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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN
BEFORE THE ARBITRATOR

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In the Matter of the Petition of

OPINION AND AWARD

DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES
UNION, LOCAL #75, A/W IBTCW & H of A

To Initiate Arbitration
Between Said Petitioner and

Case 210
No. 45419 INT/ARB-5977
Decision No. 26948-A

CITY OF GREEN BAY
(DEPARTMENT OF PUBLIC WORKS)

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APPEARANCES:

On Behalf of the City: Judith Schmidt-Lehman, Assistant City Attorney-- City of Green Bay

On Behalf of the Union: Marianne Goldstein Robbins, Attorney - Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S. C.

I. BACKGROUND

On October 3, 1990, the Parties exchanged their initial proposals on matters to be included in a new collective bargaining agreement to succeed the agreement which expired December 31, 1990. Thereafter, the Parties met on six occasions in efforts to reach an accord on a new collective bargaining agreement. On March 6, 1991, the Union filed a petition requesting that the Commission initiate Arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act. On April 3, 1991, a member of the Commission's staff, conducted an investigation which reflected that the Parties were deadlocked in their negotiations, and, by July 19, 1991, the Parties

submitted to the investigator their final offers, written positions regarding authorization of inclusion of nonresidents of Wisconsin on the arbitration panel to be submitted by the Commission, as well as a stipulation on matters agreed upon. Thereafter, the Investigator notified the Parties that the investigation was closed and advised the Commission that the Parties remain at impasse.

On July 30, 1991, the Commission ordered the Parties to select an Arbitrator. The undersigned was so selected and the Commission ordered his appointment on August 8, 1990.

A hearing was held on January 9, 1992. Post hearing briefs were exchanged February 18, 1992. Certain post hearing evidence was submitted by the Parties and was received February 21, 1992.

II. ISSUES AND FINAL OFFERS

The Parties' final offers are identical except for the proposals concerning sick leave. Of those matters not in dispute, the most significant is duration and wages. Both Parties propose a three-year contract with a 4% wage adjustment in each contract year.

With regard to sick leave, the Employer makes a proposal to modify the current sick leave plan. The union proposes to retain the current language, which reads as follows:

ARTICLE 20

SICK LEAVE OR EMERGENCY LEAVE

Each full-time employee of the City will accumulate sick leave with pay at the rate of one (1) working day for each month of service, up to a maximum of 135 working days. An employee may use sick leave with pay for absences necessitated by injury or illness to himself or of a member of his immediate family, exposure to contagious disease, or required dental care. Employees, when possible, will schedule doctor appointments outside of normal working hours. When doctor appointments are scheduled during normal working hours, employees will be charged from sick leave for actual time lost. However, employees will not be charged from sick leave for absences from work necessitated by follow-up doctor visits due to workers compensation-related accidents or illnesses.

Subject to verification, sick leave with pay shall be granted employees. Employees must (a) re port promptly to his/her department head the reason for his absence; (b) keep his/her department head informed of his/her condition if the absence is of more than three (3) days duration; (c) permit the City of Green Bay to have made such medical examination or nursing visit as it deems desirable; and (d) submit a medical certificate for any absences of more than three (3) working days if required by the City.

Charges for absences for illness extending over six (6) consecutive calendar days shall be on the basis of a five-day work week, but briefer absences shall result in charges for time actually lost. No charge shall be made for absences on an approved holiday with pay.

Regularly employed, part-time employees shall be eligible for sick leave with pay in proportion to the amount of time worked. Such time shall be computed on the basis of the regularly scheduled work week for the classification in which the employee is employed. For the purpose of this section, part-tie employment shall be defined as working regularly scheduled hours, but less than the normal work week of the class in which employed, for a period of not less than nine (9) months a years, dating from beginning of employment.

It is understood that any employee who is absence from duty on a scheduled work day will not be called or expected to report for work until his next scheduled work day, unless everyone else in the classification has been afforded the opportunity to work and additional help is still needed. Compliance with this paragraph is subject to the call-in procedure

Fifty percent (50%) of an employee's unused accumulated sick leave shall be paid upon eligibility for retirement, death or social security benefits or, at the option of the employee, the fifty percent (50%) of an employee's unused accumulated sick leave may be placed in an escrow account and used to pay health insurance premiums.

The Employer proposes that the following replace the current Article 20:

ARTICLE 20

Sick Leave

(A) All employees shall be granted sick or emergency leave with pay of one (1) full working day for each month of service. Sick or emergency leave shall accumulate, but not exceed one hundred and thirty-five (135) days. An employee may use sick leave or emergency leave for absences necessitated by injury or illness of himself or a member of his/her immediate family.

In order to be granted sick leave or emergency leave an employee must:

1) Report prior to the start of the work day to the department head or supervisor the reason for the absence.

2) Keep the department head informed of his/her condition and the anticipated date of return to work.

3) Be legitimately ill or attending a member of the immediate family who is ill and unable to care for themselves or make other arrangements for care.

   a) For purposes of this article, "immediate family" shall mean spouse, parent, stepparent, child, stepchild, foster child, guardian or sibling.

4) Be on route to, or at, a medical or dental appointment which could not be scheduled outside of work hours. Appointments that must be scheduled during work hours will qualify for sick leave on a hour for hour basis. When possible, the supervisor will be allowed to adjust the employee's work schedule to ac commodate the appointment.

(B) All sick leave requested is subject to verification. The department head may request reasonable evidence from the employee to achieve verification.

(C) Misuse of sick leave may subject the employee to disciplinary action per the labor agreement. To avoid misuse, management may periodically review amounts of use as well as patterns of use and counsel employees on problem areas.

(D) All employees who terminate employment by eligibility and acceptance to the state retirement system, disability or death shall have a portion of accumulated sick leave paid out in a lump sum cash payment or at the option of the employee shall have that amount placed in an escrow account to pay health insurance premiums. The amount placed in escrow shall be based on the average hours of sick leave used per year during the course of the employee's career according to the following schedule:

Average Hours Used Per Year	% of Hours Placed in Escrow
0-16	80
17-29	70
30-42	60
43-55	50
56-68	40
69-81	30
82-94	20
-94	10

1) Employees retiring prior to 1996 may opt to have only their last five years of sick leave used to determine their payout. All other employees may opt to use their career average or only their average days used after January 1, 1991 to determine their payout.

2) Illnesses extending beyond forty (40) consecutive hours will only count as forty (40) hours towards the employee's average.

III. ARGUMENTS OF THE PARTIES (Summary)

A. The Employer

The City acknowledges that the burden is on them to justify the proposed change in the contract. They first note that in 1989 and the first seven months of 1990 the City had an overall problem with excessive use of sick leave. It was determined that the sick leave use of seven days per employee per year in this particular unit was over 40 percent greater than the national median of five days per employee per year. Although they admit the problem with this particular unit was not as bad as some other units.

The City made its proposal to address the excessive sick leave problem. In fact, the proposal before the Arbitrator is less stringent than one which was tentatively agreed to but not ratified. The proposal is designed to curb sick leave abuse in two ways: first, by creating an incentive via the change in retirement formula based upon sick leave use, and second, by giving the Employer express, rather than implicit, authority to verify an employee's illness and/or initiate counseling or disciplinary action based upon abusive sick leave usage. In the opinion of the City, no evidence was introduced by the Union asserting that the proposal would not remedy the situation.

The City also feels it significant that all 11 other bargaining contracts open for negotiations in 1991 either accepted new sick leave language and the attendant 4 percent wage increase or consented to a one-year wage increase of 3.5 percent. They believe this is compelling evidence that the sick leave change is warranted and justified. There was one small seven-person bargaining unit which accepted the more stringent changes tentatively agreed to by the instant unit. There were two units which did not accept new sick leave language; however, as a tradeoff they accepted .5 percent less of a wage increase in the second year. This is, in their opinion, unrebuttable evidence of the acceptance of the rest of the City employees that a problem existed and unrebuttable evidence of the reasonableness of the approach used.

Accordingly, the City urges the Arbitrator to give great weight to these internal comparables inasmuch as they believe them to be the most accurate yardstick by which to measure the City's proposal to this Union. Additionally, they suggest the City should not be expected to have to administer four separate sick leave policies. Presently, one of the three different policies relates to the small, seven-person unit. It is unreasonable, in their opinion, to expect the City, in addition to two other policies affecting a large number of employees, to have to administer a third policy for another large numbered group of employees.

The City also questions the relevance of the external contracts submitted by the Union. First, they note that there is no bargaining history for those contracts. More important, nothing indicates if they have the same sick leave problem as Green Bay. As such, the City argues that the internal patterns of settlement here should be determinative of both the wage increase and sick use language in this contract. This is especially true since a 4 percent wage increase for all three years of the contract is and was, at all times during the negotiations, tied to the inclusion of the sick leave language amendments. Thus, the City offered, in exchange for the inclusion of the new sick leave language, a quid pro quo of exactly what the City expected to benefit from its inclusion, namely, .5 percent of the total package offer. This is the very quid pro quo offered to all other bargaining City units. The very fact that all of the units--save two--accepted this .5 percent increase as a quid pro quo again leads to the inescapable conclusion that not only was it adequate, but reasonable as well.

B. The Union

The Union notes from the outset that the burden is on the Employer to justify its proposal which changes the status quo. With citation of other interest arbitration cases, the Union maintains that the Employer must justify by clear and convincing evidence a need for the change and that it has provided a quid pro quo for the change. It is their position that the City has failed to meet its burden of proof either with respect to the statutory criteria or the additional factors normally applied in the case of a proposed alteration in the status quo.

The first criteria relied on by the Union is the external comparables. They review evidence from other large Wisconsin cities, including Madison (population 170,616), Racine (population 85,725), Kenosha (population 77,685), and somewhat small communities which are more geographically proximate to Green Bay--Appleton (population 59,032), Oshkosh (population 49,678), and Sheboygan (48,085). Where full contracts could be obtained (Racine, Oshkosh, and Madison), each provide for a payout provision similar to that found in the predecessor agreement between the City of Green Bay and Local 75. The Union's brief analyzes in detail these similarities. They also express that they are not aware of any comparable community which has a payout provision similar to that proposed by the City of Green Bay here. Thus, they conclude, external comparables favor the Union's final offer.

The Union also argues that the internal comparisons are not determinative in the present case. In this regard, they submit that, at the present time, there is no uniform sick leave provision covering all of the units. Rather, there are three different basic sick leave provisions covering various Green Bay bargaining units. For instance, the bus mechanics represented by the Operating Engineers and the bus drivers represented by the Amalgamated Transit unit have retained their former sick leave provisions which, like the provision in the preceding contract here, provided a maximum accumulation of sick leave of 135 days, with a 50 percent payout upon death or retirement. Other units have accepted the City's plan and yet a third plan is in effect for the IBEW. There are other contracts which are not open in 1991 (police and fire) and one unit (crossing guards) which has no sick leave at all.

Thus, they submit that there is a great deal of variation in sick leave provisions within the City of Green Bay. They note this kind of diversity was

found significant in a similar case by another Arbitrator where he found the internal comparables not persuasive.

The Union also argues that the City has failed to demonstrate a need for the proposed change. The unit does not find persuasive the national survey relied on by the City. The comparison has virtually no meaning because the grouping of employers does not permit a meaningful comparison with the City of Green Bay Public Works employees. It does not account for the nature of work done by employees. For instance, the work done by this unit's employees may result in more on-the-job injuries which cause absence. There is also no isolation of statistics for public sector employees or for employees who receive sick leave. It may well be in the absence of this protection, employees go to work sick rather than lose pay, while public sector employees, who have the benefit, take the needed absence and are more productive as a result. Moreover, the City, in negotiations, conceded that the Public Works employees were not its main concern. The reason for introduction of the amended sick leave provision was, rather, related to usage in other departments.

They also question the accuracy of the figures relied on by the City for this unit. Moreover, even if the revised figures reviewed by the Union and Employer after arbitration are used, the Union's median sick leave usage, according to the City, is six days, half of the number of days which an employee receives during each year by contract. there is, therefore, no demonstrated need for alteration of the sick leave policy as it exists. Also, in terms of need, the Union notes that the City has proposed amendments to the sick leave policy which have nothing to do with purported overuse of leave. This relates to the provision found in Article 20 at the end of the first paragraph, that "employees will not be charged from sick leave for absences from work necessitated by follow-up doctor visits to worker's compensation-related accidents or illnesses."

Last, the Union argues that the City has failed to provide an adequate quid pro quo for its proposal. The City alleges, the Union observes, that the quid pro quo is provided through the City agreement to provide a 4 percent increase during 1992 rather than a 3.5 percent increase, which, the City maintains, was offered to bargaining units unwilling to agree to the sick leave amendment. This is not a quid pro quo, in their opinion, since a 4 percent increase for the DPW unit in 1992 is fully justified on the basis of available

comparables. The Department of Public Works bargaining units within comparable communities which have settled, have settled for 4 percent. Moreover, a review of the fringe benefits provided by Green Bay and comparable communities to its DPW employees indicates that Green Bay's benefits are on a par with other bargaining units. In sum, the Union submits that the City has simply failed to provide any evidence that it has proposed a quid pro quo for altering the status quo.

IV. OPINION AND DISCUSSION

The Union correctly identifies the analytical framework to be applied to this case. In sum, the Employer must show, based on need and its quid pro quo, that it is reasonable to conclude this is the type of proposal that reasonable parties would have ordinarily agreed to in the course of bargaining. The combination of need and tradeoffs are two factors which ordinarily influence what parties agree to at the bargaining table. These considerations fall under Criteria (j).

However, parties just do not look at the intrinsic need for their proposals or tradeoffs in bargaining. It is important to consider that in demonstrating the need for and the reasonableness of their bargaining proposals, parties often point to what other parties have done in their bargaining. What other parties have agreed to can create a need and justification for the proposal in its own right. As for the need for a quid pro quo, the degree that this is required is influenced by the extent that the proposal is supported by intrinsic merit and other factors, such as comparables.

In this case, the Arbitrator isn't particularly impressed by the intrinsic need for the proposal. National averages for sick leave use aren't terribly instructive for all the reasons cited by the Union. On the other hand, the proposal isn't particularly unreasonable in its own right. For instance, it would appear that people who utilize sick leave infrequently will even fair better under the new accumulation formula. The opposite will be true for abusers.

While the Arbitrator isn't swayed by any compelling intrinsic merit to the proposal, he is swayed by the fact that eight of eleven organized internal units for which sick leave is an issue and who had contracts open in 1991 agreed to

the Employer's sick leave proposal and a 4-4-4 wage increase.[1] The IBEW, a seven-person unit, accepted a 4-4-4 wage package and a somewhat more stringent sick leave program. The two units that did not accept the new sick leave proposal and retain their old language accepted a half of a percent less of a wage increase in 1992.

This is terribly persuasive. It demonstrates the basic reasonableness of the sick leave proposal when considered along with the Employer's wage proposal. The actions, in the throws of collective bargaining, of 8 out of 11 unions and all their members in accepting this proposal reflects a collective consensus which is difficult to argue with. This collective consensus is a much more reliable indicator of reasonableness than any theoretical analysis an arbitrator might bring as to the intrinsic reasonableness of any particular proposal.

The fact that 8 out of 11 units have accepted a 4-4-4 wage package <u>and</u> the sick leave proposal also sets up an overwhelming internal equity consideration. It would be difficult to justify why this unit should retain their old sick leave program and get a 4-4-4 percent increase while (A) units that got the 4-4-4 percent increase had to give up their old language and while (B) units who retained their old language gave up .5 percent in wages the second year. In contrast, this unit wants to keep the old language and the .5 percent. To do so would be unsupportable from the standpoint of the internal comparables.

The Union also relied on the external comparables in two respects. First, they noted the other cities have sick leave language similar to what they wished to retain. Second, they note many other external comparables received a 4 percent increase, thus making the 4 percent here no quid pro quo at all.

In general, where there is a strong pattern in a multi-bargaining unit employer, arbitrators have favored the internal pattern over the external pattern. The external pattern would be favored over the internal pattern unless adherence to the internal pattern would unfairly distort the relationship of the bargaining unit to the external group. In this case, the internal pattern is very strong, and there is no evidence that the application of the pattern would pose in any respect any particularly hardship on this unit relative to the external

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[1]Two other organized units, police and fire, were not open for negotiations in 1991.

comparables. As for the quid pro quo, as noted earlier, the degree that there needs to be one is influenced by several factors. The strong internal pattern is compelling in its own right. Moreover, it is readily apparent that at least two of the other units priced the value of the proposals at .5 percent.

In summary, the Employer has demonstrated that its proposal is reasonable. On the other hand, the Union has proposed a wage increase equal to that received by other units who have accepted the change in sick leave language. Had they wished to retain the old language, they should have made a proposal consistent with the two units who retained their old language by accepting .5 percent less in the second year of the contract.

AWARD

The Final Offer of the Employer is Accepted.

Gil Vernon, Arbitrator

Dated this 21st day of April 1992.