ARBITRATION OPINION AND AWARD

In the Matter of Arbitration	)	
Between	)	
MILWAUKEE COUNTY, WISCONSIN (Sheriff's Department)	)	WERC Case 612 No. 66857 MIA-2786 Decision No. 32154-A
And	)	
MILWAUKEE COUNTY DEPUTY SHERIFFS' ASSOCIATION	)	

Impartial Arbitrator

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

Hearing Held

November 30, 2007
Milwaukee, Wisconsin

Appearances

For the Employer	DAVIS & KUELTHAU, S.C. By Mark F. Vetter Mark L. Olson Attorneys At Law 300 North Corporate Drive, Suite 150 Brookfield, WI 53045
For the Association	LABOR ASSOCIATION OF WISCONSIN, INC. By Patrick J. Coraggio Benjamin M. Barth Labor Consultants N116 W16033 Main Street Germantown, WI 53022

BACKGROUND OF THE CASE

This is a statutory interest arbitration proceeding between the Milwaukee County (Sheriff's Department) and the Milwaukee County Deputy Sheriffs' Association, with the matter in dispute the terms of a renewal labor agreement between the parties encompassing January 1, 2007 through December 31, 2008.

After the parties had failed to reach full agreement on the terms of the renewal labor agreement, the Association on March 27, 2007, filed a petition with the WERC seeking final and binding arbitration of their impasse. After investigation by a member of its staff, the Commission, on July 9, 2007, issued findings of fact, conclusions of law, certification of the results of investigation and an order requiring arbitration, and, following selection by the parties, it issued an order appointing the undersigned to hear and decide the matter on August 8, 2007.

A hearing took place before the undersigned in Milwaukee, Wisconsin on November 30, 2007, at which time both parties received full opportunities to present substantial evidence and argument in support of their respective positions, and each reserved the right to close with the submission of a post-hearing brief and a reply brief. Timely and very comprehensive post-hearing briefs were exchanged between the parties and submitted to the undersigned, and the hearing was closed on May 7, 2007.[1]

The Final Offers of the Parties

While there is a significant measure of overlap in the certified final offers of the parties, only three items remain in dispute: the *wage increases* to be applicable during the term of the renewal agreement; Association proposed *changes to the contractual grievance procedure*; and Association proposed *addition to the sick leave language* in the agreement.

(1) In connection with their proposed modification of **Section 3.01 WAGES**, the parties disagree as follows.

(a) The Employer proposes four (4) wage increases of one percent (1%) for bargaining unit employees, effective November 4, 2007, April 6, 2008, June 29, 2008 and October 5, 2008; and

[1] The County's initial and reply briefs totalled 110 pages, while those of the Association totalled 67 pages.

it additionally proposes that "A two-hundred fifty ($250.00) lump sum payment shall be made to each employee who has an assigned work week of twenty (20) or more hours per week, and who is on the payroll as of the first pay period following the date of the arbitration award."

(b) The Association proposes four (4) wage increases of one and one-half percent (1½%) for bargaining unit employees, effective January 1, 2007, July 1, 2007, January 1, 2008 and July 1, 2008.

(2) In connection with **Section 3.16 SICK LEAVE**, the parties disagree as follows.

(a) The Association proposes the addition of a new sub-paragraph to provide as follows:

(3) Sick Leave/Absenteeism. The following actions will be taken with any employee who is absent within a one year time frame (year is defined as a calendar year - January through December):

1st through 3rd absence: Absences recorded by a supervisor.
4th Absence: Noted on Employee Activity Documentation record.
5th and Subsequent Absence: Refer Documentation to Office of Professional Standards for appropriate disposition. Based on the disposition, appropriate disciplinary action if necessary, will be decided by the Sheriff and may require a doctor's excuse.

Time approved under the Family and Medical Leave Law or any excused absence will not be considered for disciplinary purposes nor will time off be taken into account for job evaluation purposes or salary increment decisions.

Employees shall be allowed to use 3 hours of excused time for scheduled doctor or dental appointments for members of the employees immediate family as defined by Wis. Stats 103.10. Employees are to notify supervisor in advance of the date of the appointment. Appointments, when possible, are to be scheduled at the beginning or near the end of the employee's shift so as to minimize disruption during the workday. A copy of the appointment notice is to be attached to the employee's time sheet."

(b) The Employer has neither proposed in its final offer nor agreed upon any change(s) in or addition(s) to the preexisting contractual sick leave language.

(3) In connection with **Section 5.01 - Grievance Procedure**, the parties disagree as follows.

(a) The Association proposes additions and/or deletions to the following sub-paragraphs, as follows:

"(1) APPLICATION: The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits, and position classifications established by ordinances and rules which are matters processed under other existing procedures. **Any disputes that arise between the Association and the County including employee grievances shall be resolved under this section**. Only matters involving the interpretation, application or enforcement of rules, regulations or the

terms of this Agreement shall constitute a grievance.[2]

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(3) TIME OF HANDLING: Whenever practical, grievances will be handled during the regularly scheduled working hours of the parties involved. **The Association and the County shall mutually agree to a time and place for hearing the grievance.**[3]

* * * * *

(4) TIME LIMITATIONS: If it is impossible to comply with the time limits specified in **this** procedure **for any reason**, these limits may be extended by mutual consent in writing. If any extension is not agreed upon by the parties within the time limits provided or a reply to the grievance is not received within time limits provided herein, the grievance may be appealed directly to the next step of the procedure. **'Working days' shall be defined as Monday through Friday excluding Saturdays, Sundays and holidays set forth in Section 3.15(3).**[4]

(5) SETTLEMENT OF GRIEVANCES: Any grievance shall be considered settled at the completion of any step in the procedure if **the Association and the County** are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next."[5]

(b) The Employer has neither proposed in its final offer nor agreed upon any change(s) in or addition(s) to the preexisting contractual grievance procedure language.

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

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[2] The sentence in **bold type** would be an addition to the previous contract language.

[3] The sentence in **bold type** would replace a sentence in the previous agreement indicating as follows: "The County agrees to provide at least twenty-four (24) hour written notice of the time and place of the hearing to the grievant and the Association."

[4] The *first two referenced words* in **bold type** replace previous contract language, with the word "**this**" replacing the word "*the*," and the words "**for any reason**" replacing prior language indicating "*...because of work schedules, illness, vacations, etc.,*". *The final sentence* in **bold type** would be an addition to the previous contract language.

[5] The reference in bold type to "**the Association and the County**" would replace previous contract language indicating "*if all parties concerned*".

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 ASSOCIATION

In support of the contention that its final offer is the more appropriate of the two offers before the undersigned in these proceedings, the Association emphasized the following preliminary considerations and arguments.

(1) It offered the following observations and arguments relative to the application of Section 111.77(6).

(a) In connection with Section 111.77(6)(a), it urged that it is within *the lawful authority* of Milwaukee County to accept and abide by the terms of the Association's final offer.

(b) In connection with Section 111.77(6)(b), it urged that the parties had not reached any *tentative agreements* during the course of their negotiations.

(i) That various areas of agreement exist within the final offers, which have been highlighted by the Association.

(ii) That minor differences in terminology within the parties final offers relating to *Dues Check Off* are immaterial, and the parties are in agreement on this item.

(c) In connection with Section 111.70(6)(c), it urged that the Employer has confirmed that it has the requisite *ability to pay;* and, that the *interests and welfare of the public* are best served by arbitral selection of the final offer of the Association.

(d) In connection with Section 111.70(6)(d), it urged that the *wage increases received within other comparable police*

departments should be given substantial weight.

(e) In connection with Section 111.70(6)(e), it urged that the *wage offer of the Association is consistent with changes in cost of living*, while the Employer's wage offer barely registers on a calculator.

(f) In connection with Section 111.70(6)(f), it urged that the *level of overall compensation of those in the bargaining unit is inferior to that enjoyed by other County employees*.

(g) In connection with Section 111.70(6)(g), it urged that the *changes in circumstances during the pendency of these proceedings* criterion is not an issue.

(h) In connection with Section 111.70(6)(h), it urged that the *numerous other factors normally taken into consideration* criterion is not an issue.

(2) It submitted that the following principal arguments support arbitral selection of the final offer of the Association in this matter.

(3) That the County's reliance upon *internal settlements* should be given no weight by the Arbitrator in these proceedings.

(a) Arbitrators are loath to award settlements greater than those voluntarily agreed to by other bargaining units within the same municipality, and this is likely to be the controlling argument in the Employer's brief.

(ii) The County has relied upon the fact that the other County represented employees have settled for the same wage offer, and has submitted this as its final offer in this case.

(b) The County did not engage in collective bargaining with the Deputies.

(i) It agreed to provide a short term agreement of no layoffs or privatization of employee jobs to Council 48 AFSCME in exchange for a meager wage offer, and relied upon a "Me Too" clause with AFSCME and in subsequent meetings with all other unions.

(ii) The Deputies were told repeatedly that it was the Council 48 settlement or go to arbitration.[6]

- The County never acknowledged that the Deputies were losing ground with the comparable law enforcement agencies, merely went through the motions of negotiating, but knew all along that it would not exceed the "Me Too" clause with AFSCME.

- The County's action flies in the face of the legislative intent, and seriously impedes the give and take of collective bargaining.

(iii) It urges that different bargaining units enjoy different levels of power, have different sets of

[6] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 25-26.

concerns, and should be allowed to determine what is and what is not worth fighting for, and submits that this principle has been recognized by various arbitrators.

(iv) It urges that the County's position that it would not deviate from the AFSCME wage settlements amounted to bargaining in bad faith.

(v) The biggest benefit that all employees enjoy is their pension, but this benefit is not the same throughout the County, in that all other County employees enjoy more lucrative pension benefits than the Association. For the County to insist on wage uniformity in the face of different pension benefits is inappropriate.

(4) That the selection of *comparable communities* by the Association in this proceeding, is supported by prior arbitral decisions.

(a) That the Association uses the nineteen local police departments within Milwaukee County as *primary comparables*, and the four contiguous counties as *secondary comparables*.

(b) The above primary and secondary and internal sets of comparables were established by Arbitrator Frank Zeidler in 1975 and Arbitrator George Fleischli in 1983.[7]

(c) The use, retention and importance of established comparables has been recognized by Wisconsin arbitrators.

(d) The above comparables have been the mainstream of comparisons used by the parties in thirty plus years of bargaining.[8]

(e) At the hearing the Employer presented exhibits indicating disagreement with the parties' well-established past comparables. It, however, failed to provide evidence regarding the comparables, which evidence is important when attempting to change comparables that have been mutually agreed upon and used in the past.

On the above described bases the Association urges that its proposed comparables are the most viable and that they should be used in determining which of the final offers is more reasonable.

(5) The Association's *wage offer has substantial support among the external comparables*.

(a) The Association proposes two 1.5% increase for each of the two years in the renewal agreement, which is amply supported by the above referenced primary and secondary comparables.

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[7] Referring to the contents of Association Exhibits 1300 and 1301.

[8] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 48-52.

(b) The Association's offer also maintains the wage rankings and differentials, which would be significantly negatively affected under the County's offer.[9]

(6) The Association is well aware of the proposition that the proponent of change bears the burden of proof.

(a) The grievance procedure is in need of change to expedite the resolution of grievances, and the Association proposals were the direct result of a County study reviewing the way grievances were handled within the County.[10]

(i) The first proposed change to the grievance procedure is the ability of the Association to be a grievant. The record establishes the need for this ability, including 107 pending grievances being processed, many of which pertain to the same issue.[11]

(ii) The County study of grievance procedures concluded that the procedure was dysfunctional and needed major changes.

- It proposed twelve major changes in the following subject matter areas: Accountability for Proactive, Consistent Labor Contract Management; Efficiency of the Grievance Process; Effectiveness of the Grievance Procedure.

- It published Labor Relations Audit Responses to the various subject matter areas, indicating concurrence, disagreement, or agreement in part.[12]

- Deputy Gedemer testified that since the study had been released, the County Labor Relations Department had done nothing to improve grievance conditions.[13]

(iii) When the Association was informed that the County would not agree that an Arbitration Award regarding sick leave would not have any effect on the remaining twelve similar grievances, it confirmed that there was a definite need for its proposed changes.

(iv) The second proposed change in the grievance procedure is to schedule meetings during working hours; it is specifically requesting that the parties mutually agree on a date and time to meet to discuss a pending

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[9] Referring the contents of Association Exhibit 611.

[10] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 54-56, and to the contents of Association Exhibit 3.

[11] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 57-58 and 67.

[12] Referring to the contents of Association Exhibit 3.

[13] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 54 and 57-61.

grievance.

- Currently, the County is only required to provide a twenty-four hour notice to the Association prior to the meeting, which provides an unreasonable time frame for the Association to be available.[14]

- The proposed change allows the parties to schedule a meeting that is convenient for all parties.

(v) The third proposed change is to modify the reason for the parties to extend the time frames of the grievance procedure *for any reason*.

- Currently such extensions are allowed only for work schedules, illness or vacations, etc.

- The change will help to clear any misunderstanding as to why either party would request an extension.

- Under the same section, the Association is proposing to define the time frames of the procedure as Monday - Friday, which would be consistent with the office hours of the County's Department of Labor Relations, the Department of Administrative Services, and the regular business hours of the Association.

- The proposed change would provide a more compatible provision for both sides.[15]

(vi) The fourth proposed change is to change the way grievances are settled.

- The old contract requires that *all parties* are satisfied with a settlement. The bargaining agreement is between the County and the Association, the change would expedite and simplify the process.[16]

- There is a definite need for the Association proposed changes in the grievance procedure, and it is time for the County to get off the bench and get in the game in this area.

(b) The history of the sick leave/absenteeism policy mandates that it be included in the collective bargaining agreement.

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[14] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 68-70.

[15] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 70-71.

[16] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, page 71-72.

(i) The proposal of the Association is to add Section 3 to Article 3.16, to confirm the collateral agreement which had been reached between the Association and the County and later unilaterally modified by the Sheriff without negotiations.[17]

(ii) Because of the number of unilateral changes, the Association reached a collateral agreement with the County on January 4, 2006, signed by Association President Felber and former Labor Relations Director Troy Hamblin.[18]

(iii) After the above agreement was signed, the Sheriff once again unilaterally changed the policy on June 14, 2006.[19]

(iv) The Association filed a grievance which ultimately resulted in a decision from Arbitrator Coleen Burns of the WERC, determined that the Sheriff did not have the right to unilaterally change the parties' agreement.[20]

(v) In addition to the grievances leading to the arbitration, the Association filed a prohibited practice complaint with the WERC which is currently pending.

(vi) The Association proposed addition to the contract of the Sick Leave/Absenteeism Policy, is to prevent the Sheriff and the County from making unilateral changes to a mandatory item of bargaining without following the mandates of labor law.

(vii) The Association believes it has proven that there is a compelling need for a change to the current contract and that the Association's final offer answers that need.

(c) The Association has provided a sufficient *quid pro quo* in support of its position, in the form of proposing to take less than adequate, split wage increases, providing less money than the raises afforded in comparable communities.[21]

(7) That the *County has incorrectly costed the Association's final offer*.

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[17] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 72-74.

[18] Referring to pages 73-78 of the current collective bargaining agreement.

[19] Referring to the *testimony of Deputy Gedemer* at Hearing Transcript, pages 75-76, and the contents of Association Exhibit 6.

[20] Referring to the contents of Association Exhibit #7.

[21] Referring to the contents of Association Exhibit 611.

(a) The County blundered when it added imaginary costs to the Association's final offer: it incorrectly added *Weekend Differential* and *Shift Differential* in the amount of approximately $350,000, in costing the Association's offer; it incorrectly determined the contributions to the pension system for the members of the Association, having used an 8.9% rather than the actual 8.0% requirement.[22]

(b) Due to arrangements for correcting exhibits during the two week period following the hearing and the fact that the County is not claiming inability to pay, the Association indicates no intention to address this further.

On the basis of all of the above, the Association urges as follows: *first*, that the County has offered a below average wage increase and has tried to hide behind a "Me Too" clause; *second*, it has refused to follow the study of the County Audit Committee, and to correct a dysfunctional grievance procedure; and, *third*, it has ignored its duty to bargain and several times unilaterally changed the sick leave/absenteeism policy, thus breaking both a collateral agreement of the parties and labor laws which require parties to negotiate changes in mandatory items of bargaining.

In summary it urges the following arguments in support its position in this matter: (1) It is within the lawful authority of Milwaukee County to accept and abide by the terms of the Association's final offer; (2) The County has affirmed it can afford the Association's final offer and thus the interest and the welfare of the public will not be adversely affected; (3) The wage increases received within other comparable police departments should be given substantial weight; (4) The wage offer of the Association is consistent with the cost of living, while the Employer's offer barely registers on a computer; (5) The overall compensation of the Association members is inferior to other County employees; (6) The County's reliance on internal settlements based on a "Me Too" clause should be given no weight by the Arbitrator; (7) The Comparable communities selected by the Association are supported by prior arbitration decisions; (8) The Association's wage offer has substantial external support; (9) As the proponent of change, the Association has satisfied the criteria to add new language to the collective bargaining agreement.

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[22] Referring to the *testimony of Mr. Manske* at Hearing Transcript, pages 186, 187-189 and 190.

In its reply brief the Association challenged the following arguments/ positions taken by the County: (1) The Employer has put forth numerous assertions which are unsupported by evidence; (2) The County never intended to bargain in good faith after it had settled with Council 48; (3) The comparables put forth by the Employer were never communicated to the Association and should be disregarded; (4) The County's argument of an internal settlement pattern is an example of "cherry picking".

Based upon all of the above, it urges that the Associations final offer is the more reasonable of the two offers, and it requests that it be accepted by the Arbitrator.

THE POSITION OF THE COUNTY

In support of the contention that its final offer is the more appropriate of the two offers before the undersigned in these proceedings, the County emphasized the following principal considerations and arguments.

(1) A synopsis of the County's case, which is elaborated upon in their brief appears below.

(a) Three items remain in dispute between the parties in this proceeding: *first*, their respective wage increase proposals; *second*, the Association proposed changes to the grievance procedure; and, *third*, the Association proposed new sick leave language.

(b) The County supplemented its *wage increase offer* with a supplemental bonus of $250 per person for all Deputy Sheriffs with an assigned work week of twenty (20) or more hours.

(i) Its wage increase proposal is consistent with settlements reached in other bargaining units and with increases provided for non-represented employees.

(ii) The negotiated settlements with identical wage increases consisted of 85.1% of the County's workforce.

(iii) Apart from the Deputy Sheriffs, only 6.4% of the remaining employees have not settled.

(c) The *Union's wage proposal* would increase the Deputy Sheriffs' percentage wage increase to an amount exceeding any other County unit: its proposal is not supported by any other comparable internal or external settlements; the County is unwilling to create the labor discord which would result if it agreed to the Union's unsupported offer, thereby disregarding the County settlement pattern for 2007-2008.

(d) The *Union's grievance procedure proposal* is totally out of line and inconsistent with the language contained in all of the other internal collective bargaining agreements.

(i) The County proposes to maintain the status quo in this area.
(ii) The Union has also failed to offer any *quid pro quo* in support of its proposed language concessions.

(e) The Union's proposed new *sick leave language* contains neither reason nor an offer of any *quid pro quo*, and is also rejected by the County.

(f) The County's position in this case is supported internally, externally, under statutory criteria, and by case law; the Union's position is not supported by any of these relevant arbitral factors. The County's final offer is thus the most reasonable and supportable and it should, therefore, be selected by the Arbitrator.

(2) Internal comparables support the County's final offer.

(a) It urged that *wage settlements* identical to its *final wage offer* in this matter had been reached with five other bargaining units in the County.[23] It submitted that the unreasonableness of the Union's final wage offer is apparent from consideration of *the County's ongoing fiscal crisis*, *the interests and welfare of the public*, *the internal morale of all County employees*, *the external comparables*, *the remaining statutory criteria*, and the *case law* governing this type of dispute.

(b) It urges that the Union's proposal for major revisions to the *grievance procedure* are inappropriate: that arbitral precedent and principles of collective bargaining dictate that language changes of this magnitude should not be the product of an interest arbitration award; and that such changes should be resolved by the parties at the bargaining table.

(i) In the above connection it is seeking to expand the definition of a grievance, to gain the right to file Association grievances, to gain some control over the time and place for grievances to be heard, to modify the contractual time limitations for filing grievances, and to provide that grievances will be settled after any step of the grievance procedure if *the Association and the County* are mutually satisfied, rather than conditioning such settlement upon *mutual satisfaction of all parties concerned*.

(ii) It urges that the Association proposed changes are inconsistent with the contractual grievance procedures in the other County bargaining units, which have been used successfully.[24]

(iii) The Association is attempting to achieve more control and leverage over the grievance process than it has ever possessed, more than any other union in the County has possessed, and more control and leverage than the County would ever have agreed to at the bargaining table.

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[23] Referring to the contents of County Exhibits 2, 3 and 7-B.

[24] Referring to the contents of County Exhibits 2, 3 and 7-D.

(c) It urged that the Association is seeking to add an entire new section to *the parties' sick leave provision*. Two major factors, however, in rejecting the proposal: *first*, it represents an attempt to be in control of all administrative decisions regarding sick leave and absenteeism; and, *second*, it attempts to by-pass the entire negotiations process.

(i) Such far reaching language changes should be negotiated, and should not be established through arbitration awards.

(ii) In the absence of demonstrated need for such changes, they should not be arbitrally imposed, and no such need has been established.

(iii) While the Association urges that its proposal has been in effect since 2002, the evidence does not bear this out. To the contrary, the County's position is to maintain the status quo as set forth in Sick Leave/Absenteeism Directive No. 01-04 dated January 5, 2004.[25]

(iv) The July 1, 2006 policy was reasonably based, and Inspector Carr followed the precise policy outlined in the January 4, 2006, collateral agreement.[26]

(v) Following implementation of the July 1, 2006 policy, a grievance was filed and proceeded to arbitration, but neither the underlying grievance nor the arbitral decision addressed the reasonableness of the policy; accordingly, it must be presumed that this policy was inherently reasonable, that it remained in full force and effect, and that it was the status quo at the expiration of the parties' 2005-2006 agreement.

- If for some reason the July 1, 2006 directive was determined not to be the *status quo*, the Sheriff's directive on January 5, 2004, remained the status quo, but it specifically provided therein that it "shall sunset on December 31, 2006."[27]

- Pursuant to the above, the status quo on the first day of the 2007-2008 agreement, was either the July 1, 2006 Sick Leave/Absenteeism policy or the January 5, 2004 policy.

(vi) Since the Association's final offer sick leave proposal is not the status quo, it assumes the burden of proving *why a change is necessary* and *what it is offering as a quid pro quo* for the change. The record does not establish that it has met its burden on either of these requirements.

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[25] Principally referring to the contents of County Exhibits 24, 24-A, 24-B, 24-D1, 24-E, 27 and 28.

[26] Referring to the *testimony of Inspector Carr* at Hearing Transcript, pages 203 and 210, and the contents of County Exhibit 24-B.

[27] Referring to the contents of County Exhibit 24-B.

(vii) In the unlikely event that the June 1, 2002 Sick leave/Absenteeism policy is somehow determined to be the status quo, the Association's final offer goes far beyond that policy in two significant respects: *first*, it expands the scope of the use of excused time for scheduled doctor and dental appointments; and, *second*, it provides that scheduling of appointments at the beginning and the end of the employees shift, to minimize disruption during the workday, would only apply "when possible."

(3) That considerable arbitral authority mandates the maintenance of internal consistency in settlement terms.

(a) Arbitral case law repeatedly emphasizes the importance of consistent internal settlement terms.

(i) The wage offer proposed by the County has been accepted by 85% of its employees, including five of eight bargaining units in the County.

(ii) The Union has presented no evidence which would justify a richer settlement than that achieved by 85% percent of their fellow County employees.

(b) The County's final offer serves the interest of labor peace, the importance of which has been emphasized in numerous public sector arbitration decisions.

(i) In a county the size of Milwaukee County, it is very important to foster equity among all its employees.

(ii) The County's goal has been not only to reach a fair bargain with the Deputy Sheriffs, but to achieve fairness for all Milwaukee County employees.

(iii) The potential fallout from breaking the established settlement pattern would create significant inequities and morale issues within the five bargaining units which have already settled.

(iv) The public interest, labor peace, employee morale and job satisfaction considerations require maintenance of the internal settlement patterns.

(v) Not only is the County's offer the more reasonable of the two offers, but the Association should not be rewarded with an arbitration award solely on the basis that it has delayed and held off settling with the County in an attempt to extract a more lucrative settlement than the other five bargaining units which have settled.

(c) Arbitration is not a substitute for collective bargaining.

(i) Arbitral precedent establishes that if an internal pattern of settlement is to be considered irrelevant, any alternative settlement must be voluntarily negotiated.

(ii) The Union is attempting to obtain larger wage increases, numerous grievance language changes and an entire new section governing the handling of sick leave.

(iii) It is attempting to achieve through arbitration what it was unable to gain through collective bargaining, and attempting to do so without even suggesting a concession or a quid pro quo.

(iv) The Union should not be rewarded for refusing a voluntary settlement, particularly in view of the fact that five other County bargaining units have voluntarily settled for the same package offered by the County.

(d) Internal settlements are the most compelling and important comparability factor under the present circumstances.

(i) Here the internal County comparables fully and comprehensively support the County's final offer and, as such, the County's offer should be selected.

(ii) The County's offer is supported by the governing statutes, by internal settlements within the majority of County bargaining units, and by considerable arbitral authority.

(iii) For various reasons arbitrators quite generally avoid breaking established settlement patterns.

(e) In at attempt to sway the Arbitrator, the Association has offered exhibits and testimony intended to show that the Deputy Sheriffs' do not receive the same benefits as other County employees.

(i) The Association offered evidence setting forth names of individuals in other internal bargaining units who had received back drop pension benefits; the County does not dispute that the back drop pension benefit had been available to other employees, but this is being discontinued as part of the recent settlement reached with the County's other units.

(ii) The above exhibit is not complete and is not relevant in light of the overall history of the back drop pension benefit.

(iii) The back drop benefit proved to be an unaffordable benefit from the County's perspective, and has been discontinued in all other bargaining units which had the benefit.

(iv) The Deputy Sheriffs' lack of participation in the back drop benefit is shown in Employer Exhibit 15; they chose to relinquish any back drop pension benefit in lieu of a significant wage increase totalling 5% compared to other bargaining units' wage increases of 2.0%. Accordingly, they cannot now claim they had been short changed because they hadn't received the back drop benefit.

(4) The financial condition of Milwaukee County is a major consideration in these proceedings.

(a) The cost of the parties' final offers must be considered.

(b) Milwaukee County's financial crisis needs to be considered as a relevant factor in this arbitration.

(c) Future County liabilities must be considered in assessing

the parties' final offers.

(d) Sky rocketing health insurance costs must be considered as part of the County's fiscal planning.

(e) Case Law has taken financial considerations into account in interest arbitrations, specifically noting the need for fiscal restraint.

(f) A quid pro quo from the Association is required to obtain changes to the status quo.

(5) Consideration of external comparables is a major factor in these proceedings.

(a) The Company proposed external comparable pool is appropriate.

(i) The Association proposed comparable pool is flawed.

(ii) The County proposed pool is the most appropriate.

(b) The Milwaukee County Deputy Sheriffs will receive a wage and benefit package which is unparalleled among the comparables.

(i) Their wages are among the highest in both the contiguous counties and in the largest counties in Wisconsin.

(ii) The health insurance premium contributions among the comparables are generally higher than those required by Milwaukee County.

(iii) Milwaukee County provides comparably generous or competitive benefits in various remaining areas including the following: dental insurance; days of vacation; holidays; payment for responding to court subpoenas; personal days; sick leave; standby pay; compensatory time; funeral leaves; uniform allowances; life insurance; jury duty; retiree health insurance, educational incentives, and call-in pay.

(c) Analysis of fringe benefits available to the Milwaukee County Deputy Sheriffs is compelling evidence that their entire wage and benefit packages is superlative to that offered by any of the comparable counties, the City of Milwaukee, or the State of Wisconsin. The comparable fringe benefit date explicitly shows that the County's wage offer is the more reasonable of the final offers.

In its reply brief the County challenged the following arguments/ positions taken by the Association: (1) The County has not affirmed that it can afford the Association's final offer; (2) The Association's interpretation of Section 111.77(6)(d) of the Wisconsin Statutes is not supported by the weight of arbitral precedent; (3) The consumer price index should not be a controlling factor in this dispute; (4) The overall compensation of the Association Members is not inferior to other County

employees; (5) The "Me-Too" clause contained in the District Council 48 settlement is relevant in this proceeding; (6) The internal settlement pattern is a key consideration in this dispute; (7) The County has bargained in good faith with the Association; (8) The County's external comparables are more reasonable than those used by the Association; (9) The County's wage offer is supported by the external comparables; (10) The benefit package enjoyed by Deputy Sheriffs is supportive of the County's final offer; (11) A quid pro quo must be proffered to obtain a change in the status quo; (12) The Association's sick leave proposal disrupts the status quo; (13) The County's costing of the final offers is not flawed.

In summary and conclusion, the County urges that its final offer should be selected, based upon the entire record, the briefs and the supporting case law. It urges that its final offer is the more reasonable, considering all of the internal and external comparisons, the dire financial condition of Milwaukee County, the best interest of the public, and the best interest of maintaining internal labor peace, stability and morale.

FINDINGS AND CONCLUSIONS

The outcome of this proceeding depends upon arbitral application of the evidence and the arguments of the parties to the arbitral criteria contained in Section 111.77(6) of the Wisconsin Statutes and, on the basis of this application, to select one of the two final offers. In carrying out this process the undersigned first notes that no significant questions have been raised by the parties relative to the *lawful authority of the employer*, the *stipulations of the parties*, or to the negative *ability to pay* criteria; and, in arguing their respective positions, the parties have principally emphasized the *interests and welfare of the public*, including the *impaired ability to pay* of the County, *external and internal* comparisons, the *cost of living*, the *overall compensation* received by those in the bargaining unit, and *other statutory criteria* arising under Section 111.77(6)(h).

Prior to specifically applying the evidence and the arguments of the parties to the statutory criteria, reaching a decision and rendering an award, the undersigned will address the following preliminary considerations: ***first***, the *composition of and the weight to be placed upon the primary*

intraindustry comparables; and, ***second***, the *application of the quid pro quo requirements in the case at hand*.

The Composition of and the Normal Weight Placed Upon the Primary Intraindustry Comparables

As emphasized by the undersigned in many prior proceedings, Wisconsin interest arbitrators operate as extensions of the contract negotiations process and their primary goal is normally to attempt, to the extent possible, to put the parties into the same position they might have reached at the bargaining table. In this connection, it is widely recognized by arbitrators, advocates and scholars that *the comparison criteria* are normally the most important and the most persuasive of the various arbitral criteria, and that the most persuasive of these is normally the so-called *intraindustry comparison criterion*.[28] These principles are well described in the following excerpts from the venerable but still highly respected and authoritative book authored by the late Irving Berstein.

> "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.
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> * * * * *

[28] While the *intraindustry comparison* terminology obviously derives from its long use in the private sector, its application in the public sector normally refers to comparison with similar units of employees employed by comparable governmental units.

"The last of the factors related to the worker is wage history. 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. By the same token, if they have not had a wage relationship over time, he is likely to refuse to create one."[29]

The above principles are also briefly addressed, as follows, in the authoritative book originally authored by Elkouri and Elkouri:

"**A. Prevailing Practice**

Without question, the most extensively used standard in interest arbitration is 'prevailing practice.' In utilizing this standard, arbitrators, in effect, require the disputants indirectly to adopt the end results of the successful collective bargaining or arbitration proceedings of other similarly situated parties. ...

* * * * *

In many cases, strong reason exists for using the prevailing practice of the same class of employers within the locality or area for the comparison. Indeed, 'precedent' may be accorded arbitral stare decisis treatment and found to be the determinative factor in the selection of an appropriate comparability group. In an arbitration regarding a successor agreement between a police officers' association and the City of Waterville, each party presented a list of municipalities deemed comparable. The cities proposed by the association all had industrial tax revenue bases, while Waterville was a 'bedroom community.' The Association's list had, however, been utilized in a prior wage award. In the successor award, the arbitrator noted that the same arguments as to which list was the more appropriate had previously been made and considered. Since the budgets of the association-sponsored cities had remained in line with the Budget of Waterville and there had been no change in any material factor, there was no reason to deviate from precedent."[30]

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[29] See Bernstein, Irving, The Arbitration of Wages, University of California Press (Berkeley and Los Angeles), 1954, pages 54, 56, and 66. (footnotes omitted)

[30] See Ruben, Allan Miles, Editor in Chief, *Elkouri & Elkouri* HOW ARBITRATION WORKS, Bureau of National Affairs, Sixth Edition - 2003, pages 1407, 1408-1409. (Citing therein the *decision of Arbitrator Frederic R. Dichter* in City of Waterville, 107 LA 1194 (1996); and other footnotes omitted.)

In applying the above described principles in the case at hand, neither party to a dispute can normally expect an interest arbitrator that historical intraindustry comparisons used by the parties, should be abandoned or modified solely on the basis of one party's preference for alternative comparisons first advanced at an arbitral hearing or in a post-hearing brief. While the Employer is quite correct that it may be appropriate under certain circumstances for an interest arbitrator to approve modification of the intraindustry comparisons historically utilized by parties, such a change must normally have been considered and discussed by the parties in their prior negotiations *and* supported by persuasive evidence and argument advanced by the proponent of change.[31]

On the above described bases the undersigned has preliminarily concluded that the composition of the primary intraindustry comparisons *historically utilized by the parties*, *determined to have been appropriate in two prior arbitral decisions,* and *once again urged by the Association in this proceeding*, should remain unchanged and should appropriately be utilized in applying the statutory criteria in this proceeding.

The Application of the Quid Pro Quo Requirements in this Matter Due to the Association Proposed Changes in the Grievance Procedure and the Sick Leave Provisions

When one of the parties to a renewal labor agreement which has proceeded to interest arbitration is proposing elimination, reduction or significant modification of a previously negotiated benefit or previously existing contract language, arbitral approval is normally conditioned upon three determinative prerequisites: *first*, that the proposal is motivated by the existence of a significant and unanticipated problem or problems; *second*, that the proposal reasonably addresses the underlying problem or problems; and, *third*, that the proposal is normally, *but not always*, accompanied by an appropriate *quid pro quo*. If the underlying problem or problems addressed by either of the parties are *mutual* and the first two criteria are met, it may be

[31] See an *early discussion by the undersigned* of this principle in Monona Grove School District, Case 42, No. 39312, INT/ARB-4538 (July 23, 1988), at pages 13-18 and footnotes #1-#4.

arbitrally determined that little or no significant *quid pro quo* is required.[32]

In the case at hand the Association has proposed the earlier described changes in the *contractual grievance procedure* and the addition of a new section to the *contractual sick leave provision*, while the Employer is proposing no changes from the previous agreement in these two areas. The parties disagree relative to the application of the so-called quid pro quo requirement to these Association proposed changes and, in resolving this disagreement, the undersigned finds the following described evidence and considerations to be determinative.

(1) A well researched and detailed report entitled "Audit of Milwaukee County Employee Grievance Process," was published by the Milwaukee County Department of Audit in March 2003, under the auspices of the County's Committee on Finance and Audit, over the signature of Jerome J. Heer, Director of Audits.

(a) In the cover letter dated March 10, 2003, directed to the Chairman of the Board of Supervisors of the County of Milwaukee, Director Heer indicates in part as follows:

"...The grievance process is the formal mechanism used to resolve complaints by union represented employees alleging a violation of a collective bargaining agreement. The process is defined by the eight labor agreements currently in place within Milwaukee County.

Our report indicates that the grievance process for represented employees can be a time consuming and costly process. A formal centralized and coordinated County-wide management strategy to address grievances is not in place.

[32] See the decision of the undersigned and the various cases cited therein, in Outagamie County -and- Wisconsin Professional Police, Law Enforcement Employee Relations Division, Decision No. 31400-A (2/7/06), pages 17-20 and footnote #59.

A management response from the Department of Administrative Services is included as Exhibit 5. We would like to thank key human resources managers throughout the County, the Department of Administrative Services, Corporation Counsel and representatives of District Council 48 for their cooperation in this review."[33]

(b) In the body of the Audit which follows thereafter, three sections are emphasized, including one containing the following excerpted conclusions and recommendations:

"**Conclusions and Recommendations**

Both County and management and labor representatives must recognize that excessive and rising employee grievances represent an avoidable cost indicative of labor/management problems that must be identified and resolved. During the course of our fieldwork, there were several indications that the current state of labor/management relations in Milwaukee County concerning the resolution of employee grievances can best be described as dysfunctional. For instance, we noted the following:

- Attitudes on the part of both management and the County's largest labor union reflect a position that each party suspected the other was more interested in protecting turf or 'winning' rather than resolving conflict;

- The fact that six employees filed nine or more grievances during the period 2000-2002, with one individual filing 75 grievances, is indicative of a breakdown in the employee/employee relationship; and

- There is no sustained effort to provide County managers and front line supervisors with training or guidance on the particulars of the County's eight collective bargaining agreements.

[33] See Association Exhibit #3, page 2.

We have recommended measures that can be undertaken to improve accountability for proactive, consistent labor contract management and also to improve the effectiveness and efficiency of the grievance process. Our recommendations will facilitate improved Milwaukee County labor/management relations in the future."[34]

(c) The above referenced, *fifth exhibit*, entitled "Response to Employee Grievance Process Audit," was transmitted to Mr. Heer by Charles E. McDowell, Director of Human Resources, and Troy M. Hamlin, Director of Labor Relations. It contains the following responses to various of the Audit Committee recommendations, in which it either *concurs* or *agrees in part*:

"2. Regularly review grievance trends to identify 'hot spots' and 'hot issues' for further investigation and remedial action. Work with departments to develop strategies for improvement.

Concur. Labor Relations has already had an initial meeting with some of the high grievance divisions. One strategy would be to utilize labor/management cooperation committees. Labor Relations will continue to work with the Departments in an attempt to change the culture in Milwaukee County.

3. Establish regular training and coordinating sessions with front line supervisors to discuss labor contract provisions, administration and particularly grievance issues/resolutions, with a goal of eliminating repetitive grievances.

Concur. Labor Relations has already started developing new training programs for supervisors and managers. The first program will be implemented in April 2003. Other programs will be implemented in the summer of 2003.

* * * * *

5. Develop an internal best practices approach, adopting techniques such as the Parks Department's use of monthly meetings between management and union officials to discuss issues and potential disputes to avoid formal grievances.

Concur. Labor Relations will include this with the training programs in the summer. Also, Labor Relations will continue to pursue new opportunities for implementing new approaches to problem solving.

6. Include performance objective in the Labor Relations section budget to reduce costs association with labor grievances. Establish an environment in which a key objective of Labor Relations is to facilitate the resolution of grievances at a point in the process that limits, to the extent possible, the expenditure of County resources.

Agree in part. The grievance process in Milwaukee County has a very long history, which is checkered at

[34] See Association Exhibit #3, page 3.

best. The Union forwards numerous grievances to arbitration in an attempt to get some type of financial settlement in cases where they know the chances of prevailing in arbitration are slim at best. The County could settle some of these grievances at a lesser cost than the arbitration hearing. However, when the County settles these cases, they are in effect encouraging this type of behavior and establishing a practice.

The County, on the other hand, has forced many issues into arbitration when they should have been settled at the second step in the process. This will end.

The approach Labor Relations will take is to resolve grievances that should be resolved, and arbitrate grievances in situations where the County has not violated the memorandum of agreement.

In the interim, this may result in increased expenditures on arbitrations, but in the long run it will reduce the overall cost to the County because the Union will soon realize that the County is only taking sure winners into arbitration.

7. Negotiate a standardized grievance procedure in each collective bargaining unit contract, including re-institution of verbal 1st step grievances in the District Council 48 contract.

Concur. The contracts do not expire until December of 2004. In the meantime, Labor Relations will attempt to work with Union officials and jointly encourage employees to go to their immediate supervisors to discuss concerns, which should result in fewer grievances.

* * * * *

9. Empower front-line supervisors with the authority to settle disputes at 1st step.

Agree in part. The current first step allows the Department to resolve the grievance; however, it does not encourage communication between the employee and his/her supervisor before the formal first step. Currently, front-line supervisors resolve many issues before they become grievances. In other situations, the issue in dispute may have County-wide impact. In this type of situation, it is better resolved at the second step.

As noted in recommendation seven, the front-line supervisor may not hear about the issue in dispute until the first step in the grievance process. This is a problem, which Labor Relations will attempt to correct in negotiations.

10. Work with the unions to include more effective union 'screening' of frivolous grievances.

Agree in part. The Union has an obligation to represent its members, and it can be a fine line for them to walk. It is not appropriate for the County to become involved in how the Union conducts its

business. However, a goal of Labor Relations is to change the culture of Milwaukee County. To this end Labor Relations will work closely with the Union to resolve issues before they become grievances and strengthen the grievance process.

11. Work with Corporation Counsel to develop an incentive against repetitive filings.

    Agree in part. Repetitive filings need to be eliminated, and they only end when there is an agreement between the parties or there is an arbitration decision. Corporate Counsel does not play a role in ending repetitive filings.

    Since I am not sure what type of incentive program is envisioned, I am very reluctant to agree with this recommendation.

12. Bring in a third party influence to help change the attitudes and behaviors of both management and union representatives. This may require a long-term, sustained commitment toward improving Milwaukee County labor/management relations and procedures.

    Agree in part. The County has started to work with employees of the Wisconsin Employment Relations Commission (WERC) to institute labor/management cooperation committees. However, funds are not available to sustain an outside third party commitment.

    Labor Relations plans on instituting change from within. The grievance process has already been changed at the second step, and arbitrations are proceeding based on the merit of the case only."[35]

Without unnecessary elaboration it is clear from the above evidence that the County has long recognized the existence of *multiple mutual problems* in the handling of grievances and arbitration under its eight separate labor agreements. It is equally clear that while the three changes in the grievance procedure proposed by the Association in this proceeding address only portions of these *mutual problems*, they fall well within the categories of proposed contract changes for which little or no so-called quid pro quo would be required. By way of contrast, the County has proposed no change(s) in the grievance procedure in its final offer.

(2) *Association witness Norb Gedemer*, a fifteen year County employee, the Association's Treasurer for the past seven years and a member of its Bargaining Committee for the same period, credibly testified, in part, as follows.

[35] See the contents of Association Exhibit #3, pages 32-35.

(a) That the Association currently has 19 pending grievances from 2006 and 107 grievances pending from 2007, and that the number of prior grievances filed in 2003, 2004 and 2005, had been similar to the current grievance volume.[36]

(b) That the Association had received an arbitral decision which favored two sick leave grievants, but the remaining sick leave grievances had remained in a state of limbo while the County was attempting to decide how to handle them.[37]

(c) That its proposed changes in the contract grievance procedure, including the *right to file Association grievances* rather than being limited to the filing of multiple individual grievances, its proposed *scheduling of grievance hearings at agreed upon times and places*, its *proposed handling of grievances where it was impossible to comply with time limits*, its proposed addition of a *definition of "working days"*, and its proposed settlement of grievances on the basis of *mutual satisfaction of the Association and the County*, would provide better control over the initiation and processing of grievances, and would both expedite and simplify the processes.[38]

The above, essentially unchallenged testimony of Mr. Gedemer, is consistent with the County's Audit determination that the current state of its labor/management relations in the resolution of employee grievances was dysfunctional in various respects, and it also verifies that this condition is a mutual problem.

(3) *Various exhibits in the record* also clearly and persuasively establish the existence of mutual and ongoing problems involving grievances, prohibited practices and arbitration, primarily in conjunction with the Employer establishment, definition, redefinition and application of the contractual Sick Leave and Absenteeism requirements.

(a) Directive 5-02, replacing Directive 24-97 and modifying Section 108.00 entitled SICK LEAVE/ABSENTEEISM, was issued by Sheriff Clarke on June 9, 2002.[39]

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[36] See the *testimony of Deputy Gedemer* at Hearing Transcript, page 53(6-14).

[37] See the *testimony of Deputy Gedemer* at Hearing Transcript, pages 60(23)-61(12).

[38] See the *testimony of Deputy Gedemer* at Hearing Transcript, pages 60(2)-72(7).

[39] See the contents of Association Exhibit #8.

(b) Directive 01-04, replacing Directive 5-02 and again modifying Section 108.00 entitled SICK LEAVE/ABSENTEEISM, was issued by Sheriff Clark on January 5, 2004.[40]

(c) A Collateral Agreement, signed and confirmed by Association President Roy Felber and County Director of Labor Relations Troy M. Hamblin on January 4, 2006, indicated in material part as follows:

"The following shall constitute a Collateral Agreement between Milwaukee County and the Milwaukee Deputy Sheriffs' Association in accordance with Section 4.05 of the Memorandum of Agreement (MOA)

The parties agree to amend the 2005-2006 MOA as follows:

Departmental Work Rules

(1) The Association recognizes the prerogative of the County to operate and manage its affairs in all respects in accordance with its responsibilities, duties and powers, pursuant to the statutes of the State of Wisconsin, the ordinances and resolutions of the County and the rules of the Civil Service Commission. The Association recognizes the exclusive right of the County to establish reasonable work rules. Labor Relations and the Office of the Sheriff shall meet with the Association for the purpose of discussing the contemplated creation or modification of such rules 10 days prior to implementation, except in emergency situations where no advance notice shall be required. In such situations, the County shall meet with the Association as soon as practical following implementation.

(2) Participation in such meetings shall be limited to 2 representatives from the Association plus the Association Legal Counsel if desired.

(3) This Collateral Agreement shall sunset on December 31, 2006, unless extended by mutual agreement.

The parties further agree to the following items in resolution of the Complaint filed by the Milwaukee Deputy Sheriffs' Association with the Wisconsin Employment Relations Commission, Case Number 581 No. 65231 NP-4194:

1. Grievance number 43408 shall be resolved by immediately removing the EAD from Roy Felber's personnel file. This EAD shall not be used when determining future levels of discipline issued to Roy Felber.

2. Grievance number 43079 shall be resolved by immediately removing the EAD from Roy Felber's personnel file. This EAD shall not be used when determining future levels of discipline issued to Roy Felber.

[40] See the contents of Employer Exhibit 24-A.

3. Grievance number 43078 shall be resolved by immediately removing the EAD from Richard Kruszka's personnel file. This EAD shall not be used when determining future levels of discipline issued to Richard Kruszka.

4. Grievance number 43084 shall be resolved by immediately removing the EAD from Roy Felber's personnel file. This EAD shall not be used when determining future levels of discipline issued to Roy Felber.

5. Grievance number 43094 shall be resolved by immediately removing the EAD from Kathleen Fisenne's personnel file. This EAD shall not be used when determining future levels of discipline issued to Kathleen Fisenne.

6. Grievance number 43082 shall be resolved by immediately removing the EAD from Byron Terry's personnel file. This EAD shall not be used when determining future levels of discipline issued to Byron Terry.

7. The Office of the Sheriff is directed to revert to the June 9, 2002 Sick Leave/Absenteeism Policy (See Attachment).

8. If the Office of the Sheriff desires a change in the Sick Leave/Absenteeism Policy, then they must comply with the language contained in this Collateral Agreement under Departmental Rules. If the parties are not able to reach an agreement on the proposed changes to the Sick Leave/Absenteeism Policy, then the Department shall implement the changes and the Association retains the right to grieve the reasonableness of the changes once an employee is impacted by the changes through all steps in the grievance process.

9. The Association agrees to withdraw all prohibited practice charges, grievances, filed with the Wisconsin Employment Relations Commission and/or any other litigation associated with changes to the Sick Leave/Absenteeism Policy implemented by the Office of the Sheriff.[41]

(d) A notice from the Office of the Sheriff to the MCDSA, dated February 16, 2006, and signed by Inspector Kevin A. Carr, indicates as follows:

"This written notice is being provided by the MCDSA at least ten days prior to the implementation of a work rule that may be a mandatory subject of bargaining. It is the Sheriff's intention to implement the Sick Absence/Absenteeism policy that results in rules violation referral to Internal Affairs after the third

[41] See the contents of Employer Exhibit 24-B and Association Exhibit 200, pages 73-74. There are minor differences in the two exhibits, because in the publication of the Association exhibit in the 2005-2006 labor agreement the detailed descriptions of the individual grievance settlements described in the Employer exhibit are omitted.

incident of absenteeism. It is anticipated that this rule change would take effect on Sunday, March 5, 2006.

Additionally, the Sheriff intends to seek requests for proposals regarding the transporting of inmates to and from other Wisconsin counties. It is anticipated that should this process move forward an RFP could be selected by June 1, 2006. As previously stated, this proposal is being provided to the MCDSA at least ten days prior to implementations. Further, to give the MCDSA an opportunity to bargain with respect to both of these issues. The Office of the Sheriff requests a written response from the MCDSA by Monday, February 27, 2006. Please direct any correspondence to Inspector Kevin A. Carr.[42]

(e) A notice from the Office of the Sheriff to the MCDSA, dated March 14, 2006, and signed by Inspector Kevin A. Carr, indicates as follows:

"On Monday, March 6, 2006 while at the WERC hearing regarding Correctional officers in the Detention services Bureau, I initiated discussion with the DSA to resume our discussions pertaining to the Sheriff's Office desire to explore to possible issuance of inmate transportation RFP. Additionally, the Office of the Sheriff previously notified the DSA of our intention to implement a sick leave policy that would make three incidences of sick leave absence a violation of the policy.

At our prior meeting on February 16, 2006, The Office of the Sheriff provided the DSA with proposals related to the above named issues and requested the DSA's written response by Monday, February 27, 2006. The requested responses were received on Monday, February 27, 2006 and are the basis for continuing dialog as requested by our office.

Therefore, the goal of our meeting today is to attempt to reach a compromise regarding our positions. If no agreement can be reached the Office of the Sheriff intends to move forward with the implementation of the proposed Sick Absence policy and issuance of and Inmate Transportation RFP."[43]

(f) Directive 08-06, dated June 14, 2006, and signed by Inspector Kevin A. Carr, indicates as follows:

"**TO BE READ AT ALL ROLL CALLS**

RE: SICK LEAVE ABSENCE POLICY

Based on a collateral agreement entered into between the Milwaukee County Deputy Sheriff's Association and Milwaukee County, for the period of time preceding July 1, 2006, staff members shall be subject to the requirements of Agency Directives 5-02, dated June 9, 2002. (See Attached Directive).

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[42] See the contents of Employer Exhibit 27.

[43] See the contents of Employer Exhibit 28.

Effective July 1, 2006 sick leave absence policy 202.04 shall supersede all preceding sick leave policies. (See attached directive.)"[44]

(g) An arbitral decision and award was issued to the parties by *Arbitrator Coleen A. Burns* on November 14, 2007, which indicated and determined, in part, as follows:

"...the undersigned concludes that the issues are most appropriately stated as follows:

Did the Milwaukee County Sheriff's Office violate the parties' 2005-2006 collective bargaining agreement when it issued the EAD of September 14, 2006 to Deputy Adams or the EAD of October 27, 2006 to Deputy Myer?

If so, what is the appropriate remedy?

* * * * *

Merits

In arguing that the Sheriff's Department does not have a right to issue the EADs in dispute, the Association relies upon the January 4, 2006 agreement that resolves the Complaint filed by Milwaukee Deputy Sheriffs' with the Wisconsin Employment Relations Commission, Case number 581 No. 65231 No. 65231 NP-4194. This agreement is hereafter referred to as the Sick Leave Agreement.

* * * * *

The undersigned is satisfied that the Sick Leave Agreement is enforceable as a term of the parties' 2005-2006 collective bargaining agreement. Thus, the Article 1.02 Management Rights relied upon by the County must be exercised in a manner that is consistent with the provisions of the Sick Leave Agreement.

The plain language of the Sick Leave Agreement, while not a model of clarity, is most reasonably construed as requiring the Office of the Sheriff to revert back to the June 9, 2002 Sick Leave/Absenteeism Policy and limiting the Office of the Sheriff's management right to implement changes to the June 9, 2002 Sick Leave/Absenteeism Policy. Specifically, prior to the implementation of any such changes, the Office of the Sheriff must first propose the changes to the parties. Given the signatories to the Sick Leave Agreement, as well as to the 2005-2006 collective bargaining agreement, the parties are most reasonably construed to be the Association and the County. Only if the Association and the County are unable to reach an agreement on the changes proposed by the Office of the Sheriff does the Sick Leave Agreement permit the Office of the Sheriff to implement its proposed changes to the June 2, 2002 policy."

[44] See the contents of Association Exhibit 6. [Attached Directives Excluded]

> After determining that the June 2, 2002 policy had remained in effect, and that the disputed EADs issued to Deputy Adams and Deputy Myer were inconsistent with this policy, the arbitrator ordered their rescission and the expunging of all references to them in the personnel files of the two deputies.[45]

On the basis of the above record, it is quite clear that the Associations' proposals relating to the contractual grievance procedure and sick leave provisions had been in response to long standing, ongoing, mutual and sometimes overlapping problems in both areas.

(1) The above problems have included multiple instances of disputed, ongoing, and essentially unilateral actions by the Sheriff relating to the substance and application of the contractual sick leave provisions. In this connection it seems clear that the meetings between the parties in February and March of 2006, prior to the most recent change in the sick leave provision, had not been the product of normal bargaining, but rather had consisted largely of notification to the Association of anticipated unilateral action by the Sheriff in the near future. It is also significant that the meetings had not been participated in by representation from the County's Department of Labor Relations, and that the above referenced arbitral decision reversing the action has not yet been implemented and is being appealed by the Employer.[46]

(i) The fact of forty-two pending grievances awaiting potential arbitration on a question which had already been subjected to final and binding arbitration, for example, is clearly a *mutual problem*, even if the final offer of one of the parties is resisting any language change reasonably directed toward the correction of such problem.

(ii) An implicit requirement of all labor agreements is the requirement that both parties exercise even those rights reserved to them for unilateral exercise during the life of the agreement, in a reasonable manner (*i.e.*, in a manner which is neither arbitrary, capricious, discriminatory, nor otherwise unreasonable).

(2) The argument advanced by the Employer that the proposed changes are to language which is common to other bargaining units in the County is not persuasive in this matter, in that there is no indication in the record that employees in other bargaining units had been experiencing the same difficulties in applying the preexisting language and/or experiencing similar, unilateral changes in policies and practices as those experienced and relied upon by the Association in the case at hand.

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[45] See the contents of Association Exhibit 7, pages 8-10.

[46] See the *testimony of Inspector Carr* at Hearing Transcript, pages 204(19)-206(18).

(3) The arbitrator is limited to selection of the more appropriate of the two final offers before him/her, and has no authority to determine if, for example, one or both of the parties had violated their *continuing bargaining obligation* and/or had committed *other prohibited practices* during the term of the agreement, nor whether either or both had violated the *implicit requirement of reasonableness* in exercising their rights during the life of the agreement. If, however, the language in question has not been producing its' reasonably anticipated outcome(s), a reasonable proposed modification of such prior language to correct such problem(s), is simply not the type of proposal which must be supported by a significant quid pro quo!

While the Association proposed changes in the grievance and sick leave areas do not address all of the parties' significant mutual problems in these areas, it is clear to the undersigned that they reasonably address some of these problems and, accordingly, that the proposed changes require little or no significant *quid pro quo*, to justify their potential selection in this proceeding.

The Interest and Welfare of the Public and the Financial Ability to Pay Considerations

It is frequently recognized by Wisconsin interest arbitrators that professional and effective police services and adequate and reasonable compensation to the professionals who provide such services, are important elements in serving and maintaining the interest and welfare of the public, and no disagreement has arisen in this case with respect to this principle.

What next, however, of the Employer's argument that Milwaukee County is in a financial crisis which must be given significant weight in the final offer selection process in this proceeding? In this connection it is emphasized that the County is not claiming *inability to pay*, but is appropriately seeking consideration of its *impaired ability to pay*.

As noted by the undersigned in earlier decisions, the distinction between bona fide *inability to pay* and claimed *impaired ability to pay* in public sector interest arbitrations was presciently addressed by Arbitrator Howard S. Block, in part, as follows:

"Ability to Pay: The Problem of Priorities

> Nowhere in the public sector is the problem of interest arbitration more critical than in the major urban areas of the nation. Municipal governments are highly dependent, vulnerable public agencies. Their options for making concessions in collective bargaining are at best limited, and are often nullified by social and economic forces which command markets, resources, and political power extending far beyond the city limits. City and county administration are buffeted by

winds of controversy over conflicting claims upon the tax dollar. On the federal level, the ultimate source of tax revenues, the order of priorities between military expenditures and the needs of the cities are a persistent focus of debate. On the state level, the counterclaims over priorities in most states seem to be education over all others.

* * * * *

At any rate, whatever the complexities presented by the ability-to-pay argument on state and federal levels, it is on the local level that the problem is most resistant to solution. ...How does an arbitration panel respond to a municipal government that says, 'We just don't have the money'?

Pioneering decisions of interest neutrals have assigned no greater weight to such an assertion than they have to an inability-to-pay position of private management. An arbitration panel constituted under Michigan's Public Act 312 rejected an argument by the City of Detroit which would have precluded the panel from awarding money because of an asserted inability to pay. What would be the point of an arbitration, the panel asks in effect, if its function were simply to rubber-stamp the city's position that it had no money for salary increases? What employer could resist a claim of inability to pay if such claim would become, as a matter of course, the basis of a binding arbitration award that would relieve it of the grinding pressures of arduous negotiations? While the panel considered the city's argument on this point, it was not a controlling conclusion.

Inability to pay may often be the result of an unwillingness to bell the cat by raising local taxes or reassessing property to make more funds available. Arnold Zack gives a realistic depiction of the inherent elasticity of management's position in the following comment:

> 'It is generally true that the funds can be made available to pay for settlement of an imminent negotiation, although the consequences may well be depletion of needed reserves for unanticipated contingencies, the failure to undertake new planned services such as hiring more teachers, or even the curtailment of existing services, such as elimination of subsidized student activities, to finance the settlement.'

The very fact of this elasticity places an additional burden on public management to hold the line against treasury raids by strong aggressive employee groups, who are able to gain a disproportionate share of available funds at the expense of the weak and the docile. Understandably, management will be prone to assert an inability to pay rather than to antagonize an employee group needlessly by declaring it has the money but will not make one-sided disbursements to accommodate partisan interests.

Also, an inability to pay declaration, or at least a restricted ability-to-pay stance, has another useful purpose: that of enabling public management to maintain a bargaining position. The very concept of bargaining carries with it as a logical corollary the necessity for the bargaining teams to limit the extent of information furnished to each other and to justify withholding possible concessions until they can be made at strategic times in order to exact reciprocity from each other. With budgetary information a matter of public record, management often has to overcome this inherent disadvantage by stubbornly refusing to revise allocations or redistributing reserve funds until an acceptable economic package can be agreed upon at the bargaining talks.

* * * * *

A parting comment on the matter of priorities. Although I have tended to dwell on inability to pay as a form of conflict over priorities in spending, I would not want to leave the impression that a local or state government cannot, in a very real and practical sense, be dead broke." [47]

The distinction between *unwillingness to pay* versus *inability to pay* is also recognized in the following excerpts from the authoritative book originally authored by Elkouri and Elkouri:

"***i. Proof of Inability to Pay***

Employers who have pleaded inability to pay have been held to have the burden of producing sufficient evidence to support the plea. The alleged inability must be more than 'speculative,' and failure to produce sufficient evidence will result in a rejection of the plea. ...

* * * * *

iii. Other Public-Sector Entities' Ability to Pay

In the public sector, with the necessity of continuing to provide adequate public service as a given, 'going out of business' is not an option, and an employer's inability to pay can be the decisive factor in a wage award notwithstanding that comparable employers in the area have agreed to higher wage scales. ...

* * * * *

In granting a wage increase to police officers to bring them generally in line with police in other communities, an arbitration board recognized the financial problems of the city resulting from temporarily reduced property valuations during an urban redevelopment program, but the board stated that a police officer should be treated as a skilled employee whose wages reflect the caliber of the work expected from such employees. The Board declared that 'it cannot accept the conclusion that the Police Department must continue to suffer until the redevelopment program is completed.' However, the board did give definite weight to the city's budget limitations by denying a request for improved vacation benefits, additional insurance, a shift differential, and a cost-of-living escalator clause. In another case involving police officers and firefighters, an arbitrator awarded a 6 percent wage increase (which he recognized as the prevailing pattern in private industry) despite the city's financial problems. He limited the increase to this figure, though a larger increase was deserved, in order to keep the city within the statutory taxing limit and in light of the impact of the award on the wages of other city employees.

In some cases, neutrals have expressly asserted an obligation of public employers to make added efforts to obtain additional funds to finance improved terms of employment found to be justified. In one case, the neutral refused to excuse a public employer from its obligation to pay certain automatic increases that the employer had voluntarily contracted to pay, the neutral ordering the employer to 'take all required steps to provide the funds necessary to implement his award in favor of the employees.'

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[47] See Arbitration and the Public Interest, *Proceedings of the 24th Annual Meeting of the National Academy of Arbitrators*, Bureau of National Affairs, Inc., 1971, pages 169, 171-172, 178. (footnotes omitted)

> Finally, where one city submitted information regarding its revenues and expenditures to support its claim of inability to pay an otherwise justified wage increase, the arbitrator responded that the 'information is interesting, but is not really relevant to the issues,' and explained:
>
> > The *price of labor* must be viewed like any other commodity which needs to be purchased. If a new truck is needed, the City does not plead poverty and ask to buy the truck for 25% of its established price. It can shop various dealers and makes of trucks to get the best possible buy. But in the end the City either pays the asked price or gets along without a new truck.[48]

In the case at hand the Employer initially reached a negotiated settlement for 2007-2008 with District Council 48, representing 66.7% of its workforce, it subsequently extended the same level of wage/salary increases to its non-represented employees, and it has attempted to achieve absolute wage increase consistency within its remaining seven collective bargaining agreements.[49] It proffered the same wage increase to the Deputy Sheriffs' Association in their early negotiation meetings, pointed out that it was limited by the "*me too*" provision in its settlement with District Council 48 from agreeing to larger wage increases, and it never thereafter deviated from its initial wage increase proposal. In support of this position, the County refers to many perceived benefits of internal bargaining consistency on *wages*, and it also cites and relies upon its current *significantly impaired ability to pay*.

(1) In the above connections, the County is quite correct that interest arbitrators frequently place significant weight in the final offer selection process on *internal wage comparisons*, when supported by the *bargaining history of the parties*. No such bargaining history, however, has been shown to exist in the case at hand.

(2) In addition to bargaining history considerations, interest arbitrators are normally reluctant to assign significant or determinative weight to internal wage increase uniformity in *situations unaccompanied by internal uniformity in fringe benefits, hours and other terms and conditions of employment*.

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[48] See *Elkouri & Elkouri* HOW ARBITRATION WORKS, Sixth Edition - 2003, pages 1431 and 1433-1436. (footnotes omitted)

[49] See the contents of Employer Exhibits 7, 7-A and 7-B; as noted therein, no wage settlements had yet been reached within three bargaining units consisting of *the Deputy Sheriffs*, *the Firefighters* and *the Health Care Professionals*.

(a) The County's attempt to achieve uniform wage increases for all of its employees, including the Deputy Sheriffs, is complicated by its failure to propose during contract renewal negotiations or in its final offer to the Association, various concessions and benefits applicable to other County employees, including those represented by District Council 48. Unchallenged evidence in the record identifies some such items as the following: refusal to agree to a *no layoff guarantee*; failure to propose *not to hold 2007 vacancies open solely for the purpose of their privatization*; failure to *offer comparable 40 cent per hour shift and weekend differentials*; and failure *to propose equivalent pension back drop benefits, pension multipliers* and *five year rather than ten year pension vesting*.[50]

(b) Such disparities had apparently been called to the attention of the County during contract renewal negotiations, when it had been emphasizing to the Association its perceived need for uniform internal wage increases during the life of the 2007-2008 renewal agreement.[51]

Despite the earlier described general principles, and as urged by the Employer in the case at hand, it is clear that interest arbitrators must consider and give appropriate weight to *temporarily impaired ability to pay* pursuant to Sections 111.77(6)(c) and (f) of the Wisconsin Statutes. In the case at hand, the Employer urges that such consideration should extend to and justify uniform internal wage increases for employees in 2007-2008, and it submits that failure to maintain such uniformity could create significant inequities and morale issues within the five bargaining units which have already settled their contracts. As noted above, however, is *not* incurring additional short or long term costs within the Deputy Sheriffs' bargaining unit for 2007-2008 for various changes granted to District Council 48 and within other bargaining units, and not to be included in the Deputy Sheriffs' renewal agreement, perhaps most significantly including the *elimination of layoffs and privatization for 2007*, and the pension modifications including *elimination of the back drop pension benefit for certain future employees*.[52]

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[50] see also the contents of Employer Exhibit 7-B and 8, at page 11. As noted therein the pension back drop benefit has been *eliminated for future District Council 48 represented employees, but continued for incumbent employees.*

[51] See the *testimony of Deputy Gedemer* at Hearing Transcript, pages 34(12)-37(6) and 44(20)-47(7).

[52] See the contents of Employer Exhibit 8, page 11, which briefly addresses the cost impact of the *elimination of layoff and privatization for 2007*, and the *discontinuation of the back drop pension benefit* for employees

whose membership in the employees retirement system begins after the date of the contract. Although not specifically identified therein, the costs of *continuing the back drop pension benefit* for eligible or already retired employees, and the costs associated with *higher pension multipliers* and *shorter vesting periods* in other bargaining units, continue to be a County responsibility.

The County logically refers to many perceived benefits of internal consistency in wage increases and is correct that interest arbitrators may place significant weight in the final offer selection process on internal wage comparisons, *when supported by the bargaining history of the parties*. In addition to absence of the requisite bargaining history, arbitrators are also reluctant to initially adopt internal wage uniformity, unless such a proposal is accompanied by *substantial uniformity in fringe benefits, hours and other terms and conditions of employment*.

Stated simply, the County's attempt to achieve uniform wage increases for all of its employees is complicated by its failure to propose during contract renewal negotiations or in its final offer to the Association, the various concessions and benefits applicable to other County employees, including those represented by District Council 48. These disparities had apparently been called to the attention of the County during contract renewal negotiations, when it had been emphasizing to the Association its perceived need for uniform internal wage increases during the life of the 2007-2008 renewal agreement. Although it is clear from the record that the Deputy Sheriffs, *alone*, among the internal bargaining units, had not agreed to the so-called pension back-drop in 2001, there is insufficient evidence of bargaining history in the record indicating that this action had then been the product of such a *trade-off* for higher wage increases.[53] No logical basis exists, therefore, for the Deputies being held to the same lower wage increase in 2007-2008, as all of the other internals who enjoyed various enhanced wages, hours and other terms and conditions of employment, compared to the Deputy Sheriffs. While the significant continuing costs of maintaining such enhanced and continuing programs can clearly be recognized in arriving at lower levels of wage increases for other employees, no appropriate basis exists for offsetting otherwise appropriate wage levels within the Deputy Sheriffs' bargaining unit for the continuing costs of such programs, which they had never received.

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[53] The contents of Employer Exhibit #15, the only evidence relied upon by the Employer, is insufficient, alone, to support an arbitral determination that any such tradeoff had then taken place.

On the above described bases the undersigned has determined that the Employer asserted *impaired ability to pay* and its *preference for uniform wage increases for all of employees during 2007 and 2008*, cannot alone be assigned determinative weight in this proceeding, without full and normal consideration of all of the statutory arbitral criteria.

The Comparison Criteria

As previously explained, the intraindustry comparables historically utilized by the parties are normally of primary importance in determining the relative merits of two wage proposals.

(1) The Association proposed split increases providing 3% lifts in split increases in each of the two years of the renewal agreement are quite comparable with the average increases among the nineteen primary comparables.[54]

(a) The average 2007 hourly pay increases among the primary comparables for the *top patrol rates* and the *top sergeant rates* were 2.97% and 2.88% respectively; and selection of the final offer of the Association would maintain the top patrol rates and top sergeant rates at levels of $1.14 per hour and $1.90 per hour below the primary comparables.

(b) None of the 2008 hourly pay increases among the limited number of primary comparables for the *top patrol rates* and the *top sergeant rates*, were below 3.00%.[55]

(2) The Association proposed wage increases are also quite comparable with the average increases among the four secondary comparables.[56]

(a) The 2007 hourly wage increases among the secondary comparables for the top patrol rates and the top sergeant rates were 3% in Washington County, and split increases totalling 4% in Ozaukee and Waukesha counties.

(b) No 2008 hourly wage increase information was available among the secondary comparables.[57]

(3) By way of contrast with the above, the County proposed wage increases of 1% effective in November of 2007, and in April, June and October of 2008, with a $250 lump sum payment to eligible employees after the issuance of the award in this matter are significantly below the wage increases provided by the primary and the secondary intraindustry comparables.

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[54] Referring to Bayside, Brown Deer, Cudahy, Fox Point, Franklin, Glendale, Greendale, Greenfield, Hales Corners, Milwaukee, Oak Creek, River Hills, Shorewood, South Milwaukee, St. Francis, Wauwatosa, West Allis, West Milwaukee and Whitefish Bay.

[55] See the contents of Association Exhibits 611 and 612.

[56] Referring to Ozaukee, Waukesha, Washington and Racine counties.

[57] See the contents of Association Exhibit 613.

On the above bases the undersigned has determined that arbitral consideration of *the comparison criteria* significantly favors selection of the final offer of the Association in this proceeding.

The Cost of Living Criterion

A record of certain increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers between December 2006 and October 2007 was accepted into the record and indicates, in part, as follows: an unadjusted 12 month increase of 2.7% for the 12 month period ending in June of 2007; and an unadjusted increase of 3.7% for the 12 month period ending in October of 2007.[58]

Without unnecessary elaboration it is clear that the Association's wage increase offer of two 1.5% split wage increases in 2007 and in 2008, is fairly consistent with and justified by the above increases in the consumer price index. By way of contrast, the County's offer for 1% wage increases in November of 2007, and in April, June and October of 2008, plus a $250.00 lump sum to eligible employees following the arbitral award, falls significantly below these levels of increase in the consumer price index.

On the above bases the undersigned has determined that arbitral consideration of the *cost of living criterion* significantly favors selection of the final offer of the Association in this proceeding.

The Overall Level of Compensation Criterion

In support of its wage offer in this proceeding, the County urged that its Deputy Sheriffs would be receiving a wage and benefits package which was unparalleled among the external comparables. While this argument was advanced by the County using its proposed intraindustry comparables rather than those urged by the Association it must be recognized, in either case, that while the *overall level of compensation presently received by employees* can be used *to justify the initial establishment of differential wages or salaries*, they normally have little or nothing to do *with the application of general wage increases thereafter*. The long standing rationale for this still currently recognized principle is described as follows by Bernstein:

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[58] See the contents of Association Exhibit 1101.

"...Such 'fringes' as vacations, holidays, and welfare plans may vary among firms in the same industry and thereby complicate the wage comparison.

* * * * *

...In the *Reading Street Railway* case, for example, the company argued strenuously that its fringes were superior to those on comparable properties and should be credited against wage rates.

Arbitrators have had little difficulty in establishing a rule to cover this point. They hold that features of the work, though appropriate for fixing differential between jobs, should not influence a general wage movement. As a consequence, in across-the-board wage cases, they have ignored claims that tractor-trailer drivers were entitled to a premium for physical strain; that fringe benefits should be charged off against wage rates; that offensive odors in a fish-reduction plant merited a differential; that weight should be given the fact that employees of a utility, generally speaking, were more skilled than workers in the community at large; that merit and experience deserved special recognition; and that regularity of employment should bar an otherwise justified increase. ...

The theory behind this rule is that the parties accounted for these factors in their past collective bargaining over rates. Hence established differentials and premiums are regarded as fixed for purposes of general wage changes."[59]

In applying the above described principle to the dispute at hand, the undersigned recognizes that while the *overall compensation presently received* criterion may apply in the initial establishment of wage rates comparisons, it cannot appropriately be applied thereafter to retroactively affect the levels of future general wage increases. Stated simply, a higher, preexisting level of fringe benefits cannot justify lower general wage increases thereafter. This principle applies, regardless of which external comparables might have been selected and applied in this proceeding.

On the above described basis, the undersigned has determined that the overall level of compensation criteria cannot be assigned significant weight in this proceeding.

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[59] See The Arbitration of Wages, at pages 65-66 and 90-91. (footnotes omitted)

Summary of Preliminary Conclusions

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

(1) The outcome of this proceeding depends upon arbitral application of the evidence and the arguments of the parties to the arbitral criteria contained in Section 111.77(6) of the Wisconsin Statutes and, on the basis of this application, to select one of the two final offers.

(a) No significant questions have been raised by the parties relative to the *lawful authority of the employer*, the *stipulations of the parties*, or the *ability to pay* criteria.

(b) The parties have principally emphasized the following the *interests and welfare of the public*, the *external and internal* comparisons, the *cost of living*, the *overall level compensation* received by those in the bargaining unit, and various other appropriate arbitral criteria arising pursuant to Section 111.77(6)(h).

(2) Prior to specifically applying the evidence and the arguments of the parties to the statutory criteria, reaching a decision and rendering an award, the undersigned has made the following described preliminary determinations.

(a) In connection with the application of the comparison criteria, the undersigned has determined as follows.

(i) It is widely recognized by arbitrators, advocates and scholars that *the comparison criteria* are normally the most important and the most persuasive of the various arbitral criteria, and that the most persuasive of these is normally the so-called *intraindustry comparison criterion*.

(ii) The composition of the primary intraindustry comparisons *historically utilized by the parties*, *determined to have been appropriate in two prior arbitral decisions,* and *once again urged by the Association in this proceeding*, should remain unchanged and should appropriately be utilized in applying Section 111.77(6)(d) in this proceeding.

(b) When one of the parties to a renewal labor agreement which has proceeded to interest arbitration is proposing elimination, reduction or significant modification of a previously negotiated benefit or previously existing contract language, arbitral approval is normally conditioned upon three determinative prerequisites: *first*, that the proposal is motivated by the existence of a significant and unanticipated problem or problems; *second*, that the proposal reasonably addresses the underlying problem or

problems; and, *third*, that the proposal is normally, *but not always*, accompanied by an appropriate *quid pro quo*.

(i) If the underlying problem or problems addressed by either of the parties are *mutual* and the first two criteria are met, it may be arbitrally determined that little or no significant *quid pro quo* is required.

(ii) It is clear that the Association proposed changes reasonably address some long term mutual problems of the parties, and that these changes require little or no significant *quid pro quo* to justify their selection in this proceeding.

(3) In applying the *Interest and Welfare of the Public and the Financial Ability to Pay criteria*, the undersigned has determined that the Employer asserted *impaired ability to pay* and its *preference for uniform wage increases for all employees during 2007-2008*, cannot alone be assigned determinative weight in this proceeding, without full and normal consideration of all of the statutory arbitral criteria.

(4) In applying *the Comparison Criteria* in this proceeding, the undersigned has noted and determined as follows.

(a) The intraindustry comparables historically utilized by the parties are normally of primary importance in determining the relative merits of wage increase proposals.

(b) The Association proposed split increases providing 3% lifts in split increases in each of the two years of the renewal agreement are quite comparable with the average increases among the intraindustry comparables.

(c) By way of contrast with the above, the County proposed wage increases are significantly below the wage increases provided by the primary and the secondary intraindustry comparables.

(d) On the above bases the undersigned has determined that arbitral consideration and application of *the comparison criteria* significantly favors selection of the final offer of the Association in this proceeding.

(5) In applying *the Cost of Living Criterion* the undersigned has noted and determined as follows.

(a) The Association proposed wage increase offer is fairly consistent with and justified by increases in the Consumer Price Index.

(b) The County's wage offer falls significantly below the levels of increase in the CPI.

(c) Arbitral consideration of *the cost of living criterion* significantly favors selection of the final offer of the Association in this proceeding.

(6) In applying *the Overall Level of Compensation Criterion*, the undersigned has noted and determined as follows.

(a) While this criterion may apply in the initial establishment of wage rates, it normally will not be retroactively applied thereafter to affect the levels of future general wage increases.

(b) On the above bases, the *overall level of compensation presently received* criterion cannot be assigned significant weight in the final offer selection process in this proceeding.

Selection of Final Offer

Based upon a careful consideration of the entire record in these proceedings, including arbitral consideration of all of the statutory criteria contained in Section 111.77(6) of the Wisconsin Statutes, the undersigned has concluded that the final offer of the Association is the more appropriate of the two final offers, and it will be ordered implemented by the parties.

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 Association is the more appropriate of the two final offers before the Arbitrator.

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

WILLIAM W. PETRIE
Impartial Arbitrator

June 4, 2008