STATE OF WISCONSIN
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WAUPACA COUNTY LAW
ENFORCEMENT OFFICERS
ASSOCIATION, LOCAL 2771
AFSCME, AFL-CIO

And

Case ID 298.0004
Dec. No. 37277-A
Case Type MIA

WAUPACA COUNTY

Appearances:

For the Union: Mark DeLorme,
Staff Representative

For the County: James R. Macy, Esq.
von Briesen & Roper

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the Wisconsin Employment Relations Commission. A hearing was held on April 2, 2018 in Waupaca, Wisconsin. The parties were given the full opportunity to present evidence and testimony. At the close of the hearing, the parties elected to file initial Briefs and the County also filed a Reply Brief. The arbitrator has reviewed the information provided at the hearing, the exhibits and briefs of the parties in reaching his decision.

BACKGROUND

Waupaca County, hereinafter referred to as the County, is in Central Wisconsin. The Sworn Officers in the Sheriff's Department are represented by AFSCME, Local, 2771.

The parties' collective bargaining agreement expired on December 31, 2016. They entered into negotiations for a successor agreement. They agreed upon all issues except those listed below:

1. Duration.
   County proposes a three (3) year agreement, covering 2017-2019.

   Union proposes a two (2) year agreement, covering 2017-2018.

2. Wages.
   County proposes a two percent (2%) increase for 2017, 2018 and 2019 plus an additional $.25 increase in 2017.

   Union proposes a two percent (2%) increase in 2017 and 2018.

3. Article XXI- Paid Time Off (PTO) (New Article)
   County proposes:
   Eliminate the Second Paragraph of Article XX regarding holidays
   Eliminate current language in Article XXI involving sick leave and replace it with a new Article XXI
   Sick leave and floating holiday benefits would be combined. Each year an employee would receive seven (7) PTO days on January 1. Unused PTO days can be transferred into an Extended Leave Bank and can accumulate up to 90 days. At retirement employees with five years of service are paid out for unused days based on this scale:

0 – 30 days	25% of balance
31 – 60 days	50% of balance
61 - 90 days	100% of balance

   At retirement, employees in active status as of January 1, 2018 would receive the greater of: (1) 100% of sick days accumulated as of 1/1/18; or (2) the above new PTO formula.

   Union proposes the status quo on this issue.

Currently employees receive one (1) day of sick leave per month after completion of a twelve (12) month probationary period and can accumulate up to 90 days. Any unused sick leave is paid out at a retirement at 100%. Employees currently receive 2.5 floating holidays.

Comparables

The parties proposed the same six comparable jurisdictions. They are the Counties of Marathon, Outagamie, Portage, Shawano, Waushara and Winnebago. The Arbitrator adopts those counties as the appropriate comparables.

DISCUSSION

The Statute requires the Arbitrator to give greater weight to "the economic conditions in the jurisdiction" than to any other factor. In this case, the County has not argued its current economic condition are a factor. Neither side has suggested that one proposal has significantly more cost than the other. Looking at the proposals it does not appear there are any major cost differences. The Arbitrator find this factor is not relevant in this case.

There are eight other factors an arbitrator should consider. As is almost always true in this type of case, not all factors are relevant. The Arbitrator finds the only factors relevant here are 4(a)

> **1.** 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:
>
> a. In public employment in comparable communities.

and to lesser extent factor 8

> 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.

These are the only factors the Arbitrator shall address.

Paid Time Off (PTO)

The major difference in the proposals of the parties is the proposal of the County to strike language regarding floating holidays and sick leave and replace it with Paid Time Off. Currently employees get 2.5 floating holidays. They also accrue sick leave at the rate of 1 day for each month of service. Unused sick leave is paid at retirement or the money can go toward health insurance premiums. There is a cap on how many hours an employee may accrue. Under the County proposal, instead of sick leave and floating holidays, employees would get PTO. They would get 5 days when hired and 7 days annually. Under the PTO proposal, an employee who retires gets 25% of the balance for the first 0-30 days, 50% for the next 30-50 days and 100% for 61-90 days.

Factor 8 says the Arbitrator should consider "other factors… which are normally or traditionally taken into consideration… in the consideration of … benefits." The County argues in some respects its proposal gives greater benefit to employees than the current language does. Sick leave can only be used for sicknesses. There is no such limitation on the use of PTO time. It also can be used to cover time off under FMLA. Accrual under current language does not begin until the employee has worked 12 months. Under PTO, accrual is immediate. This new proposal the County argues makes it more competitive. Another benefit it contends is that under the current agreement an employee

who reaches the maximum 90 hours of sick leave accrual loses any time accrued over 90 days. It is simply lost, whereas under its proposal that extra time can be used as vacation time. The County says that when it implemented this language for its other employees, there were no complaints raised by employees. It contends the transition here would be as smooth.

The Union disagrees with the County contention that employees get the same leave under its proposal as they currently receive. It offered a chart comparing benefits. That chart shows:

Status Quo: Personal Holidays/Sick Time Earned Each Year 12 sick days per year (1 per month) 2 ½ Personal Holidays per year 1 Wellness Day per year Current total = 15 ½ days per year	County Proposal: 'PTO' 7 days (8 hour/day) Personal Holidays per year
Status Quo: Sick Leave Bank Up to 90 days and is replenishable. Upon retirement, disability retirement or death, employee will be paid for one hundred percent (100%) of the unused sick leave remaining in his/her account. Employee has two options for payout: 1. 100% payout in cash 2. Purchase Health Care Insurance	County Proposal: 'Extended Leave Bank' Upon retirement: Number of Days Payout The first 0-30 days 25% of the balance The second 30-60 days 50% of the balance The third 61-90 days 100% of the balance

The Union does not include on its chart the five days an employee gets when first hired as opposed to having to wait 12 months before accrual begins. The County also points out in its Reply Brief that the wellness day listed in the chart is not automatic and that the personal holidays are incorporated into its

proposal. It also notes the options to use accrued leave when leaving employment have not changed from the current language and the chart fails to show that. Finally, it points out that current employees are "grandfathered" under the County proposal. They can cash in their accumulated balance at 100%. Of course, they would have to do so immediately and could not wait until their retirement so there is a negative aspect to its proposal. The Arbitrator has put all these above arguments under category 8. The proposal affects wages and conditions of employment and as such, they are factors normally taken into consideration.

The Arbitrator is also mindful it is the County that is seeking to change the status quo. The Party seeking to make such a change must justify that change. The burden falls upon it. The County feels it has met that burden in several respects. Its proposal has the benefits noted earlier. It says it also has offered a quid pro quo. It is offering an additional $.25 per hour increase in wages on top of its 2% wage proposal as a quid pro quo. The Arbitrator finds when considering the above arguments of the parties on this point and the addition of a quid pro quo that these facts slightly favors the County proposal. However, factor 4(a) must now also be considered.

External Comparables

The County contends its proposal is in keeping with a trend among the external comparables. It notes several of them have gone to a similar PTO leave policy. Marathon and Shawano provide employees PTO. Waushara has PTO for

non-represented employees, but not for represented employees. The other comparables do not have it.

External comparables are not as relevant when dealing with benefits as they are for wages. Given that there is a split among the comparables, the Arbitrator finds the external comparables provide little assistance here. While there might be a trend towards the adoption of a PTO benefit among the external comparables, it is not enough of one for this Arbitrator to find it to be a significant factor in this proceeding. Further, the comparables that do have PTO are not uniform in how much PTO is offered and how it can be used.

Internal Comparables

All County employees, but the employees in this unit are now under the PTO language. These are the only employees remaining under the old system. The County stresses the importance of internal comparability as a factor in an issue like this one. Traditionally, Arbitrators, even in police cases, have given greater weight to external comparables regarding wages and to internal comparables when it comes to benefits. PTO falls into the latter category. The County it states has always tried to treat all its employees the same regarding benefits. Its final offer would continue that practice. It further notes for public policy reasons treating employees in the same way makes sense. It points to a case before Arbitrator Flaten where he held.[1]

[1] Washington County (Deputies), Dec. No. 29379, 2/19/99. See also Village of Greendale Dec. No 33924-A (Stryker-3/27/13) where he noted; "Ignoring, equity, fairness, and internal settlements can erode morale and possibly impact service delivery." City of Waukesha Dec. No. 21299 (Fleischli 8/28/84) as well as other cases with similar holdings.

> At present, the Employer treats all workers the same regarding all the fringe benefits of health insurance, vacation, holidays and contribution to the Wisconsin Retirement System. It would really be asking for future trouble, not to mention bad feelings, conflict and poor morale if it changed now with one of its bargaining units.[2]

Almost all the cases cited by the County, including the cases decided by this Arbitrator, took place prior to the adoption of Act 10. Most employees were covered by a collective bargaining agreement. Given that fact, it was not unusual, especially when it came to comparing wage increases of comparable jurisdictions to look only at the wages that were agreed upon through negotiations. Non-union employees were excluded because those increases were not the product of negotiations.

That same rationale applied to internal comparables. Most employees were under a collective bargaining agreement. For that reason, reference to employer's non-covered employees was given far less importance than what the unionized groups were doing. The employer would negotiate with all its bargaining units. It got agreement from these other units to adopt a benefit. One unit held out. The Employer then came to an arbitrator to point out that the unit was a lone holdout. Under those circumstances arbitrators gave great weight to what was agreed to by the other bargaining units. That was so in the cases heard years ago by this Arbitrator as well many others. Then came Act 10. Many employees were now not covered by a collective bargaining agreement

[2] This Arbitrator has also in the past adopted this position. In Waukesha County Dec. No 30468 (5/12/03) this Arbitrator held: "Internal comparables are generally considered to be one of the most significant factors when the subject of the dispute involves benefits rather than wages." See also City of Monroe (1997)

or to the extent employees remained in a Union, their ability to negotiate over traditional issues like this one was curtailed.

Today, arbitrators are being asked to continue to use the old tools to support a party's proposal. They are asked to continue to find internal comparability to be the controlling factor. However, some arbitrators have noted that times have changed and that the value of internal comparables has diminished with the change in the state's bargaining law. Law Enforcement employees have always been distinct from general municipal or county employees. With the change in the law, that difference has been magnified. They are even more dissimilar than they were prior to the change. As Arbitrator Yaeger observed:

> Regarding internal comparability, in prior arbitration decisions I have stated on several occasions that this factor should be considered as a significant, if not controlling, factor in evaluating the parties' final offers relating to benefits and wages. However, that conclusion was reached when local government employers collectively bargained wages, hours and conditions of employment with represented employees. That is no longer the case. Local government employers can now only bargain with their public safety employees hired prior to July 1, 2011 regarding fringe benefits, hours and other conditions of employment. And, therefore, because that conclusion was applicable only with respect to collectively bargained agreements with an employer's other employees internal comparability today it is no longer a controlling factor and does not hold the same significance if any at all when now an employer can act unilaterally without bargaining regarding hours, fringe benefits and other conditions of employment for its other employees.[3]

Arbitrator McAlpin acknowledged the decreased value of internal comparables when compared to law enforcement employees noting the use of

[3] Green Lake County (Sheriff's Department), Dec. No.35779-B (Yaeger, 2016)

interna1 comparables is "questionable at best" because other units have no choice on contribution levels.[4]

The question then is to what extent this factor should continue to have value? This Arbitrator finds it cannot be totally discounted. The rationale behind consistency as referenced by Arbitrator Flaten remains an issue. The effect on morale in having employees treated disparately can still be a problem. Conversely, these employees have retained the right to have a Union bargain for it over this issue. The importance of that cannot be overemphasized. These competing factors must be balanced if an arbitrator is going to fulfill his role in this type of proceeding. The Arbitrator must weigh the impact of the change on bargaining unit members with the harm to the County in having two sets of rules and the consequences that flow from that. The greater the impact on the employees the less weight that should be given to internal comparability. Conversely, if the impact is less than the harm to the County, than the traditional holdings should continue to prevail. In that sense, this is not unlike what arbitrators have always been asked to do. The Arbitrator finds in this case that the County proposal is not all detrimental to employees. There are benefits that were noted above to employees under the County proposal. While there is unquestionably some detriment to employees at retirement and more senior employees may lose some days, the exhibits show there are not many today who would be impacted by this change. Then there is the additional $.25. The

[4] Town of Rome, Decision No. 33866-A, p.24 (12/14/12)

Arbitrator finds the scales here tip in favor of the County on this factor. Thus, both relevant factors favor adoption of the County proposal.

Wages

Both the County and the Union propose a 2% for 2017 and 2018, As noted above, the County also offered a $.25 increase, but that was to offset any hardship regarding its benefit proposal. Since the wages offered by both sides are the same, this issue has no bearing on the overall outcome of this proceeding.

Duration

Marathon, Portage and Shawano all agreed to a three-year agreement. The agreements cover 2017-2019. Winnebago did a three-year agreement, but it went from 2016-2018. Outagamie had a one-year agreement for 2017. Waushara did a two-year agreement covering 2017-2018.

Four of the six comparables agreed to a three-year agreement. The County has argued a three-year agreement is better for budgeting purposes. It also notes if a two-year agreement were adopted that by the time this Decision were issued, the parties would almost immediately have to begin negotiations for a new agreement since all of 2017 and a good part of 2018 would have passed. That is a valid argument. Adopting a three-year agreement would give the parties a little breathing room before they have to go back into negotiations. The Arbitrator finds the County proposal favored on this issue.

Conclusion

The Arbitrator has found the County proposal for a three-year agreement is favored. He has found that the wage proposals are identical and thus carry no weight. This Arbitrator's finding regarding the County proposal to adopt a Paid Time Off in lieu of sick leave accrual to be the deciding factor. Interest arbitration require the arbitrator to balance the benefits versus the harm to the employees by adopting one party's proposal over the others. What is different is that the scales used for that balancing act have been modified since the passage of Act. 10. In this case even using these newer modified scales, those scales still tipped in the County's favor.

AWARD

The County proposal along with all the tentative agreements reached by the parties are incorporated here as the Agreement of the Parties.

Dated: August 14, 2018

Fredric R. Dichter, Arbitrator