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| Interest Arbitration | * | |
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| **SHEBOYGAN COUNTY** (COURTHOUSE) | * | |
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| and | * | |
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| **LOCAL 110, SHEBOYGAN COUNTY SUPPORT SERVICES, AFSCME, AFL-CIO** | * | **ARBITRATION AWARD** |
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| re | * | |
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| **WERC Case 264, No. 52124 INT/ARB - 7539** | * | **Decision No. 28461-A** |

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## ISSUES

The Country proposes across the board wage increases of 3% on January 1 of each year of the two year contract running from 1/1/95 - 12/31/96 as opposed to the 3 & 1/2 percent increases proposed by the Union for the same time periods.

The County proposes to reclassify Account Clerks to Grade 11 and Dispatcher to Grade 17.

The County proposes to grandfather the present longevity program to employees hired before 1/1/95 and to provide for new employees hired after 1/1/95 a longevity program that pays $10/mo. after 5 years of employment, $20/mo. after 10 years of employment and $30/mo. after 15 years of employment.

The Union proposes the following subcontracting clause: "The County agrees not to subcontract work if it would result in a lay-off or reduction in hours of current employees. The County reserves the right to assign the displaced employees to other work."

## INTRODUCTION

The arbitration hearing in the above identified dispute between Sheboygan County, hereinafter called the County, and Local 110, AFSCME, AFL-CIO Sheboygan County Supportive Services, hereinafter called the Union, was held in

Sheboygan, Wisconsin on October 30, 1995 by the undersigned arbitrator selected by the parties from a panel submitted to them by the WERC and appointed by the WERC on August 21, 1995 in accordance with Sec. 111.70(4)(cm)6&7 Wisconsin Statutes. Appearing for the County was Louella Conway, Personnel Director; appearing for the Union was Helen Isferding, District Representative. The hearing was not transcribed. Post-hearing briefs and rebuttals were received by the arbitrator on January 10, 1996.

## DISCUSSION

Comparables: The parties use the same ten counties that have been used in prior arbitrations -- Brown, Calumet, Dodge, Fond du Lac, Kenosha, Manitowoc, Outagamie, Ozaukee, Washington and Winnebago -- as well as the other internal County Units and Units in the City of Sheboygan. The arbitrator will use these comparables in reaching his decision.

Wages: For reasons not explained to the arbitrator, neither party presented tables showing the wage increases granted in comparable jurisdictions. However, the arbitrator was able to calculate the wage increases granted in most of the comparables from the various exhibits submitted by the County and the Union. Calumet data for 1995 were not included, presumably because no settlement had been reached at the time of the hearing in this dispute. Of the other nine comparable counties, six gave increases in 1995 of 3.5% or more (Dodge - 3.6%, Kenosha - 3.5% plus .5% for six months, Manitowoc - 4%, Outagamie 3.75%, Ozaukee - 3.5% and Washington - 3.53%) while three gave increases of 3% or slightly less than that figure (Brown - 2.85%, Fond du Lac - 3% and Winnebago - 3%). Only two 1996 settlements were reported. Both of these were for more than 3.5% ( Dodge 3.65% and Kenosha 3.5% plus .5% for six months).

No comparable internals were available because the other units currently

negotiating their contracts are in arbitration and no results were included in the record which was closed at the conclusion of the hearing. Employees in two internal units, which had negotiated three year contracts several years ago, received 4.25% increases in 1995, the third year of the contract. As the County points out, raises negotiated three years ago usually have little weight in determining current wage trends. And, in this dispute, carry very little weight.

Union Exhibit 30 shows that four units of the City of Sheboygan have negotiated increases of 2% + 2% after six months for 1995, 1996 and 1997. Although this is the equivalent of three percent increases, the annual lift of 4% means that the increases over three years exceed three percent and that the ending wage is about 12.5% over the starting wage. The ending wage with 3% increases is only about 9.3% higher than the starting wage.

Although the County says little about the pattern of wage increases it contends that 1994 Sheboygan wages are better than the wages of most of the comparables. Comparing wages at the top level without longevity, we find at the Clerk Typist II level (15 employees), Sheboygan ranks second of eleven counties; at the Secretary I level (13 employees), Sheboygan ranks seventh of ten counties; and at the Secretary II level (25 employees), Sheboygan ranks tied for eighth of nine counties (County Ex. 16). The data do not lend strong support for the County claim that its wages are better than those of the comparables.

Although the County claims in its brief that "there is a consistent pattern of bargaining among the units of Sheboygan County" (County Brief, pp.6-7) and cites Arbitrator Vernon (Decision No. 26491-A) in support of the statement that considerable weight must be given to the fact that "Sheboygan County has established a pattern of bargaining with regard to across the board increases and longevity with all the open units" (County Brief, p. 7). The arbitrator finds

that the exhibits do not support this County claim. The exhibits support a finding that the County final offers to all four open units propose 3% wage increases and grandfathering the longevity clause. However, proposing this solution in the final offer does not establish a settlement pattern. If patterns are based on proposals, each of the Union offers in the negotiations of the four open units would also constitute a pattern. Clearly, neither deserves such status and neither will be accorded pattern status. Patterns are set by negotiated settlements and by arbitration awards, not by final offers.

In addition to comparing the rankings and increases of Sheboygan with the comparable counties, the internal comparables and the City of Sheboygan, the arbitrator reviewed the general economic data presented by the County. The arbitrator agrees that the increase in the consumer price index for 1994 was less than the 3% wage increase offered by the County. Also, the private sector wage survey data (County Ex. 17) and the 3% wage increase granted by the Kohler Company, the largest private employer in the area, support the choice of the County offer. Historically, however, the County, the Union and arbitrators and negotiators for other local government employers have given less weight to these factors considered under criteria e and f of Wisconsin Statute 111.70(4)(cm)7 than to the comparables agreed to by both the County and the Union considered under criteria c and d.

The comparison of the Sheboygan wages with those of the comparables and the comparison of wage increases show that the wage offer of the Union is preferable to that of the County under Statutory criterion, Chapter 111.70(4)(cm)7d&e. And since the arbitrator believes that these factors outweigh those cited by the County, he finds that the Union offer of 3&1/2% is preferable to the County offer of 3%.

Reclass of Account Clerks and Dispatcher: The arbitrator does not regard these items as ones that tip the balance of final offers. Normally they would be included in the list of tentative agreements. This is not a case in which a union proposes upgrades and the employer disagrees. Here, the County proposes the upgrades and the disagreement arises about the inclusion of the cost of these upgrades in the final offer (See Union Exs. 10 & 11). Since other issues are the important issues on which the parties disagree and the arbitrator's choice of final offers will not be affected by the reclassification issue, the arbitrator sees no need to analyze this issue or to discuss it further.

Longevity: The Employer points out that it has been trying to eliminate the current longevity program for over twenty years. County Exhibit 24 shows that it has tried in seven previous contract negotiations stretching back to the 1974-1975 contract. The longevity program provides for 2&1/2 % after 5 years, 5% after 10 years, 7&1/2% after 15 years, 10% after 20 years and 12&1/2% after 25 years. Employer Exhibit 23 shows that the Sheboygan longevity plan provides greater benefits than any other plan of the comparable counties. Five of the other ten comparable counties have no longevity plans; four give dollar longevity payments rather than percents and the final one gives dollar payments to employees hired after 1973 and grandfathers those hired previously under a 2% payment after five years of employment. The flat dollar amounts vary from county to county. One is identical to the County proposal and the others pay slightly more (Manitowoc) or slightly less (Winnebago, Dodge and Washington). So far as county comparables are concerned, the County offer is a fair one.

Page 10 of the Union brief summarizes the longevity plans in its exhibits. It shows that two City of Sheboygan units receive longevity payments of 2.5% after 5 years, 5% after 10 years and 7.5% after 15 years. The Sheboygan Water

Utility has longevity payments of 3% after 5 years, 6% after 10 years and 9% after 15 years plus 12% for foreman only. Compared to these plans, the current Sheboygan County plan is not out of line although it is clearly one of the richer ones. The 10% payment after 20 years and the 12.5% after 25 years place the Sheboygan County plan at the top of the comparables.

In defense of its position, the Union raises several points. It claims that the County has not offered a significant quid pro quo in return for the "take away" of the current longevity plan. It claims that the wages including longevity are not out of line with those of the comparables. It cites the payments above 3% given to the non-represented employees. And, it states that the anticipated savings of over five hundred thousand dollars in health insurance costs would pay almost half of the longevity costs for all the Sheboygan County bargaining units.

The County claims that no quid pro quo is required when the proposal only brings an out-of-line benefit back to the level maintained by the comparables. The County cites approvingly the award of Arbitrator Gil Vernon in which he states four considerations for determining whether a change in the status quo is justified. They are

> (1) if, and the degree to which, there is a demonstrated need for the change, (2) if, and the degree to which, the proposal reasonably addresses the need, (3) if, and the degree to which, there is support in the comparables, and (4) the nature of a quid pro quo if offered.
>
> All four of these elements should be present to some degree and the degree to which any one or more of these considerations must be strongly evidenced depends on the facts and the circumstances of each case. What is ultimately determined to be an acceptable mix of those considerations will vary from unique situation to unique situation. (County Brief, p. 19)

The County exhibits and arguments in the brief suggest that the "need" to curtail the longevity benefits is two fold. First, the County suggests that the fact the longevity benefits are greater than those of the comparables means that

there is a need to reduce to them. The arbitrator rejects that reason. The fact that the Sheboygan longevity benefits are greater than the benefits of the comparables is not enough to show need. Some local governments and their unions may believe it is proper to provide benefits that reward length of service and do it through a longevity program. Others prefer to pay workers who have reached the top step the same wage and believe that further payments on the basis of longevity improperly distort the salary structure and give rise to the undesirable result of paying different wages for the same work. Each position is reasonable and half the comparable counties do not have longevity programs while half do.

The second grounds for the "need" to curtail the longevity program is because its cost is increasing by 15.25% in 1995 and 17.86% in 1996. The County says that "An increase in a single benefit over 15% a year must be addressed." (County Brief, p. 15). The County makes it point dramatically but the arbitrator is not persuaded that the increase in cost is as consequential as the County claims. Stating it in another way which is equally valid but makes the increase seem less important is to state that the cost of longevity increased from 3.37% of total labor costs to 3.72% in 1995 and to 4.26% in 1996 (Derived from County Exhibits 18, 19 & 20). The dollar increases in longevity costs in 1995 of $29,096.75 and $42,280.94 in 1996 that the County is concerned about account for annual increases in total labor costs of about one third of a percent in 1995 and one half of a percent in 1996. It is also of interest to note that County Exhibit 22 shows that total longevity payments of 4.9% for this unit are less than the 5.6% average for all units.

As the Union points out in its brief, both the County and the Union are pleased about the projected 1995 savings of about one-half million dollars in

health care costs. The Union suggests that the County should be so pleased that it should not press the issue of reducing the longevity. The arbitrator notes that County Exhibits 18, 19 and 20 show no dollar increase in health care costs. This is a remarkable achievement, one which generates a savings far greater than the increase in longevity costs under the existing program.

One final aspect of this analysis of the longevity program is whether Sheboygan wages including longevity are out of line with the wages including longevity of the comparables. Insufficient comparative data were supplied to answer this question definitively. However, the arbitrator selected, as an example, the most highly populated classification included in County Exhibit 16 -- the Secretary II with 25 employees -- in an attempt to answer this question.

As noted in the section of this discussion dealing with wages, the Sheboygan Secretary II ranks tied for eighth at the top rate without longevity. If we assume that a Secretary II is eligible for longevity based on 15 years service and make the comparisons by use of County Exhibits 16 and 23, the Sheboygan Secretary II will rank fifth of ten counties under the present longevity program. If the County offer prevails, the Sheboygan Secretary II with fifteen years service will rank eighth out of ten counties. So far as this one classification is concerned, the arbitrator believes that it will not be out of line if the current longevity plan remains in place.

The arbitrator concludes that the data show a need for the County to offer a quid pro quo equivalent to what will be lost if the current longevity plan is reduced. The arbitrator finds that the County final offer does not contain such a quid pro quo and therefore that it has not supplied the grounds to substitute the reduced longevity program it proposes for the existing one. If there were no other issues to consider, the arbitrator would choose the Union offer. However,

there is still the issue of whether a restriction on subcontracting should be added to the contract.

Subcontracting: The Wisconsin Employment Relations Commission modified an examiners findings of fact regarding Article 3 of the County's and Union's collective bargaining agreement and concluded that "Article 3 of the parties' collective bargaining agreement does not address the issue of subcontracting." (Un. Ex. 61 - WERC Case 210, No. 49303 MP-2741, Decision No. 27692-B dated March 8, 1995). Therefore the duty to bargain about the decision to subcontract and/or the decision to bargain about the impact of a subcontracting decision is governed by the WERC's interpretation of Section 111.70(3)(a) of the Wisconsin statutes without regard to Article 3 of the Agreement.

This decision puts the Union in a better position than it was before the dispute arose because the decision denied the County claim that Article 3 gave it the right to subcontract the work in question, thus diminishing the Union's need for protection. There is no doubt, however, that the clause the Union is seeking would provide meaningful protection. Whether it is justified by comparison with the comparables and/or whether a quid pro quo has been offered in return for this proposal are questions to which the arbitrator turns next.

Of the ten comparable counties, only one, Kenosha, has language providing that the employer will not contract out work or services where it will result in the layoff of employees or the reduction of regular hours (Union Brief, p.9). Calumet and Manitowoc counties provide that contracting out will be reviewed first with the union if it will result in the layoff of employees (Calumet contract, Section 7.02 and Manitowoc contract, Article 3, para 2). The Brown County contract provides that the county will review with the union any regular jobs which it contemplates contracting out and will notify the union if it does

so (Brown County contract, Article 28). The Washington County contract states that the employer has the right to subcontract provided it does not decimate the bargaining unit (Section 25.01,J of Washington County contract). No claim is made that the other six comparable counties have contractual language dealing with subcontracting.

The Union also points to the City of Sheboygan Board of Education contract covering custodial/maintenance employees and the Water Utility contract. The Board of Education contract states that the employer has the right to subcontract work so long as it does not result in layoffs or reductions in hours of bargaining unit employees (Union Exhibit 34, p.18). The Utility contract does not limit subcontracting except to specify that the employer can not lay off regular full-time employees during temporary subcontracting of work or services (Section 1.2 of Union Exhibit 37). No claim is made that other City of Sheboygan contracts restrict subcontracting if it will result in layoffs of regular employees.

The Union cites two internal comparisons that support its proposal to restrict subcontracting if it results in a layoff of bargaining unit employees. The Institutions contract, Union Exhibit 62, page 23 provides that the County will not subcontract if it would result in the layoff or reduction in hours of current employees. Article 3, paragraph 2 of Sheboygan County's contract with the AFT represented professional nurses states that the County "may subcontract any work, but subcontracting will not result in layoff of unit employees."

It appears to the arbitrator that so far as comparables are concerned, the restriction on subcontracting sought by the Union is not found in a majority of contracts. Only one of the ten comparable counties has the kind of language the Union is seeking. And only a minority of the internal comparables and City of Sheboygan units have such language.

The Union states in its brief that it has "offered a significant quid pro quo." (p.19) in order to obtain this restriction on subcontracting. However, the County contends that the "unit has not offered a quid pro quo" (County Brief, p.18). In its rebuttal brief, the County reiterates that it did not find a quid pro quo in the Union's final offer (p.10), while the Union makes no reference to subcontracting in its rebuttal brief.

The arbitrator agrees with the County on this question of whether the Union has offered a quid pro quo. So far as the arbitrator can determine, no support is found in the Union brief or rebuttal for the Union claim that it offered a quid pro quo. Given the absence of a quid pro quo and given the fact that a preponderance of the comparables cited above do not bar subcontracting that would result in a layoff, the arbitrator finds that the County position on subcontracting is preferable to that of the Union.

Improper Evidence: At the conclusion of the hearing, the arbitrator asked the parties when the record should be closed and specifically raised the question of whether the results of the arbitrations of the other internal units would be included in the record. Both the County and the Union agreed that the record was closed at the conclusion of the October 30, 1995 hearing except for correction of exhibits submitted at the hearing on that day and that the results of the other pending arbitrations were inadmissable.

In its brief, the County violated this agreement, stating on page 20 that Arbitrator Richard Tyson ruled for the County in his award and quoted his remarks favoring the County position on longevity. The arbitrator believes that the Tyson award should not have been mentioned. In addition, along with its rebuttal brief, the County furnished the arbitrator County Resolution No. 34 (1995/1996) dated December 19, 1995 reporting on the 1996 settlement of the law enforcement unit.

The arbitrator finds that it was improper of the County to submit this settlement which occurred subsequent to the agreed upon October 30, 1995 date.

Among the criteria listed in 111.70(4)(cm)7 to which the arbitrator shall give weight is j. which states

> 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.

In voluntary collective bargaining, when one party violates ground rules agreed upon by both parties, the party that has been harmed attempts to remedy the damage. In the private sector, a union might strike if an employer that has agreed to some ground rules during negotiations violates those rules.

What remedy is available to a union or an employer in an interest arbitration when ground rules are violated in a prejudicial fashion? The arbitrator is not aware that there is a remedy available to an employer or union. And the power of the arbitrator is limited to the choice of final offers based upon the criteria provided by the statute. In this dispute the arbitrator finds that the improper introduction of evidence by the County reflects adversely on the quality of its final offer under criterion j. Therefore, in consideration of the County offer as a whole, the arbitrator will include as one the elements of his decision, the fact that the County improperly introduced evidence.

Consideration of Final Offers as a Whole: The arbitrator believes that the important issues in this dispute are the County proposal to reduce the longevity program for new employees and the Union proposal to add a new clause prohibiting subcontracting if it would result in a layoff or reduction of hours. Both of these proposals are controversial and both carry psychological implications that exceed their monetary value.

If the final offer of the Union did not include the restriction on subcontracting, the arbitrator would have found it preferable to the final offer of the County. On the other hand, if the final offer of the County did not include the reduction in the longevity program, the arbitrator would have chosen it in preference to the Union final offer that included the clause on subcontracting. The subcontracting clause poisons the Union offer while the longevity change poisons the County offer.

The arbitrator finds himself placed in the uncomfortable position of having to choose between two almost equally unsatisfactory offers. The arbitrator recognizes that he could chose the Union's final offer on the grounds that he has found the Union wage offer to be preferable to that of the County. However, that would be dodging the basic issues in this dispute. Therefore, although the arbitrator dislikes the prospect of doing so, he believes it only proper that he render a decision based on which of these two offers is less harmful than the other.

Taking refuge in the criteria in the Statute, the arbitrator finds that the County longevity offer is less objectionable than the Union restriction on subcontracting for the following reasons. First of all, no immediate damage will be done to current employees who are grand fathered. The adverse affect of the two tier system will not be felt for at least five years when new employees become eligible for a $10/month longevity payment rather than a 5% payment. Second, the new employees will receive longevity payments which are about the same as the payments of many of the comparable counties. Although it is a takeaway without a quid pro quo for which no great need has been established, at least the takeaway only brings a leader back to about the average of the county comparables.

The restriction on subcontracting proposed by the Union represents an attempt to gain a benefit possessed by only one of the ten comparable counties. This is an attempt to reach new grounds; it is an attempt to gain job security at a time when down sizing in private industry and privatizing of customarily public jobs are talked about on T.V. and reported on in our newspapers. It is an important proposal, one that requires a great deal of support if it is to prevail before an arbitrator. The Union was unable to produce the kind of evidence needed under the Statute if it is to gain such a clause restricting subcontracting.

The arbitrator believes that, for the most part, clauses restricting subcontracting that causes layoffs were negotiated many years ago. The arbitrator is not aware of any recent negotiations in which public sector unions have gained layoff protection from subcontracting and, more importantly, the Union in its arguments is unable to muster evidence showing that such a clause is being obtained by any of the comparables.

Although the Union claims it has supplied a quid pro quo for this proposal, the arbitrator has failed to find it. When breaking new ground it is important for the Union to determine what quid pro quo, if any, is appropriate and to offer it. If the Union is to succeed in future years in obtaining the protection it seeks, it probably will have to obtain the protection through collective bargaining rather than arbitration. If the Union is forced to submit this proposal to arbitration because of a bargaining impasse, it will need to produce much more extensive, detailed, persuasive arguments than it has done so far.

The arbitrator concludes that the arguments against the subcontracting clause proposed by the Union are stronger than the arguments against the reduction in longevity payments for new employees. And, since these are the crucial items in this dispute, will base his choice of offers on that finding.

**AWARD**

After full consideration of the exhibits and arguments of the County and the Union, the arbitrator finds for the reasons explained above that the County final offer is preferable under the criteria in the statute.

The arbitrator therefore selects the final offer of the County and orders that it and the agreed upon stipulated items be placed into effect.

2/6/96
February 6, 1996

James L. Stern
James L. Stern
Arbitrator