BEFORE THE ARBITRATOR

In the Matter of the Petition of:

LOCAL 1287 AFSCME, AFL-CIO

To Initiate Arbitration
Between Said Petitioner and

MARATHON COUNTY

Case 229 No. 52119
INT/ARB-7535

Decision No. 28362-A

Heard: 7/27/95
Record Closed: 9/29/95
Award Issued:

Sherwood Malamud
Arbitrator

APPEARANCES:

Phil Salamone, Staff Representative, AFSCME Council 40, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., by Dean R. Dietrich, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the Employer.

ARBITRATION AWARD

Jurisdiction of Arbitrator

On May 2, 1995, the Wisconsin Employment Relations Commission appointed Sherwood Malamud to serve as the Arbitrator under Sec. 111.70(4)(cm)6 and 7, of the Municipal Employment Relations Act, to resolve the impasse between the Employer and the Union by selecting the total final offer of either Local 1287 AFSCME, AFL-CIO or of Marathon County. Hearing in the matter was held on July 27, 1995, at the Marathon County Courthouse in Wausau, Wisconsin. Post-hearing briefs were received by the Arbitrator by September 29, 1995.[1]

[1]The parties exchanged briefs on their own. Both the Union and the Employer's briefs were postmarked September 22. The Arbitrator received the Union's brief on September 29, 1995.

Summary of the Issue in Dispute

The Employer proposes the deletion of language in Article 34A and 34B that provides for a four day week/ten hour day during the period of May 1 through September 15.

The Union proposes to retain the status quo. It proposes to retain the summer schedule of a four day week/ten hour day.

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:

> 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.
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> 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.
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> 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.
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> 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.

POSITIONS OF THE PARTIES

The Employer Argument

The Employer argues that the following criteria support its position: 1. the interest and welfare of the public; 2. comparability as to summer hours schedule and assigned by other comparable counties; 3. such other factors-internal comparability among settlements achieved by employees in other bargaining units in Marathon County; 4. such other factors circumstances that justify changing the status quo.

The Employer argues that the interest and welfare of the public would be best served through the elimination of the four day per week, 10 hour per day summer schedule because the mission of the Parks system has changed. In 1990, it completed a study and adopted the Comprehensive Outdoor Recreation Plan. Since then, it has divested some of its parks. In 1976, there were 21 parks; now, there are 13 County parks. There are only two parks at the western border and two parks at the eastern border of the County.

The County has more efficient equipment to service the parks. Larger mowers and improved equipment make the department's employees more productive. In addition, volunteers perform a portion of the maintenance work on County parks. There is no longer a need for the four day-ten hour per day work week.

On the contrary, with the new service orientation of the Parks Department the many weekend festivities and special events, the Department requires that the full complement of 24 employees be on duty on Monday and Friday for take down and set up for these events. The normal 40-hour work week will provide the personnel to set up and take down for weekend events. The Employer emphasizes that events such as the Log Jam, three kayak race weekends, arts festival, water ski tournament, blues festival, community festival, YMCA triathalon, and other tournaments and events underlie the need for changing the summer schedule to the normal eight hour per day, five day per week work week. With the staffing pattern of 10 employees scheduled for Mondays and 14 for Fridays, absences may reduce the personnel available on a Monday to as few as 7-8 employees.

The County emphasizes that for approximately five years it has introduced proposals to eliminate the four day/ten hour per day work week.

The Employer argues that the external comparables established by Arbitrator Stern support its proposal. The contracts that reference a four day work week do so in the context of available "flex time." However, none of the counties and cities comparable to Marathon permit the bulk of the unit to work a four day week.

In this regard, the Employer cites Arbitrator Michelstetter in City of Medford (Police), Dec. No. 26674-A (7/91), who observed that employees may desire to have time off available to them at times most convenient for them. However, proper allocation of resources should outweigh employee convenience in the determination of scheduling and staffing questions raised in interest arbitration.

The Employer argues that no quid pro quo is necessary for the change which it advocates. The Employer argues that the three pronged test employed by Arbitrator Reynolds in Edgerton School District, Dec. No. 25933-A (11/89), should govern the determination of this case. In his analysis, Arbitrator Reynolds asks the following questions:

1. Does the present contract language give rise to conditions that require change?

2. Does the proposed language remedy the condition?

3. Does the proposed language impose an unreasonable burden upon the other party?

Further, the Employer cites the views of Arbitrator Vernon that the inherent reasonableness of a proposal may be so overwhelming that no quid pro quo or little quid pro quo is necessary, especially where the comparables support the proposal for change; Buffalo County (Human Services), Dec. No. 25624-A (2/89). Arbitrator Zeidler suggests in School District of Plymouth, Dec. No. 26487-A (10/90), that the lack of a quid pro quo should not bar a proposal for change, where the circumstances requiring change are critical.

The County argues that the Union has made no counter offer to its proposal to eliminate the summer schedule. It does not propose a quid pro quo for the change. When the benefit was included in the agreement in 1976, no quid pro quo was obtained. The Employer concludes that its proposal is the more reasonable and should be adopted by the Arbitrator.

The Union Argument

The Union argues that the County proposal to eliminate the summer schedule of the four day by ten hour day would also result in the elimination of a paid lunch. In effect, the employees would be required to work 40 hours instead of the 38 which they now work and are paid for 40. The elimination of the paid lunch may be an unintended consequence of the Employer's proposal, however, the Employer offers no quid pro quo for the change.

The Union argues that the County has not shown a compelling need for the change. The Union maintains that the reduction in staff over an 18 year period from 44 to 29 unit employees is the source of the Employer's staffing problems.

The Union argues that the only other blue collar unit in Marathon County, the Highway unit, the internal comparable that should be given the most weight by this Arbitrator, provides for a four day by ten hour day work

week similar to the summer schedule that the Employer seeks to eliminate in this proceeding. The summer schedule in the Highway unit will not be changed and was not changed in this round of bargaining.

The Union notes that the personnel ordinance provides for a summer schedule. Employees on that schedule are paid for 40 hours when they work a 37.5 hour work week in the summer. The Union argues that should the Arbitrator adopt the County's proposal, it would result in a wage cut.

The Union quotes extensively from this Arbitrator's analysis in City of Verona (Police Department), Dec. No. 28066-A (12/94). The Union concludes that the Employer's proposal constitutes a unilateral confiscation of a benefit. It argues that the interest arbitration statute was established to avoid what the Employer attempts in this proceeding.

DISCUSSION

Introduction

In the tentative agreement for a collective bargaining agreement covering calendar years 1995-1997, these parties agreed as follows:

> 14. Agreement to Arbitrate Hours of Work Dispute:
>
> As a part of the Tentative Agreement, Marathon County and Local 1287 agree to proceed to interest arbitration on the issue of the County's proposal to eliminate the 10 hour work day language contained in Article 34 - Hours and Overtime, Paragraph B - Hours of Work. All other terms of this Tentative Agreement will be implemented by the parties and Marathon County will petition for interest arbitration as soon as possible. The language of Article 34, Paragraph B will continue in effect during the pendency of the interest arbitration process.

This unit of County employees maintains the parks of the City of Wausau, as well as Marathon County. Effective January 1, 1975, the administration and maintenance of city and county parks were merged.

In negotiations under a reopener in the 1975-76 contract for calendar year 1976, it is the County that proposed the inclusion of the four day by ten hour day work week. The County succeeded. The summer schedule for the period of May 1 through October 31 was included in the Agreement under the 1976 reopener. In September 1977, the parties agreed to reduce the period of the summer schedule to May 1 through September 30.

In negotiations for the 1979-80 collective bargaining agreement, the Union sought the deletion of the four day by ten hour day work week language from the Agreement. The Union kept this proposal as part of its final offer. In the mediation/arbitration process, the late Arbitrator Kerkman assisted the parties in resolving the hours of work issue. The Consent Award issued by Arbitrator Kerkman states as follows:

> During the time that the four consecutive day work week schedule is in effect from May 1 to September 15, there will be one ten minute per day paid break in the morning; a fifteen minute per day paid noon lunch break; and no afternoon break. During the period of time from May 1 through September 15 when the four consecutive day work week schedule is in effect, all employees working the regular work day schedule shall be paid ten hours' pay per day. When employees revert to the work week of forty (40) hours per week Monday through Friday, the noon lunch break will not be a paid lunch break, and the employees will receive a ten minute paid break in the a.m. and a ten minute break in the p.m.

In negotiations for the 1993-94 contract that commenced in 1992, the County proposed the deletion of the language at issue, here.

In the balance of this Award, the Arbitrator addresses the statutory criteria applicable to the determination of this case that are addressed in the parties' arguments: interest and welfare of the public; comparability; such other factors - internal comparability; such other factors - changing the status quo.

Interest and Welfare of the Public

The County argues that when the four day by ten hour day work week was first proposed by the County for inclusion in the Collective Bargaining Agreement, the County maintained and operated 21 parks, ten of which were outlying parks; five close to the eastern border of the county and five close to the western border of the county. As a result of the Comprehensive Outdoor Recreation Plan issued in 1990, the County has since divested itself of three parks in the western part of the county and three parks in the eastern part of the county to other governmental jurisdictions. The considerable savings in gas, travel time and efficient use of personnel attendant to the adoption of the summer hours in 1976, no longer exists today.

Furthermore, the County emphasizes that the equipment it operates is more efficient, consequently its employees are more productive. For example, the County now mows with 72" wide mowers as compared to 54" mowers back in 1976. The County no longer sprays for insects, nor does it operate two garbage trucks.

In 1976, larger crews were dispatched from Wausau to the outlying parks. With the ten hour work day, the percentage of time spent in travel was reduced when crews could travel to the outlying parks and complete their work. With the divestiture of these outlying parks and with more efficient equipment, the County no longer receives the benefit of the savings in gas and time spent in travel previously associated with the ten hour day.

On the other hand, with the change in philosophy in the Comprehensive Outdoor Recreation Plan, the mission of the Parks Department has changed to provide service and support for summertime festivals and activities. During the summer months, the following events occur in the parks operated and maintained by the Department: the Log Jam, three kayak race weekends, an arts festival, Fourth of July Celebration, water ski tournament, blues fest, YMCA triathalon, and other sporting tournaments and events.

The County maintains that staffing the Department with a full complement of employees Monday through Friday will facilitate the setup

and takedown necessary to successfully carry out these events. Under the four day by ten hour day work week, ten employees are scheduled on Mondays through Thursdays and fourteen are scheduled for Tuesdays through Fridays. Any illness or absence on Monday can reduce staffing levels to 7 or 8 employees.

The Union notes that full-time employment levels have dropped by one-third from 44 full-time employees to 29 since 1976. In addition, the County employs non-unit seasonal employees, as well as, volunteers to maintain the parks.

The above analysis provides substantial evidentiary support on the criterion, the interest and welfare of the public, for the deletion of the summer schedule language from the successor Agreement. The Union's argument that employment of full-time employees has declined over the past 18 years does not undermine the Employer's claim that present staff levels are best met through a 40-hour work week comprised of a five day by eight hour day. Accordingly, the Arbitrator concludes that the Employer's proposal to delete the summer hours schedule from the Collective Bargaining Agreement is supported by the interest and welfare of the public criterion.

Comparability

Both the Employer and Union refer to the list of comparables established by Arbitrator Stern in his award between these parties that he issued on July 3, 1992. He established Wood and Portage Counties, as well as the cities of Marshfield, Stevens Point, Wisconsin Rapids, and Wausau as the appropriate comparability grouping for Marathon County.[2] The Arbitrator applies the primary comparables agreed to by both the Employer and the Union as the basis for the application of the comparability criterion.

None of the comparables establish as a contractual right/obligation a summer schedule of a four day/ten hour day work week for most of their employees. A number of the labor contracts of the comparables permit an

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[2]The Employer also proposes secondary comparables of Brown County and the City of Eau Claire.

employee or classification of employees to work a flex time schedule with the approval of supervision. The Arbitrator concludes that this criterion supports the selection of the Employer's offer to delete the summer schedule language from the 1995-97 Agreement.

Such Other Factors - Internal Comparability

The Union notes that the only other blue collar unit, the Highway unit, continues to enjoy a four day by ten hour day summer schedule under a letter of agreement included in its collective bargaining agreement. This letter will continue in effect during the term of the contract at issue herein. The Union notes that the County ordinance provides for flex time with approval of supervision. Similarly, employees in other units may apply for flex time. The Union notes that the County's proposal does not provide for any flex time opportunities for any employee in the Park Department unit. However, the Union does not propose the elimination of flex time as part of the definition of the work week during the summer period of May 1 through September 15 and replace that language with the availability of flex time upon the approval of supervision.

The Employer proposes to change the summertime schedule for all employees, not just for some. The Employer's proposal to totally eliminate flex time in this unit and not make it available to some, leads the Arbitrator to conclude that this criterion provides some support for the Union's proposal.

Such Other Factors - Changing the Status Quo

Arbitrators employ different analytical frameworks for determining the circumstances under which they will adopt a proposal to change the status quo. In this Arbitrator's decision in the City of Verona (Police Department), supra, at pp. 17-22, this Arbitrator engaged in an extended discussion of the basis for the application of the status quo analysis. The analytical tool employed by this Arbitrator to review a proposal which attempts to alter the language of an expired agreement is a three-pronged test:

1. Has the party proposing the change demonstrated a need for the change?

2. If there has been a demonstration of need, has the party proposing the change provided a quid pro quo for the proposed change?

3. Have 1 and 2 been established by clear and convincing evidence?

The Employer asks the Arbitrator to apply the analytical framework employed by the late Arbitrator Robert Reynolds to a proposal to change the status quo. Arbitrator Reynolds' asks:

1. Does the present contract language give rise to conditions that require change?

2. Does the proposed language remedy the condition?

3. Does the proposed language impose an unreasonable burden upon the other party?

Edgerton School District, Dec. No. 25933-A, (11/89).

This Arbitrator concludes that the application of either analytical framework will result in the rejection of the Employer's offer under this criterion. Under either model, the Employer must demonstrate the need for a change.

Duncanson, the Director of the Wausau/Marathon County Parks Department acknowledged in his testimony that under the summer schedule, all work that needed to be done was accomplished during the period of May 1 through September 15 period, without resorting to the use of overtime. Nonetheless, as noted under the discussion of the interest and welfare of the public criterion, the Employer has established the preferability of the five day per week/eight hour day work schedule in the Parks Department during the summer months. The Employer has demonstrated a need for a change.

It has not established that the change is critical to its operation. It has not established that the need for change is required. Under this Arbitrator's paradigm, the Employer has met the first test; under the Reynolds model, whether the Employer met this test is open to question.

Under the Reynolds paradigm, an arbitrator applies a second test to determine whether the proposed change solves the problem identified. It may be difficult for the proponent of change to establish the impact that change will have on the conditions at hand. However, in this case, the Employer has established that the elimination of summer hours will increase its staffing on Mondays and Fridays when taking down and setting up for weekend events takes place.

The Union suggests that there may be another cause of the staffing problem identified by the Employer. The Union suggests that the reduction in staff from 44 full-time employees to 29 over a period of 18 years is the force underlying the staffing problems. Nonetheless, the Reynolds second test is met.

Under the third test of the Reynolds model, an Arbitrator must determine, whether the proposed change imposes an unreasonable burden on the other party. It requires the Arbitrator to distinguish between reasonable and unreasonable burdens. The proponent of change, or more likely the party resisting change, must establish the "loss" it will suffer from the proposed change. Here, the Union will no longer have a four day work week in the summer; it will lose a paid lunch during the summer hours.

What is the justification or the offset for this change; should this change occur in the absence of any quid pro quo and by arbitral fiat? Is the burden imposed on the Union by this change unreasonable? The answers to these questions under the Reynolds paradigm are difficult to articulate. The analytical framework used by this Arbitrator is simpler to apply.

This Arbitrator applies the simple three-pronged paradigm noted above: 1. Is there a need for change?; 2. Has a quid pro quo been offered?; 3. Have 1 and 2 been established by clear and convincing evidence?

This Arbitrator's inquiry attempts to identify the part of the Employer's offer that would offset the loss attendant to the proposed change. The Union notes that the elimination of the four day by ten hour day work week will result in the elimination of a paid lunch. Where employees have worked 38 hours and were paid for 40 hours, that benefit will be eliminated under the Employer's proposal. The Employer

acknowledges that it does not offer a quid pro quo for the change. Accordingly, the Arbitrator concludes that this criterion provides the strongest support for the adoption of the Union final offer to retain the summer schedule language in the successor Agreement.

SELECTION OF THE FINAL OFFER

In selecting the final offer for inclusion in the successor agreement, this Arbitrator weighs all criteria. In the above discussion, the Arbitrator concludes that the criterion the interest and welfare of the public and external comparability provide strong support for the adoption of the Employer's final offer. Certainly, the Employer decision as to the assignment of its work force is entitled to substantial weight.

The Arbitrator concludes that internal comparability provides some support for the Union position. The Employer proposal eliminates flex time for all Parks Department employees. Under the Employer proposal, flex time is not afforded to some employees.

The Arbitrator concludes that the criterion such other factors-changing the status quo provides strong support for the inclusion of the Union's final offer in the successor Agreement. The Employer's final offer would eliminate the paid lunch period during the summer schedule, yet it offers no quid pro quo for the elimination of that benefit.

The Arbitrator gives the such other factor-status quo criterion greater weight than the interest and welfare of the public criterion, in this case. If the sole effect of the Employer's proposal were to eliminate the summer schedule, the interest and welfare of the public criterion would have been given the most weight. The Employer's determination of its manpower needs is borne out by the evidence. Its proposal to increase staffing on Mondays and Fridays through the elimination of the four day work week is reasonable.

However, its proposal eliminates a paid benefit, a paid lunch, without anything offered in exchange. Although the external comparables support the Employer's proposal, its proposal does not make flex time available to some employees as provided by some of the external and the internal

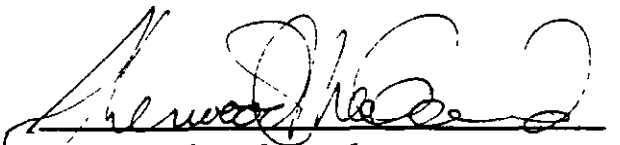
comparables. Therefore, the Arbitrator concludes that the Union's proposal for the retention of the status quo and continuation of the summer schedule language in the successor Agreement is slightly preferred.

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

AWARD

Upon the application of the statutory criteria found at Sec. 111.70(4)(cm)7.a.-j., Wis. Stats., and upon consideration of the evidence and arguments presented by the parties and for the reasons discussed above, the Arbitrator selects the final offer of Local 1287 AFSCME, Council 40, AFL-CIO, which, together with the stipulations of the parties, are to be included in the Collective Bargaining Agreement between Marathon County (Parks Department) and Local 1287 AFSCME, Council 40, AFL-CIO, for an agreement for calendar years 1995-1997.

Dated at Madison, Wisconsin, this 20th day of November, 1995.



Sherwood Malamud
Arbitrator