EDWARD B. KRINSKY, ARBITRATOR

In the matter of the Petition of

City of Manitowoc Waste Water Treatment Plant Employees, Local 731, AFSCME, AFL-CIO

To Initiate Arbitration
Between Said Petitioner and

City of Manitowoc (Waste Water Treatment Plant)

Case 109
No 52343 INT/ARB-7596
Decision No. 29016-A

Appearances for the Union — Mr Gerald D Ugland Staff Representative, Council 40, AFSCME,

Mr Patrick L Willis City Attorney, for the Employer

By its Order of March 18, 1997 the Wisconsin Employment Relations Commission appointed Edward B Krinsky as the arbitrator "to issue a final and binding award, pursuant to Sec 111 70(4)(cm)6 and 7 of the Municipal Employment Relations Act," to resolve the impasse between the above-captioned parties " .by selecting either the total final offer of the [Union] or the total final offer of the [Employer] "

A hearing was held at Manitowoc, Wisconsin on May 16, 1997. No transcript of the proceeding was made. The parties had the opportunity to present evidence, testimony and arguments The record was completed with the exchange by the arbitrator of the parties' reply briefs on August 7, 1997

The dispute in this case is over the terms of the parties' 1996-1998 Agreement During the course of bargaining for that Agreement the parties reached, and then implemented, numerous tentative agreements

The Union's final offer is to implement those tentative agreements The Union makes no additional final offer. Thus, if the arbitrator rules in favor of the Union's final offer there will be no change in the terms of the 1996-1998 Agreement which the parties have already implemented

The Employer's final offer, in addition to the implementation of the tentative agreements, is as follows

> In return for agreeing to increase the employer's pension contribution to up to 6.5%, which is one of the tentative agreements, the Employer proposes that

the Union be required to elect to include, in writing addressed the undersigned, within ten (10) days of the date of receipt of the Arbitration Award, one of the two following changes in the attached collective bargaining agreement

(1) Amend Article II(i) to read as follows

~~"To contract out for services under emergency conditions if all available bargaining unit employees are working. There shall be no subcontracting of usual and customary bargaining unit work. Subcontracting shall not be used for the purpose of reducing or replacing regular employment.~~

~~Notwithstanding these restrictions, the City may subcontract the hauling and disposal of sludge from the Wastewater Treatment Facility as long as the City maintains at least 18 non-clerical full time equivalent bargaining unit positions and one permanent part time clerical position without any employee(s) being laid off.~~

To contract out for services, but only if such contracting will not result in the lay off or reduction of the normal work hours of bargaining unit employees at the time of such contracting.

(or)

Amend Article X, Section 4(d) as follows:

(d) **Light Duty** ~~Worker's compensation Injury Leave. An employee who is injured or suffers from illness caused by work for the City shall continue to receive the difference between the regular take home pay and Worker's Compensation for a period not to exceed three (3) months. Thereafter, the employee may choose the Worker's Compensation check or sick leave. The three (3) months may be extended by the appropriate committee of the Common Council.~~

Employees who are recuperating from a duty-incurred injury may temporarily be assigned light duty notwithstanding the employee's

> inability to perform all essential job functions for such period of time as the employer determines alternative productive work is available. The employee shall, upon request, furnish the employer with a physician's statement specifying the type of work to which the employee may be assigned. Temporary work assignments hereunder shall be consistent with any work restrictions placed on the employee by the employee's physician.

The petition for arbitration was filed on March 10, 1995 Thus, this dispute is covered by the statute as it existed prior to its most recent amendments The statute requires the arbitrator to give weight to several factors A number of them are not at issue in this case, and were not raised by the parties in their arguments These include (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, (f) comparison of wages, hours and conditions of employment with ".. employes in private employment in the same community and in comparable communities", (g) the cost of living, (h) overall compensation received by the municipal employees The factors which are at issue, and which will be considered in the discussion below, are (d) "comparisons of wages, hours and conditions of employment. with. other employees performing similar services", (e) "comparison of the wages, hours, and conditions of employment...with.. other employees generally in public employment in the same community and in comparable communities", (i) changes in circumstances during the pendency of the arbitration; (j) "Such other factors. .which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation,.. arbitration or otherwise between the parties ."

The parties bargained and reached tentative agreement on all issues except for those at issue in the final offers. The tentative agreements include payment by the Employer of "up to six and one-half percent (6.5%) of the employee's gross wages toward the employee's share of the Wisconsin Retirement Fund." They also include the "light duty" language portion of the Employer's final offer

The Employer maintains in this arbitration case that its agreement to increase the retirement contribution to 6 5% was conditioned upon acceptance by the Union of a *quid pro quo* During bargaining it asked the Union to give up the Workers Compensation supplement. The Union did not agree and, among other things, pointed out that the bargaining unit in the Library was given the 6.5% retirement benefit without giving up the Workers Compensation supplement. The Employer replied that it was the case that the Library employees retained the Workers

Compensation supplement, but the Library employees agreed to modifications in subcontracting language as a condition of receiving the 6 5% retirement benefit The Union did not agree to modify the subcontracting language as a substitute for giving up the Workers Compensation language The Employer then took the position that the Union could have its choice of which language to modify (the Workers Compensation language or the subcontracting language) as a condition of receiving the 6 5% retirement benefit This is the choice which the Employer gave the Union as its final offer. The Employer agreed to implement the 6 5% as part of the tentative agreements, but it seeks the *quid pro quo* through this arbitration proceeding

What all of this means is that if the Union's final offer is selected, the employees will receive the retirement benefit up to 6 5% and the Agreement will contain the existing Workers Compensation supplement and subcontracting language, and the new light duty language If the Employer's final offer is selected, the employees will receive the retirement benefit up to 6 5% and may elect to retain either the Workers Compensation supplement or the subcontracting language, but not both, The light duty language will be in the Agreement

The parties base many of their arguments on comparability with other employing units With respect to internal comparability, their only dispute is that the Union does not view the Library as a relevant comparable. The Employer emphasizes that its reason for including the subcontracting language in its final offer is that during bargaining the Union cited the Library employees in arguing that it should not have to give up the Workers Compensation supplement, since the Library employees had not done so. It is the arbitrator's view that the Library is a relevant internal comparable since it is a municipal employer within the City of Manitowoc even though the governing body is a separate Board (as is the case also with the Wastewater Treatment facility). Even if it is the case, as the Union argues, that employees in other internal units have much more in common with the Wastewater unit than the Library does, it is a relevant comparable, and the Union acknowledged as much during bargaining when discussing the Workers Compensation issue

The parties are in agreement about external comparability They have agreed to use as comparables those municipalities which were used in a 1980 arbitration, namely Appleton, Fond du Lac, Neenah-Menasha, Oshkosh and Sheboygan. DePere and Two Rivers were also included as comparables, but the arbitrator gave them lesser weight than the other municipalities The Employer emphasizes that it would argue for the use of different comparables if the current dispute involved wages but, since it does not , these comparables are acceptable for this proceeding.

The Union objects to the Employer's final offer for a number of reasons. It argues that the Employer's final offer is improper because it ". .is indefinite in that it provides two alternatives which it would have the arbitrator force on the Union through a process and on a time table which are inconsistent with Wis Stat. 111 70(3)(b)2 " The Union

suggests that the Employer's final offer constitutes a 'prohibited practice" under the statute

The arbitrator will consider the reasonableness of the choice which the Employer is offering in its final offer However, he is not giving any weight to the Union's argument that the offer violates the statute The Wisconsin Employment Relations Commission is the appropriate forum for considering and deciding whether there has been a prohibited practice There is no indication that the Union filed a prohibited practice charge against the Employer in connection with its final offer in this proceeding, or that it raised the issue in any other manner with the Commission prior to the certification of final offers

The Union argues that when a party seeks a *quid pro quo* it must demonstrate that there is a need for what it is asking, but the Employer has not done that With respect to the subcontracting language, it argues, the Employer has not demonstrated any problems with the existing language. It argues further that the guaranteed staffing language was bargained voluntarily by the parties and is very valuable to the Union, and it should not be asked to give it up in return for a small increase in the maximum retirement contribution. Moreover, it argues

> As a result of this (proposed) language the Employer could reduce the size of the staff through attrition It could subcontract and , on a delayed basis, lay off employees This provides nowhere near the protection that the current language provides for the employees.

The Employer disagrees with the Union's analysis of the effect of implementing the Employer's proposed subcontracting language It argues

> The Union. . [suggests] ..that if the Employer's subcontracting offer were accepted, the Employer could "on a delayed basis lay off employees " The Union does not suggest how this could happen without violating the contract, and the Employer cannot imagine how it could. The proposed language does not allow lay offs during <u>any</u> time while the Employer is contracting out services There is no possibility that the language proposed by the Employer could result in layoffs The language specifically prohibits the use of contracting if it would result in a layoff or reduction of the normal work schedule.
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> The Union characterizes the Employer's Offer as a

> "severe loss of job security" However, the Union does not suggest even one scenario under which any of its members, either now or in the future, could suffer While it is possible that some employees who might have been hired will, under the proposal, never be hired, the potential harm to these people who will never be known hardly constitutes a 'severe loss of job security' to anyone

The Employer argues that the need for its subcontracting proposal is simply that there needed to be a *quid pro quo* for the increase in retirement benefits The Employer was not willing to provide that benefit and get nothing for it in return The Employer offers a second reason for including the subcontracting language in its final offer

> A second and more direct reason for the subcontracting language request came from the testimony of the Union Steward who indicated that all employees are aware of a staffing study currently being conducted for the City of Manitowoc Wastewater Treatment Facility The results of that study are not in yet, so the Employer cannot say with any specificity whether staff reductions through attrition are likely However, if staff reductions are recommended and the subcontracting language is not changed, the Employer cannot effectuate those reductions through attrition unless it stops the contract hauling of sludge. Acceptance of the Employer's subcontracting proposal would allow the Employer to effectuate staff reductions through attrition if such staff reductions are recommended. Under the current language,the Employer would be forced to burden taxpayers with unnecessary staffing as a condition of continuing to contract for the hauling of sludge, if a staff reduction through attrition was recommended."

The Union argues that in bargaining the Union was told by the Employer that it had no plans for subcontracting in the future.

The arbitrator's notes of the hearing reflect that steward Kanugh testified that there was no discussion in bargaining about any planned reorganization, although that matter has been brought up in staff meetings. He testified that there were no reports or documents made available. The parties stipulated that three other members of the Union's bargaining committee would offer the same testimony

Based upon this testimony about what occurred in bargaining, it is the arbitrator's conclusion that the Employer did not discuss in bargaining any proposed reorganization and/or planned subcontracting, or a need for greater staffing flexibility

The Employer argues that its subcontracting proposal ' would provide more flexibility in plant operations, serving the interests and welfare of the public, with the guarantee in writing that the regular work hours of current employees would not be adversely affected " It is the case that the Employer's proposal would give it greater flexibility than it now has, but the arbitrator notes that the language to which the Employer now objects is language which it previously agreed to voluntarily, and it has not demonstrated to the Union in bargaining, or to the arbitrator that there is a current problem which needs to be addressed

With respect to the Workers Compensation issue, again the Union argues that the Employer has not demonstrated a need for the proposal It argues that the Employer's cost of providing this benefit has been minimal. Over a three year period supplementary payments to the entire bargaining unit have averaged $ 342 57 per year, which is 00055% of the wages paid to the unit, including overtime The Union argues, " This is negligible compared with gross wages for this bargaining unit, but a significant help to the employee who is injured on the job "

The Employer reiterates that the need for the proposal is mainly to provide some reasonable *quid pro quo* for increasing the retirement benefit The Employer acknowledges that the savings to it from this proposal is very low, but it argues that, "this. demonstrates that the *quid pro quo* which the Employer is requesting as a condition of the 6 5% pension benefit is quite reasonable. "

The Employer argues that its Workers Compensation proposal is important to it because.

> the Employer would like to self-fund its workers compensation costs and the Employer's workers compensation consultant has strongly recommended that workers compensation supplements be eliminated because they provide an artificial inducement to use workers compensation

The Union emphasizes that although the overall value of this benefit is small, "it holds a significant personal value for the individual employee who could lose three days' wages or the marginal difference between his take home wage and the supplement when the employee is out for more than seven calendar days because he was injured at work."

The parties disagree about the effect of the Employer's final offer on the employee during the first three days of absence for an injury The Union argues that with the

elimination of the Workers Compensation supplement, the employee gets no pay because the sick leave language precludes use of sick leave It cites Article X, Section 2 (f) which states

> An employee may use sick leave with pay for absence necessitated by personal illness or injury incurred off of the job or if the employee's presence is required at home in the event of illness or injury of members of his family living in the employee's residence

The Employer argues that in fact employees have been able to use sick leave to cover the first three days of illness in the case of on the job injury, and the Employer has stated that clearly and in writing It argues:

> .. The Employer's position throughout the negotiations and mediation has been that until workers compensation kicks in, an employee can use sick leave to assure no loss in pay This position is clearly stated in the Employer's September 11, 1996 letter to Mr. Ugland, which...reads in relevant part as follows:
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> > "Employees who were on workers compensation for less than four days so that they did not qualify for workers compensation benefits could use sick leave to make sure there was no resulting loss in pay, if such employees were unable to work light duty or there was no light duty available "
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> The Employer has never stated it would use Article X, Section 2(f) to deny an employee sick leave before workers compensation payments kicked in.
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> Read in isolation, the Employer understands how one could conclude that the language of Section 2(f) would preclude payment of sick leave for a workers comp injury. However, based on its written and oral representations that it would allow sick leave to be used, the Employer in this case would clearly be estopped from denying the use of sick leave .
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> . . .
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> There is other strong evidence which Local 731 is well aware of and which dispute its characterization

> of the Employer offer The Department of Public Works employees and the City Hall employees, who are also represented by Local 731, have sick leave language identical to that in the Wastewater Treatment Facility employee's contract Both of these units also now have the same light duty provision in lieu the (sic) worker's compensation supplement which the Employer nas proposed here Nevertheless employees in both of these bargaining units have already used sick leave during the first three days of a workers compensation injury How can Local 731 interpret the same contract language one way for its City Hall employees and a different way for the Wastewater employees? Whatever ambiguity might exist by virtue of the sick leave language is resolved by the Employer's written representation of its offer to the Union and Local 731's own interpretation of identical language in the City Hall contract .

The Union acknowledges that the Employer has paid sick leave for duty related illness or injury, but it argues that " if the Employer decided to cease that practice it could at any time announce the cessation and comply with the clear language of the contract " The Union argues that it should not have to accept the Employer's final offer in which an important benefit is given as a result of the Employer's good will, but which is contrary to clear contract language

The Employer notes that in earlier rounds of bargaining, the Union proposed the same language which is in the Employer's final offer with respect to light duty as a replacement for the Workers Compensation supplement The Union does not dispute the Employer's claim, but notes that the Union's proposal was not ratified by the membership. The Employer argues further:

> The City recognizes that the rejection by the Union of its bargaining committee's own proposal is not necessarily fatal to its case. However, it should certainly be considered evidence that the Union bargaining committee, at a very late stage of negotiations, viewed the proposal as reasonable.

In the arbitrator's opinion the Union argues persuasively that the Employer has not demonstrated an immediate need to delete either the existing subcontracting language or the Workers Compensation supplement. There have been no problems

involving the subcontracting language, and it is undisputed that the Workers Compensation supplement has cost the Employer very little The Employer's explanations (that it may need greater staffing flexibility and it may self-fund its workers compensation arrangements) may be sound reasons for its seeking these changes in order to accomplish future goals, but they do not demonstrate a need for the changes at this time

If either of the Employer's proposals were made in isolation, they would not have the arbitrator's support However, these proposals were not made in isolation They were made in the context of a trade-off for a new benefit which the Union wanted and the Employer agreed to give If it is reasonable for the Employer to demand a concession, and the arbitrator believes that it is, then it may be reasonable to demand one of these concessions, even though there is not a clear need for the Employer to have either of these changes at this time

As previously noted the statute requires that the arbitrator consider comparability in making his decision The evidence with respect to internal comparables is that the Manitowoc Police and Fire units have a Workers Compensation supplement in their agreements, as does the Library bargaining unit In the most recent negotiations, the City Hall and Public Works bargaining units gave up the Workers Compensation supplement in return for getting the increased retirement benefit

The Union argues that the Public Works bargaining unit "received several significant improvements to their contract." The Union notes that the City Hall employees "received meaningful wage adjustments to two positions Not that this justified the deletion of the supplement, they agreed to a bad deal "

The Employer argues that the Workers Compensation supplement was not an issue in the police and fire negotiations. It states, "The Employer would like to eliminate the workers comp supplement provision..., but because there was no increase in the police and fire pension payment, the Employer did not have a benefit of greater value to trade in return for making the workers comp supplement change "

With respect to the Public Works unit the Employer disputes the Union's claim that the City gave the Public Works unit significant improvements which the Union did not receive, although it acknowledges that "there were more mutually beneficial changes made..." there.

With respect to the City Hall, the Employer argues:

> ...Can the Union really be suggesting that the City Hall employees gave up the workers compensation supplement not for the one-half percent pension increase, but because two employees in the City's largest bargaining unit received wage adjustments?

> The . Department of Public Works employees, the City Hall employees and the Manitowoc Public Library employees, the latter two of which are also represented by AFSCME Local 731, recognized that if you want to obtain a significant benefit increase, such as the pension increase, you have to trade something for it that the Employer wants The Employer certainly recognizes that as a general rule, wages and benefits tend to increase Unions are generally not required, when attempting to gain a new benefit, to give up something else of exactly equal value However, the benefit to the employees of the pension increase will far outweigh the drawback of either alternative *quid pro quo* being proposed by the Employer. The question in this case is whether the Union should get the one-half percent pension increase without offering anything in return Neither the Department of Public Works employees, City Hall employees, or Library employees thought this was a reasonable position to take.

With respect to the external comparables, it is undisputed that each of them provides a Workers Compensation supplement. The Employer argues, however, that "... most of them have a less generous workers compensation supplement provision than is in the current Union contract . " It cites the fact that in the Oshkosh, DePere, Two Rivers and Neenah/Menasha agreements there is a ". proviso that the supplement will be deducted from an employee's sick leave." The Employer acknowledges, however that in Sheboygan, Fond du Lac and Appleton the formulas in those agreements ".. give employees more take home pay when they are on workers compensation leave than they make while they are working, ..." which the Employer characterizes as "simply not right."

The Union views the external comparables as favoring its position on Workers Compensation, not only because several of them have more generous arrangements than are provided to the bargaining unit, but because unlike several of the external comparables, the Employer's final offer will not permit employees to use sick leave during the first three days of absence [note the parties disagreement on that point, discussed elsewhere in this decision]. The Union argues that if the Employer's final offer were implemented, "...the Union would be the only bargaining unit among comparable cities with no direct supplement or use of sick leave as a supplement

With respect to the subcontracting issue, it is undisputed that none of the internal units,or the external units have guaranteed staffing language in them such as exists in the Agreement, which language the Employer now proposes to delete.

As discussed above, the Union argues that the Employer had an insufficient basis for requiring either of the proposed concessions as a *quid pro quo* for granting an increase in the maximum retirement benefit to 6 5% Moreover, the Union argues, since the commencement of the arbitration proceedings , the State has announced that the employee's maximum contribution for 1998 will be 6.2%, a reduction from the prior 6 4% Thus for 1998 the Employer s costs for retirement will be less than what was anticipated and the need for a *quid pro quo* has been diminished even further The Union notes that the statute directs the arbitrator, at subsection (i) to give weight to "changes in any of the foregoing circumstances during the pendency of the arbitration proceedings "

The Employer argues that the 1998 rates " were not available to the parties when they were attempting to negotiate the contract and should not have significant relevance to the outcome of this case .Even at 6 2%, the additional .2% benefit to the Union significantly outweighs the value of either *quid quo pro* (sic) which the Employer requests in return."

Was it reasonable for the Employer to demand something in return for agreeing to pay up to an additional .5% of employees' pay for retirement benefits? In the arbitrator's opinion, the answer is "yes." It is not always the case in bargaining that everything which one party gives is matched by a concession of equal value by the other party, and thus, it would not have been shocking if the Employer had simply granted the .5% increase without demanding a concession in return, but it is certainly reasonable that the Employer did ask for something in return.

There are two things which support the reasonableness of the Employer's position in asking for a concession. First, and most important, is that in bargaining with three of its other bargaining units (two of which are represented by the same local union involved in this case), the City conditioned its offer of an increased retirement benefit on a concession, and in each case a concession was granted. It is significant that all three bargaining units accepted a trade-off. Under those circumstances, it is certainly reasonable that the Employer seeks such a concession from this bargaining unit. The City's position in bargaining in the future would be made much more difficult if it demanded and achieved a concession from three bargaining units in return for granting a benefit, but then gave that same benefit to a fourth unit without seeking or getting anything in return.

Second, it is significant that the bargainers for this bargaining unit also viewed such a concession as reasonable. This is demonstrated by the fact that at a late stage of the bargaining, the Union's proposals included the retirement benefit increase and the deletion of the Workers Compensation supplement. While it is true that the Union members did not accept the Agreement, and thus did not support their bargainers, as is their right, it is significant that the bargaining committee viewed such a concession as a reasonable one under the circumstances.

Are these concessions which the Employer requested reasonable ones? In the arbitrator's opinion they are not unreasonable ones, and thus they are reasonable

The proposed Workers Compensation concession is reasonable in the sense that its monetary value to the bargaining unit is lower than the value which will be received in increased retirement benefits It is reasonable also as evidenced by the fact that two bargaining units (including one represented by this local Union) made this trade, and the Union's bargaining committee was prepared to do so in negotiations The proposal is less reasonable when viewed in light of the external comparisons which clearly support the Union's position The Union is correct that the sick leave language in the Agreement does not appear to permit its use in cases of on the job injuries, and if the Employer took that position in a grievance arbitration and prevailed, the loss to the bargaining unit as a result of giving up the Workers Compensation supplement would be greater than the Employer makes it out to be However, the Employer's written and oral statements and exhibits make it clear that the Employer has not taken the position that employees may not use sick leave, and it pledges not to do so in the future Under these circumstances, the arbitrator does not view this as reason to find the Employer's position unreasonable.

The proposed subcontracting concession is reasonable from the Employer's perspective because it is something that no other comparable units have, either internal or external ones It is also reasonable because there is no obvious financial cost to present bargaining unit members The Union's arguments make it clear that the staffing language is of great value to it, and that it is not something which it should be asked to give up for a 5% pension increase. The Employer recognizes the Union's view of the issue, which is why it is presented as an alternative, not as the sole concession which is demanded The Employer explained, as noted above, that it was included in the offer so that the choices given to the bargaining unit would be the same as were offered to other City bargaining units

The arbitrator must select one final offer in its entirety It is his view that it was reasonable for the Employer to demand a concession in return for agreeing to increase the retirement benefit. It was unusual, but not unreasonable, for the Employer to give the Union a choice of which concession it wanted to make The concessions offered were not unreasonable ones, notwithstanding the Employer's failure to demonstrate an immediate need for either concession except as a trade-off for the retirement benefit, and one or the other of them was accepted by three other units of City of Manitowoc employees in return for gaining the retirement benefit increase Comparability favors the Employer's position on the subcontracting issue With respect to the Workers Compensation issue, external comparability clearly favors the Union's position. Internal comparability slightly favors the Union's position, but the trend, evidenced by the most recent round of collective bargaining, favors the Employer's position. Given the necessity of selecting one offer or the other, the arbitrator has decided to select the Employer's final offer.

Based upon the above facts and discussion, the arbitrator makes the following AWARD

The final offer of the Employer is selected

Dated this 27th day of August, 1997 at Madison, Wisconsin

Edward B. Krinsky
Arbitrator