EDWARD B. KRINSKY, ARBITRATOR

In the matter of the Petition of	:	
Oconto County (Courthouse)	:	Case 147
To Initiate Arbitration Between Said Petitioner and	:	No. 54688 INT/ARB-8060 Decision No. 29085-A
Local 778-A, AFSCME, AFL-CIO	:	

Appearances: Godfrey & Kahn by Mr. Dennis W. Rader, for the County.
Mr. David A. Campshure Staff Representative, for the Union.

By its Order of June 3, 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 [County] or the total final offer of the [Union]."

A hearing was held at Oconto, Wisconsin on September 8, 1997. No transcript of the proceeding was made. The parties had the opportunity to present evidence, testimony and arguments. The record was completed with receipt by the arbitrator of the parties' reply briefs on December 23,1997.

In this proceeding the arbitrator must select one party's' final offer in its entirety. The Union's final offer is "...the tentative agreements and status quo on all other provisions of the Agreement."

The County's final offer, in addition to the tentative agreements, is as follows:

> 1. Article VII-Insurance: Hospital, Life and Dental - WRF-Pay Period. Add a new Section A to read as follows:
>
> Upon retirement of an employee pursuant to the Wisconsin Retirement System, the employee, spouse or dependent(s) or surviving spouse and dependent(s) of employees who have died during the course of the employment with the County will be eligible to participate in the County's health and dental program until the employee or spouse is eligible for Medicare or other group coverage. The County shall contract with an insurance carrier which

provides benefits to retirees, however, if no insurance carrier will cover retirees, the County shall not be responsible to provide insurance benefits for retirees. The total premium for these coverages will be the responsibility of the retiree or spouse.

The employee, at his/her option, may elect to use their own funds while employed or accumulated unused sick leave or vacation upon retirement for payment of health and dental insurance at group rates through a VEBA to the extent allowable by law. The VEBA shall be made available to employees upon the County's updating of its computer payroll software program to make such a plan technologically possible.

The sick leave bonus to be paid out each year may be paid into the VEBA Plan.

2. Article XI-Wages, Longevity Pay, Night Shift Differential, Reclassifications, add to Section 2 the following:

Employees hired on or prior to Decmeber 31, 1996 shall remain under the current longevity program. New employees hired on or after January 1, 1997 shall receive longevity on the following basis:

After 5 years $ 200 -annually
After 10 years $ 275 -annually
After 15 years $ 350 -annually
After 20 years $ 425 -annually

The statute, at subsection 111.70(4)(cm) sets forth criteria to be utilized by the arbitrator. At paragraph (7) the arbitrator "...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 revenue that may be collected by a municipal employer. The arbitrator...shall give an accounting of the consideration of this factor in the arbitrator's...decision."

Neither party presented evidence or arguments to support a position that its offer should be supported based upon the "greatest weight" factor. The arbitrator is not aware of any state law or directive of "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" which should be viewed as bearing on the outcome of this dispute. Therefore, it is the arbitrator's conclusion that the "greatest weight" factor does not favor either party's final offer, and it will not be considered further in this decision.

Paragraph (7g) provides that "...the arbitrator...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. 7r." While it is the case that both parties presented economic data about local conditions, primarily in support of arguments about which jurisdictions should be viewed as comparables, neither party has argued persuasively that its final offer should be supported more than the other based upon the "greater weight" factor, and it will not be considered further in this decision.

The remaining factors which must be considered are listed at paragraph (7r). There is no issue with respect to several of them: (a) lawful authority of the municipal employer; (b) stipulations of the parties; that portion of (c) pertaining to "...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 "...other employes in private employment in the same community and in comparable communities"; (g) cost of living; (h) overall compensation; and (i) changes during the pendency of the arbitration proceedings. The remaining factors will be considered below: (c) the interests and welfare of the public; (d) comparison... "with the wages, hours and conditions of employment of other employes performing similar services"; (e) comparison... "with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities"; (j) other factors normally taken into consideration "...in the determination of wages, hours and conditions of employment through voluntary collective bargaining...arbitration...in the public service..."

Facts

Certain background facts are essential for an understanding of the parties' dispute. Their most recent Agreement (January 1, 1995-December 31, 1996) contains no language pertaining to the right of retirees to remain covered under the County's group health and dental plans. The parties stipulated "that the practice of the County providing County health insurance at employee cost to retirees has been in effect since at least the late 1970's." The parties disagree about the present status of that practice. On October 29, 1996, during bargaining for a new Agreement, the County gave the Union notice:

> ...of discontinuing its practice of allowing employees retired from County employment under the provisions of the Wisconsin Retirement Fund the

> opportunity to participate in the County's health and dental insurance at the employee's own cost until the employees are eligible for Medicare coverage. The County further gives notice of discontinuing its practice of providing spouses and dependents of employees retired from County employment under the provisions of the Wisconsin Retirement Fund or spouses and dependents of employees who have died during the course of their work with the County, the opportunity to participate in the County's health and dental insurance plan at their own cost until they are eligible for other group coverage or Medicare coverage.
>
> The County is willing to consider incorporating into the contract, however, language setting forth the practices as they have existed in the past...

The County sent such a letter to each of the bargaining units. The Union responded on November 1, 1996 that "...the action described in those letters would violate the County's collective bargaining agreements with the AFSCME bargaining units." The Union's response stated further:

> During the current round of contract negotiations [the] Locals...each made a proposal which stated, "Retired employees that have elected to remain on the County's group health and/or dental insurance plans shall not be removed from said plans." The intent of the Locals in proposing such language was to clarify its interpretation of the current Agreement, not to incorporate a past practice into the contract.

In its reply brief the Union states that it did not include the proposal (referenced in the preceding quotation) in its final offer "...because of concerns it would be judged a permissive subject of bargaining, as it pertains at least in part to retired, as opposed [sic] current, employees."

Also on November 1st, the County responded to the Union's letter saying:

> ...The County is obviously aware that it cannot unilaterally change any contract language, but in this case there is no contract language regarding insurance being provided to retirees - no language to be clarified by a Union proposal.

> ...The County's intent is to eliminate the unwritten practice on insurance accessibility to retirees and provide the same benefits by resolution for nonrepresented employees and to negotiate the benefits into contracts with unionized employees, consistent with County actions noted above.
>
> ...The sole purpose of the October 29th letter was to place you on notice that group health insurance participation, which has been a unilaterally granted non-negotiated benefit, will no longer be provided by practice, but will now be subject to negotiations...

As mentioned above, the County's proposed language on longevity is offered as an addition to the existing longevity language. The existing language, at Article XI, Section 2, states:

> Each employee, after the completion of five (5) years of service, shall receive the following longevity pay: Three percent (3%) of the monthly wage, multiplied by the number of years of service, shall constitute the longevity pay...

The parties agree that the following counties are appropriately used as comparables to Oconto County: Door, Forest, Langlade, Marinette and Shawano. They disagree with respect to Brown County. The Union wants to include Brown County in the comparisons; the County does not. The five comparables on which the parties agree were the ones utilized by Arbitrator RJ Miller in a September 6, 1987 Award involving this bargaining unit.

Both parties have made lengthy arguments about whether the comparables should be changed. The evidence in the record, not reviewed here, demonstrates that the outcome of this dispute would not be affected by inclusion of Brown County as a comparable. Were there to be an effect, the question of Brown County's inclusion would be more compelling and the arbitrator would address it. Since the outcome of the dispute is not affected by the comparability issue, the arbitrator will use the same comparables in this proceeding which were used by Miller in the 1987 case between these parties.

Discussion:

Longevity Issue:

The County proposes to continue to provide the existing longevity benefits for employees hired before January 1, 1997, but to modify the benefits for employees hired thereafter. Its rationale for making the proposal includes: the high projected costs of continuing the current arrangements, the fact that the longevity benefits paid by the County are substantially greater than those paid in comparable jurisdictions, and the fact that the County is the only one of these jurisdictions whose longevity benefits increase in percentages as opposed to flat dollars. The County argues that even for those hired after January 1, 1997 the longevity benefits "...are significantly more valuable than the value of longevity benefits received by ...ALL the comparable counties." It argues further that employees will not suffer net losses as a result of the proposed change because while longevity benefits will be lower for newly hired employees, the County's offer guarantees health and dental insurance upon retirement, a benefit whose value will more than offset the difference between the old and new longevity benefits.

The Union is not proposing a change in the longevity provision. It emphasizes that the longevity arrangements were bargained, and any changes should be achieved through bargaining, not arbitration. It argues that the benefit was put into effect through bargaining, effective in 1972-73 when the formula agreed upon was payment, after five years service, of 2% of wages times the number of years of service. The parties then raised the multiplier in the 1974 bargaining to 3%, its current level.

The County justifies its offer in part by showing how the existing longevity benefits compare to those paid elsewhere. It makes these comparisons using an employee who has worked for the County for ten years, which is the average longevity for Courthouse employees in Oconto County. The longevity payment to such an employee is $ 500. For an employee hired after January 1, 1997 the payment after ten years will be $ 275 under the County's proposal.

The comparisons show that Door County does not have longevity pay. Shawano County has no longevity pay for employees hired after 1/1/96. For Shawano's grandfathered employees the benefit after ten years is $ 299. The figure for Forest County is $ 120; for Langlade County it is $ 240 and for Marinette County it is $ 150. The five County average, using Shawano County's grandfathered employees is $ 162, and the median is $ 150. Using Shawano County's plan for new employees, where no longevity is paid, the five County average is $ 102 and the median is $ 120.

The County is correct when it argues that even with the new proposed arrangement, the amount of longevity benefits paid to its employees far exceeds what is paid in the comparable counties. The Union does not disagree with these figures.

The Union argues that in proposing to change the arrangements and in citing the comparable figures, the County has not offered any evidence of bargaining history in the other jurisdictions which would illustrate why there are benefits paid in some of them, and not others, and what the tradeoffs have been which produced those results. The County views it as the Union's burden to produce evidence of bargaining history if it contends that such history is significant.

The arbitrator agrees with the County on this point. That is, the figures are there for all to see, and if there are explanations which exist to show why the longevity figures elsewhere are much lower than those in Oconto County, the Union should provide them if it wishes to make that argument.

The County also cites internal comparables. It notes that one bargaining unit, the non-sworn correctional officers and telecommunicators represented by the Teamsters Union, has agreed to the identical longevity provisions offered by the County in this proceeding. The County also has put these same provisions into effect for nonrepresented employees. The County argues that, "...an overwhelming majority of internal and external comparable units are operating under contract language that is virtually identical to that which the County is proposing in its offer..."

The Union argues that the Teamsters unit is the smallest of the five units with which the County bargains, and the others, including the unit in this proceeding, are in arbitration and have not accepted the County's proposal. In the four units which have not accepted the change, all have language in their most recent collective bargaining agreements which provides for the 3% longevity formula described above.

The Union is correct that the internal comparables support its position. In making internal comparisons, little weight is given by arbitrators to nonrepresented employees, because the terms and conditions of employment for those employees are established unilaterally by the employer. Attention is properly focused on the represented employees. The County bargains with five bargaining units, and only the smallest one of them has accepted the County's offer. Under these circumstances one cannot say that there is a trend towards acceptance of these arrangements by the unionized bargaining units. While the County wants to have a uniform longevity program for all of its employees, the internal comparisons do not compel such a result at this time. The County will have to bargain such changes in some of the remaining bargaining units before there can be said to be evidence that internal comparability favors the County's position.

The Union argues that there are other reasons why its position, not the County's should be supported with respect to longevity. It emphasizes that although the cost of longevity are greater than the County wishes to pay, the County has not shown any economic necessity to reduce the benefits. That is, it has not demonstrated an inability to pay, or a need to raise taxes in order to continue to pay the benefits. To the contrary, statistics presented by the Union demonstrate that the County is experiencing

economic growth, and for the last several years has reduced its levy rates.

The County does not assert that it has an inability to pay, or that current economic conditions require it to change the longevity plan. Rather, it argues, there is a "compelling need" to reduce the escalating longevity costs. To not address this problem now would be irresponsible and against the public interest, it argues, because of the impact of these costs in the future.

The arbitrator does not view it as necessary for the County to demonstrate the economic necessity of making the longevity changes now, as opposed to making them at some future time. The Union is correct, however, in arguing that the evidence does not show that an immediate reduction in longevity benefits is required by current economic conditions.

The Union argues also that the County has not offered sufficient economic incentive which justifies compelling the Union to accept the County's final offer. While wages are not at issue in this proceeding, the Union notes that the 3.0% annual wage increases on which the parties have agreed, are in line with the increases paid by the comparable jurisdictions. This is not a situation in which the County has offered overly generous wage increases as an incentive to the Union to accept the reduced longevity benefits.

The County argues that given the fact that its longevity benefits are much more generous than those paid to external comparables,it does not have to offer incentive to the Union to change these benefits. Moreover, it argues, it has in fact offered incentive by offering to guarantee health and dental insurance for retirees, (which benefits have not been guaranteed previously, it argues), and a VEBA plan.

The arbitrator will address these arguments below after consideration of the remaining issues.

The Union argues also that under the County's offer there will be a two-tier system, whereby employees doing the same job will get markedly different longevity benefits after they work an equal number of years. This, the Union argues, "...would likely lead to friction and jealousy--hardly the building blocks for good morale and a stable workforce." The County minimizes the potential difficulty, citing the fact that by the time new employees begin collecting substantial amounts of longevity benefits there will not be many grandfathered employees who will still be working and collecting benefits at the higher level.

The arbitrator is not persuaded that friction and jealousy will be a significant problem in a two-tier arrangement for longevity benefits. Of greater concern to the arbitrator is that implementation of a two-tier system, if brought about through selection of the County's final offer, would be imposed through arbitration. A system which represents a marked change in benefits or their structure ought to come about through collective

bargaining, not imposition by an arbitrator, wherever possible.

The Union emphasizes also that the reduction in longevity benefits by the County is a substantial one. An employee hired in 1997 will have earned $8,800 in longevity by the end of thirty years of employment under the County's final offer. Under the existing plan an employee with thirty years of employment would earn $ 60,107 in longevity benefits, a difference of $51,307.

The County argues that the Union's analysis is flawed because it does not take into account the savings which retirees will realize under the County's proposal by being able to remain under the County's insurance policy rather than having to purchase insurance elsewhere (and assuming, as the County does, that if the Union's final offer is selected retirees will no longer be eligible to participate in the County's insurance program). Based on the assumption that health insurance premiums will continue to rise in the future as they have since 1985 at an average of 10.6% per year, the County estimates that under its proposal, a new employee who retired at the end of thirty years would save almost $59,000 in premiums during the period when it would otherwise be necessary for that retiree to purchase insurance elsewhere. The Union views the County's use of the 10.6% yearly increase figure as arbitrary, and cites the fact that the increases since 1993 have averaged just 3.8%. Since the Union views the County as already obligated to make its insurance policy available to retirees, it does not view the County's offer as providing any cost saving to employees.

If the Union's final offer is selected, and if in a subsequent grievance arbitration or other legal action the Union does not prevail in its view that the County has a continuing obligation under the past practice to provide retiree insurance, then the County is correct that retiring employees who wish to purchase insurance will not be able to do so as part of the County's insurance plan. From this perspective, the County is correct that its final offer of guaranteed retiree health insurance benefits has a value which can be viewed as offsetting the reduction in longevity benefits, although the precise value in not easily ascertainable because of the unpredictability of future health insurance costs and conversion rates.

Retiree Medical and Dental Benefits

As mentioned above, the parties have a difference of opinion with respect to the County's current obligation to provide group medical and dental benefits to retirees. The County's position is that it gave timely notice to the Union that it was discontinuing its unilateral past practice of providing those benefits. It emphasizes that the benefits in question were never negotiated. The Union disagrees that the County no longer has the obligation to offer this coverage to retirees. The County wants the arbitrator to accept its position by making a finding that the prior practice has been terminated. The Union takes the position that the arbitrator does not have jurisdiction in this proceeding to determine that issue.

The arbitrator does not view it as his obligation to decide the present status of retiree insurance benefits, and especially so since the parties do not agree that the arbitrator should determine that issue. Also, they have not fully addressed and argued the question of whether the County's actions properly terminated the past practice. The arbitrator has the obligation of selecting one final offer or the other, but in so doing he does not have to settle the issue of the current status of the past practice.

The County's proposed language dealing with retiree insurance is quoted above. The County argues that unless its proposal is selected, there will be no insurance provided for retirees. The County views its offer as important because, it argues, it provides a guarantee to retirees that they will be able to remain covered by the County's health and dental insurance.

The County argues further that by providing this guarantee, as contrasted with the prior situation under the past practice which the County views as having been voluntary on its part, it "... has the right to expect something in return for granting such a significant contractual guarantee." The County notes that guaranteed health and dental benefits for retirees are not provided by the comparables, and thus its offer should be viewed as a valuable one which it did not have to offer. The County calculates the cost of providing retiree insurance benefits in 1997 alone at $ 27,202.68. This figure represents the reduction in its premium costs for the unit which would result if retirees were no longer part of the insurance group. The County views the granting of such a benefit as fully justifying its reduction of longevity benefits.

The Union disagrees with the assertion that it should have to give something in return for retiree insurance benefits since, in its view, those benefits already exist. The Union notes correctly that documents put into evidence by the County demonstrate that the majority of the comparables provide retiree insurance benefits either by contract or practice, although there is substantial variation in the provisions. The Union argues also that what the County is proposing is not a guarantee. It interprets the County's final offer to say that, "If retirees are eligible for other group coverage, no matter what the source or cost, they are not permitted in the group plans."

The arbitrator agrees with the Union that the County's language does not provide a guarantee. The initial sentence sounds like a guarantee, in that it is written in terms of "will be eligible to participate in the County's health and dental program," but in the same sentence eligibility is limited to, "until the employee or spouse is eligible for Medicare or other group coverage." Moreover, the "guarantee" is only as good as the County's ability to find an insurance carrier which will provide the benefits. If there is no such carrier, then "the County shall not be responsible to provide insurance benefits for retirees [and] the total premium for these coverages will be the responsibility of the retiree or spouse." It should be noted also that based on the record before him the arbitrator does not know the extent of the guarantee which the County made to employees under the disputed past practice. That is, the arbitrator

does not know whether what the County is proposing in its final offer is the same or different from what has previously been in effect for retirees.

The last part of the County's final offer is the language which would establish a VEBA program. It is offering the VEBA, along with language guaranteeing health and dental benefits to retirees, as an exchange for the proposed change in longevity benefits. The County sees it as in the employees' best interests to have the options which a VEBA plan would provide. It acknowledges that contributions to the plan are voluntary, but it argues that the VEBA provides an opportunity for employees to accumulate substantial sums of money in their accounts by depositing their annual 4 days sick pay bonus or an equivalent amount of money into it.

The Union has no interest in the VEBA program, but it notes also that in order for employees to have tax free contributions made to the plan, all employees must participate and the plan must be in a collective bargaining agreement. It argues that the County, in bargaining and in its final offer, made no proposal for payments by the County to the VEBA, which benefits would not be taxed. The Union notes also that the County's final offer makes the VEBA effective "upon the County's updating of its computer payroll system to make such a plan technically feasible." Thus, the Union argues, "...it is quite possible, even likely, that the VEBA will not be available to employees during the term of this Agreement..." At the hearing and in the briefs submitted by the County there was no evidence presented indicating that the payroll system for a VEBA is in place. The Union notes also that only a very small number of employees have qualified for the annual sick leave bonus, and thus the Union views the County's calculation of the sums to be invested and accumulated by employees in the VEBA as greatly exaggerated.

As noted above, the arbitrator must select one final offer or the other in its entirety. After considering the evidence and arguments and the statutory criteria, it is his view that the Union's final offer should be selected. While the County is correct that the existing longevity benefits are costly and much more generous than those paid by the comparables, the fact remains that those arrangements were bargained and then made more generous through subsequent bargaining. The arbitrator does not believe that a bargained program which has been in existence for many years, and which is in effect in the majority of the County's bargaining units, should be ended through arbitration unless there is an immediate need to do so. In the present case, the County's financial situation is healthy and it is not imperative that it be granted immediate relief from the costs of the longevity program. The longevity costs which the County is appropriately concerned about are future costs, but there is time in subsequent rounds of bargaining to accomplish cost reductions. Thus, the arbitrator is not persuaded by County arguments that there is a compelling public interest to reduce those longevity costs immediately.

The arbitrator is also not persuaded by the County's argument that the Union needs to

give something up in exchange for things which the Union doesn't want, i.e. the County's retiree insurance benefits proposal and the establishment of a VEBA. The arbitrator agrees with the Union's arguments that the County's proposal is not a guarantee of retirement benefits, and that attaching a value to the County's offer is a matter of speculation about the length of coverage which employees will have under the County's proposal, and the increase in insurance rates, and conversion rates. Thus, if the County's final offer were selected, it would not be clear to what extent the cost-saving to employees through participation in the County's plan, in contrast to the cost of buying their insurance elsewhere, would offset the employees' losses in reduced longevity benefits. The addition of the VEBA in the County's offer does not persuade the arbitrator to reach a different conclusion. It is not clear that the VEBA would be in place during the term of the Agreement, or to what extent employees would benefit from it during that time. Also, it is the arbitrator's view that a new benefit program such as VEBA should be put in place through bargaining, where possible, not through imposition by an arbitrator.

The arbitrator recognizes that by selecting the Union's final offer there is a possibility that retired employees will not be eligible for continuation in the County's health and dental insurance plans, given the County's position that it has properly discontinued the past practice which enabled employees to have such continued coverage. That possiblity does not persuade the arbitrator that the County's final offer should be selected.

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

The Union's final offer is selected.

Dated this 7th day of January, 1998 at Madison, Wisconsin

Edward B. Krinsky
Arbitrator