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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

EDWARD B. KRINSKY, ARBITRATOR

In the Matter of the Petition of	
TEAMSTERS UNION LOCAL #695	
To Initiate Arbitration Between Said Petitioner and	Case 39 No. 43505 INT/ARB-5571 Decision No. 26659-A
CITY OF WATERTOWN (DEPARTMENT OF PUBLIC WORKS)	

Appearances:
Lindner & Marsack, by Mr. James R. Scott, for the City.
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, by Ms. Marianne Goldstein Robbins, for the Union.

On November 13, 1990, the Wisconsin Employment Relations Commission appointed the undersigned as arbitrator "to issue a final and binding award, pursuant to Sec. 111.70(4)(cm)6. and 7. of the Municipal Employment Relations Act."

A hearing was held at Watertown, Wisconsin, on January 25, 1991. No transcript of the proceeding was made. At the hearing the parties had the opportunity to present evidence, testimony and arguments. The parties submitted post-hearing briefs. The record was completed on April 11, 1991, when the parties notified the arbitrator that they would not submit reply briefs.

There are three issues in dispute: wages, and two language proposals. The Union's wage offer is for an increase of 4% on January 1, 1990; 3% July 1, 1990; 4% January 1, 1991, and 3% July 1, 1991. The City's wage offer is 5% on January 1, 1990, and 4% on January 1, 1991.

The City proposes no language changes. The Union proposes the following additions to the existing language (the new proposed language is underscored):

Article III-WAGE RATE - WORKWEEK

3.08 The regular workday shall begin at 7:00 a.m. and end at 3:30 p.m. with one-half (1/2) hour off for lunch at 12:00 noon. Employees other than those assigned to sanitation work shall be granted a 15 minute lunch break each morning and afternoon provided they bring their own lunch and eat it on the job.

3.09 No summer help, part-time or probationary employees shall perform any work unless all regular employees who are available are working.

In making his decision the arbitrator is obligated to weigh the statutory factors. There is no issue between the parties concerning several of these factors and they will not be considered further: (a) lawful authority of the employer; (b) stipulations of the parties; (c) interest and welfare of the public and financial ability of the employer to meet the costs of the proposed settlement; (f) private sector comparisons; (i) changes in circumstances during the arbitration. The remaining factors will be considered below.

The parties do not agree about which municipalities are appropriate for use in making comparisons. The Union proposes municipalities in Wisconsin of similar population size to Watertown (18,113) which have the closest geographical proximity. In addition, the Union believes that two smaller municipalities in the Watertown area (Oconomowoc and Whitewater) also have relevance. The Union's proposed comparable municipalities are:

Neenah (22,432); Oconomowoc (9,909); South Milwaukee (21,069); Stevens Point (22,970); Whitewater (11,520) and Wisconsin Rapids (17,995).

The City proposes as comparisons the following municipalities in the Watertown geographical area:

Beaver Dam (14,294); Fort Atkinson (10,261); Oconomowoc (10,882); Sun Prairie (14,762) and Waupun (8,902).

The arbitrator accepts Oconomowoc as a comparison, since it is common to both parties' lists.

Union Recording Secretary Spencer testified that in its negotiations with firefighters, the City recognized Wisconsin Rapids, Stevens Point, Neenah and South Milwaukee as comparables. As a basis for this statement he cited a conversation between himself and the Mayor, and a newspaper article. The article from the January 31, 1989 Watertown Daily Times, included the following:

In negotiations with the finance committee, Knope said he pointed out the lower salaries for Watertown firefighters, compared to state communities of similar population, ranging from 18,000 to 23,000 people.

The 1988 salaries for the top firefighters in similar communities included $24,919 in Stevens Point, $27,563 in Neenah, $30,200 in West Bend, $29,735 in South Milwaukee and $29,686 in Wisconsin Rapids.

Spencer testified on cross-examination that he does not represent the firefighters and was not in their negotiations with the City. He testified also that he did not know for a fact that the cities mentioned in the newspaper article had been used by the City of Watertown for comparisons.

City counsel Scott testified that he has represented the City in negotiations since 1979. He testified that throughout the 1989-90 negotiations and current negotiations with the firefighters the City maintained the position that the only appropriate comparison was with Beaver Dam. On cross-examination Scott testified that in a police arbitration the City urged the arbitrator to use Whitewater as a comparison.

Scott also testified that in his judgment, while Whitewater was a relevant comparable in the police negotiations, it would not be one in the current proceeding. This is because in its agreements with AFSCME, the City of Whitewater had a COLA arrangement which generated high wage rates. Then, Whitewater bought out the COLA arrangement. The result of this history was that the wage levels in Whitewater are high and should not be used in comparisons with Watertown, which does not have a similar history. Scott agreed on cross-examination that if just proximity and population were considered, Whitewater would be an appropriate comparison.

As further support for its argument that the City did not limit its comparisons to Beaver Dam in the negotiations with the firefighters, the Union cites a January 18, 1989 letter to Spencer from Scott which states, in part:

> . . .During negotiations this year the Firefighters presented a compelling argument that, when compared to comparables (and that is the name of the game), they slipped considerably lower. . . .

The City introduced into evidence an August, 1990 arbitration award between it and the Wisconsin Professional Police Association. In that proceeding, according to Arbitrator Gundermann, the City urged use of Beaver Dam, Fort Atkinson, Waupun and Whitewater as appropriate comparisons. Gundermann noted that all of these except Whitewater, were among the comparables used in a prior arbitration between the City and the police decided by Arbitrator Zeidler. Gundermann noted that in the matter before him the Association was urging use of Cudahy, Menasha, Neenah, Wisconsin Rapids, Stevens Point and Manitowoc which it asserted had been used by the City and firefighters in their negotiations. Gundermann stated:

> The first issue which must be addressed is the selection of comparables. The Association includes among its comparables Cudahy, Menasha, Neenah, Wisconsin Rapids, Stevens Point and Manitowoc. Its rationale for selecting many of these cities as

comparable is that it includes the same cities relied upon by the City and the firefighters in arriving at an agreement. The City's comparables include Beaver Dam, Fort Atkinson, Waupun and Whitewater. All but Whitewater were among the comparables used by Arbitrator Zeidler in a previous case involving the bargaining unit and the City.

As noted by the Association, one of the factors frequently relied upon by arbitrators in selecting comparables is geographic proximity. Even a cursory review of the comparables urged by the Association clearly establishes that many of its proposed comparables are not in geographic proximity to the City. While it may be true that in the case of the firefighters a broader geographic base of comparables was considered, it was done so out of necessity; there were simply too few departments in geographic proximity that had full-time personnel to permit a fair comparison. Consequently, the parties went beyond the normal geographic area to find comparables. No such necessity exists regarding police departments. There are a number of full-time departments in geographic proximity to the City.

In selecting its comparables the City failed to include two cities which Arbitrator Zeidler concluded were comparables--Oconomowoc and Sun Prairie. It is argued by the City that both Oconomowoc and Sun Prairie are influenced by Milwaukee and Madison respectively, and for this reason should not be included among the comparables. The City does include Whitewater in its listing of comparables, although it was not among the comparables used by Arbitrator Zeidler, according to the City.

Where, as in this case, the comparables have been established by an arbitrator, the undersigned is of the opinion those comparables should be retained unless there is some evidence that the original selection of comparables was inappropriate. There is no evidence in this case to indicate that the comparables selected by Arbitrator Zeidler were inappropriate. Once appropriate comparables are established their retention adds a degree of predictability to the bargaining process and the extension of the bargaining process, arbitration. Therefore, the undersigned is persuaded the most appropriate comparables for this case are those used in the prior arbitration.

The arbitrator is not persuaded by the Union's testimony and evidence that the City ever used, or agreed to use, as comparisons the cities suggested by the Union in this proceeding, even if the Union is correct that the City didn't limit comparability to Beaver Dam. Moreover, many of the Union's suggested comparables are not anywhere near Watertown. Although they may be of comparable population size, there is no reason to suggest that they share a labor market with Watertown for public works employees. For these reasons the arbitrator does not feel that Neenah, Stevens Point, and Wisconsin Rapids are

appropriate comparisons. Of the Union's suggested comparisons, only South Milwaukee is reasonably close geographically, but its terms and conditions of employment are undoubtedly heavily influenced by its location in the metropolitan Milwaukee area.

In its brief the Union argues against use of the City's comparables because the duties performed by the public works employees in Watertown are different than in the smaller communities cited by the City. They require greater skills and responsibilities according to the Union. The Union states:

> . . .The departments in smaller communities such as Ft. Atkinson, Sun Prairie and Beaver Dam do not do road construction and masonry work. Instead, this type of work is contracted out in the smaller communities and the DPW unit performs primarily smaller repair jobs such as patchwork, brush removal, etc. By contrast, the Watertown DPW does masonry and road construction, which require more skill and responsibility.

The only evidence presented on this point which is specific to the duties done by employees in the cities used by the City for comparisons, is the testimony of Union steward Bratz, a Leadman in the Street Department, who testified that such work is contracted out by Fort Atkinson. The basis of his knowledge, he testified, was "from talking to people." There was no testimony or evidence given by Bratz or other witnesses pertaining to the job duties performed in the other cities used by the Union or the City for comparisons.

It is the arbitrator's opinion that the evidence presented is insufficient to allow him to make any judgment about whether there is a difference between the duties performed by the employees in Watertown in comparison to other jurisdictions utilized by the parties, much less to make a judgment about whether such differences are significant enough to affect the choice of comparables or the manner in which they are utilized in this proceeding.

In terms of their geographic proximity and size, the arbitrator believes that the most appropriate comparisons are with Beaver Dam and Sun Prairie. A second group, though smaller in population, is appropriate for the same reasons, namely Whitewater, Fort Atkinson and Oconomowoc. Waupun is further away and much smaller, and there is no particular reason to include it in the comparisons except that it was included in the Zeidler and Gundermann arbitration awards. The Zeidler award is not in evidence and thus the arbitrator does not know the particular reasons that Zeidler had for including Waupun. In conclusion, the arbitrator has decided to focus his attention on Beaver Dam, Fort Atkinson, Oconomowoc, Sun Prairie and Whitewater.

Wage Issue

Factor (d) requires the arbitrator to weigh comparisons with other employees performing similar services. Both parties presented data making such comparisons.

The most complete data are for those classifications which are common to all of the comparison municipalities, namely General Laborer and Mechanic. For 1989 the median of the five comparison municipalities for General Laborer for 1989 was $10.07. The parties agree that the average rate for General Laborer in Watertown was $9.56 (51 cents below the median). The City's rank was 5 out of 6. For 1990, the median was $10.50. The City's final offer is $10.13 (37 cents below the median) and the Union's final offer averages $10.19 (31 cents below the median). The rank remains 5 out of 6 under either proposal. Thus, the rank is maintained, and both offers are closer to the median of the comparables than was the case in 1989. For 1991, only three of the comparison municipalities have settled. They are (with the percent increase for 1991): Beaver Dam (4.1%); Oconomowoc (3.0%) and Sun Prairie (4.5%). The City's final offer (4.0%) is considerably closer to these figures than is the Union's final offer (7.1%).

For Mechanic, in 1989 the median of the five comparison municipalities was $10.84. The parties agree that the average rate for Mechanic in Watertown was $10.26 (58 cents below the median). The City's rank was 5 out of 6. For 1990, the median was $11.33. The City's final offer is $10.88 (45 cents below the median) and the Union's final offer averages $10.93 (40 cents below the median). The rank remains 5 out of 6 under either proposal. Both offers are closer to the median than was the case in 1989. For 1991, only three of the comparison municipalities have settled. They are (with the percent increase for 1991): Beaver Dam (3.8%); Oconomowoc (3.0%) and Sun Prairie (4.5%). The City's final offer (4.0%) is considerably closer to these figures than is the Union's final offer (7.1%).

In the arbitrator's opinion, the analysis of external comparables favors the City with respect to the percentage increase offered, but favors the Union insofar as the gap between the City and the median of the comparables is reduced further under the Union's final offer than the City's final offer. Under both final offers the employees continue to be below the comparison employees, but not as far below under the Union's proposal.

There is no historical data presented (nothing prior to 1988) which enables the arbitrator to know what the relative position of Watertown has been in relationship to the comparable communities in the past, and thus there is not a basis rooted in the past for making a judgment about what the relative position should be at the present time. There is no evidence, for example, that the City's position in relationship to the comparables has been deteriorating, or that there has been a change in where the City ranks among the comparables. For this reason the arbitrator views it as appropriate to focus on the size of the wage increase offered for 1990 and 1991. The City's offer is preferred from that standpoint.

The arbitrator has not made similar comparisons for wage increases offered to job titles other than Mechanic and General Laborer. That is because job titles vary among the comparables and it is not obvious which titles to use in making comparisons, and no information is presented about the duties performed by the various titles.

Factor (e) requires the arbitrator to weigh comparisons with ". . .other employees generally in public employment in the same community and in comparable communities." The only such data presented by the parties were for other employees of the City of Watertown, the so-called "internal comparables."

For 1990 the settlements with other bargaining units were the across-the-board settlements for firefighters of 4%, and police of 5%. Non-represented employees received 5%. Negotiations for 1991 had not yet been completed, and thus provide no basis for comparisons.

For 1990, the City's final offer of 5% is closer to what other units received than the 5 1/2% average settlement offered by the Union. Moreover, none of the other units received the 7% lift (4% + 3%) which the Union has proposed. Thus, based upon internal comparisons, the City's final offer on wages for 1990 is preferred.

The Union argues that these internal comparisons must be corrected to account for the large increase given to firefighters in 1989 as part of their 1989-90 settlement, which the Union claims should have been given to it also as part of a "me too" agreement. The discussion of the "me too" argument and the arbitrator's disposition of it is found below, where factor (j) is discussed.

Factor (g) requires the arbitrator to consider "cost of living." For a 1990 calendar year contract, the relevant period for determining the impact of the cost of living is to look at the prior year, 1989. That is, how did the cost of living change from 1988 to 1989, and how have the parties factored that into their final offers for 1990? Neither party provided cost of living data showing what happened to the cost of living during 1989 in contrast to 1988.

The City's exhibits show the percentage increase in the All Cities index for each month of 1990 in contrast to that same monthly period in 1989, through November. The Union's data provide the December data. If all of these monthly figures are averaged, they show that the average monthly change for 1990 in the All Cities index was 5.3% higher than for the same period in 1989. Similar data were not provided for the Small Metropolitan or Non Metropolitan indices, which might have more relevance to Watertown than the All Cities index.

Using this data as a basis for evaluating the parties' offers for 1991, the City's wage offer of 4.0% is below the cost of living change. The Union's offer (5.5%) is slightly above the change and is justified by the change in the cost of living. However, when the increased cost of health insurance is added to the mix, the City's cost of wages and health insurance (5.0%) is much closer to the change in the cost of living index than is the Union's cost increase resulting from the Union's offer (6.5%).

It would appear that there is a slight preference for the City's final offer, based upon cost of living changes. However, since there were no 1988 to 1989 change figures presented, no meaningful evaluation of the 1990 offers

could be made, nor an evaluation of 1990 and 1991 combined. Thus, the arbitrator does not view the cost of living evidence provided as being particularly useful in this case.

Factor (h) requires consideration of "overall compensation." The City presented the only figures relating to this factor, showing the costs of the final offers. For 1990, including wages, retirement, and FICA, the cost of the Union's offer exceeds the cost of the City's offer by $5,093. For 1991, the cost of the Union's offer exceeds the cost of the City's offer by $35,355. Thus the two year cost difference is $40,448. There are 38 employees in the bargaining unit.

City exhibits also show that the total cost increase of wages and health insurance offered by the City of 7.4% in 1990 and 5.0% in 1991. The Union's offer, according to the City, costs 9.5% and 8.1% for those same periods. The City does not show how it arrived at the cost figures which it attributes to the Union's wage offer at Exhibit 15. Since the Union's average wage increase during both years of its final offer is 5.5%, it would appear that a 5.5% figure should be used for wages, not the 7.1% figure shown. This would produce figures for the Union's wage and insurance costs of 7.4%, not 9.5% and 8.1%.

The City does not present overall compensation figures in relationship to the increases in overall compensation given to internal or external comparison groups. While clearly the Union's proposal results in greater overall costs than does the City's, the arbitrator does not have a basis for deciding that one party's proposal is more reasonable than the other in relation to the overall compensation factor.

The arbitrator must also consider factor (j) "all other factors. . . normally. . .taken into consideration in the determination of wages. . . through voluntary collective bargaining (and) arbitration. . . ."

The Union asserts that there is such a factor which should be taken into account in determining which wage offer should be implemented in this proceeding.

Spencer testified that in the negotiations which resulted in a voluntary 1988-89 Agreement, the Union settled with the City before the other bargaining units did. In so doing, he testified, the Union was told by the City that no other unit would get a higher settlement unless it was awarded through arbitration. This was a verbal agreement. He testified that for 1989 the Union agreed to a 2% increase on January 1st and another 2% on July 1st. Other units subsequently received a 4% increase on January 1st, for 1989.

Spencer testified that he made a request of the City to rectify the situation and he was told that the full Finance Committee would not agree to it. Spencer was asked on cross-examination if in his experience it was normal for such "me too" agreements to be made verbally. He responded that it happens that way "a lot of the time."

Spencer's letter to the City's Finance Committee, written January 11, 1989, is as follows:

It has been brought to my attention the Finance Committee has refused to give the salary increase to the Department of Public Works and Parks employees represented by Teamsters Union Local No. 695 as they have other city employees.

During negotiations we were told by your Committee that if we settled, other bargaining units would not get more than we did unless it was given by an arbitrator. I understand we have a labor agreement and we will live with it until it expires. But you can be assured that I will no longer take the Committee for their word. The bargaining unit and the stewards feel they have been betrayed by me and the City, and I don't blame them.

Scott responded to Spencer on January 18, 1989, as follows:

I received a copy of your letter of January 11th directed to the Finance Committee concerning proposed pay increases for the Firefighter unit for 1989 and 1990. Both the Committee and I pride ourselves on living up to verbal commitments. When people use language as strong as "betrayal" to characterize actions by the Committee and myself, I feel obliged to respond.

To set the record straight, we advised all bargaining units in the fall of 1987 that none would get a greater increase than the other during those negotiations. Needless to say, we did not commit to holding increases on par forever. Your unit and the Police agreed to two year contracts and the Firefighters agreed to a one year agreement. We honored our commitments concerning pay increases.

During negotiations this year the Firefighters presented a compelling argument that, when compared to comparables (and that is the name of the game), they slipped considerably lower. Additionally, the Firefighters themselves had absorbed an increased work load and added responsibilities without increased overtime. In light of those facts, we included a substantial lift in current rates.

Rather than expending their energies on feeling "betrayed", you might advise your group that a rededication to providing the City and its taxpayers with more effort for the tax dollars expended will yield more productive results at the bargaining table.

Scott testified that the City settled two year agreements with the Union and with the police Association for 1988-89. The agreement reached with the firefighters was for one year (1988). Scott did not deny the existence of a verbal "me too" agreement as demonstrated in his January 18, 1989 letter, but

he testified that in the City's view, the 1989 settlement with the firefighters was not covered by it, since that was a later round of negotiations. He acknowledged, however, that it was the City's intent originally to negotiate two-year agreements with all three bargaining units for 1988-89, including the firefighters.

In its brief, the Union makes the following arguments with respect to the "me too" agreement and how it should affect the current proceeding:

> More importantly, the percentage increases provided in 1990 must be considered in the context of negotiations for the prior contract period. During the last round of bargaining for the present DPW unit, the City represented to Teamsters Local 695 that it would not provide any greater increases to other Watertown employees. Trusting the City's representation, the Union agreed before the other units settled to a modest increase, which was split in 1989, thereby further limiting the average increase over the entire year.
>
> The City then turned around and granted the firefighters union a whopping 16% increase over a two year period commencing January 1, 1989. Other units received the entire 1989 increase effective January 1. On January 11, 1989 the Union protested the City's breach of its agreement that no other unit would receive more by voluntary settlement and that more could be expected in the next round. In response, the City acknowledged that it had "advised all bargaining units in the fall of 1987 that none would get a greater increase than the others during those negotiations." (City Exh. 20). The City, however, contended that it had not violated that representation in granting the higher catch-up increase to the firefighters, because the firefighters had negotiated a one year in 1988 and were involved in a second negotiation covering 1989.
>
> The City's explanation only underscores the disingenuous nature of their representation. The City knew it was negotiating a two year agreement with the Teamsters in the fall of 1987 covering 1988 and 1989. Certainly the City understood that a representation that no unit would receive a higher increase during those negotiations covered the years for which the Teamsters union was negotiating. The City offered no explanation as to why it had granted the full 1989 increase on January 1 for other employees rather than insisting on the same split it had obtained from the Teamsters.
>
> The City cannot compare its percentage offer here of 5% with the 4% increase negotiated with the firefighters when the unit received a 16% increase over the 1989-1990 contract. In this context the Union offer of 14% over two years is conservative. There is no evidence that the police and unrepresented are entitled to catch up as the DPW unit is now and as the firefighters were in 1989. Moreover, by failing to hold to the same line with those units in the last round of negotiations, the

City has lost credibility in making the comparison now.

> The Teamsters agreed to a moderate increase during 1988-1989 on the City's representation that this was all the City had to offer anyone. This turned out not to be the case. The Union is certainly entitled to catch up now over and above that provided to other units to bring the unit up to where it should have been in relation to comparable DPW units had the City not deceived it in the prior round of negotiations.

The City urges rejection of the"me too" argument. It states in its brief:

> During negotiations with all three City bargaining units in the fall of 1987, the City agreed that no unit would get a larger increase than any other. The Department of Public Works and police signed two year agreements covering 1988 and 1989. The firefighter unit agreed to a one year contract. No claim is made that the units received different increases during those negotiations. In the fall of 1988 the City negotiated a two year agreement (1989-1990) with the firefighters that provided a larger pay increase during 1989 than the Department of Public Works or the police had earlier negotiated. (See gen. City Ex. 20 and Un. Ex. 13.)
>
> The Union now argues that the City's verbal commitment was breached when it gave the firefighters a larger increase for 1989 and that the Arbitrator should consider that fact when deciding this matter. The Union is in effect attempting to obtain relief for an alleged prohibited practice (breach of a collective bargaining agreement per sec. 111.70(3)5, Stats.) through the interest arbitration process. The Union's claimed prohibited practice is barred by the one year statute of limitations for the bringing of such claims. Sec. 111.07(14), Stats. incorporated by reference in Sec. 111.70(4)(a), Stats. Giving consideration to the argument that the City committed a prohibited practice, after same is time-barred, allows an unwarranted collateral attack on a settled issue.

It is undisputed that there was no written "me too" agreement. However, the arbitrator is persuaded by the evidence and testimony that there was a verbal "me too" agreement. What is at issue is what the agreement was and what application it should have to the present proceeding.

In the arbitrator's experience, "me too" clauses are a means by which parties achieve an agreement where there is a reluctance by a bargaining unit to settle a contract because of the possibility that another unit will hold out longer and receive a better settlement. With a "me too" agreement, a bargaining unit can reach a settlement knowing that it will not do worse than those units which settle later, since anything better will be given to them as well.

The evidence in this matter is that the Union reached agreement for 1988-89 after being assured of a "me too" agreement, albeit a verbal one. It is only logical that in so doing the Union would view the "me too" provision as covering the same period as its bargain. That is, with wage increases agreed upon for 1988 and 1989, the Union would logically and rightfully expect that whatever wage agreements the City reached with other bargaining units for 1988 and 1989, those other units would not be treated more favorably. It is not conceivable to the arbitrator that the Union would have said, this is a 1988-89 Agreement that we are reaching but the "me too" agreement is just for 1988, and you can give higher wages to other units for 1989. The City offered no evidence, other than Scott's letter to support its assertion that the "me too" agreement was not meant to cover the firefighters 1989 settlement. In fact, Scott's testimony in that regard is even less clear than his letter. He testified that when he wrote the letter, he was not sure that there was a verbal agreement, but if he said in his letter that there was an agreement, he was willing to stand behind what he wrote.

There are difficulties with the Union's argument about application of the "me too" clause to the present proceeding, however. First, as already stated, it was a verbal agreement. There is no record of what the agreement was, or how it was stated or understood. Thus, even if logic says that a "me too" agreement reached during a 1988-89 bargain would cover the results of bargaining involving other units for 1988 and 1989, this conclusion is speculative as applied to the present dispute. There is no evidence presented about what was mutually understood. The Union has not presented any evidence which rebuts the City's contention that there was no mutual understanding that what was granted to firefighters in 1989 as part of a 1989-90 agreement would be given to the Union also. Not only is there no written agreement; there were no bargaining notes or initialed tentative agreements presented which would support the Union's case that the parties had a mutual understanding.

The second difficulty, about which the City argues at length, above, is that the Union did not take any action to seek enforcement of the alleged "me too" clause and that it should be precluded from doing so through interest arbitration. The arbitrator does not know what the outcome of any such action would have been had the Union filed a prohibited practice with the WERC or requested a declaratory ruling. Conceivably, had the WERC upheld the Union's allegations, it would have ordered a remedy which would then have affected the parties' final offers in the present proceeding. However, that is all speculation since no such action was taken.

The arbitrator has concluded that he should not consider the "me too" agreement as an "other factor" in this proceeding. In his opinion, the "other factors" criterion is not meant as a substitute for the Wisconsin Employment Relations Commission's proceedings. Clearly what the Union is arguing here, although not in these precise terms, is that by not implementing the "me too" clause the City did not bargain in good faith. Claims of prohibited practices based on allegations of bad faith bargaining should be determined by the WERC. They should not be brought before an interest arbitrator. The language of the statutory factor (j) is:

> Such other factors. . .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 arbitrator's opinion, the existence of alleged bad faith bargaining in the past is not a factor which an interest arbitrator normally or traditionally takes into consideration in these matters.

Language Issues

It is undisputed that the language changes proposed by the Union have been included for the first time in the negotiations which preceded this arbitration. That is, they have not been issues in past negotiations.

(1) Hours of Work

There was testimony concerning the Union's proposed language changes. The proposed changes are quoted at the beginning of this Award. Spencer testified that the Union wants to have the regular hours of work stated in the Agreement. Such a statement is included in all comparable agreements, he testified. The Union is not seeking to change the normal working hours which have been in effect for many years. He testified that the Union's proposal would not restrict the City's right to have employees work eight hours before they would receive overtime pay.

On cross-examination Spencer testified that he was not familiar with the practices in the Streets Department, but what has happened in the past would continue, and the new language would not require payment of overtime. He testified, also, that the City could unilaterally change hours of work temporarily, as it has done in the past. He acknowledged that the City would have to pay call-in pay if it unilaterally changed hours for a longer period of time. Asked by Scott if the City could change the schedule and have employees work from 1:00 a.m. to 9:00 a.m. for three weeks at a time, Spencer responded that the best way for the City to know the effects of the language is to "call me and talk to me about it."

Bratz testified about the proposed change. Asked why the Union wanted to change the language of the Agreement, he testified that it was for protection against the City changing the employees' family lives, as would occur for example if, because it was raining out, the City wanted the employees to be scheduled from noon onward instead of the regular starting time of 7:00 a.m. On cross-examination Bratz testified that the Union's language would not prohibit the City from having a noon starting time for employees. He testified that the purpose of the language is to have agreement on a regular starting time of 7:00 a.m. The purpose is not to get more overtime pay. He acknowledged that in the past the parties have talked over schedule changes and worked them out. Bratz testified also that he believes that under the Union's proposed language, the City would be obligated to discuss scheduling changes with the Union.

City Street Superintendent Field testified that on occasion employees work different hours than the normal 7:00 a.m. to 3:30 p.m. with half hour off for lunch. This scheduling is done using common sense and judgment in order to avoid working during heavy traffic times. Thus, there is night work done for such things as street sweeping and painting, snowplowing and bridge maintenance.

Field prepared an exhibit, from employees' time cards, showing work performed by full-time Streets employees, at regular pay, outside of the 7:00-3:30 hours. There was a total of 1,257.5 hours in 1990. He testified that if there had been a requirement that these hours be paid at time and one-half, the extra cost to the City would have been $6,334.05. Field did not do such an analysis for 1989. He guessed that there had not been an increase of such hours from 1989 to 1990.

The Union argues that its proposal to include hours of work in the Agreement is a reasonable one. It states in its brief:

> The Union does not, by its proposal, seek to change the compensation paid for work outside these work hours. Rather, the purpose. . .is to protect employees against a unilateral change in the existing work day under nonemergency circumstances.

The Union argues further that its proposal is "completely in line with virtually all of the comparable communities. . . ." Since, the Union argues, "the City has presented no countervailing evidence that the proposal is not reasonable. . .therefore, the Union's proposal must be considered the more reasonable."

The City argues that the proposed language is ambiguous, and that it is not clear under what circumstances, and for how long, the City would be able to deviate from the hours specified in the Union's proposal, or how it might affect its obligation to pay overtime. The City cites Spencer's testimony which emphasizes the parties' past working relationship to straighten out problems as assurance for working out future ones, and views these assurances as inadequate.

The City argues also that there has been no evidence presented asserting or proving that the City has been arbitrary in its scheduling practices. It argues that the Agreement already guarantees, in the Management Rights clause, that there will be "reasonable schedules of work," and there is a guaranteed 40 hour work week and a Maintenance of Standards provision.

The City argues that the Union has shown no compelling reason for achieving the proposed change through arbitration, noting that this language has not been discussed prior to the current round of bargaining. The City argues also that in relying upon external comparisons, the Union has not taken account of significant language differences in the contracts in these jurisdictions.

In the arbitrator's experience, it is not at all unusual for labor agreements to include a statement of what the regular or normal hours of employees will be. The evidence presented demonstrates that there is such language in the agreements covering public works employees in Fort Atkinson, Oconomowoc, Sun Prairie and Whitewater. Thus, comparability supports the Union's position on this issue.

As noted above, the City is concerned about potential overtime liability. Overtime, however, is paid based on language in an agreement which governs payment of overtime. The existing language on overtime, from the 1988-89 Agreement provides for "Time and one-half (1½)...for all hours in excess of eight (8) hours per day or forty (40) hours per week, whichever is the greater." The proposed statement of what constitutes regular hours would not necessarily affect when payment of overtime is required.

The arbitrator is on record in numerous decisions as saying that language changes should be bargained by the parties, not imposed by arbitration, where possible unless there are compelling reasons for making the changes through arbitration. It is the arbitrator's view that such compelling reason does not exist here. The arbitrator is not against the substance of the proposal, and as already noted it is common among the comparables. However, the proposal has been introduced in negotiations for the first time, and there is no evidence presented to indicate that the City has changed the regular hours of work, or has plans to do so.

(2) Layoff Language

The Union's second language proposal would prohibit the City from laying off full-time employees if there were part-time employees still working.

Spencer testified that in the past, although not recently, the City has used part-time employees to do bargaining unit work. The Union is proposing the language change to make sure that if the City does use part-time employees, it will first lay them off before laying off full-time employees.

Bratz testified that since 1989 the City has made greater use of part-time employees than formerly, and these employees are being used throughout the year, not just during the summer. The bargaining unit employees want to protect their jobs for the future, he testified. They have not been hurt thus far, however.

Field testified that the Streets Department employs one part-time employee on a permanent basis, and up to ten others. They assist with such things as street painting and yard waste, and at times work on nights, evenings and weekends. In the Parks Department there are approximately 120 part-time employees employed throughout the year doing maintenance jobs, and working in the recreation program as referees, coaches and swim instructors. On cross-examination he testified that there are more part-time employees used by the City now than was the case in 1986 or 1987. In the Streets Department, according to Field, the part-time employees do the same kind of work as is done by full-time employees. In the Parks Department there is one part-time employee who is kept employed by the City other than during the Summer.

Spencer testified that during the negotiations the City never objected to the Union's proposal based on its potential effects on Summer recreation program. Spencer reiterated that the Union's only interest in part-time employees was protection against their being used to do bargaining unit work. On cross-examination Spencer acknowledged that the Union's proposal doesn't refer to specific part-time employees. He stated that the Union's intention is that the language refer only to those covered by the Recognition article of the Agreement.

The testimony by the City is that there are many people employed part-time as referees, coaches and swim instructors, and it would not be reasonable to insist that these employees be laid off prior to laying off full-time employees in the Streets Department, or in unrelated classifications in the Parks Department.

The Union argues that the subject of referees, coaches and swim instructors never came up in negotiations and it has no intention of interpreting its proposed language to pertain to them. It is interested in protecting the job security of full-time employees in the bargaining unit. It notes the existing language of the Agreement:

> 3.09 No summer help, or probationary employee shall perform any work unless all regular employees who are available are working.

The Union wishes to strengthen the protection of full-time bargaining unit employees, by adding "part-time" to the language of 3.09.

The City argues that the Union's proposed change is ambiguous and, if implemented, will present the City with "a Hobson's choice: either eliminate City recreation programs or avoid layoffs of full-time employees," because of the many part-time employees in the recreation program. While the Union offered testimony that no such interpretation is intended, the City argues that the language is not limited to "bargaining unit work," as Spencer intends, "whatever that is," since that term is not defined in the Agreement.

The City argues also that there is no compelling reason for the arbitrator to order the inclusion of this language, which has not been an issue prior to the current round of bargaining. The City notes also that ". . .no showing was made that part-time employees had been sheltered from layoff or that any history of layoffs existed."

The arbitrator's study of the other agreements in the record reveals that among the comparables, only Fort Atkinson has language of the type being proposed here by the Union. Thus, comparability favors the City on this issue.

The Recognition Article of the Agreement covers "all employees of the City of Watertown employed in the Department of Public Works." It says nothing specific about part-time employees, and thus, presumedly, they are covered by the Agreement. The Union correctly notes, however, that the parties' wage schedule on page 17 of the Agreement lists the employee classifications covered by the wage schedule, and there is no reference there to the recreation program, referees, coaches or swim instructors. This makes

plausible the Union's arguments that the employees which it envisioned being covered by its proposal are those doing the normal work of the bargaining unit, as listed in the wage schedule. Despite these stated intentions, the fact remains that the language proposed does not make distinctions among different kinds of part-time employees and, if put to the test, the language could be interpreted to require the layoff of part-time recreational employees before full-time employees in the classifications listed in the Agreement.

There is nothing in the record that provides compelling reasons for inclusion of this proposed language at this time. The proposal is not supported by the comparables, and there is no indication that the City is laying off employees, or planning to do so, or that it would put the interests of part-time employees ahead of full-time ones.

As stated above, the arbitrator is of the opinion that unless there are compelling reasons for an arbitrator to adopt new contract language, the adoption of such language should, where possible, be left to the parties' negotiations. It is undisputed that the proposed language changes at issue here were raised by the Union in the current negotiations for the first time, and the arbitrator is not persuaded that there are reasons at this time which should make him impose this language, and especially where the language is not clearly drafted to reflect the intent of the party which is proposing it. Thus, on the issue of the layoff language, the arbitrator favors the City's position.

Conclusion

The arbitrator is required by statute to choose one final offer in its entirety.

With respect to the wage issue, the arbitrator has concluded that the City's final offer is preferred based upon the evidence concerning external and internal comparables. With respect to the language issues, the arbitrator has found no compelling need to impose the changes, although the "regular hours" proposal is supported by the comparables. The language pertaining to "part-time" employees is not supported by comparables and there is the added problem that the Union's intent, stated in evidence and arguments, is not adequately reflected in the proposed change. There is the possibility that if the language were implemented, there would be repercussions on departmental staffing which the Union did not intend. A more carefully drafted language proposal is needed in order to accomplish the Union's purpose without doing potential harm to staffing. Thus, the arbitrator's preference is clearly for the City's final offer on the second language issue.

On balance, the arbitrator has decided that there is more reason for him to support the City's final offer than the Union's final offer.

Based upon the above facts and discussion, the arbitrator hereby makes the following

AWARD

The City's final offer is selected.

Dated at Madison, Wisconsin, this 2nd day of May, 1991.

Edward B. Krinsky
Arbitrator