STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO,

To Initiate Arbitration Between Said Petitioner and

JEFFERSON COUNTY (HEALTH AGENCY)

Case 55 No. 44967
INT/ARB-5855

Decision No. 27272-A

Sherwood Malamud
Arbitrator

APPEARANCES:

Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, Local 3798(U), 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Union.

Victor Moyer, Jefferson County Corporation Counsel, Courthouse, 320 S. Main St., Jefferson, Wisconsin 53549-1799, appearing on behalf of the Municipal Employer.

ARBITRATION AWARD

Jurisdiction of Arbitrator

The Wisconsin Employment Relations Commission appointed Sherwood Malamud to serve as the Arbitrator to issue a final and binding award pursuant to Sec. 111.70(4)(cm)6.c., Wis. Stats., with regard to an interest dispute between Local 3798(U), Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, and the Jefferson County (Health Agency), hereinafter the Employer or the County. Prior to the commencement of the hearing in this matter on August 21, 1992, the Arbitrator attempted to mediate this dispute, but without success. Thereafter, on August 21, 1992, the arbitration hearing was held. The Arbitrator exchanged original briefs on October 6, 1992. The parties reserved the right to file reply briefs which were to be postmarked by October 15, 1992. However, the parties chose not to file reply briefs. The record in the matter was closed on October 19, 1992. Based upon a review of the evidence, testimony and arguments presented by the parties, and upon the application of the criteria set forth in Sec. 111.70(4)(cm)7.a.-j., Wis. Stats., to the issues in dispute herein, the Arbitrator renders the following Award.

SUMMARY OF THE ISSUES IN DISPUTE

This is an initial Collective Bargaining Agreement between these parties. Only two issues remain. They are as follows:

1. **CONTINGENCY PAY**

Both the Union and the County propose that Contingency Pay language be included in "Appendix A" where the parties have placed the salary schedule for 1991 and 1992 for the Public Health Nurse, Nutritionist and Home Health Nurse which are the classifications covered by this Agreement.

The Union Offer

The Union proposes that the Contingency Pay language read as follows:

> Contingency Pay: Contingency pay shall be offered to unit employees on the same basis as it was offered to employees prior to certification of the Union, provided the Union's position prevails in the prohibited practices complaint Case 56, No. 45179, MP 2435. Should the Union prevail such pay shall be provided as follows:
> Employees who are at the 3.5 year step, upon completion of ten (10) and fifteen (15) years of service shall receive either twelve cents ($.12) per hour (ten years) or twenty-four cents ($.24) per hour (fifteen years) for all hours, in addition to their regular rate of pay.

The County Offer

> Contingency Pay: Contingency pay shall be offered to unit employees on the same basis as it was offered to employees prior to certification of the Union, provided the Union's position prevails in the prohibited practices complaint Case 56, No. 45179, MP 2435. Should the Union prevail such pay shall be provided as follows: *on the basis of merit as established by the employee's work performance and after written recommendation of the department head and approval by the personnel director.*
>
> Employees who are at the 3.5 year step, upon completion of ten (10) and fifteen (15) years of service shall receive either twelve cents ($.12) per hour (ten years) or twenty-four cents ($.24) per hour (fifteen years) for all hours, in addition to their

regular rate of pay. [The italicized language is the focus of the dispute between these parties.]

2. **HIRE ABOVE MINIMUM**

In "Appendix A", the parties describe progression through the salary schedule. The following language on progression is identical in the proposals of both the County and the Union:

> Newly hired employees shall be paid at the start rate and shall advance to the "B" step after satisfactory completion of six (6) months of employment. Employees shall, thereafter, upon satisfactory completion of 12 months service, become eligible to advance to the next step according to the increments set forth above.

The County proposes the insertion, at this point, of the following language which is not included in the Union's proposal.

The County Offer

> Notwithstanding the above, the Employer may hire new employees above the minimum rate set forth in the schedule, provided that an employee hired at Step "B" shall have one (1) to three (3) years of appropriate nursing work experience; an employee may be hired at Step "C" provided the new employee has three (3) to five (5) years of appropriate nursing experience; an employee may be hired at Step "D" provided the new employee has more than five (5) years of appropriate nursing experience immediately preceding the date of hire.

The Union Offer

The Union proposes no language which affirmatively recognize the Employer's right to hire new employees above the minimum salary rates established by the salary schedule.

STATUTORY CRITERIA

The criteria to be used to resolve this dispute are contained in Sec. 111.70(4)(cm)7, Wis. Stats. Those criteria are:

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 employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.

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

f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees 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.

BACKGROUND

This is the initial Collective Bargaining Agreement between these parties. In 1990, the Union was certified as the Collective Bargaining Representative in the Courthouse and in this unit of professional community, Public Health, and Home Health nurses. In 1991, the Union was certified as the Collective Bargaining Representative in a unit of Human Services Professionals. The Union and the Employer were able to reach agreement for calendar years 1991 and 1992 in the Courthouse and Human Services Professional Units. Although the final offers of both parties set out the entire Collective Bargaining Agreement, the difference between them lies in the language issues identified in the section of this Award titled "Summary of the Issues in Dispute". On all other language and monetary matters, the proposals of both the County and the Union are identical.

In March 1992, it appeared that the Union and the County had agreed to a Collective Bargaining Agreement for calendar years 1991 and 1992 in the Nurses unit, as well. In fact, the parties came together to execute the Collective Bargaining Agreement which each had ratified. The Union officers refused to sign the agreement due to the inclusion of the language on contingency pay italicized by the Arbitrator in the above "Summary". Thereafter, the Union took the position that either its proposal on Contingency Pay be accepted or it would not accede to the County's proposal on hiring above the minimum. As a result, these two issues are presented to the Arbitrator for his determination.

The County argues that the Union refused to sign a ratified Agreement. The Union argues that it understood that the County had agreed to the Union's proposed language.

The Arbitrator finds on the basis of the testimony and exhibits presented at the hearing that the difference between the parties over contingency pay caused the agreement to unravel. County Exhibit #9, which includes a letter from Mr. Moyer to Mediator Buffett dated November 22, 1991, provides for County acceptance of the Union's proposal on contingency pay, but it does not set out the language of that proposal. The Stipulations which the Arbitrator received from the Commission contain the County language on Hire above Minimum and the Union language on contingency pay.

Ordinarily, one would not expect the difference on contingency pay language which exists here to undermine an agreement. However, the contingency pay language and the subject it addresses is the object of litigation before the Wisconsin Employment Relations Commission. In December 1991, Examiner Karen Mawhinney[1] and in July 1992, the Commission affirmed, modified, and reversed parts of the Examiner's

[1]Jefferson County 26845-A (12/91).

Findings of Fact, Conclusions of Law and Order[2]. That order of the Commission was appealed by the County to Circuit Court.

The provision which is the subject of this litigation appears at sec. 6.08(c) of the Personnel Policy and Salary Plan for Officers and Employees of Jefferson County, as follows:

> (c) Normally, and as a general rule, upon progress and productivity regular full-time employees may be considered eligible for increase in salary according to the following general plan:
>
> . . .
>
> (7) Noncontract employees who are at Step "E" and who are not represented by a bargaining unit shall be eligible for contingent rates, as set by the Jefferson County Board, upon completion of ten and fifteen years of continuous service. For purposes of this section, continuous service means there have been no intervening terminations. Part-time employees are eligible for 50% of the contingent rate.

The Personnel Policy and Salary Plan at sec. 6.08(d) provides, as follows:

> Except the automatic increase from Step "A" to Step "B", no advance in pay shall be automatic upon completion of the periods of service outlined hereinbefore and all increases shall be made on the basis of merit as established by the employee's work performance and after written recommendation of the department head and approval by the Personnel Committee.

The issue over the Contingency Pay arose when the Employer refused to provide contingency pay to the chair of the nurses bargaining committee, among other newly organized employees, subsequent to the certification of the Union and during bargaining over an initial agreement.

Examiner Mawhinney concluded that Sec. 6.08(c) ". . . inherently discriminates against employees by conditioning employees' eligibility for contingency rates based on the absence of union representation . . .." In that regard, she found the above provision violated Sec. 111.70(3)(a)3 of the Wisconsin Statutes.

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[2]Jefferson County 26845-B (7/92).

The Commission reversed the above conclusion of the Examiner, but it determined that:

> Jefferson County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., when it refused to consider granting contingency pay or increases in contingency pay to those employees who became eligible for same following the Union's certification as the bargaining representative for said employees.

There is one other issue between these parties. This is the first interest arbitration award between the Union and Jefferson County. Consequently, comparability is a matter in dispute.

DISCUSSION

COMPARABILITY

This is the first interest arbitration dispute emanating from Jefferson County. A pool of comparables to which employees in the County may be compared and contrasted has not been identified. The issues in this case are unusual. Contingency pay is an issue unique to this bargaining relationship. The authority to hire above the minimum is one to which comparability may serve as a factor, however, these criteria are by no means determinative of the Hire above Minimum issue. The comparability criteria do not serve as the central focus for the determination of the matters at issue, in this case.

The Union proposes counties much larger in population, and in financial resources as comparables to Jefferson County: Dane, Rock, Walworth, Waukesha, and Dodge Counties. The Union proposes the City of Madison Health Department as a comparable, as well. For its part, the County proposes Dodge and Sauk Counties as the comparability pool.

Jefferson County is a rural, primarily agricultural county. Dodge County more closely approximates Jefferson in population and in financial resources. Otherwise, Jefferson is contiguous to counties with much larger populations, financial resources and more diverse economies. The identification of a comparability pool for this County and for a unit of professional nurses is one which the parties, in the first instance, should resolve.

A viable comparability pool, in the view of this Arbitrator, should consist of <u>at least</u> five other collective bargaining units in classifications of employees who perform work similar to the employees who are the subject of the interest arbitration proceeding. The County's comparability pool of

two other units is insufficient to serve as a basis for the determination of an interest arbitration dispute. Such a small comparability pool, would only be appropriate if there is a historic relationship in the wages, hours, and conditions of employment of employees in the one county as contrasted with the employees in similar classifications in the other one or two counties which are proposed as the measure of comparability. That is not the case, here.

To sum up, the Arbitrator finds that it is appropriate to leave the determination of the appropriate comparability pool for the parties' future bargaining. The comparability criteria command little weight in the determination of the matters at issue, here. The parties only agree on Dodge County as a comparable to Jefferson. The County's proposal of but two comparables, and the Union's inclusion of the City of Madison in its comparability pool for a County Health Agency highlight the difficult task of identifying a comparability pool for this unit. Finally, this Arbitrator is reluctant to establish the comparability framework for a bargaining relationship, where as here, there is little evidence that the parties, themselves, have adequately addressed that issue.

CONTINGENCY PAY

Introduction

In the Background section of the Award, the Arbitrator describes in some detail the context in which the contingency pay issue arises. The Arbitrator finds little significant difference between the proposals of the County and the Union. Both the Union and the County agree that Contingency Pay is to be administered is in the same manner it was administered in the past. Examiner Mawhinney at finding of fact no. 6 in her decision, supra, concluded that:

> There have been instances where contingency pay has been denied due to unsatisfactory job evaluations.

The County argues in its brief that its proposed language simply sets out the manner in which the contingency pay provision has been administered in the past. The Arbitrator agrees.

However, the Union's language proposal is identical to the language incorporated into paragraphs "25" in the Collective Bargaining Agreement in the Courthouse Unit and "24" in the Human Services Professional Employees Unit. The County does not explain why different language on this issue is necessary in this unit, but was not required in the other two units. The County does not suggest that the administration of the contingency pay provision would be any different in the Nurses unit than the Courthouse and Human Services Professional Employees units, if the language it proposes were adopted.

j. Such Other Factors. . .

This criterion is determinative of this issue. Internal comparability, i.e., consistency in language among the various units of the County support the inclusion of the Union's proposal in this initial Agreement. Although the County's proposal may be preferred in the sense that the manner in which the provision has been administered is set out in the County's proposed language, the upshot is that there is no difference between the parties in terms of the meaning of the provision or its administration. Should the Employer refuse to pay an employee contingency pay during the pendency of the litigation of this issue, a grievance would be filed. The issues to be determined by a grievance Arbitrator would not be materially different under either the Union's or the County's proposed language. It is only the consistency in language from unit to unit which suggests that the Union's language should be included in this initial Agreement.

HIRE ABOVE MINIMUM

Introduction

The County proposes to continue to hire above the minimum as it has under its Personnel Policy and Salary Plan. The County has exercised its authority to hire employees above the minimum since the 1990 certification of the Union. It has hired twelve nurses, ten at above the minimum set in its salary plan and above the minimum set in the agreed to salary schedule. Eight of the nurses hired above the minimum, do not have prior experience in community health or the home health nursing fields. The Union argues that this policy undermines the salary plan which the County has had in effect and if continued under collective bargaining relationship, it would undermine the salary schedule.

The Union argues that when new employees are hired above the minimum, the trainers of the new employees who are incumbents, may be paid less than the employees they train. However, there is insufficient record evidence to support this Union charge.

The Union argues that the criteria: Interest and Welfare of the Public and Comparability- both internal and external, support its position.

At the hearing, the Union presented the expert testimony of Judy Howard, a practicing public health nurse in Dane County, who has provided career counseling for nurses and is familiar with the skills and training necessary to be a nurse in a hospital setting and in a public health agency. She testified that the skills of a hospital nurse, who works in a specialized setting, are not immediately transferable to the work setting of a community or home health nurse. A public health nurse enjoys a great deal of independence. The nurse must be cognizant of various social service programs and must be able to work with a client to obtain services for that

client. The nurse in a public health agency acquires judgment through experience and training. That experience and training takes time to acquire.

The Union argues that, by hiring above minimum, the County undermines the morale of incumbent employees who have obtained the professional judgment and training over time, but who may be paid the same wage rates as new employees who are hired at above the minimum.

The Union correctly notes that the County has failed to introduce any evidence that it has been unable to recruit employees at the minimum rates established by the agreed upon schedule.

c. Interest and Welfare of the Public

This is the initial Collective Bargaining Agreement between the parties. As this Arbitrator observed in his award in Village of East Troy[3], at page 26, it is the initial Collective Bargaining Agreement between the parties wherein they fix the status quo which is to serve as the basis for future negotiations.

The County has hired employees at rates which are equivalent to the next to the last or last step of the salary schedule agreed to by the parties for eight of the twelve nurses hired since 1990. None of these nurses had prior public health or community health nursing experience. Rather, their experience was in a hospital setting. The Arbitrator agrees with the Union that the criterion the Interest and Welfare of the Public supports its position. The hiring above minimum should occur only for employees who have the relevant experience. However, the Union's proposal does not provide for the County's hiring, at rates above the minimum, employees with outstanding backgrounds in nursing in a public health setting.

On the other hand, should the County experience difficulty in its ability to recruit, then the caseloads of incumbents may increase to the detriment of the clients served by this unit of professional nurses.

The Arbitrator concludes that this criterion provides some support for the inclusion of the Union's final offer in the initial Agreement.

d. Comparability

Dodge County is the external comparable upon which both the Union and the County agree. Dodge permits hiring above the minimum. Neither the Union nor the County point to any other employer which permits the hiring of employees above the minimum. The Arbitrator concludes that this

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[3]Village of East Troy, 27176-A,(9/92).

criterion provides the slightest support to the inclusion of the County's offer in the initial Agreement.

b. Stipulations of the Parties and j. Such Other Factors

The Arbitrator finds that the considerations involved in the analysis of these two criteria are intertwined. They are best weighed together.

The County argues that the Union had agreed to the County's proposal to permit it to hire above the minimum. The County argues that the criterion the "stipulations of the parties" supports its position.

There are two factors which come into play under the "such other factors" criterion. First, the internal comparables support the Union's proposal. None of the collective bargaining agreements between the County and its other organized units contain a provision which permits the hiring of new employees at rates above the minimum set in the contractual salary schedule. This portion of the criterion supports the Union offer.

The other factor in operation here concerns the manner and context in which this issue arises. As noted above, both parties ratified and approved the language at issue on hiring above the minimum.

The Union argues and correctly cites several decisions by this Arbitrator. In Antigo School District, (Voluntary Impasse Procedure) decided 3/89 and in Greendale School District, 25499-A, (1/89) this Arbitrator opined that the history of bargaining should play little role in the application of the statutory criteria in an interest arbitration.

However, in Brodhead School District, 22908-A, (7/86), this Arbitrator notes an exception to his opinion as to the weight to be given to bargaining history in an interest arbitration proceeding. In that case, this Arbitrator did look at bargaining history where one side, the Association, proposed a change to the salary schedule and the other side, the Municipal Employer, attempted to meet that concern through proposals dealing with the change to the salary schedule. Then, only in the exchange of final offers, did the Association return to a standard salary proposal. In that context, the Arbitrator took note of that bargaining history in order to avoid penalizing the party who responds to a proposal for change and is left in the final offer stage with a proposal which is responsive to the demand of the other side for a change. In this regard, the party who responds to the demand for a change need not justify its proposal to change the status quo. It is in that limited context that the Arbitrator does look at bargaining history.

Furthermore, unlike the cases cited by the Union in its brief, in this case the language on Hiring above Minimum, had been ratified by both the County and the Union. The cases cited by the Union concern tentative agreements which were rejected by the principal(s).

Here, during the parties' negotiations and under its Personnel ordinance, the County continued to hire nurses at rates above the minimum. The minimum set in the salary schedule and the issue of the language concerning Hiring above Minimum are closely linked. Hiring above the minimum provides the County with the flexibility to hire above the salary schedule minimum rates to meet its recruiting needs. To permit the Union to leave intact the salary schedule, as part of the stipulations, and allow it to bring to the fore the dispute over hiring above the minimum serves to undermine the integrity of that stipulation.

The County may not be able to recruit employees at the minimum so identified by the salary schedule. The cure for that problem lies not in the language which permits hiring above the minimum, but rather in establishing a salary schedule with an appropriate minimum which provides for competitive recruitment of new employees. As noted above, the County presented no evidence which demonstrates the existence of a problem in recruiting Public Health nurses. Yet, Employers do not ordinarily pay above schedule unless some special circumstance necessitates such action.

This initial agreement between the parties expires less than 30 days from the date that the parties will receive this Award. The Arbitrator finds that it would be detrimental to future bargaining to impose language which prevents the Employer from hiring above the minimum when that language can only have an impact during the hiatus and in the course of bargaining for a new collective bargaining agreement. The parties would be better served by negotiating a collective bargaining agreement which provides a salary schedule with salary minimums which provides for the effective recruitment of new employees.

Summary - Hire Above Minimum

The Arbitrator finds that the Union proposal enjoys slight support from the interest and welfare of the public criterion. The internal comparables support the Union position.

The external comparable provides the slightest support to the County's position. However, the Arbitrator finds that the other factor, in j. Such Other Factors, strongly supports the adoption of a proposal which does not undermine an agreed upon item. The salary schedule, with its minimum steps, is an agreed upon item. The Employer's ability to hire above the minimum is an integral part of that salary schedule. The issue of Hiring above Minimum is best addressed in the context of the negotiation of a salary schedule. That is certainly the case, in an initial agreement which is due to expire in less than 30 days from the receipt of this Award.

The within ruling on Hiring above Minimum should not be read as an endorsement of that concept. Extensive use of Hiring above Minimum may undermine a negotiated contractual salary schedule. The Union's arguments

on this point are well taken. However, the salary schedule in "Appendix A" will become effective with this Award. The Employer's use of this language has occurred prior to the effective date of this Agreement. It is in this limited context that the Arbitrator concludes that the County's proposal on this issue is preferred.

SELECTION OF THE FINAL OFFER

The right to Hire above Minimum is an integral part of a salary schedule. The parties must address that issue, first and foremost, in the context of negotiations over a salary schedule. It is in that context that this issue should be resolved. The determination of this issue outside the context of the salary schedule undermines the salary schedule agreed to by the parties.

In the above Discussion, the Arbitrator concludes that the Union proposal on Contingency Pay is preferred. The Employer proposal on Hiring Above the Minimum, in the context of this initial Agreement which expires on December 31, 1992, is to be preferred. There are only two issues in dispute. The issue of Hiring Above the Minimum has far greater significance than the issue of Contingency Pay. Accordingly, the Arbitrator finds that the final offer of the County is the one which is to be included in the initial Agreement between the parties.

On the basis of the above Discussion, the Arbitrator issues the following:

AWARD

Based upon the statutory criteria found in Sec. 111.70(4)(cm)7.a.-j. of the Wis. Stats., upon the evidence and arguments of the parties, and for the reasons discussed above, the Arbitrator selects the final offer of Jefferson County together with the stipulations of the agreed-upon items, to be included in the successor Agreement for the calendar years 1991 and 1992 between Jefferson County (Health Agency) and Jefferson County Local Union 3798(U), WCCME, AFSCME, AFL-CIO.

Dated at Madison, Wisconsin, this 30th day of November, 1992.

Sherwood Malamud
Arbitrator