BEFORE THE ARBITRATOR

ROSE MARIE BARON

---

In the Matter of the Arbitration of a Petition by

Juneau County Highway Employees' Union,
Local 569, AFSCME, AFL-CIO

and

Juneau County

WERC Case 105
No. 49915 INT/ARB-7034
Decision No. 28229-A

---

APPEARANCES

David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of Juneau County Highway Employees' Union, Local 569, AFSCME, AFL-CIO.

James C. Barrett, Chairman, Juneau County Board of Supervisors, appearing on behalf of Juneau County.

I. BACKGROUND

Juneau County is a municipal employer (hereinafter referred to as the "County" or the "Employer"). The Juneau County Highway Employees' Union, Local 569, AFSCME, AFL-CIO (the "Union") is the exclusive bargaining representative of certain County employees, i.e., a unit consisting of all regular full-time and regular part-time employees of the highway department. The County and the Union have been parties to a collective bargaining agreement which expired on December 31, 1993. On May 19, 1993, the parties exchanged their initial proposals and thereafter met on two occasions. On October 12, 1993, the Union filed a petition requesting the Wisconsin Employment Relations Commission initiate arbitration pursuant Commission to initiate binding arbitration. Following an investigation and declaration of impasse, the Commission, on November 17, 1994, issued an order of arbitration. The undersigned was selected by the parties from a panel submitted by the Commission and received the order of appointment dated December 28, 1994. Hearing in this matter was held on March 14, 1995 at the Juneau County Courthouse Annex. No transcript of the proceedings was made. At the hearing the parties had the opportunity to

present documentary evidence and the sworn testimony of witness.

Briefs were submitted by both parties and a reply brief was provided by the Union. The County, after consideration, determined not to submit a reply brief. The record was closed on May 23, 1995.

II. ISSUES AND FINAL OFFERS

A. The Union

The Union's final offer (Union Ex. 1) consists of two issues which remain unresolved, that of wages and a modification of the seniority provision:

> Appendix A - Work Rate Schedule. Increase all wages by 4% on the unit average on January 1 of each year of the Agreement.
>
> Article IV - Seniority. Amend paragraphs B and C, as follows:
>
> B. Policy. It shall be the policy of the Employer to recognize seniority in filling vacancies, making promotions and in laying off or rehiring (delete the balance of 1992-1993 contract language).
>
> C. Vacancies. Whenever a vacancy occurs or a new job is created....~~The senior qualified employee who has applied shall be awarded the vacancy....~~

B. The County

The County's final offer (County Ex. 1) is as follows:

> Appendix A - County proposes a 3% wage increase on January 1, 1994, a 3% wage increase on January 1, 1995.
>
> Article IX - Hours of Work. Limit compensatory time accumulation to maximum of 80 hours at any one time.
>
> Insert new paragraph at end of Article IX.
> ~~Lost Time provisions: The exception to the afore-described hours shall be that a maximum of forty (40) hours off for each employee per calendar year may be granted by the Highway Commissioner or his/her designee. If said leave is granted it shall be without pay. The morning of New Year's Eve day will become a lost time day for all employees, but will not be considered a holiday.~~

III. STATUTORY CRITERIA

The parties have not established a procedure for resolving an impasse over terms of a collective bargaining agreement and have agreed to binding interest arbitration pursuant to Section 111.70, Wis. Stats. (May 7, 1986). In determining which final offer to accept, the arbitrator is to consider the factors enumerated in Sec. 111.70(4)(cm)7:

> 7. Factors considered. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall give weight to the following factors:
>
> a. The lawful authority of the municipal employer.
>
> b. Stipulations of the parties.
>
> c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
>
> d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.
>
> e. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in 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.

## IV. POSITION OF THE PARTIES AND DISCUSSION

The following statement of the parties' positions does not purport to be a complete representation of the arguments set forth in their post-hearing briefs and the Union's reply brief which were carefully considered by the arbitrator. What follows is a summary of these materials and the arbitrator's analysis in light of the statutory factors noted above. Because the selection of the appropriate communities for purposes of comparability will have a major impact on the selection of one of the parties' final offers, that matter must be resolved before addressing the specific proposals in the final offers.

### A. Evidentiary Matters

It is necessary, however, to begin by addressing matters raised by the Union in its Reply Brief which include an allegation that the County's Brief includes a reformulated version of its exhibits and/or information that goes beyond the evidence presented at hearing. In particular the Union objects to the admission of "County Ex. 6"-- Pattern of Wage Settlements", which was never presented at hearing and is unsupported by appropriate source documentation. Additionally, the Union specifically requested at the hearing that the record be closed to new evidence and the arbitrator granted that request.

The arbitrator agrees with the Union's contention that the County has revised some of its exhibits. Among the exhibits presented at hearing, County Ex. 2 consisted of tables for "Population", "Per Capita Income", "Equalized Value Growth Rate: 1993-1994", and "County Purpose Property Tax Rate." In the exhibits attached to its Brief, the County has made the following changes:

Population: Original Counties--Clark, Crawford, Juneau
Brief--Added: Vernon, Adams

Per Capita Income: Original--Clark, Crawford, Juneau
Brief--Added: Vernon, Adams

Equalized Value Growth Rate: Original--7 contiguous counties, Juneau, Clark, and Crawford
Brief--Deleted:Columbia, Jackson, Monroe, Sauk, Wood

County Purpose Property Tax Rate: Original--7 contiguous counties, Juneau, Clark, and Crawford
Brief--not included

Pattern of Wage Settlements: Original--not included
Brief--Highway: Adams, Clark, Crawford, Vernon, Juneau Non-Union, Juneau JCPPA (Deputies)

It is the arbitrator's opinion, and it is so held, that the revisions in the first four exhibits listed above are of such a minor nature that they do not cause an evidentiary problem. For example, relating to the first two exhibits above, the County clearly indicated that Vernon and Adams County were included in its comparables; the population and per capita data which were not included in the exhibit admitted at hearing was readily available in Union Ex. 8--Population and Union Ex. 9--Per Capita Income. In the third and fourth exhibits, where all seven of the contiguous counties were first included and then several deleted, the arbitrator sees no disadvantage placed upon the Union in developing its own case.

The matter of the inclusion of County Ex. 6--Pattern of Wage Settlements--is quite a different matter. Here the County has overstepped the limit imposed by the arbitrator at hearing that no new evidence would be admissible. There is nothing in the written or testimonial record of the hearing that contained this information nor had the County requested leave to provide this material after the hearing had closed. The Union did not have relevant data on Clark, Crawford, Juneau non-union, or Juneau JCPPA (Deputies) either at hearing for purposes of cross-examination or for consideration in developing its argument for the Brief. Based upon these considerations, the arbitrator rules that County Ex. 6 is inadmissible and it will be given no

consideration in the final selection of one of the party's final offers.

B. The Comparables

1. The Union has proposed the seven following counties as comparables (Union Ex. 7):

| | | |
|---|---|---|
| Adams | Jackson | Sauk |
| Columbia | Monroe | Vernon |
| | | Wood |

The Union asserts that its comparability pool should be adopted by the arbitrator as it meets arbitral criteria for establishing comparability. The seven counties are all geographically contiguous with Juneau County and compete in the same labor market. Union Ex. 12 provides data showing the commuting pattern, i.e., number of commuters to and from Juneau County to the seven contiguous counties.

It is the Union's position that the County's reliance on Clark and Crawford Counties is inappropriate and should be rejected by the arbitrator. Neither county is contiguous to Juneau County nor is there any evidence of a labor market interaction. The only data submitted by the County at hearing in support of establishing comparability related to population, per capita income, equalized value, and county-purpose tax rates. These data are not, by themselves, definitive proof of comparability or lack of comparability.

2. The County has proposed four counties (County Ex. 2, p. 1) and Brief, County Ex. No. 2, p. 7):

| | |
|---|---|
| Adams | Crawford |
| Clark | Vernon |

It is the County's position that these four counties are the most consistent with Juneau County on the basis of population, equalized value, per capita income and wage settlements (County exhibits attached to brief). The County maintains that for purposes of comparables, contiguity does not necessarily mean comparable.

3. Discussion and Findings

The question of how parties select appropriate comparable communities has been confronting arbitrators since the beginning of interest arbitration in Wisconsin. Among the factors considered have been geographic proximity, population, similar institutions and services, per capita income, tax rates and increases, etc. It is this arbitrator's position that the degree of weight which these factors receive may vary by the facts of each case. For example, this arbitrator was faced with the union's proposal to include a geographically proximate city, Madison, as a comparable in a case involving education assistants in Middleton.

> Ultimately, the decision as to whether it is appropriate to include Madison at all must be made. While it is true that Middleton is not an isolated rural community with limited employment opportunities, and is on the doorstep of the Madison labor market, one must not apply comparability standards in a mechanical way. In this case the extreme difference in size [enrollment and number of teachers] deserves greater weight in a determination than proximity. (Middleton-Cross Plains School District, INT/ARB-6566, 1993, emphasis added).

Given the facts of the instant case, the arbitrator must determine whether proximity is the factor which will be given greater weight than some of the other factors, such as size or per capita income. The Union has selected the seven counties which are geographically contiguous with Juneau County and has provided compelling evidence of the congruence of proximity and the existence of a common labor market (Union Ex. 12). The data on commuting patterns for the seven counties show that workers coming to Juneau County for employment ranges from a low of 17 (Jackson) to a high 656 (Monroe). Persons living in Juneau County also commute to the contiguous counties for work (with the exception of Jackson County) thus bearing out the common labor market premise. However, the two counties selected by the County as comparables show a limited number of workers commuting to Juneau County, i.e., only four workers from Clark County and two from Crawford County. No specific data is available on the reverse commute to  County.

The County has not provided any rationale for its choice of Crawford or Clark Counties (Adams and Vernon are contiguous) other than to say, "...we submit that the following counties are the most consistent with Juneau County in population, equalized value, per capita income and wage settlements" (County Brief, p. 4). While this may be an accurate statement, it does not explain why Crawford County, which is at least two counties southwest of Juneau, and Clark County which is removed by at least one county to the northwest, were selected. There are no doubt other counties with similar demographics outside of the seven comparables proposed by the Union which would also be consistent with Juneau County. Like Arbitrator Winton, who decided an interest arbitration involving the Juneau County Courthouse employees in March of 1995, this arbitrator has sought and failed to find a substantial reason to go beyond the seven contiguous counties. Based upon the facts presented, it appears that a common labor market exists between these counties and Juneau County and that in the instant case proximity is the most compelling factor. To permit a party to select comparables in order to support its wage and/or benefits offer would be to encourage forum shopping and thus fail to provide a stable basis for future bargains. It is therefore held that the Union's list of seven contiguous counties is the appropriate one on which to base the comparison of the parties' final offers.

C. Wages

1. The Union

The Union's final offer for wages proposes a 4% increase on the unit average on January 1 of each year of the agreement. The County proposes a 3% wage increase on January 1, 1994 and a 3% increase on January 1, 1995. The Union has presented exhibits comparing the Juneau County patrolman classification with the seven counties in 2-year increases by percent (Union Ex. 13) and 2-year absolute increases (Union Ex. 14). Since there was no settlement in some of the 1995 agreements, Exhibit 13 shows only a range of increases for four counties from 6.18% to 9.45%, with an average (mean) of

7.58%. The County's offer is 6.09%, a deviation from the mean of -1.24; the Union's is 8.17%, with a deviation from the mean of +.74, resulting in the Union's offer being closer to the comparables.

If the 1994 data alone were considered, where all units had reached settlement, the range was from a low of 3.02% to a high of 4.54%, with a mean of 3.88%. The County's offer of 3.00% is below the mean by 1.00%; the Union's offer of 4.00% is +.12% above the mean. It should be noted that if the data were analyzed by utilizing the **median** which is a measure of the center, i.e., arranging the seven counties in numerical order and selecting the one at the center, in this case the 4th, the median is 4.00%. The County deviates from the median by -1.00%, while the Union's offer is exactly at the median.

Union's Exhibit 14 considers the increase in cents per hour. For 1994, the mean increase was $.44; the Union's offer was precisely that amount while the County's $.33 deviates from the mean by $.11.

The Union has also provided a benchmark analysis comparing the wages paid for four typical positions, i.e., motor grader, patrolman, truck driver, and mechanic. Data for 1993 show that Juneau County ranks fourth of eight for all but the patrolman position in which it is third. The wage rate paid to Juneau County employees are lower than the comparables for all positions. For 1994 and 1995, a series of tables are presented demonstrating, inter alia, the effect of the County's offer on rank (lowering it for all but the mechanic position) and an erosion of relative wages.

Finally, in its argument relating to wages, the Union asserts that factor (h) of the statute concerning "overall compensation" should be considered. It is the Union's position that in terms of insurance benefits received, Juneau County employees receive a substantially lower contribution from the employer than do the highway workers in the comparable communities. While benefits are not an issue in the present impasse, the low level of benefits, taken together with the below average level of wages at each of the benchmarks demonstrate no justification for the County's offer.

2. The County

The County has not provided any evidence rebutting the Union's data, analysis, or argument on wages. Its position is that "..there just are no extra monies to be awarded in any area of county operation." The County asserts that because there has been a freeze on the mil rate which allows tax levy only for equalized property value increases it cannot go over limited increases. The latest consumer price index is quoted as only 2.9% which is consistent with the final offer. The County refers also to the cost of a recent 4% (1994) and 4% (1995) Award to Courthouse employees as an additional $45,000 which was not budgeted. Also noted was that all non-union employees and the Juneau County Professional Police Association received 3% wage increase for both 1994 and 1995. Other costs for services and landfill expenses are cited as reasons why no additional funds exists for the Highway Department.

3. Discussion and Findings

The Union has raised objections in its Reply Brief to several of the County's statements in its Brief on the grounds that no evidence was submitted at hearing regarding the consumer price index, the 3% wage increases provided to non-union employees and the Juneau County Professional Police Association for 1994 and 1995, the $45,000 retroactive pay issue, or the landfill cost of $1.3 million dollars. In addition, the Union argues that the County's attempt to show budgetary hardship has not directly asserted that the Union's offer was beyond its ability to pay nor has it met the standard of proof for such an argument. The testimony of James Barrett, Chairperson of the County Board, admitted that the total budget of the County was about $16 million, of which less than one-quarter comes from the property tax. The Union asserts that 75% of revenues come from other tax sources, not affected by the property tax freeze. Sales taxes, greater state revenues, and additional state funds for highway maintenance are all revenues available to the County. The Union contends that the County has not met its burden of proving inability to

pay.

The arbitrator has reviewed the County exhibits admitted at hearing and her notes to determine whether there is any foundation for the information which the County has included in its Brief and to which the Union has objected. There are no contracts for the non-union or deputies in the record, nor is there any CPI data. The assertion regarding the cost of the Courthouse employees award or the landfill are likewise not part of the record. While the arbitrator does not doubt the County's claim that it is experiencing financial difficulty, there is no persuasive evidence in the record compiled at hearing of these matters. The assertions contained in the County's Brief cannot be accorded the quantum of weight which they might have received if the hard data underlying them been introduced and admitted into evidence at the hearing. Since it would be beyond the arbitrator's authority to rely on material which was not part of the official record of the hearing, it is held that this material will not be accorded weight in the decision. The County has not met the burden of proving inability to pay pursuant to factor (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."

Based upon the discussion above, the arbitrator finds that the Union's offer more closely approximates the increases in wages of the comparable counties and it is therefore deemed to be preferable.

D. Seniority

1. The Union

The parties agreed to revise the seniority provision of the collective bargaining agreement, Article VI, and reached agreement as to format changes and the wording of several provisions. At issue herein are two paragraphs, i.e., B. Policy and C. Vacancies, which the Union contends require revision if they are not to conflict with the already agreed-upon layoff and recall language. These sections, read together with paragraph J. Layoff and Recalls result in inconsistency. Paragraph J. reads as follows:

> J. Layoff and Recall. In laying off employees, the least senior shall be laid off first, provided that the remaining employees are able to perform the remaining work. In recalling employees, the most senior laid off employee shall be recalled first, provided said employee is able to perform the work of the open position.

The Union asserts that the Policy statement calls for a "relative ability" standard, while the Layoff and Recall provision provides for a "sufficient ability" standard. Thus, the Union proposes to revise the Policy statement which will delete all reference to ability and qualifications:

> B. Policy. It shall be policy of the Employer to recognize seniority in filling vacancies, making promotions and in laying off or rehiring ~~provided, however, that the application of seniority shall not materially affect the efficient operation of the Juneau County Highway Department. Filling of vacancies, promotions, laying off and rehiring shall be based on seniority, ability, and qualifications. Ability and qualifications being equal, seniority shall prevail. The high commissioner shall be the judge in any case. If the highway commissioners decision is not satisfactory, it can be appealed through the grievance procedure provided in Article V above.~~

The Union believes that without some modification to the language of the predecessor contract, the 1994-1995 contract will contain an inconsistency. It is claimed that the Employer's offer does nothing to resolve the conflicting language and therefore the Union's offer is preferable.

The Union has also proposed to amend paragraph C. Vacancies of Article IV, in the event a vacancy occurs or a new job is created, by adding "The Senior qualified employee who has applied shall be awarded the vacancy..."

2. The County

The County has not proposed any change in the status quo, i.e., the policy statement in the predecessor contract. It argues that it has consistently maintained quality in the selection of personnel for highway positions. It cites three provisions of Article VII, Employer's Rights, to confirm the kinds and amounts of services performed, the method, means and personnel by which operations are to be conducted, and its right to hire,

promote, transfer, schedule and assign employees to positions within the highway department.

The County further argues: "Above and beyond this contract language, all other Juneau County contracts emphatically state that 'Ability and qualifications being equal, seniority shall prevail.'"

Finally the County states that because of the sophisticated equipment being used in the highway department, it is necessary to select "the most skilled person assignable to the job" in order to provide for the safety of highway personnel and citizens. The County concludes that this is not an issue of compromise for the county in matters of safety, liability, productivity and cost effectiveness.

3. Discussion and Findings

At the outset the arbitrator must consider the objection raised by the Union in its Reply Brief to the introduction of certain of the County's exhibits and statements on the basis that they were not submitted at the hearing.

The County's statement regarding seniority, found at page 5 of its Brief, referring to "...all other Juneau County contracts...", is not supported by any evidence introduced by the County at the hearing. Since the contracts of the other units are not part of the official record, it is held that no weight can be accorded to that assertion made by the County in its Brief.

The Union is proposing a drastic change of the policy language in the 1992-1993 contract asserting that the newly bargained layoff and recall provision conflicts with the policy section. The layoff and recall provision states: "In recalling employees, the most senior laid off employee shall be recalled first, **provided said employee is able to perform the work of the open position.**" This language, the Union argues, is a "sufficient ability"

standard. As described by Elkouri and Elkouri[1] in their discussion of "modified seniority clauses" it is necessary only to determine if the senior employee can in fact do the job. The present policy section states: "Filling of vacancies, promotions, laying off and rehiring shall be based on seniority, ability, and qualifications. **Ability and qualifications being equal, seniority shall prevail.**" (Emphases added) This represents the "relative ability" standard which compares the abilities of two or more employees seeking the position; seniority becomes a determining factor only if the qualifications of the bidders are equal. As the Union notes, the different standards in these two provisions will create an inconsistency.

In order to remedy this potential problem, the Union proposes to excise almost all of the present policy statement which would now read: "It shall be policy of the Employer to recognize seniority in filling vacancies, making promotions and in laying off or rehiring."

Although not specifically stated, it appears that the Union fears that this inconsistency will result in future problems which may give rise to grievances. There is no evidence in the record of past layoffs and recalls or the effect of the present policy language. Under ordinary circumstances this arbitrator would find it difficult to agree to such radical surgery on contract language which did not flow from the bargaining process, i.e., there is no evidence of a quid pro quo offered by the Union for their proposal on seniority. Similarly, the Union has not indicated any quid pro quo regarding its proposed change regarding vacancies.

The County argues that the present language of the policy section in conjunction with the provisions of Employer's Rights, is necessary to maintain the safety of staff and citizens. There is no foundation, however, to support its assertion that the equipment "be operated at all times by the <u>most</u> skillful person assignable to the job." (County Brief, p. 5, emphasis added).

---

[1]Elkouri & Elkouri, How Arbitration Works, 4th Ed., 610-613 (BNA Books, 1985)

Because neither of the parties' arguments is sufficiently persuasive, the arbitrator must decline to give substantive weight to either of their final offers on the issue of seniority.

E. Article IX, Hours of Work

The County proposed to add a new paragraph entitled "Lost Time Provisions" which provides for a maximum of forty hours off for each employee per calendar year to be granted by the Highway Commissioner or designee. This leave shall be without pay. Also, the morning of New Year's Eve day will become a lost time day for all employees, but will not be counted a holiday. The Union objects to this offer and asks that it be rejected by the arbitrator. No documentary or testimonial evidence regarding this issue was introduced by the County. There has been no showing of need for this amendment and the Union makes an unrebutted statement that no quid pro quo was offered during the bargaining process. Because there is insufficient evidence, this proposal shall not be considered in the final determination of which of the final offers is the more preferable.

V. CONCLUSIONS

Based upon the discussion above the arbitrator finds the following:

The seven counties proposed by the Union are appropriate for purposes of comparability.

The Union's final offer of a wage increase of 4% on January 1, 1994 and 4% on January 1, 1995 is preferable.

No weight shall be given to the final offers regarding seniority. The language of the prevailing party's final offer shall, of necessity, become a part of the collective bargaining agreement.

The proposal of the County regarding lost time has been rejected and therefore shall not be considered in this determination.

The arbitrator finds that the final offer of the Union is preferable under the factors enumerated in Sec. 111.70(4)(cm)7, Wis. Stats.

VI. AWARD

The final offer of the Union shall be adopted and incorporated in the parties' Collective Bargaining Agreement for 1994-1995.

Dated this 17th day of July, 1995 at Milwaukee, Wisconsin.

Rose Marie Baron

Rose Marie Baron, Arbitrator