ARBITRATION OPINION AND AWARD

In the Matter of Arbitration	)	
Between	)	
TOWN OF MENASHA (Police Department)	)	Case 34 No. 59798 INT/ARB-2393 [correction: MIA-2393]
And	)	Dec. No. 30170-A
WISCONSIN PROFESSIONAL POLICE ASSOCIATION (LEER DIVISION)	)	

Impartial Arbitrator

William W. Petrie
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Post Office Box 320
Waterford, Wisconsin, 53185-0320

Hearing Held

January 17, 2002
Menasha, Wisconsin

Appearances

For the Employer	DAVIS & KUELTHAU S.C. By James R. Macy Attorney at Law 219 Washington Avenue Post Office Box 1278 Oshkosh, WI 54903-1278
For the Association	WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION By Thomas W. Bahr Consultant 9730 West Bluemound Road, Suite 21 Wauwatosa, WI 53226

BACKGROUND OF THE CASE

This is a *statutory interest arbitration proceeding* between the Town of Menasha and the Wisconsin Professional Police Association, LEER Division, with the matter in dispute the terms of a two year renewal labor agreement, effective from January 1, 2001 through December 31, 2002. After their negotiations had failed to achieve complete agreement, the Association on March 21, 2001 filed a petition with the Wisconsin Employment Relations Commission seeking final and binding interest arbitration pursuant to Section 111.77(3) of the Municipal Employment Relations Act. Following an informal investigation by a member of its staff, the Commission issued certain *findings of fact*, *conclusions of law*, *certification of the results of investigation* and an *order requiring arbitration* on July 5, 2001, and on August 13, 2001, it appointed the undersigned to hear and decide the matter.

A hearing took place in the Town of Menasha Town Hall on January 17, 2002, at which time both parties received full opportunities to present evidence and argument in support of their respective positions, and both thereafter closed with the submission of comprehensive post-hearing briefs and reply briefs, after receipt of which the record was closed by the undersigned effective August 1, 2002.

THE FINAL OFFERS OF THE PARTIES

Both final offers, herein incorporated by reference into this decision, propose a *two year renewal agreement*, effective January 1, 2001 through December 31, 2002, with *retroactive 3% wage rate increases effective January 1, 2001 and January 1, 2002*. In the remainder of their final offers they disagree only as follows:

(1) The *Employer's final offer* contains the following additional proposed changes.

(a) The following changes in Article 11, entitled **HOLIDAYS**.

(i) One and one-half floating holidays added to the nine previously provided in Section 11.01, and the addition of new language therein providing that "The floating holidays may be used at the employee's discretion, with the approval of the Chief and must be used within the calendar year."

(2) Deletion/modification of various portions of Section 11.02, to provide as follows:

"The holiday shall be observed on the calendar day on which it falls. Officers not scheduled to work on a holiday shall receive eight (8) hours pay.

Officers working the holiday shall receive time and one half pay for hours worked on the holiday as well as the eight hours pay for the holiday.

Holidays will be paid in the pay period in which they occur unless written request is submitted to the Chief for approval before the end of that particular period."

(b) The following changes in Article 13, entitled **SICK LEAVE**.

(i) Modification of Section 13.03, to provide as follows:

"Sick leave shall be accumulated to a maximum of ninety (90) workdays."

In the above connection, it noted in its final offer that in implementing the increased sick leave accumulation from thirty to ninety days, it would use the same conversion formula utilized to create the conversion of sick leave for non-represented employees.

(ii) Modification of Section 13.05, to provide as follows:

"Retirement. Employees who retire from the Town of Menasha shall have the option of receiving sick leave accumulated paid out in cash at seventy-five percent (75%) of their accumulated sick leave paid in a lump sum distribution or at the request of the employee, use one hundred percent (100%) of their accumulated sick leave for any type of Town health insurance payments. (Single, limited family, or family coverage). The health insurance benefit can be used until the employee's account is depleted. If the employee's account continues to have a balance upon death, or consecutive coverage ceases at the employee's request, the remaining accumulation reverts back to the Town of Menasha. For sick leave benefit policy purposes, an employee is considered retired if the employee leaves the Town of Menasha employment and is eligible for Wisconsin Retirement benefits."

(2) The Association's final offer contains the following additional proposed changes.

(a) The following changes in Article 13, entitled **SICK LEAVE**.

(i) Modification of Section 13.03 to increase accumulation to ninety (90) days, and removal of the second sentence in the prior agreement.

(ii) Modification of Section 13.5 to provide as follows: "Employees who retire from the Town of Menasha Police Department shall receive one hundred percent (100%) of the value of their sick leave accumulation to be used toward payment of their health insurance premiums until said amount is exhausted."

THE ARBITRAL CRITERIA

Section 111.77(6) of the Wisconsin Statutes provides that the Arbitrator shall give weight to the following arbitral criteria in reaching a decision and rendering an award in these proceedings:

"a. The lawful authority of the 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 these costs.

d. Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

(1) In public employment in comparable communities.

(2) In private employment in comparable communities.

e. The average consumer prices for goods and services, commonly known as the cost of living.

f. The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."

THE POSITION OF THE EMPLOYER

In support of its contention that its final offer is the more appropriate of the two before the Arbitrator, the Employer emphasized the following principal considerations and arguments.

(1) That its proposed comparables meet the *comparability criteria test* established by arbitrators.

(a) The parties have not resorted to interest arbitration in the past.

(b) The Town proposes the following primary external comparables: the Town of Grand Chute; Fox Valley Metro; and the Cities of Kaukauna, Menasha and Neenah.[1] The Association agrees with each of these municipalities, but

[1] Citing the contents of Town Exhibit #8.

proposes addition of the Village of Combined Locks and the Cities of De Pere and Waupun.

(c) Factors normally recognized by arbitrators in determining comparability among public employers consistent of: *location; population; geographic size; total property value; per capita property value and income;* and *whether or not the proposed comparable is in the same or a similar labor market.*[2]

(d) The Town proposed comparability group fulfills the above referenced criteria.

(i) The Town proposed municipalities are *geographically proximate*, in that they range between from 1.5 to 18.9 miles from the Town of Menasha.[3] Waupun and De Pere, however, proposed by the Association, are 44 and 32 miles away from the Town of Menasha.

(ii) The average population of the Town proposed comparables is 14,888, as compared to the Town of Menasha population of 15,868.

(iii) With the exception of Neenah, with 41 officers, the average number of officers employed by the municipalities is 25, as compared to 22 officers in the Town of Menasha.[4] Although Combined Locks is within 12 miles of the Town of Menasha, it is much smaller and employs only four officers.

(iv) The Town's total property tax at $22,329,911 is comparable to the municipal average among comparables of $19,332,208; although slightly lower, the Town's full value rates are similar that those in the other municipalities.[5]

(e) Based upon all of the above, the Town requests arbitral selection and utilization of its proposed group of primary external comparables.

(2) Town officers enjoy wages which are similar to those paid by comparable municipalities.

(a) The parties have agreed upon 3% wage increases for 2001 and 2002.

(b) Even though there is no dispute with respect to the wage increases, the statutory arbitral criteria call for a review of the comparison of wages, hours and conditions of employment of employees in comparable communities.

(c) Review of the hourly, monthly and annual wages among

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[2] Citing the decisions of *Arbitrator Michelstetter* in LaCrosse County (Highway), Decision No. 29742-A (8/29/00), and *Arbitrator Baron* in Juneau County (Highway), Decision No. 28229-A (7/17/95).

[3] Citing the contents of Town Exhibit #9, page 1.

[4] Citing the contents of Town Exhibit #9.

[5] Citing the contents of Town Exhibit #9, page 2.

comparables, from 1999 through 2002, show that the Town's annual maximum wages exceed the average by $764 in 1999, which increased to $1,184 above average for 2000.[6]

(d) The wages paid by the Town were higher than Grand Chute and Fox Valley, but less than the Cities of Menasha and Neenah; as such, it holds a *middle ground* among officers working in nearby municipalities. The same is true when reviewing the Association's comparable pool; from 1990 through 2002, the Town held fourth place among its list of comparables.[7]

(e) On the above described bases, the Officers in the Town of Menasha have been paid comparably to its neighbors, and its rank has not lowered during the past ten plus years.

(3) The Town has met the necessary criteria to justify a change in the status quo.

(a) Many Wisconsin interest arbitrators have recognized that when one party wishes to make a change in the substantive terms of an agreement, it must establish a persuasive case by establishing the following: *first*, that a compelling need exists for the proposed change; *second*, that the proposal reasonably addresses the need for the change; and, *third*, that a sufficient *quid pro quo* has been offered.[8]

(b) Some Wisconsin interest arbitrators have required either none or only a minimal quid pro quo where there is overwhelming support among comparables for the change.[9]

(c) In the case at hand, a change is needed and the Town's offer addresses such need.

(i) The work schedule provides for additional time off without any quid pro quo.

(ii) Compensatory time off by virtue of the holiday benefit creates scheduling problems.

(iii) Overtime costs increase as a result of covering patrol duties due to time off for holidays.

(iv) Eliminating the option to receive time off versus pay will reduce, if not eliminate, grievances involving the holiday benefit.

(d) The Town has offered a sufficient quid pro quo, in the form of *additional floating holidays* and an *increased sick leave bank*.

(i) The towns proposal includes *an additional one and one-half floating holidays* to be used at the employee's discretion, subject to the Chief's approval.

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[6] Citing the contents of Town Exhibit #10.

[7] Citing the contents of Association Exhibit #9.

[8] Citing the *decision of Arbitrator Torosian* in Washington County (Social Serv.), Decision 29363-A (12/11/98).

[9] Citing the decision of *Arbitrator Shiavoni* in Columbia County (Highway), Decision No. 28983-A (9/13/97).

(ii) Both final offers provide for an increase to the *maximum accumulation for sick leave from 30 days to 90 days*, and the parties have also agreed to *eliminate the provision calling for cash to be paid to an employee upon separation of employment from the Town*.

(iii) The Town has additionally agreed to convert the current sick leave days held by officers under a formula which would more significantly compensate them for the amounts of days in their current sick leave accounts.[10]

(iv) The Association has not stated in its offer any formula to compensate officers for their currently banked sick leave. The Town's proposal is, therefore, clearly more generous and fair, particularly to those officers who have accumulated the maximum number of sick days.

(v) As a result of their *proposed increases in sick leave accumulation*, both final offers provide for an *increase in retirement benefits*. While the Association's offer provides for the payment of sick leave to go toward the purchase of health insurance upon retirement, the Town proposes a retiree option to either receive 75% of accumulated sick leave in cash or to apply 100% of it to payment for health insurance premiums.

This benefit change proposed by the Town would alone be substantial in that the maximum monetary benefit of sick leave payout at retirement in the year 2000 was $4800; this would change to a maximum $10,800 cash payout or a $14,400 maximum payment toward the purchase of health insurance.[11]

(vi) The above described Town proposed increase in sick leave accumulation related retirement benefits exceeds that paid by the majority of the comparables: only the City of Neenah provides for a higher cash payout; the City of Menasha provides a higher payout for the purchase of health insurance but provides no cash option; the municipalities of Kaukauna, Grand Chute and Fox Valley do not offer benefits comparable to that proposed by the Town.[12]

(vii) In exchange for their previous option of taking off for a holiday, the officers will receive the following: *compensation for not working the holiday*; *increased leave accumulation from 30 to 90 days*; enhanced *conversion of sick leave days based upon length of service*; *increased in 2000 retirement payout for sick leave from $4,800 to $10,800 (cash) or $14,400 (health insurance)*; and an *additional one and*

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[10] Citing the *testimony of Ms. Piergrossi*, the Town's Director of Finance, at Hearing Transcript, page 52, and the contents of Town Exhibit #20, page 2.

[11] Citing the contents of Town Exhibit #17.

[12] Citing the contents of Town Exhibit #19.

one-half paid holidays.

(4) The Association, as the proposing party, has not offered a *quid pro quo* for the increase from 30 to 90 days in sick leave accumulation, contained in its final offer.

(5) Employees received in-pocket changes as a result of the change in health care providers.

(a) During preliminary bargaining the parties agreed to change the health insurance provider for both the Police and the Fire units, which resulted in significant return of *in-pocket cash* to bargaining unit employees.[13]

(b) Previously the employees contributed 15% toward monthly premiums for health and dental insurance. Effective January 1, 2002, however, the Town contributes 105% of the lowest priced qualified health care plan, and all eligible police officers in the bargaining unit have opted for the lowest cost plan; employees choosing a *family plan* will have annual savings of $1,454 and those selecting *single health insurance* would save $559 per year, in addition to savings under the deductibles.[14]

(6) The Town offers other benefits which are equivalent to, if not better than, those provided by the comparable municipalities.[15]

(a) Because all officers have opted for the lowest cost plan, the Town pays 100% of the cost of health insurance; Fox Valley, Kaukauna and Menasha officers are required to pay a portion of such premiums.

(b) The Town provides duty incurred disability pay and life insurance at no cost to employees.

(c) The town has supplemented sick leave accumulation by providing short-term disability insurance, which is a continued benefit even though sick leave accumulation has been increased from 30 to 90 days.[16]

(d) The vacation benefit for newly hired officers exceeds that offered by three comparable municipalities, and the 5 weeks of vacation after 20 years for officers is comparable to that offered by these municipalities.

(e) Only Kaukauna and Menasha provide shift differential pay, and Grand Chute and Neenah do not provide pay for shift work. By way of contrast, the Town is unique in providing differential pay at an additional $.13 per hour for all hours worked.[17]

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[13] Citing the *testimony of Mr. DeGrave* at Hearing Transcript, page 24, and the contents of Town Exhibit #5.

[14] Citing the contents of Town Exhibit #6.

[15] Citing Section 111.77(6)(f) of the statutes, and the contents of Town Exhibit #21.

[16] Citing the *testimony of Mr. DeGrave* at Hearing Transcript, page 35.

[17] Citing the contents of Town Exhibit #1, page 17.

(7) The Town offer provides for internal consistency.

(a) That internal comparables receive great weight in arbitration, particularly when the issues involve employee benefits. There is a general consensus and concern for the negative effect of disparity in benefits upon morale, equitable treatment of employees, and stability of the bargaining relationship; Unions are obviously reluctant to settle if they believe other units going through the arbitration process may obtain a benefit not attainable through voluntary settlement.[18]

(b) The Town's proposal promoted internal consistency. It is proposing a retirement benefit consistent with the agreed upon by the AFSCME unit, and is offering an additional 1½ paid holidays, increasing this total to 10.5.[19]

(c) While the Association proposes a difference in the number of sick leave days banked by employees, the Town proposes to convert current sick leave days consistently with the AFSCME represented employees. Under the Association proposal, officers would also not be entitled to the option of cash upon retirement for accumulated sick leave, but AFSCME represented employees have this option.

(d) The Town proposed ability to choose between pay and days off on holidays, is consistent with the rights of AFSCME represented employees.

(e) Other employee benefits which are consistent in both bargaining units, include non-occupational sickness & accident coverage, vacations, sick leaves, funeral leaves, and health, dental and life insurance.

(f) On the basis of the above, internal consistency is strengthened by selection of the Town's proposal.

(8) The record in these proceedings supports the following conclusions.

(a) The critical questions which must be answered are the following.

(i) Whether the party proposing change has been able to demonstrate that a legitimate issue exists which needs to be addressed?

(ii) If so, has the proponent of change demonstrated that its proposal is reasonably designed to address the problem, and that it will not impose an undue hardship on the other party?

(iii) In the above connections, the Town has outlined its proposals regarding *scheduling problems*, *overtime* and *budgetary issues*, and *its final offer clearly addresses these concerns*.

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[18] Citing the *decision of Arbitrator Torosian* in Washington County (Social Services), Decision No. 29363-A (12/11/98).

[19] Citing the contents of Town Exhibits #22, #23 and #24.

(b) Although both internal and external comparability support the Town's proposal, it has offered the following described, *adequate quid pro quo* for officers.

(i) They would receive *an additional one and one-half paid holidays per year*.

(ii) Their *sick bank would be increased from 30 to 90 days*, with *banked sick leave days converted to recognize sick time already on the books*.

(iii) Their *retirement benefits would be significantly improved*.

(c) Although the benefit of having time off is not one of monetary value, there are options for Officers interested in such time off: *first*, they have the ability to trade with other officers; and, *second*, given their work schedule, all officers would not be required to work each and every holiday. Accordingly, the impact of the Town's proposal upon the Officers would be minimized.

(d) It is compelling that Officers already receive seven additional days off per year by virtue of their *5-2, 5-3 schedule*. Their work schedule, including holiday and vacation time off, allows for an abundant number of days off during each year. Accordingly, the Town believes *its proposal to eliminate the choice of additional days off will not impose an undue hardship on the employees*.

In summary, the Town submits that its offer is in the best interests of the public, in that it would provide more efficient use of patrol officers in serving the public without added costs. On the above described bases it urges that its offer is the more reasonable when measured against the statutory criteria, and requests its selection in these proceedings.

In its reply brief, the Employer emphasized or reemphasized the following principal considerations and arguments.

(1) It agreed with the Association the *lawful authority of the employer criterion* contained in Section 111.77(6)(a) of the Wisconsin Statutes is not in issue in these proceedings.

(2) That the Arbitrator may choose to consider *the impact of the parties' agreement to change the insurance benefit* in the final offer selection process.

(a) Though not a direct quid pro quo, it saved police officers between $559 and $1,454, excluding deductibles.

(b) If officers choose to remain in the Touchpoint Health Plan, they will not have to pay a penny toward the cost of their premiums.[20]

(c) The majority of employees in comparable municipalities, whether proposed by the Association or the Town, are

[20] Citing the *testimony of Mr. DeGrave* at Hearing Transcript, page 33.

required to pay a portion of the premiums.[21]

(d) Albeit not to be granted substantial weight, this change should be given some value in choosing which final offer is the more reasonable of the two.

(3) That the *interests and welfare* of the public are best served by selection of the Town's proposal.

(a) While the Town's proposal does remove an officer's option of receiving time off for holidays, it has laid the foundation for its proposal to remove that option. While police officers and other employees need time to remove themselves from the stresses of their jobs, allowing more time for officers to patrol the streets and to serve the taxpayers, is in the best interest of the public.

(b) Police officers currently have an adequate number of days off during the year, by virtue of vacation, sick leave and holidays, to relieve themselves from pressures on the job and, moreover, the Town increased the holiday benefit by one and one-half days per year, to minimize the impact of removing the choice of taking time off with pay.

(c) No officer testified to the fact that the choice of not having the time off would significantly affect his ability to perform his duties; in point of fact one-third of the officers selected pay in lieu of days off for the holidays.[22]

(d) The town does not believe its police force will undergo duress if the officers who would have chosen time off do not receive those extra days off; given its scheduling, overtime and budgetary concerns, the Town believes this is a reasonable request.

(4) That while the Town has the *financial ability to meet the costs of the Association's offer*, it must continually look to ways to control costs. Despite the Association's position, the Arbitrator must look at the possibility of a structural deficit facing the Town if its levy is frozen, thus limiting its ability to borrow funds.[23]

(5) That the *total compensation granted to Town of Menasha police officers* is comparable to that offered to employees performing similar services in comparable communities.

(a) That *other benefits must be reviewed in order to analyze the total benefit package received by the Town's police officers*.

(i) The Association argues that the issue is not economic compensation, but one of the amount of time employees are allowed to remove themselves from their work environment, but the matter must not be viewed in a vacuum, and the issue of time off versus pay should be determined on reasonableness grounds.

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[21] Citing the contents of Town Exhibit #21 and Association Exhibit #20.

[22] Citing the contents of Employer Exhibit #14.

[23] Citing the *testimony of Mr. DeGrave* at Hearing Transcript, page 38, and the contents of Association Exhibit #5.

(ii) The average annual hours worked within the comparables, excluding the Town, averages 2,075 hours, as opposed to 2,027 hours by Town of Menasha officers.[24]

(iii) The Town's proposal relative to how funds will be paid upon retirement is clearly superior to that offered by the Association as well as that granted by the outside comparable municipalities.

(iv) Wages paid by the Town are very comparable to that paid by other employers.[25]

(v) Town employees enjoy a health insurance benefit which is more generous than that provided by the external comparables, in that they need not make out-of-pocket payments toward premiums.[26]

(vi) Along with its sick leave benefit, the Town offers short term disability to it employees; among the comparables, only Grand Chute offers such a benefit.[27]

(vii) The Town's shift differential is unique, in that it allows all employees an additional $.13 per hour; Fox Valley, Grand Chute, Neenah and Waupun do not offer any type of shift differential to their police officers.[28]

(viii) The Town's proposal calls for an additional one and one-half holidays per year, which equates to an additional 87.47 hours of compensation, over and above that paid to officers in De Pere, Menasha or Neenah.[29]

(ix) All compensation, whether in the form of in-pocket cash or other benefits, must be arbitrally considered in these proceedings, and, as a whole, Town officers receive wages and fringe benefits that are comparable, if not superior to, their counterparts.

(b) Despite the Association's opinion to the contrary, *the scheduling of officers is a problem*.

(i) The Association challenges the Town's position, claiming that it did not provide any information relative to scheduling problems, "other than the Town Administrator's vague reference" to those problems. The Town Administrator, however, is aware of the scheduling issues, for it is obvious that he discusses such matters with his staff. Having one or more other

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[24] Citing the contents of Association Exhibit #11.

[25] Citing the contents of Town Exhibit #10 and Association Exhibit #9.

[26] Citing the contents of Town Exhibit #21 and Association Exhibit #20.

[27] Citing the contents of Town Exhibit #31.

[28] Citing the contents of Association Exhibit #13.

[29] Citing the contents of Association Exhibit #14.

Town employees testify to the same issues would basically be redundant, in that Mr. DeGrave is perfectly capable of testifying to the problems associated with scheduling.

(ii) Association questions about the Town's overtime costs are questionable, in that it had ample opportunity at the hearing to question the Administrator relative to these costs but elected not to do so. The fact is that overtime costs have significantly increased, and limiting the ability of employees to receive time off for holidays, would alleviate scheduling problems and reduce overtime costs.[30]

(c) That the Town proposed pool of external comparables is preferred. Contrary to the Association's arguments, the City of Waupun is too distant to be considered a comparable, the City of De Pere has a much larger police force, the number of officers employed by the Village of Combined Locks is too small to be comparable, and both parties consider the Town of Grand Chute as a primary comparable.

(d) That a review of the comparables does not support the Association's final offer.

(i) The holiday contract language of the comparable municipalities does not specifically state that officers are entitled to compensatory time off in lieu of receiving pay for holidays.

(ii) Only Fox Valley has contract language allowing officers the option of pay or time off.[31] Even if officers in other departments receive compensatory time off by way of other contractual provisions, this does not mean that the Town must provide the same benefits for its officers.[32]

(iii) For the Town of Menasha, allowing officers the option of time off for holidays creates scheduling and overtime problems; the Town has packaged its proposal to provide for other benefits as a quid pro quo for paying officers for the holidays versus their taking time off.

(e) The Town's officers receive time off with pay by virtue of their work schedule.

(i) The 2,080 hours figure was utilized to identify the fact that employees are being paid for an additional six days per year, every year.[33]

(ii) The 2,080 hours figure was not discussed as the basis for calculating overtime rates, and the fact of the matter is that employees receive a monetary benefit without setting foot on Town premises or protecting

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[30] Citing the contents of Town Exhibit #15.

[31] Citing the contents of Town Exhibit #13.

[32] Citing the contents of Association Exhibit #16.

[33] Citing the contents of Town Exhibit #11.

the public.

(f) That Union urged comparisons with the Town's non-bargaining unit Lieutenants is improper.

(i) Employees who receive wages and benefits through unilateral dispensation by an employer receive considerably less weight than that placed upon comparable negotiated provisions.[34]

(ii) The more appropriate internal group to compare with is those represented by AFSCME, and the Town's offer of an additional one and one-half holidays is consistent with the number offered to these employees.[35]

(iii) AFSCME represented employees do not have the option of time off for a holiday, and it has many other benefits which are consistent with those in the police officers' bargaining unit.[36]

(6) That the *consumer price index* will not be the pivotal point which will determine the outcome in these proceedings. The parties agreed on 3% wage increases in each of the two years in the renewal agreement, which lies well within the increases experienced by the Midwest Urban Region during 2001.

(7) That the Town has met the requisite criteria to change its holiday contract provision.

(a) As Mr. DeGrave indicated, the Town is very concerned about the substantial time off for officers by virtue of their current work schedule, holidays, vacation, sick days, etc.

(b) Because the Town has to work around the officers' time off, scheduling has become an increasing concern, overtime has dramatically increased from 1994 to 2000, and the Town is faced with a potential structural deficit as its levy is frozen. All of these considerations point to the need for change.

(c) The Town's proposal addresses the above need, scheduling concerns will be alleviated given the fact that there will not be as many days in which to juggle officers to cover shifts, and removing the time off option will reduce overtime costs.

(d) Elimination of the option to receive time off versus pay for holidays will reduce, if not eliminate, continuing grievances involving the holiday benefit.[37]

(e) Relief scheduling, reduction in overtime costs and elimination of grievances, clearly address the second prong

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[34] Citing the *observations of the Arbitrator* at Hearing Transcript, pages 21-22, and the decisions of *Arbitrator Baron* in Merton Joint School District No. 9, Dec. No. 27568-A (8/95), and *Arbitrator Kerkman* in Washburn School District, Dec. No. 242278-A (9/87).

[35] Citing the contents of Town Exhibit #22.

[36] Citing the contents of Town Exhibit #24.

[37] Citing a recent arbitration decision involving such a decision.

of criteria relating to challenges to a quid pro quo.

(f) The Town has offered a number of items as quid pro quos: *first*, it proposed an additional one and one-half floating holidays; *second*, the sick leave bank has been greatly increased from 30 to 90 days; *third*, its proposal calls for a conversion of current sick leave days in order to compensate employees for the amount of days in their current sick leave accounts; and, *fourth*, the retirement benefit has been increased from $4,800 to $10,8000 (cash payment) or $14,400 (health insurance benefit).

(g) In summary, the need has been identified, the proposal addressed the need, and an adequate quid pro quo has been offered.

(8) That the Association's proposal comes without a *quid pro quo*, and is ultimately unfair to current employees.

(a) It proposes to change the level of sick leave accumulation from 30 to 90 days without offering a quid pro quo.

(b) Its proposal would not give employees proper credit for the number of days currently in their sick leave bank, and would require them to start from scratch to earn the maximum number of sick leave days. By way of contrast on this item, the Town proposes to give employees credit for days they have already accumulated.[38]

On the above described bases, the Town reiterates its request for arbitral selection of its final offer.

THE POSITION OF THE ASSOCIATION

In support of its contention that its final offer is the more appropriate of the two before the Arbitrator, the Association emphasized the following principal considerations and arguments, in each case referencing the applicable statutory criterion.

(1) That the Employer may legally meet the Association's final offer.[39] No allegation has been made that the Employer lacks the authority to meet the Association's final offer and, accordingly, this criterion should not affect the arbitral decision.

(2) The parties' stipulations illustrate that agreement has been reached on all issues for the renewal agreement, with the exception of those contained within the final offers.[40]

(a) After the certification of final offers the parties agreed to make certain changes in health insurance, which agreement occurred after mediation and prior to the arbitral hearing.[41]

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[38] Citing the contents of Town Exhibit #20.

[39] Citing the contents of Section 111.77(6)(a).

[40] Citing the contents of Section 111.77(6)(b).

[41] Citing the contents of Town Exhibit #5.

(b) There was little evidence offered on this matter, other than the Town' Administrator's observation that it was not part of any quid pro quo for the changes sought by the Town.[42]

(c) Pursuant to the agreement between the parties, the premium paid by the Employer is based upon 105% of the least expensive plan offered versus 85% of the premium for the Blue Cross plan. Employees can opt for an HMO plan and pay no premium or elect to enroll in a Blue Cross indemnity plan and pay $399.91 per month, approximately 32% of the monthly premium.

(d) The agreed upon change demonstrates the parties' recognition of the extraordinary cost of health insurance, it was independent of these proceedings, and no weight should be accorded it in the final offer selection process.

(3) The interests and welfare of the public will best be served by an award in favor of the Association.[43]

(a) The fundamental difference between the final offers is how the Town's police officers are to be compensated for the holidays identified in the agreement.

(b) Under the *status quo proposal* of the Association, the officers will continue to have the option of notifying the Employer by February 15 of each year, of their decision to receive cash payment for the holidays or to forego such payment and receive equivalent time off.[44] By way of contrast, the Town proposal would remove the Employees' ability to take time off in lieu of pay.

(c) The officers' ability to forego pay and to thus remove themselves from the stresses of the job, ensures the citizens of the Town well rested police officers who are capable of performing their duties. This area of the profession has developed over many years and the comparables provide guidance as to what might be considered a reasonable amount of time away from work to accomplish the rest and rejuvenation of police officers, to ensure that they are mentally and physically prepared to meet the tasks and challenges of the occupation.

(d) While direct comparisons are addressed elsewhere, the Town's offer reduces the amount of total time off to below what other municipalities feel is appropriate and reasonable in the profession. To the extent that such compensation is taken in the form of time off in lieu of pay is at the heart of citizen interest in the overall reduction of the cost of their government.

(4) The Employer has the financial ability to meet the costs of the Association's final offer.[45] The ability of the Employer to meet the financial costs of the contract has not been raised as an

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[42] Citing the *testimony of Mr. DeGrave* at Hearing Transcript, page 33.

[43] Citing the contents of Section 111.77(6)(c).

[44] Citing the contents of Association Exhibit #4.

[45] Citing the contents of Section 111.77(6)(c).

issue by either party. Accordingly, inability to pay is not a factor, and should not be considered in the final offer selection process.

(5) Comparison of wages, hours and conditions of employment of those represented by the Association with the wages, hours and conditions of employment of other employees in public employment performing similar services in comparable communities strongly favors the adoption of the Association's offer by the Arbitrator.[46]

(a) In addressing this criterion it is emphasized that the time off impasse item involves not economic compensation, but rather the amount of time officers are able to remove themselves from their work environment. Evidence submitted by the Association contradicts the Town's assertion that such time off is broader in this bargaining unit, than in other comparable municipalities.[47]

(b) Irrespective of which comparables are used, the Town's officers receive *fewer holidays* per year and *less vacation benefits*, and *lack the ability to utilize compensatory time off in lieu of overtime* payments.

(i) The Town compares vacation benefits at 20 years of service, where those in the bargaining unit lag behind the comparables by 24.20 hours; they lag behind in every year, both before and after the twenty year level, by 9 to 43 hours, depending upon the year selected for comparison.[48] The Town's officers are currently able to supplement this shortfall by the use of holiday time off.

(ii) The Town's Administrator testified that the ability of the Town's officers to opt for holiday compensation in the form of time off contributes to scheduling problems, but it offered no substantiation of this claim.[49] The Town had the ability to identify precisely what the alleged scheduling problems were, but it failed to do so, despite the presence at the hearing and availability of the Chief of Police.

(iii) While the Town cited an increase in overtime costs since 1994, it could not attribute this increase to holiday time off for officers.[50]

(iv) The Town Administrator changed a policy related to the use of holiday time off, which action resulted in a grievance. It is apparent from the grievance that the Town's position is that it need not grant holiday time off if, in so doing, it would incur additional

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[46] Citing the contents of Section 111.77(6)(d).

[47] Citing the contents of Association Exhibits #10 (*hours of work*), #14 (*holidays*), #16 (*compensatory time off*) and #17 (*vacations*).

[48] Citing the contents of Association Exhibit #17.

[49] Citing the *testimony of Mr. DeGrave* at Hearing Transcript, page 30.

[50] Citing the *testimony of Ms. Amraen* at Hearing Transcript, page 60.

overtime.[51]

(c) The Association proposed group of primary external comparables is preferable to that of the Employer.

(i) In addition to the comparable municipalities submitted by the Town, the Association proposes inclusion of the City of De Pere, the Village of Combined Locks, the Town of Grand Chute, and the City of Waupun. All of these municipalities are geographically proximate and subject to similar economic and labor forces exerted upon municipalities in the Fox Valley region, and with the exception of Combined Locks, they are similar in population. The Town has not included Grand Chute which is identical in the type of government, nearly the same in staffing levels and population, and virtually next door to it.

(ii) Given the nature of the underlying dispute, the Association has proposed a broader picture of municipal police departments than would normally be found, if the issue had been rates of compensation or other more traditional items.

(d) The Association's final offer is supported by external comparables.

(i) The Association has submitted various exhibits which identify various forms of time off available to police officers such as holiday, compensatory time off and vacation.[52] All of the comparable officers have the ability to opt to receive overtime compensation in the form of compensatory time off, although Town of Menasha officers have no such provision in their contract.

(ii) Regarding holidays, all comparable police officers enjoy substantially more holiday hours than do the Town's officers. Some departments allow holidays in the form of time off or pay and others simply pay the officers additional money.

(iii) While the Town has asserted that the ability of the Town's officers to take holiday time off causes problems in scheduling, officers of comparable departments are afforded the opportunity to absent themselves from the workplace well beyond the ability of the Town's officers to do so.

(iv) The Town Administrator testified that he had analyzed the existing use of holidays and the relationship between holidays, vacation days and scheduled days off, and that 2,080 hours per year was used for various pay purposes under the agreement. That 2,080 hours per year, however, is merely the devisor to determine hourly rates of pay for overtime purposes, and is not determinative of actual hours worked to determine the overtime rate.[53]

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[51] Citing the contents of Town Exhibit #16.

[52] Citing the contents of Association Exhibits #14, #16 and #17.

[53] Citing the *testimony of Mr. DeGrave* at Hearing Transcript, pages

(e) Typically, benefit comparisons with non-represented employees are given little weight in this type of arbitration proceedings.

(i) In the case at hand, however, the Town provides non-represented law officers with 10.5 paid holidays versus 9.0 in the bargaining unit; police lieutenants who work holidays are paid at double time rather than time and one-half in the bargaining unit, and they also have the option of taking their holiday compensation in the form of compensatory time off and will presumably continue to do so following these proceedings.

(ii) The Association cited these factors, not for comparison purposes, but to point-out that the Town's rationale for its decision to discontinue a lesser benefit in the bargaining unit, flies in the face of its practices with other law enforcement officers in the same department.

(iii) Fundamentally, the Association is seeking no more and no less than agreed upon in the Town's other bargaining units.

(f) Neither the Town nor the Association has submitted any relevant information relating to comparison with private employment in comparable communities.

(6) The average consumer price for goods and services, commonly known as the cost of living, supports the Association's final offer.[54]

(a) The Association submitted exhibits regarding the cost of living and notes that the Midwest Urban Region has experienced percentage increases in 2001 at or above the voluntary wage increases of most comparable departments.

(b) When formulating their final offers, the parties were faced with percentage increases in the CPI ranging from a low of 1.9% to a high of 4.2% during the first six months of 2001.[55]

(7) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.[56]

(a) The Association has provided information on overall compensation for the comparable departments versus those in the bargaining unit.[57]

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25 and 26.

[54] Citing the contents of Section 111.77(6)(e).

[55] Citing the contents of Association Exhibit #34(a).

[56] Citing the contents of Section 111.77(6)(f).

[57] Citing the contents of Association Exhibits #9-#21.

(b) With the exception of vacations, holidays and provisions governing compensatory time off, benefits of the Town's police officers are comparable to their law enforcement counterparts. No element(s) of the Association's final offer elevates its members to a sufficient extent to render its final offer unreasonable.

(8) Changes in the foregoing circumstances and such other factors not confined to the foregoing.[58]

In summary and conclusion that the Association has applied the specific statutory criteria set forth in the Wisconsin Statutes to the final offers presented to the arbitrator. As the above analysis shows, the Association's final offer is more reasonable than that of the Town and, accordingly, it should be selected by the Arbitrator.

In its reply brief, the Association emphasized or reemphasized the following principal considerations and arguments.

(1) That two errors in the parties' initial briefs should be corrected as follows: *first*, the Employer had included the Town of Grand in its proposed primary external comparison group; and, *second*, both parties had not agreed to eliminate the cash option of sick leave payout upon separation.

(2) That it is clear that the fundamental difference of this dispute is the officers' continued ability to receive holiday compensation in the form of cash or time off; the Association's position is one of status quo and the Town seeks to remove the time off option.

(3) When applying the customary standards for a party seeking change in the status quo, the Town cites three areas of justification:

(a) *First*, it argues that under the officers' current work schedule, they receive pay for hours not worked. The Association suggests that the manner by which the parties agree to compensate officers with their regular wages sheds little light on the holiday issue. The prior pay formula was arrived at through bargaining, and if the Town now finds fault, it should have proposed a direct change at the bargaining table.

(b) *Second*, it argues that holiday compensation in the form of time off creates *scheduling problems*. As emphasized in its original brief the Association submits that there is no credible evidence in the record to support this allegation. It refers to a previously pending grievance on this matter and to an arbitral decision received after the filing of the initial briefs.

(c) *Third*, it argues that the holiday benefit change sought by it simply brings the police officers in line with benefits provided to other Town employees. There is little relationship, however, between the police officers and the members of the AFSCME unit cited as internal comparables;

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[58] Citing the contents of Section 111.77(6)(g) & (h).

while AFSCME represented employees do not have such a benefit, it is equally true that they are not regularly scheduled to work holidays like the police officers.

(4) The Town settled its 2000-2002 AFSCME agreement by increasing wages 3% each year, increasing sick leave benefits from 30 to 90 days, and adopting a pro-rata formula for the conversion of employees' sick leave. When determining the sufficiency of quid pro quo, arbitrators have opined that the value of the change sought could be determined by what others in similar situations have done; if there is agreement between the parties, then the quid pro quo for those items has been established. It is clear that the Association is seeking similar change in these areas for the same consideration. Since it is not seeking the additional benefit of pro-rated sick leave conversion that the other unit received, then arguably the value of its proposal is less than the other unit received. The Town argues, however, that the Association has failed to provide a quid pro quo for the changes sought in sick leave and apparently feels that it should pay more for it than the AFSCME unit.

(5) The Town seeks to change a long standing benefit of employee's ability to receive holiday compensation in the form of time off. Its principal rationale for the proposal has been resolved for the Town by the determination of the grievance. If there is no need for such change, then the Town's argument for change falls short and such change ought not be allowed by an arbitrator.

On the above described bases, the Association urges that its final offer is the more reasonable of the two before the undersigned, and asks that it be included in the successor agreement.

FINDINGS AND CONCLUSIONS

As has been emphasized by the undersigned and various other Wisconsin interest arbitrators, they operate as *extensions of the contract negotiations process*, and their primary goal is *to attempt to put the parties into the same position they would have reached but for their inability to achieve a complete settlement at the bargaining table*. In so doing, these arbitrators will closely examine, consider and apply the various statutory criteria contained in Section 111.77(6) of the Wisconsin Statutes.

In arguing their respective positions in the case at hand, both parties particularly emphasized *the significance of the status quo ante* and arbitral application of the so-called *comparison criteria* both of which are preliminarily discussed below, followed by review of the remaining arbitral criteria.

The Proposed Modification of the Negotiated Status Quo Ante

The parties are quite correct that when faced with proposals for *significant changes in the negotiated status quo ante*, Wisconsin Interest

Arbitrators normally require the proponent of change to establish a *very persuasive basis for such change*, typically by showing that *a legitimate problem exists which requires attention,* that *the disputed proposal reasonably addresses the problem*, and that *the proposed change is accompanied by an appropriate quid pro quo*. This standard falls well within the scope of Section 111.77(6)(h) of the Wisconsin Statutes.

Contrary to the arguments advanced by the Employer, all proposed improvements in previously negotiated wage rates or fringe benefits by a Union are *not* the types of change which trigger the need for a *quid pro quo*, but normally entail only *the normal give and take of conventional bargaining*. Proposed wage increases, for example, are commonly triggered by such considerations as the perceived need to remain competitive with wages paid elsewhere, increases in cost of living, and/or improvements in quality or productivity, but they are not the types of change in the status quo ante which trigger the need for a *quid pro quo*. In the case at hand the Association proposal to increase sick leave accumulation from 30 to 90 days is a proposed increase to a previously negotiated benefit, and it simply does not fall within the category of proposed changes which normally require a quid pro quo. By way of contrast, the Employer proposed elimination of officer choice for time off in lieu of holiday pay, is the type of change which must normally be supported by a quid pro quo.

What first of whether the Employer has established the existence of *a significant problem which requires attention?* In this connection the Employer identified the problem as difficulty in scheduling work which contributed to a significant increase in required overtime within the bargaining unit, which it urged was at least party attributable to officers' ability to opt for time off in lieu of holiday pay. The Union challenges the Employer's proof of both the alleged problem and the impact of its proposed change. In this connection, the undersigned finds the following considerations to be determinative.

(1) The Employer offered persuasive and logical testimony indicating that various officers' election of time off rather than pay for holidays had at least contributed to its scheduling problems and to significant recent increases in overtime for officers. In this connection, it documented significant increases in overtime paid to members of the bargaining unit since 1994, which included a 20% increase in 1999 to a level of $93,397.14 and an additional 21.5%

increase in 2000 to a level of $113,510.30, in which two year period the overtime paid to officers within the bargaining unit had exceeded the budgeted amounts by $59,847,44 or 40.6%.[59] Certainly these rising levels of recent overtime expenditures within a bargaining unit of 22 officers, are quite significant and befit the Employer's characterization of them as part of a *significant problem*.

(2) If the overtime costs relied upon by the Town had been incorrect or, alternatively, if they had not been contributed to by officers opting for time off on holidays, it could have introduced evidence which so indicated. In the absence of such evidence, the undersigned finds the evidence offered by the Town to be very persuasive as to the existence of *a significant problem which requires attention*.

(3) In connection with *the interests and welfare of the public criterion*, the Union urged that removing officers' right to time off in lieu of holiday pay served the public interest in various ways, including *an overall reduction in the cost of government*! This is a specious argument, however, in that it ignores the fact that police staffing will take place regardless of individual officers' rights to take time off in lieu of pay. If the officer assigned to and working a particular shift due to such time off is working on a straight time basis, there would be neither additional costs nor savings associated with the assignment; when such staffing requires the payment of overtime, however, additional costs are clearly incurred by the Town.

On the above described bases the undersigned has concluded that the Employer has fully established the existence of the requisite *significant problem which requires attention*.

In next addressing whether the Employer's proposal *reasonably addresses the problem*, it is noted that there is no argument that its selection will solve its entire overtime problem, but only that it will contribute to the Town's ability to better control the level of its overtime expenditures. In connection with the reasonableness of the proposal, the undersigned finds the following considerations to be determinative: first, the evidence of record indicated that 40% of the officers in the bargaining unit had not previously availed themselves of their options for time off in lieu of pay in connection with holidays, which rather clearly supports an inference that future Employer flexibility in allowing officers to trade shifts or to simply to stand in for one another, as appropriate, would still allow for significant officer requested holiday time off.

On the above described bases, the undersigned has concluded that the

[59] See the contents of Town Exhibit #15.

Town's proposal *reasonably addresses its scheduling and overtime control problem*, even though it does not constitute a complete solution to such problem.

What next of whether the Employer proposed change in status quo was supported by an appropriate *quid pro quo*? In this area the undersigned is principally faced with the adequacy of the following proposed changes in Article 13 of the agreement: (1) modification of Section 13.03 to accompany the agreed upon increase in accumulated sick leave from 30 to 90 days, by providing the same favorable retroactive conversion feature applicable to non-represented employees; (2) modification of Section 13.05 to provide that retirees would have the option of being compensated for their accumulated, unused sick leave by receiving 75% of its value in a lump sum cash distribution, as an alternative to their previously existing option to use 100% of its value toward the purchase of any type of Town offered health insurance benefit; (3) and, the addition of one and one-half floating holidays for officers.

In determining whether the above offered changes by the Employer constitute an appropriate *quid pro quo*, arbitrators base their decisions upon whether it would normally have been sufficient to justify the change(s) in across the table bargaining. In this connection, the undersigned has concluded that the Town proposed change in the status quo ante was supported by an appropriate quid pro quo, if application of the remaining arbitral criteria establish that the change is reasonable.

The Normal Arbitral Application of the Comparison Criteria

The statutory criteria contained in Section 111.77(6) of the statutes have not been prioritized by the Legislature, and in the absence of such prioritization it is widely recognized by interest arbitrators that comparisons are normally the most frequently cited, the most important, and the most persuasive of the various arbitral criteria.[60] In the absence of strong evidence to the contrary, the most persuasive comparisons are normally

[60] By way of contrast, some prioritization has taken place in applying Section 111.70(4)(cm)(7) of the Wisconsin Statutes.

the so-called *intraindustry comparisons*.[61] These considerations are very well described as follows in the venerable book by the late Irving Bernstein:

> "Comparisons are preeminent in wage determination because all parties at interest derive benefit from them. To the worker they permit a decision on the adequacy of his income. He feels no discrimination if he stays abreast of other workers in his industry, his locality, his neighborhood. They are vital to the Union because they provide guidance to its officials upon what must be insisted upon and a yardstick for measuring their bargaining skill...Arbitrators benefit no less from comparisons. They have the appeal of precedent...and awards, based thereon are apt to satisfy the normal expectations of the parties and to appear just to the public.
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> * * * * *
>
> "a. *Intraindustry Comparisons*. The intraindustry comparison is more commonly cited than any other form of comparison, or, for that matter, any other criterion. Most important, the weight that it receives is clearly preeminent; it leads by a wide margin in the first rankings of arbitrators. Hence there is no risk in concluding that it is of paramount importance among the wage-determining standards.
>
> * * * * *
>
> A corollary of the preeminence of the intraindustry comparison is the superior weight it wins when found in conflict with another standard of wage determination. The balancing of opposing factors, of course, is central in the arbitration function, and most commonly arises in the present context over an employer argument of financial adversity."[62]

If the composition of the *primary intraindustry comparison group* is in issue, this is normally the first order of business for an interest arbitrator prior to applying the comparison criterion. Bernstein addresses, as follows, the reluctance of arbitrators to modify comparisons previously established and utilized by the parties in their past negotiations and/or arbitrations.

> "This, once again, suggests the force of wage history. Arbitrators are normally under pressure to comply with a standard of comparison evolved by the parties and practiced for years in the face of an effort to remove or create a differential. When the Newark Milk Company engineers asked for a higher rate than in New York City, the arbitrator rejected the claim with these words: 'Where there is, as here, a long history of area rate equalization, only the most compelling reasons can justify a departure from the practice.
>
> * * * * *
>
> The last of the factors related to the worker is wage history.

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[61] The terms *intraindustry comparisons* derive from their long use in the private sector, and they normally translate in the *public sector* to similar units of *public employment in comparable communities*, as referred to in Section 111.77(6)(d)(1) of the Wisconsin Statutes.

[62] Bernstein, Irving, The Arbitration of Wages, University of California Press (Berkeley and Los Angeles), 1954, pages 54, 56, and 57. (footnotes omitted)

> Judged by the behavior of arbitrators, it is the most significant consideration in administering the intraindustry comparison, since the past wage relationship is commonly used to test the validity of other qualifications. The logic of this position is clear: the ultimate purpose of the arbitrator is to fix wages, not to define the industry, change the method of wage payment, and so on. If he discovers that the parties have historically based wage changes on just this kind of comparison, there is virtually nothing to dissuade him from doing so again..."[63]

In the event that arbitral consideration of parties' bargaining history does not identify the composition of the primary intraindustry comparison group, which is the situation in the case at hand, a variety of considerations come into play in determining the composition of such groups. In the case at hand, the Town proposes the Towns of Grand Chute, Fox Valley Metro (i.e., Kimberly and Little Chute), the Cities of Kaukauna, Menasha and Neenah, to which the Union would add the Village of Combined Locks and the Cities of De Pere and Waupun.

(1) In support of its position, the *Town of Menasha urges* that its proposal is supported by arbitral consideration of *location*, *population and geographic size*, *total property value*, and *per capita property value and income*, and it cited arbitral precedent in support of the use of these criteria in determining comparables.

   (a) It urges that its proposed comparables meet all of the above criteria as follows: they are located within 1.5 to 18.9 miles from the Town of Menasha, and are thus *geographically proximate*; their *average populations* at 14,888 compare closely to the 15,868 population in the Town of Menasha; with the single exception of Neenah which has 41 officers, the comparables average 25 officers, while the Town of Menasha has 22 officers; the Town's total property tax of $22,329,911 is close to the comparables' average of $19,332,208; and that the Towns' full value rates are similar to those of the comparables.[64]

   (b) In urging arbitral rejection of the Association proposed additions to the pool of primary comparables it urges as follows: that the Cities of Waupun and De Pere are not *geographically proximate*, in that they are 44 and 32 miles distant from the Town of Menasha; and that while Combined Locks is only 12 miles away, it is a much smaller municipality and employs only 4 police officers.

(2) In support of its position that the Cities of De Pere and Waupun and the Village of Combined locks should be included in the primary external comparison group, *the Association urges* as follows: that all the proposed comparables were geographically proximate; that they were subject to similar economic and labor forces to those present in the Fox Valley region; that the Cities

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[63] The Arbitration of Wages, pages 63, 66. (footnotes omitted)

[64] Referring to the contents of Town Exhibits #8, #9 and #10.

> of Waupun and De Pere were comparable in size to the Town's proposed comparables; and, despite the smaller size of the Village of Combined Locks, that a broader comparison group was preferable in the case at hand, than would normally be utilized in a more traditional interest dispute involving economics.

The various criteria advanced by the Employer in support of its proposed composition of the *primary external intraindustry comparison group,* is quite persuasive, as is its cited arbitral decisions supporting the use of such criteria. The necessity for reasonable comparability in the number of officers in the various bargaining units is particularly important in addressing the issue of *time off in lieu of pay in connection with holidays*. A much larger bargaining unit such as apparently exists in De Pere, for example, would normally be expected to enjoy greater flexibility in scheduling around officers with time off options, while the reverse would obviously be true in the case of a small police officer bargaining unit such as exists in Combined Locks. Contrary to the argument of the Union in these proceedings, it must be noted that the composition of the *primary intraindustry comparison groups* in interest arbitrations is *not* dependent on the nature and number of the individual impasse items present in each case (i.e., wages, benefits or language), but rather is based exclusively upon the *comparability of the employers* and the *similarity of services performed* by the involved employees.

With due consideration to the various criteria urged by the parties the undersigned has concluded that the primary intraindustry comparison group urged by the Employer is fully appropriate, and it will be utilized in these proceedings. The Cities of De Pere and Waupun and the Village of Combined Locks are, however, entitled to some consideration as secondary comparables.

In applying the external comparison criterion to the dispute at hand it is preliminarily noted that if, for example, all other municipalities within *the primary intraindustry comparison group* had uniformly provided their police officers with the option of time off in lieu of holiday pay, it would have raised significant questions about the reasonableness of arbitral selection of the Employer's final offer in these proceedings. Both parties submitted exhibits comparing the holiday pay practices of these external comparables, but neither deals definitively with the matter of time off in lieu of holiday

pay.[65] There is nothing in the record, therefore, to justify an arbitral determination that the elimination of the officers' time off option would be unreasonable, based upon application of the external comparison criterion, if the change is consistent with the statutory criterion governing changes in the status quo ante.

In this connection, the undersigned will merely note that the holiday work practices of AFSCME represented employees of the Town of Menasha are not entitled to significant weight in the final offer selection process in these proceedings.

The Overall Compensation Presently Received and the Changes in the Foregoing Circumstances Criteria, Contained in Section 111.77(6)(f) & (g)

In this area the undersigned principally notes that there is nothing in the record to suggest significant deficiencies in the overall compensation negotiated by the parties for those in the bargaining unit. While the Union is quite correct in urging that the previously agreed upon changes in health insurance, which agreement occurred between the preliminary mediation and the arbitration steps, cannot be considered a *quid pro quo* for the Employer proposed changes to Article 11 of the agreement, these changes significantly benefitted the Officers in the bargaining unit, they evidence the reasonableness of the renewal agreement, and they are a positive part of the *overall compensation* of those in the bargaining unit. To this extent, therefore, application of this arbitral criterion at least somewhat favors selection of the final offer of the Employer in these proceedings.

The Cost of Living Criterion, Contained in Section 111.77(6) (e)

The relative importance in application of the cost of living criterion varies with the state of the national and local economies. The relative stability in cost of living over the past several years has significantly reduced the weight placed upon this factor at the bargaining table, and in conjunction with interest arbitration proceedings.

The normal base for considering the cost of living criterion begins with the last time that the parties went to the bargaining table, which would

[65] See the contents of Association Exhibit #14 and Town Exhibit #13.

normally be the January 1, 1998 effective date of their expired agreement. Without unnecessary elaboration, it is clear that while changes in cost of living during this period have been relatively moderate, those in the bargaining unit received 3.25% general wage increases in 1998, 1999 and 2000, and during the term of their renewal agreement the parties have agreed to 3.0% increases in wages in 2001 and 2002. Even without costing-out these increases in detail and considering actual wage lift, they represent increased earnings within the various years totalling 15.75%, which clearly exceeds actual and anticipated prospective increases in cost of living during the covered periods. When these factors are considered in conjunction with the fact that the parties have reached full agreement on *wages* and so-called *economic benefits* during the term of the renewal agreement, it is clear that the *cost of living criterion* cannot be accorded significant weight in the final offer selection process in these proceedings.

The Ability to Pay Criterion, Implicitly Contained in Section 111.777(6)(h)

The so-called ability to pay criterion is widely recognized in interest proceedings, and it falls well within the scope of Section 111.77(6)(h) of the statutes.

The Union is quite correct that since no question has been raised relative to the Town's *ability to meet the costs of the Union's final offer*, this consideration is not a significant issue in these proceedings. The application of the so-called *ability to pay* criterion involves a *misnomer*, in that only in the event of *inability to pay* is the criterion entitled to determinative weight in the final offer selection process. This distinction between ability and inability to pay is well described in the following excerpt from the authoritative book originally authored by Elkouri and Elkouri:

> "To determine wages exclusively on the basis of ability to pay would lead to wage scales that vary from company to company, and would require a new determination of the wage scale with each rise or fall in profits. The existence of unequal wage levels among different companies would be incompatible with union programs for the equalization of wage rates among companies in the same industry or area. If inability to pay were used as the sole or absolute basis for wage cuts, inefficient producers would receive the benefit of having a lower wage scale than that of efficient ones, regardless of the fact that the value of the

services rendered by the employees of each is the same.

> One board of arbitration indicated three different degrees of weight that may be given to the ability-to-pay factor. Speaking through its Chairman, John T. Dunlop, that board outlined the three situations as follows: (1) 'In the case of properties which have been highly profitable over a period of years, the wage level would normally be increased slightly over the levels indicated by other standards'; (2) 'in the case of persistently unprofitable firms, the wage rate would normally be reduced slightly from the levels indicated by other standards'; (3) 'in the case of the companies whose financial record over a period of years falls between these extremes, the wage rate level would be determined largely by other standards.' "[66]

In the absence of current extraordinary conditions in the Town of Menasha evidencing an inability to pay, this arbitral criterion cannot be accorded any significant weight in these proceedings.

The Interests and Welfare of the Public Criterion, Contained in Section 111.77(6)(c)

In this connection the Employer has emphasized the public interest inherent in efficient use of patrol officers without additional costs, and the Union urged, as discussed earlier, that officer flexibility in electing to receive time off in lieu of holiday better served the needs of the public.

The weight to be placed on the interests and welfare of the public varies from case to case, depending upon the specific circumstances present in each interest arbitration. With due consideration of the nature of the impasse item in dispute in these proceedings and the surrounding circumstances, the undersigned has concluded that neither party has established that this criterion should command any significant weight in the final offer selection process in these proceedings.

Miscellaneous Remaining Considerations

The undersigned has considered all of the remaining arbitral criteria contained in Section 111.77(6) of the Statutes, but due to the nature and the specifics of the underlying impasse, neither the lawful authority of the parties, the stipulations of the parties, nor any other implicit arbitral criteria can appropriately be assigned significant weight in these proceedings.

Summary of Preliminary Conclusions

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[66] See *Elkouri & Elkouri* How Arbitration Works, pages 1124-1125. (footnotes omitted)

As addressed in more significant detail above, the undersigned has reached the following summarized, principal preliminary conclusions.

(1) Wisconsin interest arbitrators operate as *extensions of the contract negotiations process*, and their primary goal is *to attempt to put the parties into the same position they would have reached but for their inability to achieve a complete settlement at the bargaining table*.

(2) In arguing their respective positions in the case at hand, both parties particularly emphasized *the significance of the status quo ante* and arbitral application of the so-called *comparison criteria*.

(3) When faced with proposals for *significant changes in the negotiated status quo ante*, Wisconsin Interest Arbitrators normally require the proponent of change to establish a *very persuasive basis for such change*, typically by showing that *a legitimate problem exists which requires attention,* that *the disputed proposal reasonably addresses the problem*, and that *the proposed change is accompanied by an appropriate quid pro quo*. This standard falls well within the scope of Section 111.77(6)(h) of the Wisconsin Statutes.

   (a) Contrary to the arguments advanced by the Employer, all proposed improvements in previously negotiated wage rates or fringe benefits by a Union are *not* the types of change which trigger the need for a *quid pro quo*, but normally entail only *the normal give and taken of conventional bargaining*.

   (b) The Employer proposed elimination of officer choice for time off in lieu of holiday pay, is the type of change which must normally be supported by an appropriate quid pro quo.

   (c) The Town has fully established the existence of the requisite *significant problem which requires attention*.

   (d) The Town's proposal *reasonably addresses its scheduling and overtime control problem*, even though it does not constitute a complete solution to such problem.

   (e) The Town proposed change in the status quo ante was supported by an appropriate quid pro quo, *if application of the remaining arbitral criteria establish that the change is reasonable*.

(4) In connection with *the application of the comparison criteria*, the undersigned finds as follows.

   (a) Although the criteria contained in Section 111.77(6) of the statutes have not been prioritized by the Legislature, it is widely recognized that comparisons are normally the most frequently cited, the most important, and the most persuasive of the various arbitral criteria, and that the so-called *intraindustry comparisons* are the most important of the various comparisons.

   (b) With due consideration to the various criteria urged by the parties the undersigned has concluded that *the primary intraindustry comparison group* urged by the Employer is fully appropriate, and it will be utilized in these proceedings; this group consists of The Town of Menasha, Fox Valley Metro (*i.e.*, Little Chute/Kimberly), the Town of

Grand Chute, the City of Kaukauna, the City of Menasha, and the City of Neenah.

(c) The Cities of De Pere and Waupun and the Village of Combined Locks are, however, entitled to some consideration as secondary comparables.

(d) In applying the *external comparison criterion* to the dispute at hand, there is nothing in the record, to justify an arbitral determination that the elimination of the officers' time off option would be unreasonable.

(e) In applying the *internal comparison criterion*, to the dispute at hand, the holiday work practices of AFSCME represented employees of the Town of Menasha are not entitled to significant weight in the final offer selection process in these proceedings.

(5) Application of the *Overall Compensation* and the *Changes in the Foregoing Circumstances* criteria in Section 111.77(6)(f) & (g) somewhat favors selection of the final offer of the Employer in these proceedings.

(6) The *cost of living criterion* in Section 111.77(6)(e) cannot be accorded significant weight in the final offer selection process in these proceedings.

(7) The *ability to pay criterion* implicitly included in Section 111.77(6)(h) cannot be accorded significant weight in these proceedings.

(8) The *interests and welfare of the public criterion* in Section 111.77(6)(c) cannot be accorded significant weight in these proceedings.

(9) Neither the *lawful authority of the employer* or the *stipulations of the parties* in Section 111.77(6)(a) & (b), nor any other implicit arbitral criteria can appropriately be assigned significant weight in these proceedings.

Based upon a careful consideration of the entire record, including a review of all of the statutory criteria, the undersigned has concluded that the final offer of the Town is the more appropriate of the two final offers, which determination is principally supported by its ability to fully justify *the arbitral criteria governing its proposed modification of the negotiated status quo ante*.

AWARD

Based upon a careful consideration of all of the evidence and arguments and a review of all of the various arbitral criteria provided in Section 111.77(6) of the Wisconsin Statutes, it is the decision of the Impartial Arbitrator that:

(1) The final offer of the Town is the more appropriate of the two final offers before the undersigned.

(2) Accordingly, the final offer of Town of Menasha, hereby incorporated by reference into this Award, is ordered implemented by the parties.

WILLIAM W. PETRIE
Impartial Arbitrator

October 3, 2002