WISCONSIN EMPLOYMENT RELATIONS COMMISSION
BEFORE ARBITRATOR WILLIAM EICH

IN THE MATTER OF: THE ARBITRATION BETWEEN

ONALASKA PROFESSIONAL POLICE ASS'N/
WISCONSIN PROFESSIONAL POLICE ASS'N,

JOINT PETITIONERS,

AND

THE CITY OF ONALASKA,

JOINT PETITIONER

AWARD

DECISION NO. 32833-A

CASE 50, NO. 68460
MIA-2855

MARCH 2, 2010

APPEARANCES

For the City, Atty. Sean O'Flaherty, La Crosse
For the Union, Richard Terry

* * * * * * *

INTRODUCTION

On August 31, 2009, the Wisconsin Employment Relations Commission, after determining that the City of Onalaska and the Wisconsin Police Professional Association/Onalaska Police Professional Association had reached an impasse in collective bargaining, ordered the parties to submit Final Offers and appointed the undersigned to arbitrate the dispute.

A hearing was held in Onalaska on November 16, 2009, and the final post-hearing brief was filed on or about January 20, 2010.

THE PARTIES' FINAL OFFERS

The Final Offers may be summarized, by issue, as follows:

- Wages
  - City: 2% across-the-board in 2009; 0.5% in 2010
  - Union: 2% across-the-board in 2009; 1% on January 1, 2010 and 1% on July 1, 2010
- Vacation
  - City: No change to the current policy of 1 week vacation after 1 year, 2 weeks after 2 years, 3 weeks after 8 years, 4 weeks after 15 years and 5 weeks after 21 years.
  - Union: Addition of a sixth week of vacation after 21 years of service and moving the anniversary dates forward to provide 2 weeks after 4 years, 4 weeks after 8 years, and 5 weeks after 15 years.
- Wisconsin Retirement System Contributions
  - City: Limit City's payment of employee share of the contribution to 5% of gross wages
  - Union: No change to current policy of the City's full payment of the employee share of the contribution.
- Holidays
  - City: No change
  - Union: Eliminate compensatory time and overtime pay for working on holidays.
- "Day Trades"
  - City: Add language to confirm that day trades cannot result in overtime
  - Union: No change.
- Overtime Call List Management

• City: Add language to provide that officers on vacation or compensatory time-off not be called to fill in unless a request to do so is filed with management

• Union: No change.

FACTORS TO BE CONSIDERED BY THE ARBITRATOR

Interest arbitrators are required by statute, after hearing, to "adopt without further modification the final offer of one of the parties on all disputed issues submitted for arbitration." Section 111.70(4)(cm)6d, *Stats.* The statutory factors governing the decision—and the manner in which they are to be applied—are set forth in § 111.70(4)(cm), *Stats.*:

> 7. "Factor given greatest weight." In making a decision under the arbitration procedures authorized by this paragraph, the arbitrator ... shall consider and shall give the greatest weight to any state law or directive ... which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer....
>
> 7g. "Factor given greater weight." In making any decision ... the arbitrator ... shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.
>
> 7r. "Other factors considered." In making any decision ... the arbitrator ... shall also give weight to the following factors:
>
> a. The lawful authority of the municipal employer.
>
> b. Stipulations of the parties.
>
> c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
>
> d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.

e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.

f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.

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

h. The overall compensation presently received by the municipal 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.

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

j. 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 PARTIES' POSITIONS SUMMARIZED

A. The City

The City begins by asserting that its offer must be favored because the Union's offer is flawed and unworkable. It then argues that:

> [1] Its proposed external comparables are more reasonable because they more closely reflect the "local community" and have been used in at least one prior municipal arbitration. And the

Union's proposed externals reflect the statewide, rather than the local, economy and some are many miles from Onalaska.

[2] The Union's proposal to eliminate special holiday compensation and compensatory time, adding additional vacation time and shifting the "anniversary requirements" for increases in vacation time based on longevity, do not meet the prerequisites necessary for a change in the *status quo* and do not contain an adequate *quid pro quo* for such a change.

[3] The City's proposed changes in the *status quo* meet all applicable requirements.

[4] The City's external and internal comparables support its final offer.

[5] The Consumer Price Index and other economic factors favor the City's final offer.

[6] The City's final offer is more reasonable in light of the public interest and the City's financial ability to meet costs, as well as the Officers' "overall compensation package."

B. The Union

The Union, in its briefs, argues that:

[1] The Union's proposed external comparables are more appropriate and have been used in a prior arbitration. And, they should be given more weight than the internals based on the fact that, under Wis. Stat. § 111.70(4)(cm)7, arbitrators may, but are not required to, use internal comparables, and there is arbitral authority recognizing the "special" nature of law enforcement personnel as compared to general service employees of a municipality. Finally, the external comparables favor the Union's final offer.

[2] The City has not provided the required *quid pro quo* for its proposal to change the *status quo* in the following respects: [a] requiring employees on vacation or leave to notify management in advance of availability for overtime work; [b] providing that employees making "day trades" will not be eligible for overtime; and [c] limiting its payment of employee WRS contributions to "5% of reportable wages to such employee."

[3] The City's reliance on the economy as a justification for its final offer (and proposed changes in the *status quo*) is misplaced.

[4] The Union's final offer is favored when measured against the cost of living.

DISCUSSION

As indicated above, the Union's final offer, among other things, proposed changes in the vacation and holiday provisions of the agreement, and the City begins by arguing that because of inconsistencies and ambiguities in the offer, it should be rejected and its own offer adopted.

Considered in context of the terms of the parties' Collective Bargaining Agreement, the Union's holiday proposal would eliminate the following underlined language:

7.1 – Paid Holidays. Holiday compensation ... shall be allowed for the following holidays:

New Year's Day	Veteran's Day
Good Friday	Thanksgiving Day
Memorial Day	December 24
Independence Day	Christmas Day
Labor Day	

Two personal holidays to be used at his/her discretion, one (1) day on January 1 and one (1) day on July 1 ...

~~7.2 Work on a Holiday. All employees will receive pay for an eight (8) hour work day for all nine (9) designated holidays regardless of whether they work or not. Those employees who work on any of the six (6) holidays chosen by the method below as identified in sec. 7.2(a) herein, shall also be paid an additional time and one-half for all hours worked up to eight (8) months.~~

~~7.2(a) The Association shall notify the employer by Nov. 1st of the previous year which six (6) holidays are designated as the days~~

~~they shall deem to be days to be paid at one and one-half (1½) under section 7.2 for hours worked.~~

7.3 Paid vacation, sick leave or compensated leave of absence shall be considered as excused for purposes of claiming holiday pay.

7.4 - Payout of Unused Holidays. Such holiday compensatory time, if not used or approved to e used when the last pay period in November is calculated, shall be paid the first pay period in December.

7.5 – Use of Holiday Compensatory Time. In as much as the aforementioned holiday compensatory time accruals to be used to augment an employee's vacation, the procedures for using said compensatory time are described in Article VIII (Vacation) of this Agreement.

7.6 – Day Trades. Work shift trades shall be permitted if trades occur within the same calendar month. Trades will only be allowed with prior Department Head approval.

As indicated, the Union offered these deletions as a *quid pro quo* for its proposed changes in the "vacation allotment" provisions of the Agreement, as well as for its wage increase proposal. Brief, at 17. The City argues, however, that the changes proposed in the Union's offer render it "unworkable" because, among other things, the Union strikes Section 7.2 in its entirety—which the City says is "the only operative provision [in the agreement] with respect to the granting of Holiday and Holiday compensatory time, *e.g.*: "all employees shall receive pay for an eight hour work day for all nine holidays regardless of whether worked or not." Brief, at 10. According to the city, "[w]ithout the language providing for compensatory time off for holidays, Sections 7.3 – 7.5 are extraneous and do not make sense as written." ***Ibid.***

In its Exhibit 3 (entitled "External Holiday Comparable), at p. 8 (under the heading "Number of Holidays Paid For"), the Union describes what it believes to be the effect of the deletions. It begins by describing the import of the existing language of Section 7:

> 2 of the above holidays are personal holidays. Employees receive 8 hours of pay (normal work day) for 9 designated holidays whether the holiday is worked or not. 6 of those holidays are paid at the rate of time and one-half if the holiday is worked. The Association notifies the employer by Nov. 1 of the previous year which 6 holidays are paid at time and one-half. Unused holiday compensation is paid the first pay period in December.

The Union goes on to sate in the Exhibit that, under its proposal, "[t]he above language is ... to be stricken from the CBA with the exception of the 2 personal holidays." ***Ibid.*** This indicates to the reader that the Union's position is that it is forfeiting all nine holidays and holiday pay with the exception of the two personal days which, as I understand it, were agreed to in an earlier stipulation. I agree with the City, however, that it is unclear how such a conclusion can be arrived at since there is no distinction between the nine holidays and the two personal days in the language the Union has struck from the Agreement..

In its brief, the Union characterizes its proposed changes to Section 7 as "deleting the requirement that the City pay overtime (@ 1.5 time) for those officers working on any of the six (6) designated (section 7.2(a)) holidays." Brief, at 3. No mention is made, however, of the fact that its final offer strikes *all* of the language in sections 7.2 and 7.2(a)—including language providing for compensation for an eight hour work day on any of the nine holidays taken. I agree with the City that, under this language, the officers will still receive eleven holidays, but that the City no longer will have to pay overtime for six of them—which appears to be inconsistent with the Union's "personal holiday exception" statement in Exhibit 3, discussed above, as well as with the "strikeouts" in the Union's offer.

Moreover, considering the Union's proposed deletions in the context of Section 7 in its entirety, the Section, as proposed, may reasonably be read as removing all pay for holidays regardless of whether they constitute one of the nine listed holidays or one of the two personal holidays. And this would render the remaining subsections of Section 7—which the Union's proposal leaves unaffected—highly ambiguous, if not meaningless.

The City raises a second of inconsistency. It notes that the Union's final offer proposes specific changes with respect to "Section 8" of the agreement—specifically sections 8.1.1 through 8.1.6. The subsections quoted (and altered) in the Union's offer, however, are not taken from the Collective Bargaining Agreement between these two parties, but rather from Section 8 of an agreement between the City and another Union, the Onalaska Supervisors Police Association, which contains different time and vacation periods.

Responding to the first challenge, the Union says, without elaboration, that it is "not factual," and that "nothing in the Association's Final Offer disqualifies it." Reply Brief, at 2. As to the second, the Union, while acknowledging that its offer proposes amendments to another union's contract, not its own, goes on to state that the effect of its error is simply to "strik[e] out words that don't exist," and that there should be no confusion as to its intention.

I must disagree. The only authority the Union offers for its assertions is a passage from an arbitrator's letter to the parties in a school district arbitration responding to a letter from one of the attorneys "pointing out an inconsistency in the award." ***School District of Turtle Lake***, Decision No. 17601-A, Letter of September 8, 1980. The inconsistency, which the arbitrator acknowledged, was that he had stated at one point in his award that "the health insurance issue is one that favors the Employer," and, a few pages later, stated that the Union's position should be adopted on the issue. ***Ibid.*** In his letter to counsel, which he said should be considered a "clarification" of, and an "addendum to" the award, the arbitrator stated that the matter was purely "ministerial," and rejected the employer's request for reconsider of the award in its entirety, stating:

> [The] inaccuracy was erroneous as to form only. In deliberating and weighing the issues, the undersigned was fully aware at the time of the execution of the ... Award that the health insurance issue had been found for the Employer, even though the writing did not say that. Furthermore ... the inconsistency involves a relatively minor item .... Specifically, the insurance issue involves a difference of less

> than a dollar a month per employee... [C]onsequently, the removal of the health insurance issue from the union's side of the ledger to the Employer's side ... would not cause the [arbitrator] to change his opinion that "the weight of the determinations on each of the issues favors the adoption of the Union's final offer." ***Ibid.***

But this case is not one where the inconsistency is so "minor" as to be miniscule—as the one-dollar-per-month difference in ***Turtle Lake***. Nor does it occur in an arbitrator's award, subject to resolution through "clarification" or modification by the arbitrator. Here, the Union's final offer, as written, creates ambiguities and inconsistencies in the underlying Agreement governing the parties' relationship. Under the statutes governing interest arbitration, the arbitrator must select the final offer of one of the parties "and shall issue an award incorporating that offer without modification." In ***Shawano County***, Decision No. 32169-A, June 18, 2008, Arbitrator Torosian, after concluding that, as written, the County's final offer was "flawed" because the work schedule for some employees was inconsistent,* stated:

> If the Arbitrator were to select the Employer's final offer, it would present serious potential problems of contract interpretation and application. The Arbitrator is mandated to select the final offer of one of the parties and incorporate that offer "without modification." While it may be argued that arbitrators can interpret final offers, they cannot modify final offers. The Arbitrator does not find it reasonable to put the parties in a position of arguing whether the Undersigned would be modifying the Employer's final offer by interpreting its final offer as it was explained by the Employer at the arbitration hearing.

I consider that analysis to be wholly applicable in the instant case. As indicated, the Union's final offer would insert inconsistencies and ambiguities into the parties' Collective Bargaining Agreement which, in my view, could present significant problems with respect to its interpretation and application now and for the duration of its existence.

---

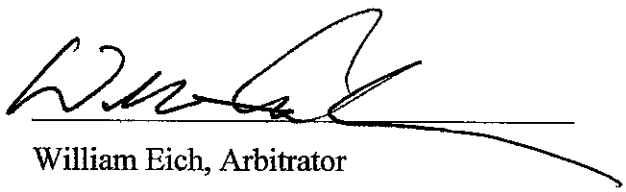
* The employer's offer proposed that the employees work on a schedule of five days on and two off, but also stated that "no [employee] shall be scheduled to work ten days in succession," and that the three shifts were to be "rotated among all [employees]." Arbitrator Torosian concluded that the "five on two off" work schedule "cannot be accomplished with the rotating schedule set forth" in the offer.

And, like Arbitrator Torosian, I am loath to adopt an interpretation of that offer in this award and thus raise the likelihood—or even the possibility—of a challenge on grounds that it constituted an impermissible modification by the arbitrator of the written terms of the parties' Agreement.

CONCLUSION & AWARD

For the above reasons, and in consideration the applicable statutory criteria, together with the evidence, exhibits and arguments put forth by the parties, I conclude that the Final Offer of the City of Onalaska, Dated July, 2009, more closely adheres to the statutory criteria than that of the Union, and I therefore direct that that offer be incorporated into the parties' Collective Bargaining Agreement in resolution of this dispute.

Dated at Madison, Wisconsin, this 2nd day of March, 2010



William Eich, Arbitrator