BEFORE THE ARBITRATOR

In the Matter of the Petition of

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

To Initiate Arbitration Between
Said Petitioner and

VILLAGE OF WEST SALEM (POLICE DEPARTMENT)

Case 14
No. 62165 MIA-2523 [#s corrected]
Decision No. 30716-A

Appearances:

Mr. Thomas W. Bahr, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, 9730 West Bluemound Road, Suite 21, Wauwatosa, Wisconsin 53226, on behalf of the Association.
Klos, Flynn, Papenfuss – Chartered, Attorneys at Law, by Mr. Jerome Klos, 800 Lynne Tower Bldg., 318 Main Street, P.O. Box 487, La Crosse, Wisconsin 54602-0487, on behalf of the Employer.

ARBITRATION AWARD

Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter referred to as the Association, and Village of West Salem (Police Department), hereinafter referred to as the Village or Employer, met on several occasions in collective bargaining in an effort to reach an accord on the terms of a new collective bargaining agreement to succeed an agreement, which by its terms was to expire on December 31, 2002. Said agreement covered all non-supervisory sworn law enforcement personnel employed by the Village of West Salem (Police Department) and represented by WPPA/LEER. Failing to reach such an accord, the Association, on February 28, 2003, filed a petition with the Wisconsin Employment Relations Commission (WERC) requesting the latter agency to initiate arbitration,

pursuant to Section 111.77(3) of the Municipal Employment Relations Act, and following an investigation conducted in the matter, the WERC, after receiving the final offers from the parties on October 2. 2003, issued an Order, dated October 9, 2003, wherein it determined that the parties were at an impasse in their bargaining, and wherein the WERC certified that the conditions for the initiation of arbitration had been met, and further, wherein the WERC ordered that the parties proceed to final and binding arbitration to resolve the impasse existing between them. In said regard the WERC submitted a panel of five arbitrators from which the parties were directed to select a single arbitrator. After being advised by the parties of their selection, the WERC, on November 4, 2003, issued an Order appointing the undersigned as the Arbitrator to resolve the impasse between the parties, and to issue a final and binding award, by selecting either of the total final offers proffered by the parties to the WERC during the course of its investigation.

Pursuant to arrangements previously agreed upon, the undersigned conducted a hearing in the matter on January 15, 2004, at West Salem, Wisconsin, during the course of which the parties were afforded the opportunity to present evidence and argument. The hearing was not transcribed. Briefs were filed and exchanged and the record was closed on March 27, 2004, when the Association advised the Arbitrator that it did not intend to file a reply brief.

THE FINAL OFFERS AND STIPULATIONS OF THE PARTIES:

The Employer and Association final offers and Tentative Agreements are attached and identified as attachment "A," "B," and "C," respectively.

BACKGROUND:

The instant police unit is the only organized unit in the Village of West Salem. As of December 31, 2002, there were four full-time police officers with service of approximately 12 years, 10 years, 1½ years and 3 months with the Village.

The parties met several times in an attempt to negotiate a successor collective bargaining agreement to their expiring 2000-2002 agreement. Throughout negotiations and until mediation, the parties, due to budget uncertainties, limited their discussion to a one-year contract. The Association proposed 12 modifications to the contract. The parties reached agreement on 7 of the 12. The main issue was the issue of sick leave. The Association proposed to delete Article XVI – 11.06 which provides that any employee who uses sick leave for any purpose other than illness or injury loses all of his/her remaining accumulated sick leave. In its place, the Association offered language that such an employee abusing sick leave would be subject to discipline up to and including discharge. Although the provision has been in the parties' contract for many years (20 or so) it has never been applied.

The Village's non-represented employees have their conditions of employment identified in the Benefit Information and Employee Operating Rules (Association Exhibit 6). Many of their benefits are identical to the police officers. However, they do not have the same penalty for the misuse of sick leave. Employees who misuse sick leave are subject to progressive discipline as follows: 1st offense - written reprimand; 2nd offense – three (3) days suspension without pay; and 3rd offense – discharge.

POSITION OF THE PARTIES:

Association's Position

It is the Association's position that application of the statutory criteria show that the Association's final offer is more reasonable than the Employer's and therefore should be selected by the Arbitrator.

I. The Lawful Authority of the Employer

This criterion, it is argued, should not affect the Arbitrator's decision because no argument has been raised by the Employer that it does not have the authority to lawfully meet the Association's final offer.

II. Stipulations of the Parties

The Association points out that the parties have reached agreement on a number of issues, except for the issues contained in the parties' final offers.

III. The Interest and Welfare of the Public and the Financial Ability of the Unit of Government to Meet These Costs

The Association asserts that its final offer best serves the citizens of the Village of West Salem by recognizing the need to maintain the morale and health of its police officers and thereby retaining the best and most qualified officers.

With regard to the term of the Agreement, the Association claims that the only rationale the Village provided as to its position of a one-year agreement was that it was only during the course of mediation that the Association made such proposal. Surely, it is argued, the Village had ample time to consider and evaluate the impact of such proposal. Given that the mediation session occurred on July 8, 2003, the Village could easily recognize that, lacking a voluntary agreement, the term of the contract would long be expired before any decision would be made by

an arbitrator. The Village has failed to provide any evidence, testimony or even a glimpse of insight as to their rationale why the Village must reasonably demand that the term of the successor agreement be only for the period of January 1 through December 31, 2003. The Association asserts that the village recognized that a one-year agreement that covers 2003, would most certainly be expired by the time it was resolved in arbitration and, under the Village's proposal would not only cause the parties to immediately begin negotiations again for another agreement, but it would cause the parties to continue to work under an expired Agreement. The Association reasons that both parties deserve a period of time away from the bargaining process to allow for some modicum of labor peace. According to the Association, the Village's proposal does not make such allowance, causes the parties to continue with non-stop negotiations and creates additional unnecessary expense upon the citizens of West Salem and should therefore be deemed unreasonable.

The Association contends that the Village's position regarding the sick leave matter clearly adversely affects the morale of the police officers they employ. To take the position that two separate police officers, who may be found to have violated the same provision of contract and have accrued substantially different amounts of sick leave, should be penalized in a wildly inconsistent manner creates a situation that breeds animosity, discontent, and creates a situation that affects the morale of the officers and would undoubtedly carry over to how those officers perform their work. The Association asserts it has offered up language to correct this inequity which is consistent with how the Village treats all other employees of the Village. The Village, on the other hand, has refused to address the grow inequity.

Clearly, it is argued, the morale of this unit will not be affected in a positive manner in the event the Village's final offer were to be adopted.

With respect to the financial ability of the Employer to meet the fiscal impact of the Association's offer, the Association notes that the Employer has not raised this as a factor so it, therefore, should not be considered by the Arbitrator.

IV. Comparables

External Comparables

There is no agreement by the parties as to the appropriate external comparable group. The Association submits the following as a comparable pool: La Crosse County, the City of La Crosse, Onalaska, Sparta, Tomah, Holmen, Black River Falls, and Campbell.

The Association contends that Association Exhibit 10A clearly establishes external support for the adoption of the Association's proposal of a multi-year collective bargaining agreement.

Also, it is argued, the external comparables support the Association's wage increase proposal. For 2003, while not in dispute between the parties, the average year end increase for the departments averaged 4.05%. For year 2004, only four of the eight departments have settled. Of these four, the average year-end increase is 3.8% (Association Exhibit 10F).

Internal Comparables

The police are the only organized employees in the employ of the Village.

As discussed earlier, the police officers are the only Village employees who are subject to losing all of their accumulated sick leave for a first offense of abuse of sick leave. The remaining Village employees begin with a written warning. It is the Association's position that to apply such a diverse penalty to employees employed by the same employer is fundamentally flawed as it invites dissention among the employees and fails to follow any notion of just cause.

V. Cost of Living

It is the Association's position that the proper measure of what weight the cost of living increases should be given in determining the outcome of an interest arbitration is what other comparable employers and associations have settled for.

The Association contends that its 2004 offer is below the average settlement of comparable departments and is fair and reasonable under the circumstances of the instant matter and should therefore be determined to be more reasonable.

VI. Overall Compensation

The Association relying on its exhibits 10B-10M, contends that the benefit levels of the Village police officers vis-a-vis their law enforcement counterparts compare with various degrees of accomplishment, and that any difference is not so great as to make the Association's final offer unreasonable.

VII. Changes in Circumstances and Other Factors

The Association is not aware of any changes in circumstances since the date of hearing.

With regard to Other Factors, the Association makes the following observations and argument. The Association is aware and recognizes that the issue of forfeiture of accrued sick leave has existed for a long period of time. However, it is argued, the duration of its existence does not overcome the problems associated with it. The Association has attempted to negotiate a change to this provision and was rebuffed by the Village. The Association applies the three pronged test established by Arbitrator Reynolds in Edgerton School District, Dec. No. 25933-A (11/89) to determine if a change in contractual language is appropriate and therefore should be adopted.

1. Does the present contract language give rise to conditions that require change?

The Association asserts that the non-discretionary forfeiture of ALL accrued sick

leave in and of itself is contrary to a Just Cause standard regarding the imposition of discipline to police officers employed by the Village of West Salem. Additionally, the fact that the existing language found in the police officers collective bargaining agreement is so far afield from the manner that the Village would treat all other employees of the Village demonstrates its need for change.

2. Does the proposed language remedy the condition?

   The Association's proposal, it argues, removes the non-discretionary forfeiture of all accrued sick leave and allows the Village to appropriately discipline offenders in a manner consistent with all other employees.

3. Does the proposed language impose an unreasonable burden upon the other party?

   According to the Association, the change sought by the Association does not cause the Village to do anything more or less than it otherwise should do in the first place. Mr. Klos's assertion that, "A penalty of termination without this provision is unattainable", is simply not supported by fact. The question of the manner by which the Village disciplines an employee is not the question. The true issue is the non-discretionary forfeiture of accrued sick leave for a select group of employees. The Village has had, and will continue to have, the ability to seek a level of penalty that is commensurate with the violation.

Based on all of the above, the Association urges the Arbitrator to select its final offer as the more reasonable of the two final offers.

EMPLOYER'S POSITION

The Employer views the issue as whether the union can substantiate an arbitration

decision, on existing facts, to nullify a municipal right negotiated into the contract many years prior supported only by its demand for change.

The Employer notes that Article 11.06 was negotiated in the labor contract by the Village many years ago, and undoubtedly made concessions to attain the language. The termination aspect of 11.06 has never been enforced but its existence has resulted in union self-enforcement of non-violation of sick leave policy. Further, any enforcement would no doubt be grieved and the Village would be held to a high standard of proof of violation.

The Union relies on the Village Employees Operating Rules for non-union employees as a basis of an argument of fairness and/or discrimination. This exhibit, it is argued, is not material herein, nor would it be material if the Village submitted the union contract in the disciplinary non-union matter or the above rules were submitted by the Village in a union arbitration as an example of a less favorable rule.

It is argued that the police officers chose to unionize and are protected by a detailed labor contract negotiated under protection of statutory rules. In addition, as law enforcement personnel, they are further protected by statutory requirements and procedures for all matters of discipline. The union employee cannot also claim additional entitlement to rules and benefits accorded non-union Village employees no more than it can claim benefits of the school union, the railroad union, etc.

With respect to the issue of a multi-year contract, the Employer acknowledges that they are ordinarily desirable, and the Village acceptance of that concept is illustrated by the prior three-year (2000-2002) contract. However, it is the Employer's position that when financial uncertainty is apparent, it is reasonable that the Village negotiate for a one-year contract. The Employer submits it would be arbitrary and unsupportable for an arbitrator to force a two-year contract.

The Union claims 11.06 is discriminatory. The Employer contends otherwise. 11.06 applies equally to all police officers. The fact one officer has more accumulated sick leave does not make it discriminatory no more than the fact one officer has less dependants or has less assets, or has less health insurance.

The Union brief properly states the Arbitrator must give weight to the interests and welfare of the public. Then, the Employer argues, it contorts to the conclusion that a change in the sick leave provision is required to maintain the morale of its police officers. The Village suggests it is more in the public interest to retain the morale of the Village Board and its citizen taxpayers that police officers do not misuse sick leave.

The Employer contends that 11.06 neither causes problems or gives rise to conditions that require change. Employees are not to misuse sick leave. They have not in the past, and, accordingly, 11.06 has never applied. It effectively accomplishes its objective, i.e., to prevent the misuse of sick leave.

The Employer argues that the proposed union language is cost prohibitive. Proof of sick leave violations which would satisfy the Union contract and/or the special police disciplinary status would involve the expense of surveillance (probably a third party) and tangible evidence (pictures or recording of violations). Such expenditures of time and resources netting only one,

then two, then three days or even one-week suspension without pay make enforcement impractical. According to the Employer, the Union substitute lacks the severity, certainty and is cost prohibitive to obtain the contract objective.

For all the reasons above, it is the Employer's position that the union language imposes an unreasonable burden on the municipality and an unreasonable burden on the labor contract objective of preventing misuse of sick leave. Further, any review of prior arbitration decisions on police termination supports the municipality contention that termination is virtually unattainable short of criminal conduct and, if then, generally solved by resignation.

Further, it is argued, the longstanding rule for arbitral change in contract language requires the petitioner therefore to give up a substantial concession in exchange. Here the Village made 7 of 12 contract changes requested by the Union. The Union offered no concessions for the 8th (sick leave) contract change it is now seeking.

The Village submits there exists no factual or legal basis for an arbitrator to rewrite 11.06 of the labor contract. It argues that the provision was negotiated by the Village and is long-standing. It meets the objective of any labor contract to control use of sick leave and, accordingly, should only be modified by the negotiation process between the parties. Any decision to the contrary, it is argued, would be arbitrary.

The Village, accordingly, respectfully requests that the Arbitrator accept the Village's final offer as binding on both parties.

DISCUSSION:

Section 111.77(6), Wis. Stats., directs the Arbitrator to give weight to the following arbitral criteria:

(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 price 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 Arbitrator, in applying the above criteria, must determine which offer is more reasonable based on the evidence presented.

Although relevant, most of the statutory criteria do not impact the outcome of the issues in this case. Neither party raised an issue with criteria (a) and (g). The remaining criteria were discussed and relied upon by one or both of the parties. While each in varying degree impact the disputed items in dispute, the Arbitrator finds the determinative criteria to be internal comparables and (h). "Such other factors. . . which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary settlement. . . ."

The Arbitrator so finds because of the three issues, i.e., term of the contract, second year wage increase, and sick leave language, by far the most important is the latter. It is quite clear that but for the sick leave language issue the parties would have reached a voluntary settlement on a one-year contract with a 3% increase, and agreement on 7 other items. It was only after it was apparent agreement could not be reached on the sick leave issue, did the Association propose a two-year agreement. Clearly, the sick leave issue is the most important to both parties. Given same, and the totality of the parties final offers, the Arbitrator finds that whichever party prevails on the sick leave issue will be determined to have the more reasonable offer.[1]

Therefore, the issue more narrowly defined is whether the Association has sustained its burden to establish the unreasonableness of the current sick leave language and need for its change; that its proposal is a reasonable remedy or solution; and that a sufficient quid pro quo has been offered, if needed.[2]

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1 In this regard, the Association proposal for a multi-year contract is inherently reasonable and its wage increase proposal for the second year is well within the average settlements for 2004. Therefore, those two issues would not render an otherwise reasonable proposal (on the sick leave issue) to be unreasonable.

2 Town of Menasha (Police), Dec. No. 59798, Petrie (10/02); Marinette County (Sheriff's

To begin with the disputed language on its face without question is both harsh and unfair. It is unduly harsh because an employee with a single sick leave abuse could lose 90 days of accumulated sick leave which takes a minimum of 7½ years (if never used) to accumulate. It is simply far too harsh for the offense committed and would not be deemed reasonable under any standard, much less the just cause standard.

It is unfair because two employees committing the exact same offense, a first offense of sick leave abuse, could get two drastically different penalties. One, with only one day accumulated sick leave, would lose one day, and the other with 90 days accumulated sick leave would lose all 90 days. Further there is no internal support for such a provision. The police officers are the only village employees so penalized.

It is because of the above that the Arbitrator finds the provision, on its merits, simply unreasonable; not because sick leave abuse should not be treated seriously, but because the penalty, likely in most cases, far exceeds the seriousness of the offense. The just cause standard requires that the penalty must fit the offense.

However, in this case, as in most cases, there is another side to the issue. For one, as bad as the provision is, the Employer points out that as far as anyone can remember (in its 20 or so years of its existence) the process has never been used. Thus, the perceived need for a change, according to the Employer, is nonexistent. The Employer argues it has served as a deterrent.

Also, and importantly, over the years principles have evolved in interest arbitration that serve as a guide in deciding issues. The parties rely on theses principles to provide

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Deputies), Dec. No. 30176, Malamud (6/02); Milwaukee Board of School Directors (Accountants/Bookkeepers), Dec. No. 30136, Grenig (3/02); and Sheboygan County (Social Workers), Dec. No. 30190-A, Schiavoni (1/02).

predictability and stability to their relationship and negotiations. One such principle was discussed by the undersigned in Washington County (Department of Social Services), Dec. No. 29363-A (12/98), p. 26, as follows:

> The Arbitrator in the instant case, like so many before him, is firmly convinced that in cases where one party is seeking to make significant changes in existing language or benefits (status quo), the interests of the parties and the public is best served by imposing on the moving party the burden of establishing (1) a compelling need for the change, (2) that its proposal reasonably addresses the need for the change, and (3) that a sufficient quid pro quo has been offered. In each case the sufficiency and weight to be given to each element must be balanced.

Here, the element most in issue is the quid pro quo. In the Arbitrator's opinion, the Association, for reasons discussed earlier, has established a need for a change and its proposal reasonably addresses the need, but it has not offered a quid pro quo for its proposed change of the status quo.

The undersigned discussed the question of what constitutes a sufficient quid pro quo in Oconto Unified School District, Dec. No. 30295-A (10/02), pp. 26-27, as follows:

> ... There is no set answer as to what constitutes a sufficient quid pro quo. It is, in the opinion of the Arbitrator, directly related, inversely, to the need for the change. Thus, the quid pro quo need not be of equivalent value or generate an equivalent cost savings as the change sought. Generally, greater the need, lesser the quid pro quo.

In the final analysis this case comes down to whether the need for the change proposed is so great that a quid pro quo is not needed. Said decision must be made in context of the entire situation.

As discussed earlier, the need for a change has been established because the existing sick

leave provision is too harsh and unfair. There is no internal comparable to support the provision in that no other Village employee is subject to the same provision. Also, there is no support for the provision in the external comparables. However, the provision has never been applied and therefore the need to make the change immediately is not urgent. The Employer's one-year final offer is for calendar year 2003. It provides for the same wage increase as proposed by the Association. The only issue is the sick leave language issue, but the Association will be able to immediately attempt to negotiate it away because the Employer's proposed final offer by its terms has already expired.

Given the specific facts and circumstances of this case, the Arbitrator finds that the principle applied in cases involving a change in status quo and the requirement of a sufficient quid pro quo outweighs the Association's need to have the change made without a quid pro quo.[3]

Conclusion

Having considered the statutory criteria, the evidence and arguments presented by the parties, the Arbitrator, based on the above and foregoing, concludes that the offer of the Employer should be favored over the offer of the Association, and in that regard the Arbitrator makes and issues the following

AWARD

The Employer's offer is to be incorporated in the 2003 collective bargaining agreement between the parties, along with those provisions agreed upon during their negotiations (Attachment C), as well as along with those provisions in their expired agreement which they

3 The sufficiency of the quid pro quo must be left to the parties to determine in negotiations.

agreed were to remain unchanged.

Dated at Madison, Wisconsin, this 8th day of June, 2004.

Herman Torosian, Arbitrator