BEFORE THE ARBITRATOR

In the Matter of the Petition of

SEYMOUR EMPLOYEE'S UNION, AFSCME,
LOCAL 455-A,

To Initiate Arbitration
Between Said Petitioner
and

Case 23
No. 54154 INT/ARB-7977
Decision No. 28957-A

CITY OF SEYMOUR

Appearances:

Bob Baxter, Staff Representative, appearing on behalf the Union.

Godfrey & Kahn, S.C, Attorneys at Law, by Dennis W. Rader, appearing on behalf of the Employer.

INTEREST ARBITRATION AWARD

Seymour Employee's Union, AFSCME, Local 455-A, (herein "Union") having filed a petition to initiate interest arbitration pursuant to Section 111.70(4)(cm), Wis. Stats., with the Wisconsin Employment Relations Commission (herein "WERC"), with respect to an impasse between it and City of Seymour, (herein "Employer"); and the WERC having appointed the Undersigned as arbitrator to hear and decide the dispute specified below by order dated February 6, 1997; and the Undersigned having held a evidentiary hearing in Seymour, Wisconsin, on April 11, 1997; and each party having filed post hearing briefs, the last of which was received June 28, 1997.

ISSUES

The following is a summary of the issue presented with respect to the parties' calendar 1996-7 agreement. The parties' final offers constitute the official statement of the issues in this case.

1. The Employer proposes to end the current practice of allowing retired city employees to participate in the city's health insurance plan at their own expense. It proposes that the parties adopt the following:

"MEMORANDUM OF UNDERSTANDING

Currently retired (as of 12/31/96) employees who are not

eligible for Medicare or who are not insurable under their insurance shall be allowed to participate in the City group insurance plan until eligible."

The stipulation of tentative agreements provides for the right of the Employer to change insurance carriers provided the benefits are at least equal to the benefits listed in Schedule A. It also provides for the right of the Employer to change the current insurance benefits to those listed in Schedule B, the schedule of benefits necessitated if the Employer's proposal were adopted herein. It also states: "If the City chooses to exercise this option, an additional one-half percent (0.50%) increase shall be added at the time the change takes effect. This change will not affect the percentage of wage increase for any other year."

The Union proposes to memorialize the current practice in the collective bargaining agreement with the addition of the following provision added as a third paragraph to Article 21 - Group Insurance:

"Pursuant to current practice retired employees and their eligible dependents shall be allowed to remain in the City's group health insurance plan at their own expense."

BACKGROUND FACTS

All of the employees of the Employer are under the same health insurance plan. The city has a total of 24 regular employees who are covered by the plan and five retirees who are covered by the plan. All five employees who are retired are retired from this bargaining unit. The recently expired collective bargaining agreement does not have a provision permitting retired employees to continue to participate in the Employer's regular health insurance plan, but under an undisputed long standing past practice, the Employer has permitted retired employees to continue to participate in its regular health insurance plan as long as they choose to do so, at their own expense.

The Employer is currently insured by Employer's Mutual Insurance of Wausau, which succeeded another carrier. The 1995, monthly premiums for the plan which the Employer then had in effect was $158.95 (single), $437.91 (family). The 1995 policy had an oral surgery benefit which the Employer is required by collective bargaining agreement to maintain.

The Employer sought bids for health insurance under 1996-7 agreement from a number of carriers. One bidder refused to bid with respect to this group of employees because more than ten per cent of the employees who would be covered were in retirement status. There was no evidence as to the results of bids from other unsuccessful bidders.

Employer's Mutual Insurance of Wausau was the successful bidder. It offered to insure all of the employees both current and retired; however, it indicated that it would have to use a different insurance product if the total number of insured exceeded 25. If the group remained 25 or under it could insure the group under a small group insurance trust plan for both 1996 and 1997, which is called the "insurance trust" or "trust" in this decision. The nature of this trust is that it combines a number of small employers into a single insurance group. The trust product has a fixed set of benefits which the carrier does not vary. It offers this only to employers with 25 or fewer insureds. The trust plan would not be available to the Employer if it continued to permit retirees to be insured under its health insurance plan because the Employer would have an insurance group, including retirees, exceeding 25 participants. However, if the Employer choose to limit its insureds to current employees, the number would be low enough at this time for the Employer to remain qualified for the trust plan. The fixed benefits in this package do not include an oral surgery benefit, but do include a routine eye exam benefit which employees did not receive under the plan in effect in 1995. Because the expiring collective bargaining agreement requires the Employer to maintain the then current level of benefits, including an oral surgery benefit not contained in the trust, Employers' Mutual also offered to include an additional dental plan which offers not only oral surgery, but routine dental coverage on an 20% co-pay basis. The monthly premiums for 1996 and 1997, for this combined plan would be $139.80 (S) and $408 (F).

If the Employer chose to have a group exceeding 25 employees, Employers' Mutual proposed the use of another product. That product included the same coverage as currently received by employees, including an oral surgery benefit. It did not include routine dental coverage or routine eye examinations. The monthly premium for that plan for 1996 and 1997, would be $160 (S) and $419 (F). If retirees were to receive the improved dental plan, the monthly premium would be $172.09 (S) and $454.77 (F). [However, the Union has not proposed that the dental plan be adopted and, therefore, that benefit will not be provided to retirees under this agreement.]

It is important to note that for the purposes of this decision only, the Employer duly took the steps which would terminate the past practice of permitting retirees to participate in the health insurance plan at their own expense.

POSITIONS OF THE PARTIES

The Employer argues that its proposed set of comparable employers for use under the comparison criterion is the most appropriate for this unit. It based its selection on the following: 1. similarity in the level of responsibility, the

services provided by, and the training and/or education required of the employees; 2 geographical proximity; and 3. similarity in size of the Employer. Based upon these factors it proposes that the cities of Bonduel, Clintonville, Gillet, New London, Oconto Falls, and Pulaski be used. The Employer argues that the comparable communities proposed by the Union are too large and/or too distant to be comparable.

It then argues that its comparisons support its position. Only New London allows its employees to remain in the health insurance pool without restriction. Clintonville allows employees to remain until they are on social security. Bonduel has no policy and Gillet, Oconto Falls and Pulaski only allow employees benefits required under COBRA. It notes other area employers have policies which are more restrictive than Seymour.

It is the Employer's position that it has properly terminated this past practice and the burden to establish the new benefit is properly placed on the Union. First, it has given the Union notice of its intention to terminate the past practice and an opportunity to bargain the same during negotiations leading to a comprehensive collective bargaining agreement. Second, the past practice in this case does not support the Union's position because case law demonstrates that the employer does have a right to change practices when the circumstances underlying the practice change. Finally, it notes that the Union has not demonstrated that it has offered any quid pro quo for the new benefit.

The Employer argues that it will be unable to maintain its small group insurance coverage if it continues this benefit. The cost of health coverage will rise unreasonably for this contract term. It points to the testimony of the city clerk-treasurer, that one of the potential bidders on the current plan refused to bid at all because the percentage of retired employees to the entire group was too high. Thus, in its view, it is very likely that in the future, insurance for this specific group may not be available or the cost of the insurance may become prohibitively expensive.

The Employer notes that it has given current employees a quid pro quo in that it will provide active employees with routine dental and routine eye exam insurance, if the city remains as a group of under 25 participants. Further, its offer includes an additional one-half percent wage increase if the Employer switches to the plan for under 25 participants.

Finally, it notes that if its offer is accepted, current retirees will not be left without the opportunity for health insurance. They are entitled under law to maintain health insurance under COBRA for 18 months. They are also entitled to purchase a conversion individual insurance plan. If an employee

retires at age 55, takes COBRA benefits at age 63.5, he or she would actually pay $5,000 less than if continuing in the Employer's plan (assuming routine dental and routine eye benefits were added to the current plan).

The Union takes the position that this benefit has been a long standing past practice even though it has not been included in a collective bargaining agreement. In its view, the Employer bears the burden of proof to show that its position is the more reasonable of the parties' positions. The Union argues that the Employer's reason for making this change is without merit. First, there are now 24 active employees and 5 retired employees. It is unreasonable to think that the Employer's complement of employees will remain at under 25. In any event, there is no reason to believe that this specific coverage (under 25 employees) will always be available or available at an advantageous rate. It notes that, contrary to the position of the Employer, that COBRA benefits are not equivalent because they only last 18 months, have a lower level of benefits, and are more expensive. The insurance rates in this unit have remained relatively the same since 1995, while insurance in comparable units has risen. Even with the increase in rates contemplated by shifting from the current insurance to the more costly insurance, the resulting rates will be relatively comparable to those in comparable communities.

The Union also argues that the Employer's method of terminating this benefit is incorrect in that the police bargaining unit is on a two year agreement (calendar 1996 and 1997). The Employer did not propose terminating this benefit to that unit. Nonetheless, the Employer's action in this case will effectively terminate the benefit for that unit as well, without that unit having had an opportunity to bargain.

The Union argues that its proposal is heavily supported by external comparisons. It proposes the use of the twenty-five communities within a thirty mile radius of Seymour. Those communities are: Allouez, Appleton, Aswaubenon, Bonduel, Brillion, Brown County (Highway Department), Clintonville (DPW and Utility Departments), Combined Locks, DePere, Gillett, Green Bay, Howard, Kaukauna, Kimberly, Little Chute, Marinette, Town of Menasha, City of Menasha, Neenah, New London, Oconto, Oconto Falls, Outagamie (Highway Department), Peshtigo, Pulaski, Shawano, Suamico. By contrast, it believes that the Employer has shopped for its comparables. The Employer's group includes six communities, half of whom are non-union. For example, the Employer's group includes Oconto Falls, but excludes Oconto. The Union also believes that population, location, local tax rates, levy rates and per capita values should be considered in determining comparability.

In reply, the Employer disputes the Union argument that

employees will have to find their own insurance carriers. They are entitled to conversion benefits under COBRA. It denies that the Union has demonstrated that that coverage will be more expensive. Further, it denies that equivalent coverage is unavailable, although it concedes it may cost employees more than the current plan. Finally, pre-existing condition coverage is available through COBRA. Congress may remedy this problem entirely.

It also argues that the police officers will not be impacted by this change. First, the problem with this benefit arose after the police contract was negotiated. There is no way the Employer could have raised this issue in that negotiation. Second, since the Employer has the right to terminate this benefit on due notice, the police union like this union will have the obligation to prove that the benefit is needed. Finally, the police unit has only four people.

The Employer believes that it has made an offer of a quid pro quo for this benefit in that it has offered an additional one-half percent wage increase effective when this change takes place. Further, current employees will receive dental and eye exam insurance. Additionally, the Employer's health insurance premiums will decrease with this change.

Finally, the Employer denies that its proposal is based upon "flawed logic" as the Union had argued. The Employer has made its decision based upon current circumstances. Neither it, nor, the Union can know that whether or not the Employer will need to have more than twenty-five employees in the future or whether this insurance plan for twenty-five or less employees will be always offered in the future. While it may be industry practice, Employer exhibit 27 demonstrates that the Employer may not be able to obtain reasonable rates even in larger pools if it has a high percentage of retirees. The Employer notes it provided wage information merely to demonstrate that public works employees are not under-paid.

The Union replies to the Employer's position as to comparables by arguing that the "standards" the Employer stated it used to establish its comparability group actually support the adoption of the Union's proposed group. The Union denies the employees will receive extra benefits if the Employer's position is adopted. The Union reiterates the practice supports its position and that in its view, the Employer's true motive is to eliminate expensive older people from its insurance plan. Finally, the Union denies that the Employer has "grandfathered" any employees in that only those who were "uninsurable" were "grandfathered." It denies that their is any quid pro quo for the employees who retired.

DISCUSSION

I. Standards

Under Sec. 111.70(4)(cm), Wis. Stats., as amended, the arbitrator is required to select the final offer of one party or the other, without modification. The purpose of this requirement is to force the parties to attempt to make their offers the "most reasonable". In some situations, the parties don't do this. When this occurs, the arbitrator is forced to choose between the least "unreasonable" of the offers.

An arbitrator is not free to make this decision on any basis. Instead, he or she is to make that choice by applying the following factors specified in the statute:

7. "Factor given greatest weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body, or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

7.g. 'Factor given greater weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7 r.

7r. 'Other factors considered.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also 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 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 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 parties, in the public service or in private employment.

Under these standards, the arbitrator must give weight to the standards specified in the statute as having priority. The arbitrator may apply those remaining standards as he or she deems appropriate. In this proceeding, neither of the priority factors are directly involved.

II. burden of proof.

The parties have hotly debated who has the "burden of proof" in this proceeding and specifically what that party must show in order to persuade the arbitrator of its position. The Employer's position would essentially treat its undisputed long term history of providing this benefit as if it had no weight at all in this proceeding, essentially forcing the Union to prove its case in the same manner it would if it were trying to establish a completely new benefit which the Employer had never had. The Union, on the other hand, would essentially treat that same history as if it had already been included in the collective bargaining agreement. In practice it is exceedingly difficult

for an Employer to end contractually agreed upon benefits. Both of these positions are extreme and I reject them.

I recently reiterated my statement of the burden of proof and standards by which I apply to a party proposing any new contract provision (including the establishment of new benefits) as follows in Vernon County, Dec. No. 28984-A (6/97):

> "Nonetheless, the party seeking to establish a new benefit has to show that circumstances have changed such that there is a need for a new benefit and that its proposal is appropriate to fill the need. Alternatively, it must show that it has offered an equivalent quid pro quo for its offer."

Most of the evidence required by that standard is easily met when there has been an undisputed and unequivocal past practice of providing the benefit. Certainly, in this case, the Employer has demonstrated by its conduct in establishing and maintaining this benefit until very recently that there is a long standing need to provide its employees with this benefit. Indeed, the Employer has not denied herein that providing this benefit is no longer important to its employees, it has merely argued that the impact of doing so in terms of its cost and ability to maintain its preferred insurance policy make it no longer reasonable to do so. Accordingly, the first element has been met. Further, there is no need to provide a quid pro quo to establish a benefit which already exists.

However, it appears far better to impose upon the party seeking to incorporate the benefit into the agreement the ultimate burden to persuade the arbitrator by a preponderance of the evidence that its position is the more appropriate. Such a burden encourages parties to fully negotiate the terms they want in their collective bargaining agreement in the first place and to not rely upon "practice" to supplant that duty. By doing so, it would also insure that those practices which are incorporated into an agreement are subjected to the clarifying process which is the essence of collective bargaining. Contrary, to the position of the Union, the existence of a past practice is an important fact in support of the reasonableness of a proposal, but it is not conclusive. For example, the language proposed by the Union herein has serious difficulties. Further, whether a past practice affecting wages, hours and working conditions ought to be incorporated into an agreement, is likely to be affected by, among other factors, the parties' relative interests in the practice and the importance of the practice.

There is a difference between the ultimate duty to persuade the arbitrator described above and the very different duty a party has to prove (produce evidence of) facts. See, Hochgurtel v San Felippo, 78 Wis. 2d 70 (1977). For example, in this case,

the Employer has the responsibility to establish that it is likely that it will be expensive to obtain insurance in the future, if that is its position.

III. Application of Factors to Determine Appropriateness

a. Internal Comparisons

The Union urges on the basis of internal comparability that it is only reasonable to continue this policy in light of the fact that the Employer has not bargained with the police unit over the discontinuation of this benefit. This position is without merit. The Employer learned that it would no longer be able to participate in the trust group only after the police contract was settled. The Employer learned of this change after the police contract was settled. It raised the issue with the first union with an open agreement. While the police unit with its earlier retirements has a substantial interest in this benefit, there is no one in that very small unit who will be affected for many years. This unit is larger and has both current retirees receiving the benefit and retirees who are likely to retire sooner. Under these circumstances, the Employer has properly raised the issue and properly dealt with the termination of the practice. This determination is for the purposes of this decision only. The internal comparison criterion is of no weight.

b. External Comparisons

The parties have both sought a determination of what is the appropriate set of comparables. In determining the appropriate set of comparables, the undersigned looks to units from similar employers with similar positions which are in the same or a similar labor market, are of similar size, similar economic base, and similar tax resources.

Of the comparables proposed by the parties I have selected the following:

	population	per capita value	
Bonduel	1,276	30,398	
Brillion	2,901	33,987	*
Clintonville	4,512	23,184	
Combined Locks	2,237	46,564	*
Gillett	1,368	20,655	
Kimberly	5,656	38,536	*
New London	6,954	24,255	
Oconto	4,563	18,976	*
Oconto Falls	2,674	26,997	
Pulaski	2,534	24,961	
Suamico	6,280	45,266	*

Seymour	2,954	29,509

Those marked with an asterisk were from the group proposed by the Union. The others were the group proposed by the Employer. All of these are within 24 miles except Oconto which is slightly further, but has very easy highway access to Seymour. All are of a similar size to that proposed by the Employer. There is a variation in economic base, but this group tends to represent a good cross section of similar sized municipalities in this area. The group proposed by the Employer had many units which were not organized for collective bargaining. This group tends to be more representative.

The totality of comparables offered by the Union show that in general a benefit of this nature (often with restrictions on the number of years of use or age of the employee) is common among employers in this area. The following is the comparative data in the close comparability group:

	1995	1996	1997	ret. cov.
Bonduel	383.08	391.00	301.00	no
	331.05	310.00	310.00	
Brillion	484.77	565.62	671.11	yes
Clintonville*	477.17	529.65	616.49	yes
Combined Locks*	459.16	450.06	463.70	yes
	419.42	406.86	417.14	
Gillett	goes by age		486.00	no
			330.00	
Kimberly*	459.16	450.06	463.70	yes
	419.00	406.86	417.14	
New London	478.58	478.58	545.20	yes
Oconto	510.47	565.07	623.13	yes
Oconto Falls		489.00	396.57	no
Pulaski	456.00	419.00	419.00	no
Suamico		412.39	412.39	yes
Seymour	437.91	419.00	419.00	

Even among the close comparability group determined above, this benefit is generally common. This is even clearer when those units which are not organized are not considered. Those units marked with an asterisk above place substantial limitations on the length of time or age at which the benefit terminates. Thus, similar restrictions to those noted in larger units are frequent in this comparability group. The comparability factor generally supports maintenance of this benefit; however, it does not support an unlimited benefit.

The Employer's position that the change from the trust group to a policy for greater than 25 employees, will result in an unreasonably high premium during the term of this agreement is

without merit. The resulting premium of the policy the Employer will have is well within the range of normal for the comparability group.

c. Public Interest

The public interest is also implicated in this issue in two conflicting ways. The public has an interest in the efficiency of government which would support reasonable efforts to keep loyal and effective employees. It would also support reasonable efforts to facilitate their voluntary retirement when they feel they can no longer serve effectively. It would also support a policy of continuity and consistency in benefits implicated in employees' choices to retire in order to insure that they are an effective inducement. This general principle strongly supports continuity of benefits for those employees who have already retired and for others who have changed their positions in reliance upon the existence of those benefits. The conflicting policy, also part of efficient government, is cost containment, obtaining the services of public employees at the most reasonable cost. This includes both the cost of administration benefits and the direct cost of the benefit both now and in the future.

The Union's contract proposal essentially incorporates the "past practice" without definition. I don't believe that in this small bargaining unit that there is a sufficiently well established practice to cover all contingencies. It is far more likely that this language is likely to lead to repeated, expensive litigation.

The Employer alleged that if retirees remain on the Employer's insurance, the rates may increase and the ability of the Employer to obtain lower rates of other insurance companies may be severely limited. It supported this with the evidence that one prospective bidder refused to bid because over 10% of the health insureds were retirees. This does appear to be serious risk for several reasons. First, this is a small insurance unit. One serious major medical expense would have a proportionately large impact on the "experience" factor. Second, older employees, particularly those who have chosen to retire are more likely to be at risk for those expenses. It is not clear whether or not this Employer is likely to have retirees be a higher proportion of its insurance unit than comparable small employers.

It is unclear under this evidence whether the premium rate for the Employer's health insurance was ever rated on the basis of health claims experience within this group. The trust premium rate is not based upon the health claims experience of this group, but on the entire trust pool. This certainly would be a very serious change in circumstances and might well have been beyond the contemplation of the Employer in starting this

practice.

The evidence of premiums among the comparables above does suggest that premiums can be much higher. While termination of retiree participation was an extreme method of controlling these risks, the more reasonable approach would have been changes to minimize these risks. The difficulty in this proceeding is that neither offer takes that more moderate approach.

The Employer has argued that elimination of this benefit does not seriously impact either current or future retirees because they have access to other insurance at reasonable cost. Federal law (COBRA) requires the insurer to continue coverage for employees for 18 months following there termination from the Employer's plan. Those retirees who reach Medicare age before 18 months are able to obtain insurance at reasonable cost. It is not clear how many retirees their currently are who could use COBRA to reach Medicare age.

The same is not true of employees who cannot reach Medicare age. Retirees who have serious medical conditions will have to either accept a "conversion" policy offered by the carrier or enter the state's high risk health insurance pool. Contrary to the position of the Employer, the premium for these conversion policies is substantially in excess of the premium for participation in the current plan. The chart in the Employer's brief showing no cost to the retiree is miscalculated and assumes the wrong group plan premium. If correctly calculated using 3 rather than 4 months for a quarter year and making the same inflation assumption for the conversion policy, retirees who have to take conversion coverage will pay substantially more than they would under the group plan. Further, there are substantial differences in the quality of coverage, deductibles and co-pay features between the conversion policies offered and the Employer's health insurance. For example, the maximum lifetime benefit under the group health plan is $1,000,000 while the maximum lifetime benefit under the conversion plan II is limited to $75,000. While the state high risk insurance program may be better, it still suffers from many of the same problems. In this context the Employer's offer to grandfather only those who are "uninsurable" is ambiguous and illusory.

The Employer is correct that an offer of an equivalent quid pro quo for the elimination of a previously offered benefit might justify its elimination, while an offer which is less than equivalent is a consideration in determining the reasonableness of the parties' positions. In this case the .5% benefit (even with the addition of minor benefits) is far less than the equivalent to the value of the benefit to current relatively employees. It is, therefore, a factor which is considered in determining the reasonableness of the parties' positions.

IV. Selection of Final Offer

In this case, the offer of neither party is appropriate. The Union's offer is ambiguous and leaves the Employer at unusually high risk for large insurance premium increases in future contracts. The Employer's proposal addresses those risks in an extreme fashion which is not supported by the comparability data or the public's interest. I believe the Union's final offer is closer to appropriate. I would note that the parties still have an opportunity to seriously address the risk factors associated with this benefit in their next collective bargaining agreement. I would expect that any offer in order to be appropriate would have to adequately address those issues.

AWARD

That the parties collective bargaining agreement include the final offer of the Union.

Dated at Milwaukee, Wisconsin, this 26th day of July, 1997.

Stanley H. Michelstetter II, Arbitrator