WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

In the Matter of Final and Binding	:	
Final Offer Arbitration Between	:	
CITY OF NEW BERLIN	:	**AWARD**
and	:	
TEAMSTERS "GENERAL" LOCAL NO. 200	:	Decision No. 27903-A
WERC Case 74 No. 49558 INT/ARB-6965	:	

I. NATURE OF PROCEEDING. This is a proceeding in final and binding final offer arbitration. Teamsters "General" Local Union No. 200 on July 20, 1993, filed a petition with the Wisconsin Employment Relations Commission alleging that an impasse existed between it and the City of New Berlin in collective bargaining and requested the Commission to initiate arbitration pursuant to Section 111.70 (4) (cm) 6 of the Municipal Employment Relations Act. An investigation was conducted by Thomas L. Yaeger, staff member, who found that the parties indeed were at impasse. The Commission thereafter found that the parties had not established mutually agreed upon procedures for resolution of the dispute, concluded that the parties substantially complied with the procedures required in the Municipal Employment Relations Act prior to the initiation of arbitration, and that an impasse existed. The Commission certified that the conditions precedent to initiation of arbitration as required by the Act had been met. On December 20, 1993, it ordered arbitration to be initiated. The parties having selected Frank P. Zeidler, Milwaukee, Wisconsin, as arbitrator, the Commission appointed him on January 10, 1994.

A hearing was held on January 25, 1994, at the City Hall in New Berlin. Parties were given full opportunity to give testimony, present evidence and make argument. Briefs and reply briefs were filed, the last brief being received by the arbitrator on March 28, 1994.

II. APPEARANCES.

PREVIANT, GOLDBERG, UELMEN, GRATZ, MILLER & BRUEGGEMAN, S.C., by MARIANNE GOLDSTEIN ROBBINS and RASSANDRA L. CODY, Attorney, appeared for the Union.

VON BRIESEN & PURTELL, S.C. by JAMES R. KOROM, appeared for the City.

III. THE OFFERS. The following are the offers of the parties:

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RELATIONS COMMISSION

Final offer to be submitted to Arbitration for employees of the City of New Berlin, who are represented by Teamsters "General" Local Union No. 200

ARTICLE VI. RATE OF PAY

A. Wages. Effective April 1, 1993, four percent (4%) increase to all classifications.

Effective April 1, 1994, four percent (4%) increase to all classifications.

ARTICLE XXIV. RETIREMENT CONTRIBUTIONS

Change: Six percent (6%) to up to six and two-tenths percent (6.2%).

ARTICLE XXVI. TERMINATION

April 1, 1993 to March 31, 1995.

Final Offer
of the City of New Berlin to
TEAMSTER General Local Union No. 200

November, 1993

The provisions of the April 1, 1991 to March 31, 1993 contract will be continued in a new two (2) year contract to be executed by the parties except as modified by the agreed items and the following:

1. **Article V - Hours of Work**

   A. Revise paragraph 2 to read as follows: For the Streets Division From Monday through Friday, eight (8) hours a day and forty (40) hours a week.

2. **Article VI - Rates of Pay**

   A. Wages - Effective April 1, 1993, wages of bargaining unit employees to be increased by four percent (4%).

   Wages - Effective April 1, 1994, wages of bargaining unit employees to be increased by four percent (4%).

   Retroactivity shall apply to bargaining unit employees on the payroll as of the date of the execution of the agreement, to those who have retired subsequent to April 1,1993, and to the estates of those who have died while in the service of New Berlin after April 1, 1993 and prior to the execution of the agreement.

3. **Article XXIV - Retirement Contribution**

   Change current language to read as follows:

   "The City shall pay an amount up to six and two-tenths percent (6.2%) of the employee's earnings to the Wisconsin Retirement System toward the employee's monthly contribution.

4. **XXVI - Termination**

   This agreement shall be in effect upon approval of the Common Council of the City of New Berlin from April 1, 1993, and shall remain in full force and effect as to all matters until March 31, 1995, and from year to year thereafter, unless either party serves a sixty (60) day written notice on the other prior to the expiration date, specifying a desire to modify or terminate this agreement.

IV. FACTORS TO BE WEIGHED BY THE ARBITRATOR. Section 111.70(4)(cm)

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

"a. The lawful authority of the municipal employer.

"b. Stipulation of the parties.

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

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

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

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

V. LAWFUL AUTHORITY OF THE UNIT OF GOVERNMENT. In this matter the City has proposed a clause on retroactivity to be added. The Union has no counter clause but intends to remain with the terms of the past contract which did not address the issue raised by the City. The clause would deny retroactive pay to any employee who terminated between the end of the last contract on March 31, 1993,

and the effective date of the present contract. The Union position is that the City has an obligation to pay any such employee retroactively for the time the employee was in City employment. The City holds that the Union cannot bargain for any employee who terminates and therefore has no standing in opposing the City proposal. This matter is more fully treated in Section VIII following.

VI. STIPULATIONS. The parties have stipulated to all other matters between them.

VII. COMPARABLE MUNICIPALITIES. The following table presents the parties' lists of comparables with data relating to them derived from both Union and City exhibits:

Table I

PARTIES' LISTS OF COMPARABLES AND RELEVANT DATA

Union List	City List	Population	1992-93 Taxes (000) For City Purposes	1991 Aver. Comm. Income (00)
Bayside				
Brookfield	Brookfield	35,795	14,997	51.7
Brown Deer	Brown Deer	12,484	4,143	32.5
Butler	Butler	2,068	1,116	23.9
Cudahy	Cudahy	18,868	4,247	23.7
Elm Grove	Elm Grove	6,268	2,564	79.1
Fox Point				
Franklin	Franklin	23,168	4,924	37.1
Germantown	Germantown	14,633	3,521	34.2
Glendale	Glendale	14,101	5,961	37.1
Greendale	Greendale	15,024	5,207	49.8
Greenfield	Greenfield	34,549	11,426	28.9
Hales Corners	Hales Corners	7,765	2,093	35.1
Menomonee Falls	Menomonee Falls	27,112	10,715	34.3
Mequon				
Muskego	Muskego	17,704	3,006	34.8
New Berlin	New Berlin	34,342	9,087	36.8
Oak Creek	Oak Creek	20,543	6,191	30.7
River Hills				
Shorewood				
St. Francis	St. Francis	9,221	2,410	23.8
South Milwaukee		21,040	4,967	25.4
Waukesha	Waukesha	58,113	19,487	30.8
Wauwatosa	Wauwatosa	49,484	21,951	35.6
West Allis	West Allis	63,374	20,019	24.0
West Milwaukee	West Milwaukee	4,126		21.4
Whitefish Bay				

(From UX 8, CX8, 9, 13)

City Exhibit 10 showed that New Berlin was sixth among the 21 City comparables in increase in community income between 1986-1991 with a 30.7% change where the top was 76.6% and the bottom 14.6%. The average residential property value in 1992 was fifth highest in New Berlin with $111,794 where the highest was $188,857 in Elm Grove and the lowest $63,181 in West Milwaukee. (CX 11). In equalized property value changes from 1987-1992, New Berlin was fourth with a 52.3% change as compared to 78.0% in Germantown and 15.0% in Cudahy. (CX 12).

In increase in property tax levy, 1987-1992, New Berlin at 41.1% change was fifth highest where Franklin was first with 130.9% and West Milwaukee lowest with -0.3%. (CX 14).

The above data relates only to the City's list of comparables.

Discussion on Comparables. The union notes that 19 of the comparables of both parties are the same, but argues for its six additional comparables on the ground that the comparables used by the Union draw upon the same labor market. Further the Union contends that arbitrators in four previous arbitrations involving the City of New Berlin selected all 25 comparables used by the Union. Cases cited were:

City of New Berlin (Highway Department), Dec. No. 27293-B
Krinsky, Arb., 1993

City of New Berlin (Highway Department), Dec. No. 26303-A
McAlpin, Arb., 1990

City of New Berlin (Police Department), Dec. No. 24472
Michelstetter, Arb., 1988

City of New Berlin (Clerical Employees), Dec. No. 24407
Kerkman, 1988

The City contends that the Union is erroneously citing four previous arbitration cases as supporting the use of all 25 comparables used by the Union. The City says that in none of the cases did the arbitrator make any statement as to which municipalities are the most comparable. The previous decision cannot be used as an argument for selection of appropriate comparables.

In its presentation the City noted that it eliminated the North Shore suburbs of Milwaukee and Ozaukee Counties as not being comparable.

City Exhibit 5 is the decision of Arbitrator Grenig in an arbitration involving the Union and the City's Highway, Sewer and Water Departments. It is not clear in this decision what specific municipalities were designated as comparables, but from the text of the decision it appears that municipalities west and south of the City of Milwaukee were used and Waukesha County was included. Different governmental units were used. In the Krinsky decision cited above, the arbitrator used all of the 25 comparables and said that in the Grenig case and the McAlpin case, the 25 comparables were accepted.

In this matter, the arbitrator believes that 20 districts including New Berlin the parties can agree on for use as comparables will be the primary comparables. Considering the emphasis on conditions of work chiefly as does the instant matter, instead of wages and total compensation, the 20 districts are in an area south and west of Milwaukee City where the labor market is the same.

VIII. CONDITIONS OF WORK - HOURS. The City is proposing to change former Article VI, A, 2 to read,

"For the Streets Division. From Monday through Friday, eight (8) hours a day and forty (40) hours a week."

The Union is proposing to remain with the former provision which reads,

"A. Normal Workweek. The normal workweek for full-time employees shall be as follows:

"For the Highway Department. From Monday through Friday, eight (8) hours a day and forty (40) hours a week from 7:00 a.m. to 3:30 p.m. for the first shift and from between 3:15 p.m. and 3:30 p.m. until between 11:45 p.m. and midnight for the second shift. The City shall determine the starting and quitting."

Union Exhibit 8 was a chart in which 16 of the primary comparables were listed as having defined starting and ending hours in the contract and three did not have that type of provision.

In City Exhibit 20 hours of work for highway or department of public works were listed along with provision affecting other employees. In this exhibit only nine municipalities were determined to have specific, regular or normal hours of work.

Changes from a normal shift could occur in Butler and Cudahy, and changes could occur in Waukesha for specific reasons. In West Allis they could be made under present practice, and in Germantown shifts may start between 6 and 8 a.m. This exhibit is included as following in Table II. Hales Corners, Muskego and Oak Creek have no specific hours in the contract, and in essence have conditions similar to what the City is proposing in its offer.

Table II

20

City	Hours of Work Clause	City	Union
Brookfield	City Hall - No hours specified in contract	X	
	Others - Specific hours of work		X
Brown Deer	DPW - Specific hours of work		X
	Clerical - 8 hours anytime between 7 a.m and 5 p m	X	
Butler	"Normal" shifts may be changed with 8 hour notice	X	
Cudahy	"Normal" shifts may be modified to perform the essential function of City Government	X	
Elm Grove	"Regular" hours of work specified		X
Franklin	"Normal" hours of work specified		X
Germantown	Any shift may start between 6:00 and 8:00 a.m., as specified by the Department head	X	
Greendale	"Normal" hours of work specified		X
	Clerical - staggered start times to be set by the Village Manager	X	
Greenfield	"Normal" hours of work specified		X
Hales Corners	No specific hours of work in contract	X	
Muskego	No hours of work, specific work schedules set by the department head	X	
Oak Creek	No specific hours of work in contract	X	
Pewaukee	Hours may be changed with 1 week notice, less if reason for change is an emergency	X	
St. Francis	Highway - shift must start at 7:00 a.m.		X
	Clerical - shift hours in contract		X
	Custodian - arranged informally	X	
	All others - No hours specified in contract	X	
Waukesha	WWTP - Shifts may be modified for various specific reasons. Changes may be made after negotiations with the union	X	
	Streets and Parks - Hours of work specified		X
West Allis	Specified hours of work may be changed consistent with "present practice" or in the event of addition of a second or third shift	X	X
West Milwaukee	"Normal" hours of work specified in contract		X
New Berlin	Streets - at issue		
	Sewer and Water - No specific hours of work in contract	X	
	Parks and Rec. - No specific hours of work in contract	X	

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The City is noting that in its exhibit some provisions in the past contract do not provide fixed starting times for New Berlin Sewer and Water employees, and for Parks and Recreation employees.

Union Exhibit 32 shows that in a contract the City has with the New Berlin Public Employees Union Local 2676, there are fixed starting times for City Hall and Municipal Building employees, and for Police Dispatchers, but not for Library employees. A contract affecting the New Berlin Professional Police Association describes "regular" duty hours. (UX 33).

Union Position on Hours Summarized. The Union notes that the overwhelming number of comparable communities have specific starting and ending hours. The City's proposal is a complete departure from the practices of most of the comparables. The Union notes that the City in its Exhibit 20 has listed units within governments which are not highway or street employees, and notes that street departments have fixed starting and ending hours even if the other units do not.

The Union also avers that the contract clauses in Cudahy, Germantown, Waukesha Waste Water Treatment Plant, and West Allis are more comparable to the Union proposal than to the City proposal. The Union says that comparability in externals must be given more serious consideration.

The Union says that the issue of regular starting times is important to the Union because in the winter employees must work outside of their regular hours in plowing. To compensate for this inconvenience they received overtime. This is a practice found in most of the comparables. Under the City offer the employees would lose this opportunity for overtime.

The Union citing its Exhibits 32 and 33 says that internal comparables involving the clerical, technical and law enforcement personnel support its position.

The Union is emphasizing that in this case the status quo should be maintained because conditions do not require a change, the proposed language does not remedy conditions the City wants to meet, and the proposed City language imposes an unreasonable burden on the Union. The Union notes that the City wants to meet staffing needs of the recycling center, but the Union is offering to negotiate with the City on this matter. The change proposed by the City is far broader than it need be.

The Union says that the City's claim that it needs greater flexibility in scheduling because of the dangers of employees working long hours in snow plowing and endangering public safety was never raised in the bargaining. There have been no reports of accidents during snow plowing and further the employees who do work overtime have had liberal rest periods.

The City's claim that it needs changes in scheduling to accomplish road maintenance and sweeping work when the traffic is light is not supported by any report of problems that occurred under the present terms. The Union further contends that the City is attempting to establish an internal pattern to cope with a dilemma with engineers whose starting times are fixed.

The City has offered no quid pro quo for its proposed change, and the Union contends that the 4% wage increase which the City is offering is not a quid prop quo. Its contention is not supported by any written evidence nor contact with representatives of the various municipalities listed as granting 4% increases.

The Union also notes that in five municipalities where the Employer can change the hours of working, the changes permitted are limited by specific provisions. The City in effect is asking a carte blanche to make a change in hours.

City Position on Hours Summarized. The City notes that in its contract with employees of the Sewer and Water Departments and with the employees of the Parks and Recreation Department, the Employer has had the right to modify work hours, and there is no dispute that it ever abused this right. There has been flexibility and communication between the Employer and the employees. In this case the City also needs flexibility, but will not abuse its right if the new provision is adopted.

The City holds that the Union's purpose in opposing the Employer's offer on the hours of work is to force more overtime. In the past when the City asked employees to adjust their hours to work during an anticipated snow storm by starting later in the morning, the employees adamantly refused. The Union in the hearing only now had belatedly offered to be more flexible.

The City also has a concern about public safety when employees work long hours, as much as two full shifts without rest.

The City also has a problem developing at the City Recycling Center where highway employees operate equipment including a brush chipper. The demand for peak service occurs when people are able to go there, which is after 3:30 p.m. just when the brush chipper service is shut down under present working conditions. When the load accumulates, this causes breakdowns and damage when the employees have to sort through piles of brush for metal and stones and other objects.

Summer scheduling also could be changed so that the employees would not have to work during the hottest part of the day. There are summer schedules in other departments. Also the City would like to conduct major road maintenance before the rush hour, and it would like the flexibility of street sweeping operations in the early morning hours. Further the City would consider later winter hours.

The City says that if it gets its final offer selected, this does not amount to carte blanche control over hours of work. The City knows the importance of fair and honest communication with the Union and its legal duty to bargain. The City as Employer has a past good record in this respect.

The City maintains that in a number of circumstances it would be able to provide better service to the community under its proposed provision. The present language precludes certain efficiences and service decisions to be made. The new proposal would improve employee productivity during the hottest part of the year as will later starting hours in winter. Hours on the landfill and Recycling Center could be matched to the time of the greatest need.

The City has the ability to do all of these if it uses the employees on an overtime basis, but this would require a premium rate. The City believes that it should not have to pay employees premium pay when most needed. The employees still would have rights for overtime pay after 8 hours a day or 40 hours a week or weekend and holiday pay. The Employer only wants flexibility during the days of Monday through Friday.

If the City offer is selected, the City still has the legal obligation to notify employees as far in advance as possible of any changes in starting and ending times, and to discuss the matter with the Union.

The City contends it has been a responsible and effective administrator of identical provisions governing two other departments and has not abused flexibility. On the other hand the Union has been adamant about adjusting work hours even in the light of a known impending snow storm. It will not give up a few hours of overtime for efficiency. Its position on the matter of the landfill also has been inflexible.

The City contends that its Exhibit 20 reveals that hours of work vary greatly from community to community. A reading of the contract language shows that it is difficult to precisely determine whether the contract language supports either offer. Thus external comparability is of limited value. However Exhibit 20 shows that many communities have recognized that it is necessary to modify hours on an occasional basis to meet needs for service. Union Exhibit 8 on the other hand merely shows whether the language of the contracts designated starting and ending times, but does not tell whether they can be modified. The City notes that the Union cited Mequon as including starting and ending times and therefore in support of the Union position. However, the Mequon contract clearly sets forth the employer's right to establish shifts other than those provided in the contract.

The City also argues that its offer meets the test of internal comparability. The issue in this case is whether the Employer can modify the starting hours to ensure adequate staffing when services are needed and not have to make unnecessary expenditure of overtime. In the case of the City contract covering the police officers, providing specific shifts starting and ending times does not matter for police officers and dispatchers because there is a 24-hour coverage. In the contract for police officers, the chief can fix starting times for other than patrol officers.

The City notes that there are no set hours in the contract for library employees. As for the set hours for City Hall employees, the prospect that there will be a call for their services outside of the set hours is highly unlikely. However the City wants to change the starting and ending times for the engineering department and will continue to try to get flexibility in the future. In sum the City can change work for non-patrol officers, library employees, park and recreation employees and sewer and water employees. Only the engineers and highway department refuse to recognize the City's need for flexible hours to meet service demands.

In its brief the Union listed 20 communities which the Union claims provide specific regular hours of work and pay one and one-half hours for snow plowing beyond the regular hours. This is not true, according to the City. In some of the contracts there are gray areas as in Butler, which is cited, for there the employer need pay only $.50 per hour premium and not time and a half outside of regular hours. The City also cites Cudahy, Germantown, Shorewood, and West Allis which allow for modification of the shift starting time. Similarly the Union claim that Shorewood and Whitefish Bay support its proposition is not borne out by the contracts. Seven errors in claims as to what contracts show undermine the Union's credibility.

Discussion. The issue in this matter first comes to the necessity of determining which offer meets the test of comparability with the language found in other municipalities. As the foregoing discussion shows, there are three types of contract language which appear in the contracts.

One type asserts hours of work with specified starting and ending times; another type asserts hours of work with specific starting and ending times, but permits modifications; and a third type mentions only hours of work with no specific starting and ending times, and in effect permitting total flexibility on the part of the Employer - the "carte blanche", so to speak.

A review of contract provisions among the primary comparables and limited to highway and street employees produces this table:

Table III

CLASSIFICATION OF CONTRACT PROVISIONS BY TYPE AMONG COMPARABLE MUNICIPALITIES COVERING HIGHWAY AND STREET EMPLOYEES

Specified Starting and Ending Times	Modifications of Starting Times Possible	Hours of Work Named Only
Brookfield	Butler	Hales Corners
Brown Deer	Cudahy	Muskego
Elm Grove	Germantown	Oak Creek
Franklin	West Allis	
Greendale		
Greenfield		
Menomonee Falls		
St. Francis(1)		
Waukesha		
Wauwatosa		
West Milwaukee		

(1) Starting time only.

From this Table it can be seen that the Union offer on fixed starting and ending times meets the test of external comparability which is identified in the Factors to be Considered as criterion "d".

As to internal comparables (identified as criterion "e" in Factors to be Considered," the following table is useful:

Table IV

CONTRACTUAL PROVISIONS ON STARTING TIMES FOR ORGANIZED EMPLOYEES IN THE CITY OF NEW BERLIN

	Specified Starting and Ending Times	Modifications of Starting Times Possible but "Regular Hours"	Hours of Work Named Only
Local 200 Past Contract	Highway Dept.		Sewer & Water Parks & Recreation
Local 2676 Contract	City Hall & Municipal Bldg. Police Dispatcher Police Cadets Engineers		Library Part-Time
Professional Police Assn.	Patrol Division	Other Officers	

A review of the above Table leads to the conclusion internal comparables show only that no consistent pattern exists to validate the contention of either party that a pattern of hours supporting either of the offers predominates.

IX. CONDITIONS OF WORK - RETROACTIVITY. The City is proposing to add a clause to the Agreement which is as follows:

"Retroactivity shall apply to bargaining unit employees on the payroll as of the date of execution of the agreement, to those who have retired subsequent to April 1, 1993, and to the estates of those who have died while in the service of New Berlin after April 1, 1993, prior to the execution of the agreement."

The Union offer contains no provision relating to this item, but the Union is opposing the inclusion of this clause holding that benefits should apply to employees leaving the service of the City subsequent to April 1, 1993, for whatever reason.

The previous contract expired March 31, 1993.

<u>City Position on Retroactivity</u>. The City contends that the Union has no lawful right to bargain on behalf of employees who resigned. This is supported by a decision of the Wisconsin Employment Relations Commission and the United States Supreme Court in <u>Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Company</u>, 404 US 157, # 30 LEd 2nd 341, 92 S. Ct. 383 (1971). The City cites decisions of WERC to the effect that the duty to bargain exists only as to employees within the bargaining unit represented by the Union. Resigned employees do not fit this criterion. The issue is one of permissive bargaining only and the Employer cannot be compelled to bargain on it.

The City contends the Union is following a tactic in which by not filing its own position on the subject, it thus avoids a declaratory ruling on the matter. If the Union offer is accepted, the Union will then demand benefits for resigned employees and new litigation will result which is not in the interest and welfare of the public.

There are few examples of where a clause to give some rights exists in contracts, and the Union could not present examples of contracts which require an Employer to confer benefits on employees who resigned in the hiatus between an expired contract and the execution of a new one.

The City notes that the Union in its brief failed to address this issue or produce any case law to support its position.

<u>Union Position on Retroactivity</u>. The Union contends that under its position there will be maintained a past practice of the payment of wage rates retroactively to bargaining unit employees who voluntarily terminated their employment and to any bargaining unit employees who retired prior to April 1, 1993. The Union says that the City had an established practice of applying wage increases retroactively to employees who quit or were terminated prior to the execution of a successor Agreement. The Union says that the City did not provide this clause until its final offer and gave no indication of it in its October 1993 "Initial Final Offer." This late submission is unreasonable and should cause the rejection of the City offer, pursuant to arbitral practice.

The reason the Union did not submit an offer on this issue was that it did not know until the final offer that the matter was in dispute.

The Union contends that it does represent employees for the period before they terminate and that is the period for which the Union seeks retroactive pay. The City is also inconsistent when it excludes terminated employees, but includes retired and deceased employees in its offer.

The Union contends that testimony shows that the City paid retroactive wage increases in the past to three employees who quit or were terminated. Thus the City is altering the status quo without offering a quid pro quo. The Union says that it could find no communities which limit retroactivity in the manner the City is proposing. There is a general principle that wage clauses are retroactive for all to the date on which the rate becomes effective. Other City contracts do not have such a clause as the City is proposing. The Union cites <u>Berns vs. Werg</u>, Dec. No. 14382-C (Sup. Ct. 1980) to support its position.

Discussion. The lack of comparables for the City proposal, the lack of evidence other than statements in the Union brief that other contracts in comparable communities do not have such a clause as that proposed by the City, and the contention by the Union that there has been a past practice of retroactivity in benefits after a contract goes into effect, leads this arbitrator to the viewpoint that this issue is best treated if and when a specific case arises under the new contract and someone who terminated between the expiration of the previous contract and the execution of a new contract seeks retroactive pay. The matter then can be fully treated in all its aspects which the arbitrator feels he cannot do here, because there is no specific former employee who might benefit. The proposed change offered by the City, though it may be legally justified, may be vitiated by a past practice which the arbitrator here cannot determine exists.

In the absence of a specific employee or employees who would be affected in the present proposed contract, the arbitrator believes that the interests of the puboic will be best served when a concrete example appears. The arbitrator therefore sees no pressing need for the City proposal to be included in the proposed agreement at this time.

X. WAGES. Both parties are placing in their offers a 4% wage increase for each of two years and a 6.2% payment in a retirement contribution, which is up 0.2%. The City is in effect saying that this 4% increase for each of two years ought to be related in a yielding on the part of the Union on the issue of starting times. The Employer offer in wages and total compensation is a major one and the change in starting times asked by the City is only a minor factor.

City Exhibit 17 shows that 19 among 20 comparables excluding New Berlin in the matter of wages, one was not settled, that three gave raises less than 4%, 15 gave a 4% raise, and one a 4.5% raise. Again, nine municipalities were listed as not giving a quid pro quo in relation to the increases, one was not settled, and at two the information was not available. Nine municipalities did show some kind of quid pro quo. The Union contends that the City exhibit shows that slightly less than half of the municipalities showed a quid pro quo and where a quid pro quo was shown, in two municipalities the increase was higher than 4%. The Union also contends that as to the claimed quid pro quos, no documentation was shown and the Union attitude as to whether a quid pro quo existed was not obtained.

The parties did not discuss extensively fringe benefits. However City Exhbiit 15 shows that New Berlin paid 100% of both the single and family premium for health insurance.

Discussion. From City Exhibit 17 it is evident that the City in its offer on wages meets the test of comparability. However the evidence that it should be regarded as a quid pro quo justifying the City offer on the work day without specific starting and ending times is not present. Among the comparables a sufficient number of them have granted a 4% wage increase without evidence of any quid pro quo, and the evidence about others as to whether the major contract changes were given as a quid prop quo for a 4% or better wage increase was not substantiated.

XI. CHANGE IN COST OF LIVING. City Exhibit 19 showed that the annual increase of the Consumer Price Index, U.S. City Average - All Items for Urban Wage Earners and Consumers was 3.1% in April 1993, the time of the expiration of the last agreement. Concerning this exhibit the Union asserts that the relevant CPI data for the City of Milwaukee were not submitted and this data are far higher than the United States City Average. Also the settled wage increases of external comparables is evidence which outweighs the use of the CPI. Arbitral opinion has concluded that comparisons between comparable communities furnish a better measure as to the extent in the change of the cost of living than does the CPI.

Discussion. The evidence here is that the City offer as far as wages are concerned and also benefits meets the test of comparability with changes in the cost of living. The 4% wage increase does not include roll-up costs to the City which would certainly increase the percentage increase for total compensation. As to whether this situation would justify a change in the clause on hours of work will be considered in a following section.

XII. OTHER FACTORS - MAINTAINING THE STATUS QUO AND THE ISSUE OF QUID PRO QUO. In this matter the Union is asserting that the status quo on both the proposed change in hours of work and on keeping out a retroactivity clause should be maintained. In the former matter, the maintaining of the specified starting and ending times, the Union is holding that there was no quid pro quo from the City to justify a change in starting time. The City is asserting that its percentage wage increase justifies an improvement in its flexibility of assignment and in starting and ending times.

As noted before, the arbitrator believes that the evidence on the percentage wage increase does not support the City in its concept about a quid pro quo situation existing with respect to the clause on hours of work. This arbitrator is of the opinion that in contractual negotiations everything is open for consideration and if a offer is justified for reasons other than a quid pro quo, it should be considered. Here there is insufficient evidence that among the comparables a wage increase was granted in turn for a concession in the contract on some part of a union.

XIII. ABILITY OF THE UNIT OF GOVERNMENT TO MEET THE COSTS OF EITHER OFFER. The evidence here is that the City has the ability to meet the cost of either offer. That there is an element of cost involved in this matter is shown by the City's desire to reduce overtime, among other things, on the part of the employees. However, if the Union offer is awarded a decision, the City has the ability to meet the costs as it has been operating under the provisions the Union seeks in the past as related to starting and ending times.

XIV. GOOD AND WELFARE OF THE COMMUNITY. The main issue here between the parties is whether the good and welfare of the community will be served best by one of the offers. The Union position with respect to the hours of work proposal of the City would be that it would disrupt the lives of the employees to allow the City the amount of flexibility it seeks in designating starting and ending times. The City says that it would best serve the interest of the taxpayer to have the flexibility it seeks in its offer on hours of work.

To this arbitrator there is a difficulty with the position of both parties. The Union's heretofore inflexibility with negotiating with the City a side agreement on taking care of needs in the recycling and landfill center indicates that the present language on starting is too inflexible. On the other hand the City seeks not only to set presumably an afternoon shift for work at the center, but also to have the right to change winter hours, summer hours, hours per snow storm, and hours relating to repair work on the roads, and hours for street sweeping. The effect of granting the City its request would be to give, in the opinion of the arbitrator, it a carte blance for changing hours. The City avers that it will meet and confer with the Union, but the decision to change hours will extensively as contemplated rest with the City. In the evolution from the strict adherence to the starting and ending times of the current provision, conferring this wide a latitude in determining the authority of the City to change those times appears excessive, particularly when the comparables do not support such a type of contractual right. To the arbitrator the lesser of the two evils is to maintain the present provision of a defined starting and ending time, and to ascertain by informal negotiation whether side agreements can be made on some of the concerns of the City to render service at appropriate times. Otherwise to support the City's position would in the opinion of the arbitrator lead to enough disruption in the lives of the employees which could conceivably result in multiple grievances.

The bests interests of the public therefore appears to be to maintain the existing defined starting and ending times for the highway department (street division).

XV. CHANGES DURING THE PENDENCY OF THE PROCEEDINGS. There were no changes reported during the pendency of the proceedings.

XVI. SUMMARY OF FINDINGS AND CONCLUSIONS. The following is a summary of findings and conclusions of the arbitrator:

1. There is a dispute as to the lawful authority of the parties in this matter relating to the City proposal not to offer retroactive pay to any employee who is terminated or resigns between the expiry of the previous contract and the execution of the new contract. Because there is no former employee immediately affected by this proposed provision of the City, the arbitrator believes it is in the interest of the public not to include the disputed provision, but to wait until an actual case may arise.

2. The parties have stipulated to all other matters between them.

3. The list of 20 comparable municipalities provided by the City, municipalities which are south and west of the City of Milwaukee is a primary list of comparables for matters in dispute which are largely conditions of work.

4. In the matter of the proposed clause offered by the City on hours of work omitting mention of specific starting and ending times as opposed to past provisions which included them, the Union offer meets the test of comparability.

5. As to the matter of the comparability of the City offer on hours of work with internal conditions, there is no consistant pattern on hours of work to validate the claim of either party that its type of offer predominates currently in City operations.

6. Again as to the matter of retroactivity of contract benefits upon execution of the contract, apart from the aspects noted in Paragraph 1 above, neither party could furnish evidence of comparability with its proposal, contracts being mostly silent on the subject.

7. As to wages, the City offer meets the test of comparability.

8. The City offer as to wages and presumably total compensation meets the test of comparability to changes in the cost of living.

9. The City has the ability to meet the costs attached to either offer.

10. As to the interest and welfare of the public, the arbitrator finds that both offers as to hours of work present a difficulty, with too much inflexibility of the past provision supported by the Union and too much flexibility in the City proposal. The arbitrator is of the opinion that the interests of the public are best served by maintaining the Union position, considering the Union testimony that it would confer with the City on City concerns for efficient operation.

In sum, the arbitrator believes that in the two major provisions, that of retroactivity and of the hours of work provision, the weight lies with the Union offer. Therefore the following Award:

XVII. AWARD. The terms of the Agreement between Teamsters "General" Local 200 and the City of New Berlin should include the offer of the Union.

Frank P. Zeidler

FRANK P. ZEIDLER
Arbitrator

Date April 11, 1994

Milwaukee, Wisconsin