STATE OF WISCONSIN
BEFORE THE ARBITRATOR

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In the Matter of Interest Arbitration

Between

CITY OF RACINE

Case 444
No. 51783 INT/ARB-7450
Decision No. 28396-A

and

RACINE CROSSING GUARD EMPLOYEES
LOCAL 2239A, AFSCME, AFL-CIO

Gil Vernon, Arbitrator

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APPEARANCES:

On Behalf of the City: Guadalupe G. Villarreal, Assistant City Attorney

On Behalf of the Union: John P. Maglio, Staff Representative, Wisconsin Council 40/AFSCME

I. BACKGROUND

The Union and the City have been Parties to a collective bargaining agreement covering the wages, hours, and working conditions of bargaining unit employees which expired on December 31, 1994. On October 5, 1994, the Parties exchanged their initial proposals on matters to be included in a new collective bargaining agreement. Thereafter the Parties met on one occasion in efforts to reach an accord. On November 8, 1994, the Union filed the instant petition requesting that the Commission initiate arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act. On February 8 and March 16, 1995, a member of the Commissions' staff conducted an investigation which reflected that the Parties were deadlocked in their negotiations, and by April 19, 1995, the Parties submitted to the investigator their final offer, written positions regarding authorization of inclusion of

nonresidents of Wisconsin on the arbitration panel to be submitted by the Commission, and thereupon the investigator notified the Parties that the investigation was closed. He also advised the Commission that the Parties remain at impasse.

On May 1, 1995, the Commission ordered the Parties to select an arbitrator. Subsequently the Parties selected the undersigned. His appointment was ordered on May 22, 1995.

A hearing was scheduled and held on July 26, 1995. The proceedings were transcribed, and post-hearing briefs were filed. The record was closed September 21, 1995.

II. ISSUE AND FINAL OFFERS

There were two issues that the Parties could not resolve and were at issue in arbitration. The first relates to the wage rate increase for each of the years 1995 and 1996. The other issue relates to language concerning contracting out.

Regarding the wage rate increase, the Union proposes that the previous contract rates be increased by 2 percent effective January 1, 1995, and another 2 percent effective January 1, 1996. The Employer proposes a 3 percent increase January 1, 1995, and a 2.5 percent increase January 1, 1996.

The City, relative to the subcontracting, proposes to renew and change the expiration date of a side letter of agreement that appeared in the predecessor agreement. The previous letter reads as follows:

> "During the terms of this Agreement, the City agrees that it will not subcontract or contract out any Crossing Guard jobs or positions under Article IV of this Agreement. This provisions (sic) shall expire upon the expiration of this Agreement, i.e., December 31, 1994. The parties to this side letter agree that this letter is non-precedential in nature and does not constitute a past practice."

They propose the expiration date be changed to December 31, 1996.

The Union proposes to delete the first sentence of Article IV (Management Rights), Section K which reads:

> "Nothing in this agreement shall limit in any way the City's contracting or subcontracting of work or shall require the City to continue in existence any of its present programs in its present form and/or location or on any other basis."

In its place the Union proposes to add the following language as Section L to Article IV:

> "To contract out for goods and services; however, there shall be no layoffs or reductions in hours due to any contracting out of work."

Thus, Article IV would read, as it relates to the issues in dispute as follows:

> "ARTICLE IV
> Management Rights
>
> "The City possesses the sole right to operate City Government and all management rights repose in it, subject only to the provisions of this contract the applicable law. These rights include, but are not limited to the following:
>
> "K. To take whatever action is necessary to carry out the functions of the City in situations of emergency.
>
> "The Union agrees that it will not attempt to interfere with the management rights of the City, and the City agrees not to interfere with the rights or reduce the benefits established under this contract."
>
> "L. To contract out for goods and services; however, there shall be no layoffs or reductions in hours due to any contracting out of work."

III. ARGUMENTS OF THE PARTIES (Summary)

A. The Union

The Union acknowledges their proposal for subcontracting protection represents a deviation from the status quo. Nevertheless, they argue that the need to alter the agreement is substantial. Indeed, they contend that a "compelling" need exits to alter the agreement. The need was initiated by the fact that the City notified the Union of its intent to vacate its collective bargaining agreement with the Union. The City indicated to the Union it planned to "shop around" and determine if subcontracting the Crossing Guard jobs was feasible. They note the City's action was met with stiff opposition from the citizenry. Thus, the Union submits that its proposal addresses the needs of the community as well as the Crossing Guards. The Union's proposal would help eliminate a repeat of the same turmoil and controversy in two years that arose as a result of the Council's action.

The Union also asserts that the degree of support in the comparables for their job security proposal is overwhelming. Internally they note that all labor agreements between the City of Racine and its 11 assorted bargaining units have subcontracting restrictions in their collective bargaining agreement except for the Crossing Guards. Of the internal comparables offered by the Union, seven of the units have subcontracting protection within the body of their respective labor agreements identical to that proposed by the Union in its final offer. Thus, they conclude there is unanimous internal support for the Union's proposal to afford subcontracting protection to the members of Local 2239A, within the body of the collective bargaining agreement, as opposed to a side letter which, upon vaporization again, threatens the livelihoods of only this group of City employees.

Regarding the Employer's reliance on certain external comparables, the Union notes that only one of the four is a traditional comparable as established in a previous arbitration award between the Parties. Moreover, two of the units cited by the City are not represented by a certified labor organization. Accordingly, the Union concludes that not only are the City's proposed external comparables inappropriate, they are overwhelmed by the internals.

The Union also argues that its wage offer extends a significant quid pro quo in exchange for its subcontracting proposal. The pattern is 3 percent for 1995 compared to the Union 2 percent request. Similarly the "lift" internally is 3 percent for 1996 compared to the Union's 2 percent. Moreover, they note the City's proposed wage increase for 1996, 2.5 percent on January 1, represents a reduction of .5 percent in the wage lift granted all other settled bargaining units.

B. The Employer

The Employer notes as background that for the 20 years the bargaining relationship has existed between the groups, the City has had the right under Article IV to subcontract. The first restriction appeared in a side letter beginning in 1991-92. The Union now seeks to prevent or deny the Employer's management right to subcontract out as it had retained throughout its bargaining history with the Union in the contract's Article IV Management's Right clause.

In support of its position, the City argues that the Union's comparisons to other internal bargaining units is essentially irrelevant. This is because the Crossing Guards are not comparable to any other employee bargaining unit, nor

do they perform services similar to any other bargaining unit representing City of Racine employees. They are employed only part of the calendar year (while middle and elementary schools are in session). Moreover, they need work only twelve (12) hours a week or twenty-four (24) hours a month to be considered a regular school-term employee. Last, school year employees are not eligible for unemployment compensation during the time he/she is off at the end of the school year in the summer as seasonal employees might be under other contracts.

Because of the lack of basic comparability to the terms and conditions of other Racine City employees, the Employer contends that the Crossing Guards can only be compared to other Crossing Guards. For this reason they concentrate on comparisons to Crossing Guards in other cities of Kenosha, Beloit, Appleton, and Green Bay.

The City also argues that the Union failed to show a comparable group of employees who perform similar services with a layoff and recall clause such as the one it proposes. The Union, in the City's opinion, has also failed to provide a persuasive reason to change a clause that has a twenty (20) year history in the collective bargaining agreements between the Employer and Union.

The City's second major argument relates to the comparisons to Kenosha, Beloit, Green Bay, and Appleton. They stress the fact that these comparable communities with employees performing similar duties do not have the subcontracting and/or layoff and recall language proposed by the Union. None of these contracts have language such as proposed by the Union. Thus, the City believes its position satisfies one of the most important factors to be considered by the Arbitrator in a case such as this one, specifically the factor required by Sec. 111.70 (7)(d). The above employees are providing similar services as the Crossing Guards in the City of Racine.

IV. STATUTORY CRITERIA

"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 of 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. DISCUSSION AND OPINION

The pivotal issue in this case is clearly the subcontracting issue. The amount of the wages is not a major issue of independent significance since the Employer's wage offer exceeds that of the Union and closely tracks the settlements of other bargaining units internally. As for the subcontracting issue, the impact of the proposals is more significant for the future than it is for the present. This is because the Employer agrees not to subcontract during the

term of the agreement. Given the side letter, one could ask rhetorically "if the Employer is willing not subcontract during the contract term, what's the big deal?"

The "big deal" or critical issue really concerns on whose back will be the burden of addressing the issue of subcontracting for the next contract term and/or during the next contract hiatus. Under the Employer's offer the burden would still be on the Union to restrict Management's right to subcontract since that would again be the status quo. Under the Union's offer the status quo going into the next set of negotiations would be a Management's rights clause which restricted the City's right to contract out. The burden would be on the Employer to change the status quo at the bargaining table if they wished to contract out in such a way that reduced hours or resulted in layoffs.

One of the questions, if not the central issue, for the Arbitrator is which of the offers in this regard is more reasonable in terms of the statutory criteria. In essence, the Union relies on Factor (e) or comparisons to other public employees, generally in the same community. On the other hand, the Employer relies on Factor (d) which is a more specific comparison to other employees performing similar services, coincidentally without regard to whether they are in the same community or different communities.

There is great surface appeal to the Union's reliance on the "internal" comparisons. They back this up with case citations which specifically favored internal comparisons in subcontracting issues. However, under closer scrutiny the Union's argument regarding the internals is not as compelling as first thought. First of all, the cases they rely on may have been under somewhat different criteria, in terms of construction, which might have caused the Arbitrators to give more weight to the internal comparables and less weight to the external comparables. "External comparables" under Criteria "D" is now a stand-alone criteria separated from other comparisons.

More importantly, it is difficult to compare Crossing Guards and police, for instance. This is true both with respect to their duties but also to the nature of their bargaining relationship. One can imagine that it was not difficult for the City to give up the right to subcontract police work since it is extremely difficult to contract out such highly skilled and essential work. The same is true for fire protection and, to a lesser extent, health care professionals. Different parties come to the bargaining table with different circumstances and leverage. Not all circumstances are the same, and not all the results should necessarily be the same. This is one reason that it is difficult to subscribe

entirely to the Union's blanket statement that the internal comparables overwhelmingly support their position and outweigh the externals.

One message the internal comparables send to the Arbitrator is that various bargaining units and the City have gone to the bargaining table and consistent with their leverage and circumstances have been able to voluntarily and mutually agree to a specific restriction which carries forward from contract to contract unless one Party can make the case to change it. It is obvious that the instant Parties have not done this same thing over the history of their agreement. It seems that history is on Management's side.

It has often been said under the umbrella of Criteria "J" that matters of such fundamental importance should be left to the Parties to address unless there is a compelling need to. In this case when looking at Criteria "D," it seems at least two other Parties to a collective bargaining relationship performing similar services have also decided not to address the issue of contracting out. This suggests that other Parties have not found the "need" to address this matter.

Perhaps these units didn't have to look down the same proverbial "barrel of the gun" that this unit did when the City Council took its action to vacate the labor agreement. However, it is obvious that such plans have for now been rescinded since the City offered the side letter. While the Arbitrator can appreciate and empathize with the Union's view of its situation as tenuous, the evidence in this record shows that it is no more likely that the City will attempt to contract in the future as not. Awarding for the City puts the Union in no worse position that it has been since 1991 and in a better position than it was for 15 years or so before that since it will have the side letter for two more years. Moreover, it leaves the Parties in the same position in terms of flexibility to respond between contract terms to unforeseen circumstances.

Indeed, under the Employer's offer, the Union is in a better position in the short run. The Employer's offer is actually more restrictive for the term of this contract since under the Union's offer, subcontracting would be allowed so long as it didn't reduce the employment of bargaining unit members. Under the Employer's offer it could be argued that no subcontracting could occur for any reason or under any circumstance. Under the Union offer the Employer might be able to contract out where the bargaining unit was decreased due to attrition or where it was increased due to added jobs since no one individual would be reduced as a result. This definitely could adversely affect the security of the bargaining unit as a whole. Under the side letter the Union could take the

position that all work must be performed by bargaining unit members thereby preserving its numbers under an attrition situation or increasing its numbers in an expansion situation rather than seeing those jobs go to a subcontractor.

The Union also contended that it offered a sufficient quid pro quo to justify the change in language. Arbitrators often find this to be relevant under Criteria "J." Arbitrators like to be convinced that given all the circumstances, including the existence of a quid pro quo, that the deal sought by a party proposing a major change in the status quo would be the likely result if the parties were negotiating free of the safety net of interest arbitration. In this case the Arbitrator is not convinced of this. The concession of accepting a percent and a half less than the Employer is offering in wages does not impress the Arbitrator as the kind of sacrifice that would have inspired an employer to give up a jealously guarded and fundamental right (within reasonable limits) such as contracting out.

In summary, while the Union's offer has support in the internal comparables, it is insufficient to overcome the external comparables and the concerns of the Arbitrator, for various reasons, that this is not a "deal" that the Parties, more than likely, would have arrived at in free collective bargaining. Indeed, in the short run the City's proposal provides more protection than the Union's proposal.

AWARD

The final offer of the Employer is accepted.

Gil Vernon, Arbitrator

Dated this 21ST day of November 1995.