination and severance pay clauses therefore are not fully comparable.

5. The parties did not make any comparison with conditions of other employees generally.

6. In cost of living changes, there is a modicum of support for the Union position in not losing a further benefit.

7. Overall compensation was not addressed by the parties.

8. As to the weight to be given to a tentative settlement between negotiators, the arbitrator does not consider this tentative settlement to be a major factor in determining outcome of the matter.

9. As to the matter of a quid pro quo not being offered by the City, the failure of the City to offer a quid pro quo when deciding on a change in the previous contract does not stand as a bar to consideration of the City's offer; however the City has not shown the necessity of uniformity in all its employee contracts owing to urgent need for a change or abuse of a provision.

10. There is no question as to the ability of the unit of government to meet the costs under either offer.

11. The interests and the welfare of the public are not injured by the continuation of the Union offer on termination pay.

12. The interests and welfare of the public will be adversely affected by acceptance of the City offer since the language as amended is ambiguous and will still leave open to interpretation the same conditions as exist presently.

13. No changes were brought to the arbitrator during the pendency of the proceedings.

In the summary of the most weighty factors in the foregoing, while the City offer better meets the test of comparability of language externally and to a degree internally, yet the City did not demonstrate a compelling need for a change and the proposed City language has an ambiguity which would negate its own intent. Based on these positions, and the foregoing analysis in general, the arbitrator makes the following award.

XXI. AWARD. The 1990-91 agreement between the City of Two Rivers and Two Rivers City employees, Local 76, AFSCME, AFL-CIO should contain the provisions of the Union offer.

Frank P. Zeidler

FRANK P. ZEIDLER

Date September 22, 1990