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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

BEFORE THE ARBITRATOR

ROSE MARIE BARON

In the Matter of the Arbitration of a Petition by

Labor Association of Wisconsin, Inc. for
Mequon Department of Public Works Employees
Association, Local 715

and

Case 23 No. 51933
INT/ARB-7487
Decision No. 28399-A

City of Mequon

APPEARANCES

Patrick J. Corragio and Robert E. Blumenberg, Labor Consultants, Labor Association of Wisconsin, Inc., appearing on behalf of the Mequon Department of Public Works Employees Association, Local 715.

Robert W. Mulcahy, Esq., Michael Best & Friedrich, appearing on behalf of the City of Mequon.

I. BACKGROUND

The City is a municipal employer (hereinafter referred to as the "City" or the "Employer"). The Labor Association of Wisconsin, Inc. (the "Association" or the "Union") is the bargaining agent for all permanent full-time employees of the Mequon Department of Public Works employed in the Highway, Sewer, Bureau of Equipment, and Parks and Public Buildings divisions. The District and the Association have been parties to a collective bargaining agreement which expired on December 31, 1994. On June 28, 1994, the parties exchanged their initial proposals; after five meetings no accord was reached and the Association filed a petition on December 12, 1994 requesting the Wisconsin Employment Relations Commission to initiate binding arbitration. Following an investigation and declaration of impasse, the Commission, on May 5, 1995, 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 May 31, 1995. Hearing in this matter was held on September 13, 1995 at the Mequon City Hall. 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 the parties according to an agreed-upon schedule. The record was closed on November 8, 1995.

II. ISSUE AND FINAL OFFERS

The outstanding issues to be resolved include subcontracting (Management Rights), lunch hour scheduling, and wages.

A. Article III - MANAGEMENT RIGHTS

Section 3.02 of the present contract states:

> Whatever work is to be accomplished by the Mequon Department of Public Works is not necessarily to be done by employees in this bargaining unit. The Employer reserves unto itself the right to contract or subcontract out any such work and/or to transfer any such work to other employees.

The Association's final offer proposes to add the following:

> ...provided that no bargaining unit employees are laid off or have their normal work schedule reduced (i.e., 40 hours per week).

The City's final offer proposes to add:

> In the event a reduction in the bargaining unit occurs during the term of this contract due to contracting out of work normally performed by the bargaining unit, the Employer will notify (in advance and in writing) the Association;s representative as to the services to be contracted out, the approximate number of bargaining unit members to be laid off and/or positions to be abolished, and the reasons for the contracting out.
>
> The Employer agrees to meet and discuss (in advance) the contracting out, the reduction of the workforce, and/or the impact on the bargaining unit. The Association will be allowed to submit proposals to the Employer that will provide the same quality of service, financial savings, economies and/or efficiencies to the Employer that the subcontracting out would provide. However, the Employer is not required to accept the Associations' proposal unless this proposal meets the interests and welfare of the public and/or the financial needs of the City.
>
> The Employer agrees not to eliminate the entire bargaining unit due to contracting out.

B. Article VIII - HOURS OF WORK-PREMIUM PAY

Section 8.01 of the present contract reads:

> The normal work schedule for full-time employees shall be 40 hours per week and consist of 8-hour workdays, with normal workdays being Monday thru Friday, 7:00 a.am. to 3:30 p.m. with an unpaid 1/2 hour for lunch which will be from noon until 12:30 p.m. These provisions shall not interfere with special time tables required in the operation of the several divisions of the Department of Public works (sic) or prohibit the creation of part-time employment or establishment of rotative, staggered or shortened work periods by the Director of Public Works.

The City proposes the following addition to this language:

> The Employer reserves the right to schedule work through the lunch hour on specific projects and stagger the employees' half-hour lunch break around the project requirements.

The Association does not propose any language change in this section.

C. APPENDIX A - WAGE RATES

The Association proposes the following increments:

3.25% across the board - effective 1-1-95
3.25% across the board - effective 1-1-96
3.25% across the board - effective 1-1-97

The City proposes the following increments:

3.50% across the board - effective 1-1-95
3.75% across the board - effective 1-1-96
3.75% across the board - effective 1-1-97

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 extensive briefs 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 will be addressed first.

A. The Comparables

1. The Association

The Association considered certain criteria in determining which communities are appropriate as comparables. These include population, square miles, miles of roads maintained, property values, community household income, average property taxes, percent of property taxes to total income, spending per person by service area, and number of bargaining unit members. It was determined that the following communities are comparable to the city of Mequon: Brookfield, Franklin, Germantown, Menomonee Falls, Muskego, New Berlin, and Oak Creek. In addition a secondary set of comparables are proposed based upon their close proximity to the City of Mequon: Cedarburg, Grafton, Port Washington, Saukville, and Thiensville.

2. The City

The City has selected as comparables five communities in Ozaukee County: Cedarburg, Grafton, Port Washington, Saukville, and Thiensville; because of the close working relation with the County Highway Department, it also includes Ozaukee County itself. With the exception of Ozaukee County, the cities and villages within Ozaukee County have been selected as secondary comparables by the Association. The City cites interest arbitrations involving the Cedarburg Police Department, the Grafton Department of Public Works, and the City of Port Washington Police Department as relying upon similar comparables.

In a 1977 Mequon Police Department award, Arbitrator Zeidler utilized as primary comparables the Ozaukee County communities cited in the instant case (except for Saukville). Although he also utilized for "general comparisons" departments from various suburbs of Milwaukee, the City argues that these are no longer relevant because of the radical demographic shifts in the area since 1977. The Association has included two of these suburban communities in its primary comparables, i.e., Brookfield and Menomonee Falls.

The City contends that by relegating the geographically contiguous Ozaukee County communities to a secondary status and selecting communities in a four-county area, the Association is engaging in "comparability shopping." Arbitral precedent is cited for historic reliance on comparability of communities which are geographically proximate and which comprise the labor market. The Association, it is argued, has provided no compelling rationale to justify its selection of it primary comparables, i.e., no economic, social, or demographic parallels. It is highly unlikely, the City contends, that an individual living in New Berlin, Brookfield, or Menomonee Falls would travel the distance to Mequon to work as a mechanic or truck driver.

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, per capita income, tax rates and increases, etc. It is this arbitrator's opinion that the degree of weight which these factors receive may vary by the facts of each case. For example, in a case involving the Middleton-Cross Plains School District educational assistants, the union proposed to include a geographically proximate school district, Madison, as a comparable:

> 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. 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 population or miles of roads or number of bargaining unit members. The Union has selected as its primary group seven

communities some of which are located some distance from Mequon in Milwaukee, Washington, and Waukesha counties.

Among the factors considered in selecting its primary comparables, the Union relied upon population, square miles, miles of roads, average residential poverty value, household income, property tax, amount spent on public works, and number of bargaining unit members.

The City has focused on geographic proximity as the major factor in selecting its comparables. It has provided data on population and number of bargaining unit members for its six external comparables (Employer Ex. 13).. It also included 1995-97 wage settlements (or tentative agreement) with other Mequon bargaining units, i.e., dispatchers, police and city hall employees as internal comparables (Ex. 9).

It would have been helpful in determining the appropriateness of the Association's proposed comparables, some of which are a considerable distance from Mequon, i.e., Oak Creek and Franklin, to have some evidence of commuting patterns for relevant employees. This information would assist in defining the labor market for the Mequon Department of Public Works if it showed that employees of the department resided in these communities but worked in Mequon. In the case of the Juneau County Highway Department, this arbitrator found that the Union had established "compelling evidence of the congruence of proximity and the existence of a common labor market" through the commuting patterns for seven geographically contiguous counties. The data revealed that workers coming to Juneau County for employment ranged from a low of 17 from Jackson County to a high of 656 from Monroe County. Persons living in Juneau County also commuted to the contiguous counties for work except for Jackson County, thus bearing out the common labor market premise. Juneau County Highway Department, Decision No. 28229-B (7\95).

Robert Lembcke, the city's Human Resources Coordinator, testified at hearing that recruitment of employees is mainly from within Ozaukee County and that ads for personnel are placed in local newspapers. The City argues that it

is highly unlikely that an individual will travel any great distance for a municipal job at this level.

In explaining its choice of factors for determining comparability, the Association admits that it was difficult to stay within geographic proximity of Mequon because it is the "fourth largest city in the State of Wisconsin." (Association Brief, p. 8). The arbitrator assumes, based upon the discussion in the DMG study (Joint Ex. 1), that size refers to geographic size, not population. The report states:

> Mequon is unique in other respects too. It is the fourth largest city in Wisconsin in terms of land area, covering approximately 47 square miles and including 190 miles of roads....These unique characteristics, particularly for a city with a population the size of Mequon (20,273 estimated for 1993) makes it difficult to find benchmark cities for a direct comparison.

Size, in and of itself, does not appear to be the most relevant criterion. Even among the Association's proposed comparables, Mequon's 47 square miles far surpasses all of them by a significant amount: the square miles measure ranges from a low of 25.95 to a high of 36.85; the median (average) size is 34.50. The arbitrator has carefully analyzed all the data contained in Association Exhibits 8 to 15. There exists a wide disparity in the economic factors: Mequon's average residential property value is $211, 248 far above the median of $122,467 (range $103,694-$176,431; Mequon's household income of $108,773 is more than twice the median of $51,635 (range $44,700-$ 82,697); Mequon's property tax of $4,616 is substantially higher than the median of $3,367 (range $$3,142-$3,995).

There does not seem to be a consistent pattern which would make the choice of some of these far-flung communities appropriate as comparables. The rationale proposed by the City that geographic proximity is the most important factor is persuasive. Based upon the facts as presented, it appears that a common labor market exists between geographically proximate cities and villages, as well as Ozaukee County, and the City of Mequon; in this case

proximity is the most compelling factor. As arbitrators have held in the past, it would be inadvisable to permit a party to select comparables in order to support its final offer for to do so would be to encourage forum shopping and thus fail to provide a stable basis for future bargains.

In examining the data on demographics, the arbitrator finds that the Association's selection of the Village of Germantown is appropriate. Germantown, although in Washington County, is contiguous with Ozaukee County and closer to Mequon than, for example, Port Washington or Saukville, both included in the City's comparables.

It is held, therefore, that the appropriate external comparables for the Mequon Department of Public Works are public employees performing similar services in the following communities:

Cedarburg	Port Washington
Germantown	Saukville
Grafton	Thiensville
Ozaukee County	

Also to be considered are the City of Mequon internal comparables: Dispatcher, Police, and General Employees.

B. The Final Offers

Three issues remain to be resolved: subcontracting, wage offer, scheduling of lunch hour. Both parties agree that the subcontracting/job security issue is primary and should be given the greatest weight in this determination.

1. Management Rights/Contracting Out

Throughout bargaining, the Association has been most concerned with the matter of job security. Under the present contract, the Employer has had the unfettered right to subcontract work:

> Section 3.02. Whatever work is to be accomplished by the Mequon Department of Public Works is not necessarily to be done by employees in the bargaining unit. The Employer reserves unto itself the right to contract or subcontract out any such work and/or to transfer any such work to other employees.

Testimony at hearing of both Union and Management witnesses confirm that many projects have been contracted out when, for example, the City did not own the necessary equipment or it would not be economically sound to purchase equipment which would be used only rarely. Union witness Thomas Brown noted that the City's recycling operation was given to a private garbage collector. No grievance was filed since no one in the bargaining unit lost his job. Other subcontracting such as seal-coating of roads to the Scott Company, graveling a parking lot, as well as others in the past, were not grieved since no bargaining unit members were laid off or had their hours reduced. Jon J. Garms, Mequon's Director of Public Works, stated that neither he nor the Common Council had been involved in any discussion regarding layoffs.

The motivating force behind the Association's proposal to modify the contractual provision regarding subcontracting, i.e., Section 3.02, was the promulgation of a management study of the Department of Public Works by David M. Griffith & Associates, Ltd. in October, 1994 (Joint Ex. 1). This report caused concern among the members of the Association because of several of the recommendations, particularly one which referred to the Highway Division:

> If the Highway Division can meet the demands of a snow storm, all other duties are adequately staffed. Based on these considerations, it would be realistic to reduce Highway Division staffing by two positions, for a savings of approximately $85,500 annually, including salary and benefits. (at page 23).
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> * * *
>
> Recommendation #13:
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> Highway Division: Reduce two positions through attrition (saving approximately $85,500 per year). Develop formal arrangements for Parks & Buildings staff to provide plowing support. Research use of contractors for plowing sidewalks/bike paths and City parking lots to free Parks & Buildings staff to assist with other plowing duties. (at page 24).

The Association's intent was to add language to the management rights clause which would protect its members whose tenure with the City was on average 12.5 years. According to the documentary evidence, the Association

notified the WERC on February 1, 1995 that it proposed, inter alia, to add the sentence, "Provided that no bargaining unit employees are laid off or have their normal work schedule reduced" to Section 3.02 (Employer Ex. 21K). On February 9, 1995, the City submitted a Preliminary Final Offer including a provision to add new paragraphs to Section 3.02 to provide notice and consultation to the Association if subcontracting were to result in a reduction in the bargaining unit. Also included was a guarantee that the Employer would not eliminate the entire bargaining unit due to contracting out. (Employer Ex. 21O; See page 2, supra, for complete text).

The arbitrator has considered the parties' arguments regarding this issue and understands the importance of the effect of the proposed changes on future labor-management relations between the City and the employees of the Department of Public Works. The City contends that the Association bears the burden of proof since it has proposed a change to the language under which the parties have operated since their initial agreement in the 1978-79 contract. This language gave the City the absolute right to subcontract. It is asserted that the Association must show that a need exists for a change to the status quo, that the change must resolve the existing problem, and that an unreasonable burden is not placed upon the other party. In addition, the proposing party must offer an adequate quid pro quo for the change.

The City appears to have added several elements to the traditional standard of proof in cases in which one parties seeks to change the status quo. Traditionally arbitrators consider whether a need exists (sometimes requiring a "compelling" reason for the arbitrator to change the language, Barron County, Krinsky, Dec. 16276, 1978), meaning that a legitimate problem exists. The second consideration is whether the moving party has offered a quid pro quo for the change. Arbitrator Malamud, in D.C. Everest, (Dec. No. 24678-A, 1988) added another facet to the analysis, i.e., that proof has been established by clear and convincing evidence. The Association believes that it has demonstrated a clear and convincing need for a change in the contract

language and has offered a monetary quid pro quo by offering to take a lower wage increase in each year of a three-year contract than that offered by the City. It further contends that external and internal comparables support its position.

There is no question that the Association believes that the job security of its members is at risk based upon the results of the DMG study and the subcontracting attempts in Saukville and Thiensville. However, Mequon's final offer shows that it has no intention of eliminating the entire bargaining unit. Despite the present contract language which has permitted the City to subcontract without any limitation, there have not been any layoffs or reduction in hours for bargaining unit members. It is also of importance to recognize that the DMG recommendation was for the reduction of two positions **by attrition**. According to testimony by Mr. Lembcke, Human Resources Coordinator, one position in the department has already been eliminated through retirement.

The question for the arbitrator is whether the Association has demonstrated a need for a change in the status quo. Despite the fact that there have been no layoffs in the past (under less restrictive language than the City now proposes), and the City's proposal guarantees that the bargaining unit will not be eliminated due to contracting out, the employees are concerned about their future with the City. The Saukville and Thiensville attempts, although unsuccessful, to privatize similar services has struck a warning note. The perception of the bargaining unit that the future is uncertain is a factor to be considered in this determination.

The arbitrator finds the question of whether the Association has shown a need to change the status quo language on subcontracting to be a very difficult one to resolve: How best to reconcile the desire of the employees to counter a harm that **might** occur in the future with the fact that subcontracting in the past has not led to layoff or reduction in hours of bargaining unit members?

There is no doubt that the Association recognized that by attempting to change the status quo, it was necessary to provide some benefit in exchange, i.e., a quid pro quo. It did so by offering to take a lesser wage increase than that offered by the City. Although the City argues that the amount of the lesser wage offer, i.e., approximately $26,000 is wholly inadequate, and the timing of the quid pro quo is questionable, the arbitrator finds that the Association's offer is reasonable under the circumstances.

This is a very close issue and reaching a decision regarding the Association's need for a change to Section 3.02 has not been easy. The Association's wish to protect its members in the event that City were to contract out the work of the bargaining unit is understandable. However, the weight of the evidence does not support the Association. The record reflects that even under the present language, which does not limit the City's subcontracting rights in any way, no employees have been laid off or had their hours reduced nor has the City gone on record as intending to privatize the services provided by Department. It is held, therefore, that the Association has not met the required burden of proving need.

It is the arbitrator's position that even if a party has not met the burden of proving "need" by the higher quantum of "clear and convincing" evidence (greater than the "preponderance" of the evidence standard), it is necessary to consider whether the moving party's final offer is supported by the comparables pursuant to Section 111.70(4)(cm)7. An analysis of the seven external comparables selected above indicates the following:

> Cedarburg (Assoc. Ex. 42): 28.11 - Subcontractings. The City shall not lay off any employees as a result of subcontracting.
>
> Germantown (Assoc. Ex. 36): 2.01 Rights- K. The Union recognizes the Board has the right to contract or subcontract for goods or services provided no unit employee shall be laid off or suffer a reduction in hours below forty (40) hours per week as a result of said contracting or subcontracting.
>
> Grafton (Assoc. Ex. 43): Article II - Management Rights. Except as otherwise specifically provided herein, the management of all Village business and the direction of the working forces is vested exclusively in the Employer, including, but not limited to, the

right...to contract out work for economic reasons as long as permanent employees are working,....

Ozaukee County: No data has been provided on subcontracting language.

Port Washington (Assoc. Ex. 44): No specific subcontracting language. Article I - Management Rights provides: Unless otherwise herein provided, the management of the work, the direction of the work forces, including..., and the right to relieve employees from duty because of lack of work, or other legitimate reason is vested exclusively in the City.

Saukville (Assoc. Ex. 45): Section K. To contract or subcontract out all work except that said right shall not be used to displace full-time bargaining unit employees.

Thiensville (Assoc. Ex. 46): No specific subcontracting language. Article 2 -Management Rights, Section 2.01(1) provides: To determine the methods, means and personnel by which Village operations are to be conducted...

Of the six comparable communities for which data on management rights/ subcontract is provided, only one, Germantown, provides the same level of protection as that sought by the Association, i.e., no layoff or reduction in hours. Cedarburg and Grafton contract provisions permit subcontracting as long as there are no layoffs however there is no protection against a reduction in hours. Saukville's contract speaks of not "displacing" full-time bargaining unit employees; displacement could be interpreted to mean layoffs, but it is not clear whether displacement is a broad enough term to cover reduction in hours. Finally, both Port Washington and Thiensville do not have any specific limiting subcontracting language and it appears that management is free to determine how and by whom work will done.

The conclusion which must be reached from this analysis is that the Association's proposed subcontracting language is not supported by a comparison with other municipal employees in comparable communities.

The internal comparables involve three units within the City of Mequon: the Dispatchers (Assoc. Ex. 48), The Police (Assoc. Ex. 49), and the general City Employees who presently operate under the City Personnel Code (Assoc. Ex. 50). The Dispatchers' present contract has no specific subcontracting language; Article V - Management Rights, Section 5.01(12) gives the City the

right to "determine the methods, means, and personnel by which City operations are to be conducted." Under the Police contract, Management has the right, without limitation, "to subcontract or contract out work when deemed necessary." Finally, the General Employees operating under the 1992-93 Personnel Code are governed by Section 4.02 which states:

> Whatever work is to be accomplished by the City of Mequon is not necessarily to be done by employees of the City. The City reserves unto itself the right to contract or subcontract out any such work and/or to transfer any such work to employees not covered by this Personnel Code.

None of the internal comparables provide the level of protection from subcontracting which the Association seeks to achieve for the Department of Public Works bargaining unit. It is held, therefore, that the internal comparables do not support the Association's position.

Therefore the final offer of the City of Mequon on subcontracting is selected to be incorporated into the 1995-1997 collective bargaining agreement.

2. Other issues

The issue of new language on lunch hour scheduling proposed by the City to be added to Section 8.01, Hours of Work-Premium Pay, was extensively briefed by the parties. However, because it was agreed by the parties that the major issue in this arbitration is subcontracting, and the arbitrator has found that the City has prevailed, a lengthy discussion and analysis of the lunch hour provision, no matter which party prevailed, would not change the final outcome of this award. While this matter is of importance to the parties, it would not receive the same weight as the subcontracting issue. Similarly, the matter of wages requires no further examination since the employees will receive the percentage increases set forth in the final offer of the City.

V. AWARD

Based upon the discussion above, the final offer of the City of Mequon shall be adopted and incorporated in the parties' Collective Bargaining Agreement commencing January 1, 1995 through December 31, 1997.

Dated this 14th day of December, 1995 at Milwaukee, Wisconsin.

Rose Marie Baron

Rose Marie Baron, Arbitrator