

INTEREST ARBITRATION DECISION
APPLETON PROFESSIONAL POLICE ASSOCIATION
&
CITY OF APPLETON (POLICE DEPARTMENT)
JULY 12, 1999

In the Matter of:	}	
	}	By Assignment of the
Appleton Professional Police Association	}	Wisconsin Employment Relations
	}	Commission
	}	
&	}	Case 377 No. 56058 MIA-2181
	}	
City of Appleton (Police Department)	}	[Dec. No. 29488]

ISSUES

- A. Hourly Wage Rates
- B. Lump Sum Payment
- C. Hospital Plan. (1) Prescription Drug Program and (2) Mental Health & Drug/Alcohol Plan
- D. Hours. Required Phone Page
- E. Pay for Shift Differential
- F. Position Enhancement Program
- G. Hours. Maximum Scheduled Overtime
- H. Clothing Allowance
- I. Physical Fitness Program
- J. Incorporation of Tentatively Agreed-Upon Provisions

HEARING & BRIEFING DATE AND SITE

HEARING: May 13, 1999

BRIEFS: June 15, 1999

AWARD AND DECISION: July 12, 1999

For the Association

Mr. Stephen Dozer
McCarty, Curry, Wydeven, Peeters & Haak, LLP
P.O. Box 860
120 E. Fourth St.
Kaukauna, WI 54130-0860
920.766.4693

For the Department

Mr. David Bill
Human Resources Department
City of Appleton
100 N. Appleton St.
Appleton, WI 54911
920.832.6455

ARBITRATOR

Michael H. LeRoy

I. Pre-Hearing Development of the Case

On Dec. 16, 1998, the Wisconsin Employment Relations Commission appointed Michael H. LeRoy to issue a final and binding arbitration award pursuant to Sec. 111.77(4)(b) of the Wisconsin Municipal Employment Relations Act. The parties were promptly contacted to arrange a hearing date, and mutually postponed a hearing until other labor agreements in Appleton were settled. This matter came on for hearing on May 13, 1999.

By way of pertinent background, Sharon A. Gallagher, a staff member of the Wisconsin Employment Relations Commission, conducted an informal investigation of the state of contract negotiations on May 6, May 26, and July 30, 1998. She concluded that the parties were at impasse with respect to a series of final offers. On October 12, she formally transmitted those final offers to the Commission and closed her investigation. Thereupon, the Commission ordered the parties were to submit to final and binding arbitration in a WERC decision dated Nov. 18, 1998.

II. THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION **CERTIFIES FINAL OFFERS**

The Commission certified the following final offers:

A. The City (Police Department)

1. All items previously agreed to (attached).
2. Article 3. Hours add:

Employees shall not normally be scheduled or permitted to work more than 12 consecutive hours. A rest break of at least 6 consecutive hours or a total of 8 hours is required in the 12 hours preceding the start of their next scheduled shift. These provisions may be waived at the discretion of the Chief or his designee.
3. Article 3. Hours add:

D. The City may require off-duty employees who have been supplied with a City provided pager to return a phone call when paged.
4. Article 11. Hospital Plan add:

a) Add a drug card program with a \$5 co-pay for generic drugs and a \$10 co-pay for brand name drugs. This would include an optional mail order program which would allow the purchase of 90-day supplies of maintenance drugs.

Note: The drug co-pay would apply regardless of whether or not the deductible

and co-insurance of the basic plan have been met. They would not be applied to those deductibles and co-insurances.

If an employee/eligible dependent purchases a brand name drug, and an equivalent generic drug is available, the employee-eligible dependent must pay the difference between the brand name drug and the generic cost, plus the brand name co-payment. If the physician writes on the prescription .dispense as written,, the drug will be dispensed as such and the employee/eligible dependent will only be responsible for the brand name co-payment. If no generic equivalent is available, the employee/eligible dependent will be responsible for the generic co-payment.

(b) Change the outpatient nervous and mental health and alcohol drug coverage from an annual maximum of \$2,500 including prescription drugs to:

- 1) A maximum of 20 office visits per year.
- 2) Prescription drugs under the \$5/\$10 co-pay program.

5. Article 14. Clothing Allowance. Add:

If an individual separates from City employment during the first three months of the calendar year, that individual will be eligible to spend up to $\frac{1}{2}$ their annual clothing allowance; if an individual separates after March 31, he/she will be eligible to spend up to the full clothing allowance. If an individual who separates overspends their clothing allowance, the individual reimburse the City for the overage.

6. Article 30. Physical Fitness Program. Change .F. to read:

- F. If the employee is unable to test due to an on-duty injury, they would continue payment at the current level. If the employee is unable to test due to an off-duty injury or illness, the employee would not be paid until they passed the test and payment would be retroactive until the beginning of that testing period. An employee on paid leave can take the test if they are physically able to do so but would receive no overtime payment for taking the test. An employee who is on unpaid leave cannot test until they return to work; they would be paid a pro rata portion based on their date of return to work.

7. Article 31. Position Enhancement Program. add:

Employees at the level of Senior Police Officer or higher must be recertified every two years in order to maintain their pay level. Such recertification shall be based on the standards in place at that time for that level. This provision shall not apply to employees who are currently in the program until they advance to a higher level in the program.

8. Exhibit A. Hourly Wage Rates

Increase all rates of classification by: a) 3% effective 1/1/98
b) 3% effective 1/1/99.

9. Exhibit A . add:

All employees shall be paid an additional twenty cents (\$.20) per hour for all regularly scheduled straight time hours worked on any shift which begins between 12 p.m. and 5 p.m.

10. \$100 lump sum payment to all employees on the payroll as of August 1, 1998 who are on the payroll as of 3-31-99. Such payment to be made on the first payroll in April 1999.

(The Commission's certification of the City's final offer also included the following attachment:)

LIST OF ITEMS PREVIOUSLY AGREED TO

TENTATIVE AGREEMENT

Appleton Professional Police Association

1. Items eligible for clothing allowance. (Parties have agreed to a list of such items. no change in contract language.)
2. Article 30 Physical Fitness Program. Change paragraph C to read:
 - C. All Officers who score as .excellent. will be paid a ~~monthly~~ premium of 2% of their base pay and those who score as .good. will be paid a ~~monthly~~ premium of 1% of their base pay until the following testing date. ~~Effective with the testing procedure in the Fall of 1990,~~ Such payment shall be in a lump sum payable within thirty (30) days of finalization of the testing results and shall be calculated on the basis of 2% or 1% of one half of the employee's annual base pay, calculated on the rate of pay at the time of the test. Such employees shall also be eligible for increased retirement bonus as provided in Article 11 A(8). Those who score as .adequate. will receive no salary or retirement bonus incentive. New employees are not eligible for payment under the program until they have participated in one of the regularly scheduled testing procedures.
3. Article 9 . Paid Holidays. Delete Good Friday and add:

All permanent employees shall receive one additional regularly scheduled work day off each calendar year to be designated as paid holiday. This holiday shall be part of the pro-rated calculation for retirees unless it is used before the last day of work.

4. Article 4 . Overtime

The City has agreed to provide one phone number that will allow employees access to the status of both City and County court cases. No change in contract language.

B. APPA (Association)

1. Wage Increase; Article VI . Salaries

Across the board wage increases for all classifications listed in Exhibit A which is attached to the Collective Bargaining Agreement based on a two year contract as follows:

01/01/98	3.25%
01/01/99	3.25%

2. Shift Differential; Article VI . Salaries

Increase the shift differential described in Paragraph VI contained in Exhibit A which is attached to the Collective Bargaining Agreement as follows:

All employees shall be paid an additional twenty-five cents (\$0.25) per hour for all regularly scheduled straight time hours worked on any shift which begins between 5:00 p.m. and 5:00 a.m., and twenty cents (\$0.20) on any shift which begins between 12:00 p.m. and 5:00 p.m..

The increase in the 12:00 p.m. to 5:00 p.m. shift would be in \$.05 increments effective 01/01/98, 07/01/98, 01/01/99 and 07/01/99.

The increase in the 5:00 p.m. to 5:00 a.m. shift would be in \$.05 increments effective 07/01/98, 01/01/99 and 07/01/99.

3. Maximum Hours of Work; Article III . Hours

Add a paragraph D to Article III as follows:

Each officer shall be allowed to work up to 16½ scheduled hours in a 24 hour period.

4. Tentative Agreements

The tentative agreements previously reached with the City to be included with this final offer are:

- (A) Items eligible for clothing allowance.
- (B) Article 9 . Paid Holidays. Delete Good Friday and add:

All permanent employees shall receive one additional regularly scheduled work day off each calendar year to be designated as paid holiday. This holiday shall be part of the prorated calculation for retirees unless it is used before the last day of work.

- (C) Article 4 . Overtime

The City has agreed to provide one phone number that will allow employees access to the status of both City and County court cases. No changes in contract language.

- (D) New employee clothing allowance

III. COMPARABLE JURISDICTIONS AND EMPLOYMENT GROUPS

A. External Comparability: At the hearing, the Association and City agreed that Neenah, Menasha, Manitowoc, Green Bay, and Oshkosh meet the statutory criteria for external comparability.¹

Finding 1: I therefore adopt these municipalities as comparable jurisdictions.

The City also offered six private-sector employers as external comparables to support its proposal to limit the amount of scheduled overtime to twelve hours.² Wisconsin law permits but does not require this type of comparability.³

Finding 2: I reject these private-sector firms as comparable jurisdictions because the nature of their employment is too far removed from professional work performed by the bargaining unit in this arbitration.

B. Internal Comparability: The City also offered sixteen City of Appleton employment

¹ Wis. Stats., § 111.77(6)(d)(1).

² City Exhibit 45, using Riverside Press, Banta, Albany International, Great Northern Corp., Pensar Corp., and Fox River Paper as comparables.

³ Wis. Stats., § 111.77(6)(d)(2).

groups as internal comparables to support its wage and prescription medication offers.⁴

Wisconsin law permits but does not require this type of comparability.⁵

Finding 3: I adopt all of these internal comparables except for the employment group designated .non-represented. because of the parties' apparent history of engaging in a general form of pattern bargaining that accounts for gains and concessions that occur in other Appleton collective bargaining units.

IV. WAGES

In general, the Association's case shows that its 1998 and 1999 wage offers place the Appleton bargaining unit at or near the bottom of the comparable jurisdictions.⁶ While the Association's comparison to external jurisdictions is factually correct, it is also very selective.

First, it examines wage rates only at the lowest end of scale, that is, for basic Patrol Officers. Thus, the Association's case overlooks the fact that many bargaining unit employees are in higher ranks (i.e., 45 out of 80 officers).⁷

Second, this analysis ends at the 4-year point in the wage scale. Nevertheless, officers are paid on a six-step scale. The first five steps correspond to years of service, while the sixth provides additional pay to more experienced officers who qualify for the position enhancement program.⁸ Since many employees appear to have more than four years of service, this comparison

⁴ City Exhibit 10, using bargaining units from City Hall, Inspections, Community Service Officers, Electrical Maintenance, Engineer Aides/Clerical DPW, Meter Checkers/Animal Control, Park and Recreation, Parking/DPW, Health Department Professionals, Street/ Sanitation/ Water/DPW, Valley Transit, Fire, Police Supervisory, Waste water CBM, and water Plant Employees.

⁵ Wis. Stats., § 111.77(6)(d)(1).

⁶ See Association's case overview at pp. 4-5. For example, at 3 years, Appleton officers rank last among the comparables for 1998 using the Association's final offer (Appleton, \$2,963.20; Neenah, \$3,115.00; Menasha, \$3,185.00; Manitowoc, \$2,965.00; Green Bay, \$3,321.00; and Oshkosh, \$3,228.09).

⁷ City Exhibit 35, column 2, showing each officers job title.

⁸ Labor Agreement, 1996-1997 (City of Appleton and the Appleton Professional Police Association), I(B) at p. 27.

has limited value.⁹

Third, this analysis overlooks the fact that the pay scale is adjusted for level of education to pay more for college-degreed officers. Thus, an officer at Step F (six years of service) who has a college degree makes 58 cents an hour, or about \$1,200 a year, more in base pay than the same officer who has no college degree.¹⁰ Fifty employees out of 82 have a baccalaureate degree.¹¹

Fourth, this analysis does not take into account the fact that virtually every member of the bargaining unit (73 out of 82) received an additional 2% pay increase by qualifying as excellent on their 1997 physical fitness test.¹²

In contrast, the City's wage analysis is more comprehensive, and therefore provides a more realistic comparison to other jurisdictions. This analysis takes into account not only the annualized rate of pay, but the dollar value of employer-provided family health insurance, family dental coverage, educational attainment, paid holidays, physical fitness pay, and longevity pay (provided by all other jurisdictions but not provided by Appleton).

As Table 1 shows, when total compensation is considered, Appleton police officers ran second among comparable jurisdictions using the City's wage offer or the Association's wage offer.

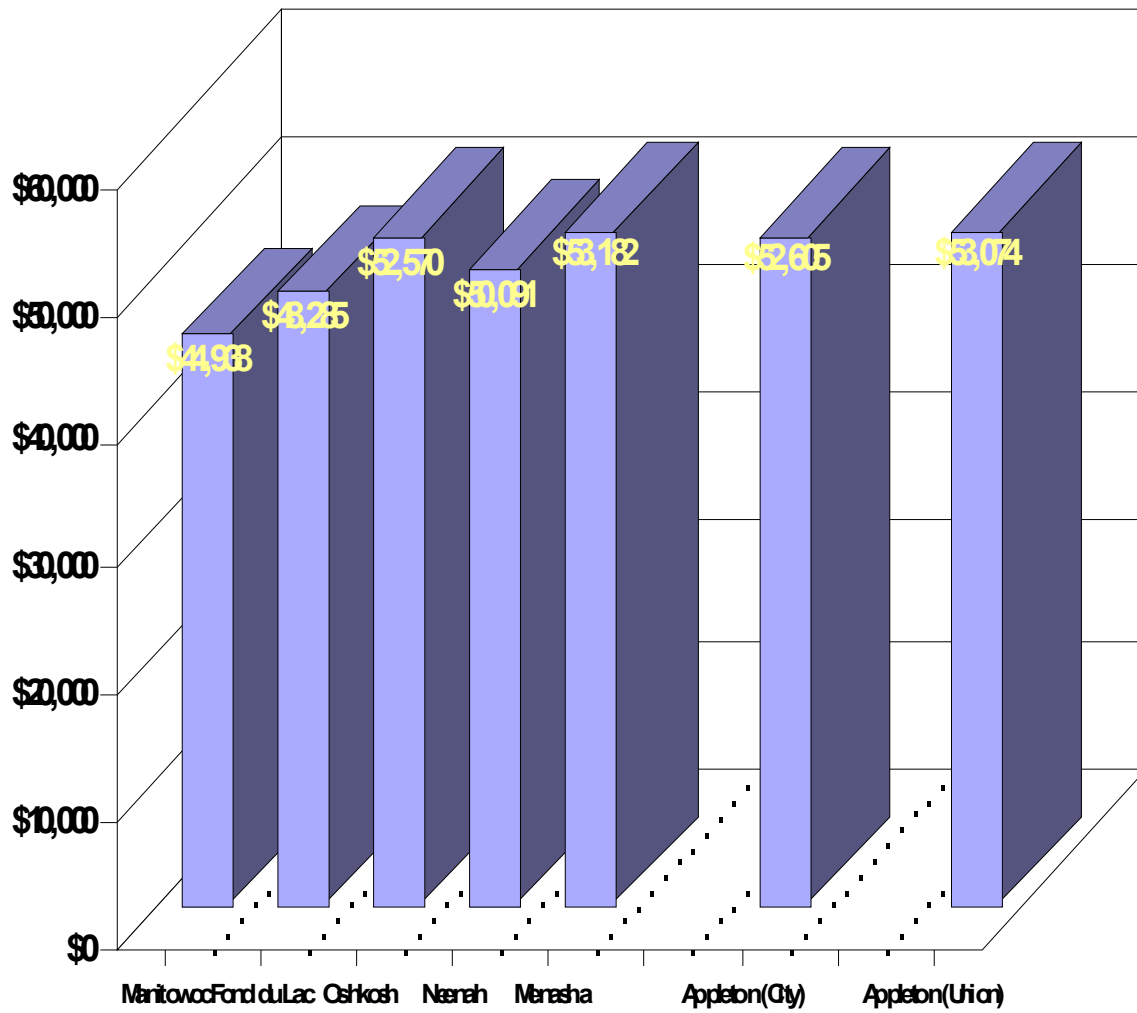
⁹ See City Exhibit 39, showing that 13 officers on the first shift have five or more years of service, 5 officers on the second shift have five or more years of service, and 13 officers on the third shift have five or more years of service.

¹⁰ Labor Agreement at Exhibit A, p. 26, comparing Police Officer at Step F (\$19.26) with Police Officer (Baccalaureate Degree) at Step F (\$19.26).

¹¹ City Exhibit 22B.

¹² City Exhibit 35B.

Table 1: Total 1999 Pay Appleton and Comparable Jurisdictions



Total Pay 1999

There is one important additional element in my consideration of the parties' respective wage offers. The Association put on a detailed proof to show that its emergency-response duties have increased in the past two years. Specifically, instead of carrying a first aid kit to accident scenes, and in contrast to providing essentially moral comfort to injured people while waiting for EMS units to arrive, officers carry much more sophisticated equipment, including mobile defibrillators and are trained in their use.

This part of the Association's case was genuinely impressive, in my view. Without question, they are better professionals for this and the public is unquestionably better served.

After careful consideration, however, I do not base my wage ruling on this evidence.

First, granting that these skills are vital, if I accept the Association's argument I potentially open the door to future arguments that increases in job-duties are *alone* compensable factors, above and beyond the economic framework that lies at the heart of the Wisconsin interest-arbitration model. Since the job-duties of bargaining unit employees are likely to grow as a function of the increasing professionalization of police work, I am reluctant to put the parties' future bargaining relationship on this slippery slope.

Second, and closer to the Wisconsin statute that governs my authority, evidence showed that the Appleton fire fighters recently agreed to take on certain EMS duties without seeking additional compensation for this work. In light of that closely-situated precedent, I believe my adoption of the Association's rationale for higher pay would tend to destabilize the agreement concluded between the City and its fire fighters.

Accordingly, notwithstanding my admiration for the unusual and life-saving work performed by Appleton police officers, I am unpersuaded by this evidence.

In light of the foregoing evidence, I adopt the City's final offer for 1998 and 1999 wages.

V. LUMP SUM PAYMENT

By ruling in favor of the City's wage offer, this automatically results in my adoption of the City's lump-sum payment offer.¹³ Therefore, I order that a \$100 lump sum payment be made to bargaining unit employees who were on the payroll as of August 1, 1998, and also to bargaining unit employees who were on the payroll as of 3-31-99.

VI. HEALTH AND MEDICAL INSURANCE, PRESCRIPTION COVERAGE

The final offer of the Association is for maintenance of the status quo. It is axiomatic in interest arbitration that no party is entitled to a breakthrough, unless there is compelling justification to warrant a change in the status quo. Moreover, to the extent that a breakthrough offer changes the status quo, the offering party carries an increasing burden of persuasion.

¹³ See Point No. 10 in WERC's certified finding of the City's final offer.

Thus, there is a presumption in favor of the Association's final offer concerning prescription coverage, and mental health and drug and alcohol rehabilitation coverage.¹⁴ Moreover, since the City's final offer would substantially alter the overall compensation of bargaining unit employees by requiring them to pay significantly more for prescriptions, or possibly compromise the quality of their medical care. I believe that the City carries a heavy burden of persuasion to support its final offer.

Based on the evidence adduced at the hearing, I find that the City has met this burden.

The evidence shows that the national trend of sharply rising prescription medications is affecting the City and the Association. City Exhibit 13 shows prescription drug claims paid by the City of Appleton from 1995 through 1998. This amounts escalated sharply from \$419,584 in 1995, to \$482,875 in 1996, to \$522,441 in 1997, and \$679,358 in 1998. This represents a 62% cost increase in a four-year period. Even more, the rate of cost increases was greatest for 1998 (30%), the most recent year in the survey.

The Association correctly noted on cross-examination that its bargaining unit employees accounted for only a fairly small fraction of these increases, assuming that these increases were normally distributed throughout the City's population of employees. In fact, a careful reading of City Exhibit 14(A) supports the Association's conclusion. That exhibit lists prescription medication expenses charged in 1997 to the current insurance plan for every bargaining unit employee (coded by number to conceal their identity). Charges totaled \$28,435, of which \$22,116 was paid by the plan. Under the City's final offer, the plan would have saved an estimated \$9,279.

¹⁴ I note that the City's offer also included a change in the hospitalization plan for mental health, and drug and alcohol rehabilitation coverage; however, neither the City nor the Association entered evidence on this aspect of the final offer. To be clear, in reaching my decision on this final offer, I considered only evidence pertaining to prescription medications. Since the mental health and drug and alcohol treatment amendment was tied to the prescription offer, my findings for the latter determined my findings for the former.

In my judgment, the significance of these data is that they shift the burden of persuasion to the Association to demonstrate why the City's breakthrough offer should not be adopted. In this vein, Wisconsin law allows me to consider whether, and to what extent, comparable jurisdictions have insurance plans that are consistent with the City's final offer.

The Association does not argue, nor can it argue, that the City's offer is inconsistent with similar plans in every other comparable jurisdiction. The City's offer is consistent with plans in Sheboygan, Oshkosh, Neenah, and Menasha.¹⁵ Thus, although some jurisdictions have plans consistent with the Association's final offer. Fond du Lac, Green Bay and Manitowoc¹⁶, there are fewer of these municipalities.

When Wisconsin law sets forth comparability standards, it specifically references either public or private employment in comparable communities..¹⁷ The law does not expressly provide for internal comparisons to other groups employed by the governmental unit. Conceivably, an arbitrator is free to consider this form of comparability under the miscellaneous provision in Section 111.77(6)(h).

In this regard, I note that this bargaining unit is the only remaining bargaining unit that does not have drug card coverage with incentives for use of generic medications.¹⁸ This, too, is a factor in my judgment, though it is not determinative.

Before adopting of the City's final offer, I also examined what impact this ruling would have on overall employee compensation. If I had seen evidence that the City's final offer would substantially erode this bargaining unit's placement among comparable jurisdictions for total

¹⁵ City Exhibit 15. In Sheboygan, employees pay \$5.00 for generic drugs and \$10 for brand name drugs; in Oshkosh, employees pay \$3.00 for generic drugs and \$7 for brand name drugs; in Neenah, employees pay nothing for generic drugs and \$5 for brand name drugs; and in Menasha, employees pay \$5.00 for generic drugs and \$15 for brand name drugs.

¹⁶ *Id.*

¹⁷ Wis. Stats. §111.77(6)(1)-(2).

¹⁸ City Ex. 10, far right-hand column.

compensation, I would have been more receptive to the Association's final offer.

In this regard, City Exhibit 26 strengthened my impression that the City's final offer, although a breakthrough, would have relatively little impact on total compensation. As I understand the evidence, the City's final offer is the main change in compensation listed under the broader heading, .Family Health.. Under this heading, the City's final offer is valued at \$6,452, compared to the Union's final offer, which is valued at \$6,704. In short, the City's offer is regressive on this dimension, but its small impact must also be kept in perspective. The difference in these offers (an estimated \$252) is a miniscule fraction of total compensation.

Also, before reaching judgment on this issue, I considered the City's argument, made in its brief, that the Federal Mental Health Parity Act (FMHPA) prohibits a different maximum dollar benefit for nervous and mental health illnesses than for others. The City raises this argument in light of Wis. Stat. § 111.77(6)(a), lawful authority of the employer. Since I have determined that the comparability provisions of the Wisconsin law provide a sound basis for my decision in favor of the City, I did not reach the City's FMHPA argument.

For the foregoing reasons, I adopt the City's final offer provides for amendment of Article 11 (Hospital Plan) to add:

a) Add a drug card program with a \$5 co-pay for generic drugs and a \$10 co-pay for brand name drugs. This would include an optional mail order program which would allow the purchase of 90-day supplies of maintenance drugs.

Note: The drug co-pay would apply regardless of whether or not the deductible and co-insurance of the basic plan have been met. They would not be applied to those deductibles and co-insurances.

If an employee/eligible dependent purchases a brand name drug, and an equivalent generic drug is available, the employee-eligible dependent must pay the difference between the brand name drug and the generic cost, plus the brand name co-payment. If the physician writes on the prescription .dispense as written., the drug will be dispensed as such and the employee/eligible dependent will only be responsible for the brand name co-payment. If no generic equivalent is available, the employee/eligible dependent will be responsible for the generic co-payment.

(b) Change the outpatient nervous and mental health and alcohol drug coverage from an annual maximum of \$2,500 including prescription drugs to:

- 1) A maximum of 20 office visits per year.
- 2) Prescription drugs under the \$5/\$10 co-pay program.

VII. REQUIREMENT TO RESPOND TO PAGE WHILE OFF-DUTY

Currently, only officers who are assigned to special units (Investigative Services, Special Tactics and Response, Police School Liaison and Community Intervention) are issued a pager. Under the current system, they are asked but not required to return a page during off-duty hours. The City's final offer would require off-duty officers to return pages so that supervisors would be able to respond better to situations involving these services. The City emphasize that its intent is not to penalize the employees but to let the Appleton Police Department know if the employee is available to respond for the special unit they have signed up for..¹⁹

While the Association has no final offer on this issue as such, testimony at the hearing clearly indicates that it prefers the status quo.

I decline to adopt the City's final offer and thereby order the status quo to be maintained.

Although I clearly understood Chief Meyers' testimony concerning this issue and agree with his statement that this requirement would improve the Department's planning capability as emergency situations evolve, I find very little in the Wisconsin law that justifies my adoption of the City's final offer.

Notably, the City fails to support its position by reference to comparable jurisdictions. Possibly, I have authority under § 111.77(6)(c), the interests and welfare of the public, but that provision is meant to apply to offers involving financial situations since the rest of the provision states and the financial ability of the unit of government to meet these costs.. Since there is no financial aspect to the City's offer on pages, this sub-section does not apply. There is a miscellaneous provision in § 111.77(6)(h), permitting me to consider (s)uch other factors, not confined to the foregoing, which are normally and traditionally taken into consideration, but this

¹⁹ City Br. at 29.

is vague, and in any event, at no point does the City explain why I should use this provision to adopt its final offer.

In sum, since the City provides no statutory argument in support of its final offer on pagers, I am without authority to adopt its offer.

My ruling on this issue also reflects my judgment that this requirement involves more than the City represents in its brief when it states: .The City's proposal solves the problem, and no special burden is placed on the other party..²⁰ The evidentiary record on this issue is not well developed, but my strong impression is that a requirement to answer a page could be enforced by discipline. In my judgment, the City's final offer appears to open the door to overtime pay issues under the Fair Labor Standards Act (FLSA). While I cannot speculate how those issue might take shape in Appleton because the City's final offer does not specifically address restrictions placed on a police officer during off-duty hours, I note that the general tendency is that as more restrictions are placed on employees' off-duty freedom, the probability increases that the FLSA's overtime pay requirements apply.²¹ Since a requirement to return an page would necessarily limit an officer to the range of a page, and the response time to report for assignment, it is reasonable to conclude that this provision would potentially expose the City to unanticipated overtime

²⁰ *Id.*

²¹ *See Bartholomew v. City of Burlington*, 5 F.Supp.2d 1161, 1165) (D. Kan. 1998), a lawsuit involving a complaint by police officers that the City's on-call requirements were so restrictive as to constitute compensable time under the Fair Labor Standards Act. The court summarized how federal courts test for elements of control:

Courts have considered the following factors in determining whether employee plaintiffs had use of on-call time for personal purposes: (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employees' movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employees could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employees had actually engaged in personal activities during call-in time.

liability for officers who are required during off-duty hours to carry a pager.²² For this reason, too, I do not adopt the City's final offer.

VIII. SHIFT DIFFERENTIAL

Under the expired agreement, there is a \$.10 per hour shift differential paid for work from 5:00 p.m. to 5:00 a.m.

The Association proposes the following change in pay for shift differential:

All employees shall be paid an additional twenty-five cents (\$0.25) per hour for all regularly scheduled straight time hours worked on any shift which begins between 5:00 p.m. and 5:00 a.m., and twenty cents (\$0.20) on any shift which begins between 12:00 p.m. and 5:00 p.m.

The increase in the 12:00 p.m. to 5:00 p.m. shift would be in \$.05 increments effective 01/01/98, 07/01/98, 01/01/99 and 07/01/99.

The increase in the 5:00 p.m. to 5:00 a.m. shift would be in \$.05 increments effective 07/01/98, 01/01/99 and 07/01/99.

In support of this position, the Association contends that by staggering the differential, its offer

²² To be clear, these FLSA cases vary to a great extent by their facts. Thus, it is misleading to use any one decision to make a general conclusion. Also, it is quite possible to require an employee to carry a pager and not be subject to the compensable time regulations under FLSA. For purposes of this arbitration, I considered this caselaw, however, because the City's assertion that its final offer solves the problem. is at least open to question on this record.

To illustrate, in *Renfrom v. City of Emporia, Knasas*, 948 F.2d 1529 (10th Cir. 1991), the U.S. Court of Appeals for the Tenth Circuit upheld the trial court's finding that the City's on-call requirement for fire fighters constituted compensable time. Off-duty firefighters appeared on a mandatory callback list for each 24-hour period following a regularly scheduled tour of duty. Although they were not required to remain on the stationhouse premises, they were required to carry pagers and return to work within twenty minutes if called or be subject to discipline.

In ruling that these off-duty restrictions were so great as to benefit the employer while depriving city employees the use of their free time, the trial court weighed the fact that employees were required hear the pager at all times while they were off-duty; that they were required to stay within a geographic range that permitted them to respond to a call within twenty minutes of being paged or be subject to discipline; that the on-call periods lasted 24-hours; and that page-calls were frequent (averaging about 3-5 calls per period).

mitigates the impact of the increase in payment of these differentials. It also contends that the City's offer should be rejected because it would impose the entire shift differential from the onset. . . .²³

In response, the City's final offer is:²⁴

All employees shall be paid an additional twenty cents (\$0.20) per hour for all regularly scheduled straight time hours worked on any shift which begins between 12:00 p.m. and 5:00 p.m., and ten cents (\$0.10) on any shift which begins between 5:00 p.m. and 5:00 a.m.

The City supports its offer by testimonial and documentary evidence showing that a large disparity exists in the seniority levels of its three daily shifts. Its reasoning for weighting the second shift so heavily is that the average seniority on that shift is much lower than the first or third shifts. The City wants to create a financial incentive for senior officers to bid onto this shift, and thereby improve service to the City by matching experienced and relatively inexperienced officers.

I adopt the City's final offer. Notably, neither party bases its offer on external or internal comparable figures. This leaves me with relatively little information to make a determination. I have some difficulty accepting the Association's offer because of the comparatively superior overall compensation that officers enjoy relative to officers in comparable jurisdictions. When I view this in light of the City's shift differential offer, which also proposes a raise, I consider the City's offer more reasonable. This is because a greater number of officers would enjoy shift differential pay, and because the City offered convincing proof that the second shift suffers from a problem that appears to affect the quality of service provided to the public. I found the

²³ Ass'n. Br. at 2.

²⁴ This statement of the offer reflects the City's position in its September 25, 1998 letter to Ms. Sharon Gallagher of the Wisconsin Employment Relations Commission, and its consistent but more detailed statement of its final offer in City Exhibit 38.

following statistical evidence especially persuasive.

Average Seniority (in Years) of Appleton Police Officers by Shift, 1997-1999		
Shift Begins 0600 or 0800	Shift Begins 1200 or 1400	Shift Begins 2000 or 2200
1997 ²⁵ 15.84	1997 2.66	1997 8.52
1998 ²⁶ 13.80	1998 4.56	1998 9.68
1999 ²⁷ 10.94	1999 3.64	1999 9.76

IX. HOURS. MAXIMUM SCHEDULED OVERTIME

The City proposed a change in the status quo as follows:

Article 3. Hours add:

Employees shall not normally be scheduled or permitted to work more than 12 consecutive hours. A rest break of at least 6 consecutive hours or a total of 8 hours is required in the 12 hours preceding the start of their next scheduled shift. These provisions may be waived at the discretion of the Chief or his designee.

The expired Agreement does not reflect the Association's offer, however, its final offer would effectively codify current practice. Its final offer is:

Maximum Hours of Work; Article III . Hours

Add a paragraph D to Article III as follows:

Each officer shall be allowed to work up to 16½ scheduled hours in a 24 hour period.

The City offers persuasive evidence in support of its position. Sheboygan, Oshkosh, Menasha, Fond du Lac, and Manitowoc limit police officers to a maximum of 12 hours of continuous work in non-emergency situations.²⁸ At the arbitration hearing, the City's

²⁵ City Ex. 39.

²⁶ City Ex. 40.

²⁷ City Ex. 41.

²⁸ City Exhibit 43.

representative, David Bill, summed it up well when he said, .Ours is not typical..

The City also introduced evidence showing 29 police officers work part-time in other jobs that include snow plowing, coaching, airline agent, teaching, and sales.²⁹ It also introduced evidence showing that some large area employers limit employment to 12 continuous hours.³⁰

In addition, the City introduced evidence published in *A Newsletter of the Police Executive Research Forum* that suggests that on-the-job fatigue for officers is increasingly common and is potentially dangerous.³¹ Citing the role that fatigue played in catastrophes at Three Mile Island, the Exxon Valdez, and Chernobyl, the newsletter concludes: .Thus, there is a clear public interest in ensuring that workers in some jobs are reasonably fit for duty..³²

The Association objected in a general way to the relevance of private-sector employers and other city exhibits that did not compare the employment of police officers to police officers.

This issue was difficult to decide. Clearly, the City enters evidence showing that its offer is consistent with an overwhelming majority of comparable jurisdictions. However, in reviewing this comparability, I carefully examined the applicable provisions in these jurisdictions and found that they significantly differed from the City's offer in a key respect.³³ In general, the comparable jurisdictions limit continuous hours worked; but while the City's offer has a similar limitation, it has this additional element: .A rest break of at least 6 consecutive hours or a total of 8 hours is required in the 12 hours preceding the start of their next scheduled shift..

I have several strong concerns about this particular language. First and foremost, as far as the record demonstrates, this constitutes breakthrough not only for the City, but down the road,

²⁹ City Exhibits 43A-43C.

³⁰ City Exhibits 45.

³¹ City Exhibit 46.

³² *Id.* at 1 (middle column).

³³ The most comprehensive information I had to decide this issue was the summary provided in City Exhibit 43. Neither party provided me, however, with the exact contract language for limitation on hours-worked in comparable jurisdictions.

for comparable jurisdictions. In short, while the City's position is superficially supported by the comparables, on closer inspection, it is in a category by itself. Thus, there is no basis under the comparability provisions of Wisconsin law to adopt this offer.

Second, I cannot adopt a final offer that is so vague on its face that a grievance arbitration resulting from its implementation is a reasonably foreseeable possibility. Given the evidence that the City introduced at the hearing, it is likely that the City would construe .rest break. to mean that police officers could not work for an outside employer (or in self-employment, for example, by plowing snow) in the six hours preceding an officer's shift. The Association could reasonably interpret rest break in a more limited vein, however, to mean a limit on departmental work, since the record also showed that the most common occurrence of 16-hour scheduling was in conjunction with special event assignments, such as traffic duty associated with a store's grand opening or a community parade or festival.

Third, while the City's view that fatigued officers can be ineffective, or worse, be a danger to themselves or the public makes intuitive sense, the City based its proof on conjectural information. The *Newsletter* is not a sufficient basis to conclude that the current arrangement presents this danger to Appleton police officers. Indeed, as this part of the City's case unfolded, I was struck by the absence of a specific instance where fatigue actually or possibly interfered with a bargaining unit officer's performance of his or her duties. Moreover, a careful reading of the *Newsletter* suggests that its main conclusion is not based on valid comparisons. For example, it cites the Exxon Valdez disaster as a reason for imposing an hours-worked limitation, but it is common knowledge that the skipper's alcohol consumption played a decisive role in that tragedy.

Finally, what concerns me about the City's final offer is not its hours-worked on duty limitation, but its apparent attempt to regulate off-duty conduct. In so many words, the rest-break provision appears to absolutely prohibit or substantially prohibit the outside employment engaged in by nearly half of the bargaining unit. City Exhibits 43A-43C, delineating outside employment engaged in by police officers, supports my view.

In sum, the City's offer cannot be adopted on any statutory grounds, and furthermore, is

of such magnitude in its scope for changing the terms and conditions of bargaining unit members that it requires mutual assent, rather than imposition by an arbitrator.

I therefore adopt the Association's final offer.

X. CLOTHING ALLOWANCE

The City proposed a change in the status quo as follows:

5. Article 14. Clothing Allowance. Add:

If an individual separates from City employment during the first three months of the calendar year, that individual will be eligible to spend up to ½ their annual clothing allowance; if an individual separates after March 31, he/she will be eligible to spend up to the full clothing allowance. If an individual who separates overspends their clothing allowance, the individual will reimburse the City for the overage.

The Association's final offer is the status quo. In pertinent part, this provides for annual maintenance of \$280 plus a variety of other reimbursable expenses. City Exhibit 47 estimates that the clothing allowance was \$358 for 1997, \$362 for 1998, and \$372 for 1999.

As I have stated before, a party seeking a breakthrough at arbitration bears a heavy burden of proof. It is not enough that it is supportable by the Wisconsin arbitration law. There must be strong justification to prefer a breakthrough offer over an offer to maintain the status quo.

In this case, practices in comparable jurisdictions are an insufficient basis to support the City's offer. The reimbursement practices are so mixed that they do not form a clear pattern.

City Exhibit 49 convinces me, however, that under Wis. Stats., § 111.77(6)(c), the interests and welfare of the public would be served by adopting the City's final offer. That exhibit shows a disturbing pattern of abuse of the reimbursement policy by retiring police officers.

One officer was reimbursed \$300 for a gun on January 1, 1994, and retired on January 2. A second officer was reimbursed \$359 for a shotgun and boots on February 13, 1996, and retired on March 3. A third officer was reimbursed \$166 for a sweater, flashlight and light holder on January 30, 1996, and retired on February 11. A fourth officer was reimbursed \$326 for leg irons,

boots, binoculars, and a telescoping monocular on January 4, 1996, and retired on January 11. A fifth officer was reimbursed \$330 for a variety of sportswear items on January 2, 1996, and retired on February 9. A sixth officer was reimbursed \$340 for shoes and a variety of equipment accessories on March 9, 1996, and retired on May 8. A seventh officer was reimbursed \$276 for boots, gloves, a hat, turtlenecks and underwear on January 1, 1999, and retired on January 2. An eighth officer was reimbursed \$307 for a briefcase and other accessories on January 13, 1999, and retired on February 13. Finally, a ninth officer was reimbursed \$342 for a variety of clothing articles on January 4, 1999, and retired on March 1.

These details unambiguously reflect a pattern of abusing a benefit that is intended to serve a public interest. With only one exception (the sixth officer in this sequence), these retiring officers made opportunistic purchases at the beginning of the calendar year, usually purchased an amount that was close to the maximum for reimbursement, and then deprived the City of its end of the bargain when they announced their retirement within days of being reimbursed. Thus, although I am predisposed to reject the City's final offer because it amounts to a breakthrough, I adopt it because bargaining unit employees have repeatedly abused this benefit on the occasion of their retirement, and the City's final offer is reasonably calculated to continue the benefit while deterring this abuse.

XI. OFFICER POSITION ENHANCEMENT PROGRAM

At one time, the parties' labor agreements provided a typical longevity pay scale.³⁴ The most recently expired Agreement has no such provision. In its place is a compensation plan called the .Position Enhancement Program. (also known as PEP).³⁵ The plan maintains an element of longevity pay at the beginning of an officer's career by providing a graduated pay

³⁴ City Exhibit 54, *Labor Agreement 1994-1995 between City of Appleton and the Appleton Professional Police Association*, Article IX (Longevity).

³⁵ Union Exhibit Tab 1, *Labor Agreement 1996-1997 between City of Appleton and the Appleton Professional Police Association*, Article XXXI (Position Enhancement Program).

scale for his or her first six years of employment at the grade of Police Officer.³⁶ An officer either remains in Grade F, or advances by passing a exam to the rank of Senior Police Officer. Advancement in grade is rewarded with a 2.5% increase in base pay.³⁷ Progression continues to Master Police Officer, Sergeant, and Senior Sergeant, and at each level, an officer who successfully tests for promotion receives an additional 2.5% increment in base-pay.

The aim of PEP is clear. It is based on a theory that individual officers should be rewarded for performing duties, gaining knowledge, and developing skills and abilities that exceed average work performance..³⁸ The PEP manual explains in detail the testing procedure that is used for promotion decisions.

It is important to note that participation in the program is voluntary.³⁹ Obviously, however, the program's financial incentives are aimed to cultivate a high level of officer participation.

Only one aspect of the program is at issue in this arbitration. Currently, there is no requirement that officers who achieve a promotion recertify after a period of time in order to remain eligible for rank and pay. Chief Meyers testified that this aspect should change because of the increasing professionalization of police work. He cited the increased use of computers and computer-based technologies to make his point.⁴⁰ These applications are increasingly part of every officer's work, as is reflected by the fact that officers now have on-board computers that disseminate vital information to patrolling officers. Since these applications change so much and so rapidly, it is important to provide a continuing incentive for officer development and

³⁶ *Id.* at Exhibit A (Hourly Wage Rates), p. 26.

³⁷ City Exhibit 52, *Appleton Police Department. Officer Position Enhancement Program*, at 10.

³⁸ *Id.* at 3.

³⁹ Union Exhibit Tab 1, *Labor Agreement 1996-1997 between City of Appleton and the Appleton Professional Police Association*, Article XXXI (Position Enhancement Program), at 21.

⁴⁰ This subject comprises one of the ten areas that is tested for promotion. *See* Point IV, City Exhibit 52, *Appleton Police Department. Officer Position Enhancement Program*, at 4.

improvement. By implication, he suggested that the current system is flawed because an officer receives an automatic pay increase for successfully passing an exam several years ago, when standards for police performance were probably at a lower level. Thus, the City made this final offer:

7. Article 31. Position Enhancement Program. add:

Employees at the level of Senior Police Officer or higher must be recertified every two years in order to maintain their pay level. Such recertification shall be based on the standards in place at that time for that level. This provision shall not apply to employees who are currently in the program until they advance to a higher level in the program.

This offer represents a change in the status quo. The Association's final offer is maintenance of language under the expired Agreement. In short, that means that once an officer achieves a PEP promotion, he or she is not required to recertify.

As I have said before, no party is entitled to a breakthrough, unless there is compelling justification to warrant a change in the status quo. Moreover, to the extent that a breakthrough offer changes the status quo, the offering party carries an increasing burden of persuasion. Although I personally agree with City's position, I cannot adopt its final offer because I found insufficient evidence to support this offer within the confines of my authority under Wisconsin's interest arbitration law.

Briefly, I elaborate:

First, the City did not support its case by reference to comparable jurisdictions. I assume that this reflects the fact that comparable jurisdictions do not have a recertification requirement because they have a longevity system in its place.⁴¹

Second, I gave serious thought to adopting the City's final offer under the interest and general welfare of the public provision under § 111.77(6)(c). This was a closer question for me,

⁴¹ City Exhibit 36 summarizes the longevity pay plan of comparable jurisdictions.

but again, I found too little statutory justification to support the City's position and thereby upset the status quo.

In this regard, I note that the current system was bargained by the parties, and I suppose that a key element for the Association's agreement was the voluntary nature of an officer's participation. In my view, a recertification requirement represents a take-away from the Association's initial bargain with the City. Thus, I am reluctant to impose a condition that the Association would likely regard as a forced concession, especially when so much of the program is premised on cooperation between the Association and the City.⁴²

Moreover, I found the City's argument diminished by the fact that its recertification proposal is set to begin at the lowest level of PEP. I assume, however, that officers at the Senior Police Officer level (the lowest rank in the program) have a continuing and substantial incentive to progress to higher ranks. This fact, combined with the lack of any record evidence that officers are languishing in the lower or intermediate ranks, attenuates the City's more broadly stated justification.

Since I find myself torn between the City's philosophical justification, and the Association's initial cooperation in helping to make this excellent program possible, I offer an advisory solution for future consideration. Perhaps a lump sum payment for successful recertification could provide an affordable and effective incentive without affecting the base-pay structure of the current plan. I note that this advisory opinion has no effect for purposes of this arbitration.

XII. PHYSICAL FITNESS PROGRAM

⁴² The program provides a continuing role for the Association is helping to readjust professional standards. *See* Union Exhibit Tab 1, *Labor Agreement 1996-1997 between City of Appleton and the Appleton Professional Police Association*, Article XXXI (Position Enhancement Program), at 21, stating: "In order to keep the Police Enhancement Program current and relevant to contemporary policing needs, the City and the Association may, from time to time, find it necessary to modify criteria used for movement through the various steps.."

The City proposed a change in the status quo as follows:

Article 30. Physical Fitness Program. Change .F. to read:

If the employee is unable to test due to an on-duty injury, they would continue payment at the current level. If the employee is unable to test due to an off-duty injury or illness, the employee would not be paid until they passed the test and payment would be retroactive until the beginning of that testing period. An employee on paid leave can take the test if they are physically able to do so but would receive no overtime payment for taking the test. An employee who is on unpaid leave cannot test until they return to work; they would be paid a pro rata portion based on their date of return to work.

The Association's final offer is the status quo. I adopt the Association's offer because the City was unable to justify its alteration of the status quo by reference to any of the statutory factors. Since this is the only jurisdiction in the record that offers pay for fitness, the City is without suitable comparable jurisdictions to justify its position.

As I understand the City's offer, this is meant to impose reasonable limits on this incentive-based pay plan. Currently, over 95% of the employees rate excellent and receive an annual 2% bonus on top of their base pay. The City's offer appears to be aimed at a few situations where an off-duty injury limits an officer's ability to test for the bonus, or otherwise places the issue of the officer's fitness in question.

However, in contrast to the clothing allowance issue, where the City clearly demonstrated that a public interest would be served by placing a reasonable limit on an employee benefit, no such justification is made here.

Accordingly, I adopt the Association's offer of maintaining the status quo.

XIII. RETENTION OF JURISDICTION BY THE ARBITRATOR

This arbitration presents a large number of issues. During pre-hearing conferences with the parties, there was some confusion about the framing of the parties' final offers. In light of these facts, I retain jurisdiction for sixty (60) days, but only for the limited purpose of clarifying any matter that my decision and award inadvertently leaves open and without decision.

XIV. INTEREST ARBITRATION AWARD

1. Wages: I adopt the City's final offer.
2. Lump Sum Payment: I adopt the City's final offer.
3. Hospital Plan. (1) Prescription Drug Program and (2) Mental Health & Drug/Alcohol Plan: I adopt the City's final offer.
4. Requirement to Respond to a Page While Off-Duty: I adopt the Association's final offer.
5. Shift Differential: I adopt the City's final offer.
6. Maximum Scheduled Overtime: I adopt the Association's final offer.
7. Clothing Allowance: I adopt the City's final offer.
8. Position Enhancement Program: I adopt the Association's final offer.
9. Physical Fitness Program: I adopt the Association's final offer.
10. Tentative Agreed-Upon Provisions: I adopt all tentatively agreed-upon provisions without any modification.
11. I retain jurisdiction for sixty (60) days, but only for the limited purpose of clarifying any matter that my decision and award inadvertently leaves open and without decision.

Michael H. LeRoy
Arbitrator by Appointment of the
Wisconsin Employment Relations Commission

This Award Entered Into
this **12th Day of July, 1999.**