WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE BOARD OF ARBITRATORS

In the Matter of the Arbitration of a Dispute Between WAUWATOSA FIREMEN'S PROTECTIVE ASSOCIATION, LOCAL 1923 and CITY OF WAUWATOSA	ARBITRATION AWARD Case XXXI No. 16548 MIA-41 Decision No. 11790-B

BOARD OF ARBITRATORS:

Mr. Robert J. Mueller, Chairman, appointed by the W.E.R.C.

Mr. Ted Ryan, appointed by the Association.

Mr. Jerome H. Rusch, appointed by the Employer.

APPEARANCES:

Brendel, Flanagan & Sendik, S.C., Attorneys at Law, by Mr. John K. Brendel, for the Association.

Mr. Bruce K. Patterson, Employee Relations Director, City of Wauwatosa, for the Employer.

BACKGROUND

Wauwatosa Fireman's Protective Association, Local 1923, hereinafter referred to as the Association, and City of Wauwatosa, Wisconsin, hereinafter referred to as the Employer, were unable to resolve a dispute involving certain issues arising in negotiation of the 1973 labor contract, and evantually an impasse was reached. On June 1, 1973, the Wisconsin Employment Relations Commission, upon application of the parties, issued an order appointing a Board of Arbitration in the matter. By Order Substituting Board of Arbitration of September 12, 1973, the Commission designated the undersigned, Robert J. Mueller, to serve as chairman of said Board; Mr. Ted Ryan, President of the Professional Fire Fighters of Wisconsin served on the Board on behalf of the Association; Mr. Jerome H. Rusch, Director of Personnel, City of LaCrosse, served on behalf of the Employer. A hearing was held on the matter before the full Board on November 29, 1973 at Wauwatosa, Wisconsin. The parties were present, and were afforded full opportunity to submit such evidence and offer such testimony as they deemed relevant. Post-hearing briefs and reply briefs were submitted in the matter.

The instant dispute is before the panel under the provision of form #2 of Wisconsin Statutes Section 111.77. Under form 2, the panel must issue an award of one of the parties last offer without modification.

ISSUE

Which of the final offers of the parties shall be selected by the arbitration panel and incorporated into the contract without modification?

FINAL OFFER OF THE ASSOCIATION

The following constitutes the final position of the Association as of November 21, 1973:

1. Wages: 6.9% across the board salary increase.

2. Health insurance: full payment of the premiums of the Blue Cross - Blue Shield program.

3. Longevity: Five Dollars ($5.00) monthly after five (5) years of service; Ten Dollars ($10.00) monthly after ten (10) years of service; Fifteen Dollars ($15.00) after fifteen (15) years; Twenty Dollars ($20.00) after twenty (20) years; Twenty-five Dollars ($25.00) after twenty-five years of service; to commence with the first pay period after the anniversary date of the Association member's employment.

4. Grievance Procedure:

Section 1. The Association and the City recognize that grievances involving interpretation, application or enforcement of the terms of this agreement and the application of work rules, regulations and conditions of employment should be settled promptly and in a just manner.

Section 2. Any grievance by an Association member relative to the above must be submitted to the Chief within five (5) days of an alleged contract violation or within five (5) days of the aggrieved being aware of an alleged contract violation, but not more than thirty (30) days from the date of the actual occurrence of the incident complained of. Any grievance not filed within the stated time limits shall be invalid. Except where expressly referred to otherwise in this article, days for processing of grievances are to be consecutive days exclusive of Saturdays, Sundays and holidays. The filing of any grievance pertaining to non-fire and/or non-emergency functions, shall cause a stay of the ordered activity and possible resulting disciplinary action, pending the ultimate determination of the merits of the grievance providing that the executive board of the Association invokes such stay by including such in the filing of the grievance submitted to the Chief as hereinafter required. The right to grieve shall not be affected by any prior waiver of similar incidents or past practices by the party aggrieved or any other member of the Association.

Section 3. Nothing contained herein shall be construed to divest nor enhance the Police and Fire Commission of the City of its rights, responsibilities or duties provided, or to be provided, by law.

Section 4. The Association shall select a grievance committee composed of three stewards, one to be designated from each of the three crews, the names of which shall be placed on file with the Chief of the department and the Employee Relations Director as soon thereafter as possible.

Section 4. Procedure.

Step a) Any aggrieved member shall first present his grievance orally to one or more members

of aforestated grievance committee or to any Association officer. If it is decided that a grievance is to be submitted to the City, the aggrieved party shall prepare a written grievance which shall be submitted to the Chief of the Department. The Association shall have standing to process and support a position with regard to the grievance, through its committee or officers, in the same manner as an individual aggrieved could act.

Step b) The Chief shall, within five (5) days subsequent to its receipt, hold an informal meeting with the aggrieved party, one or more members of the grievance committee and/or Association officers, and any other principals deemed necessary. Within three (3) days subsequent to the meeting the Chief shall respond in writing. A copy of such response shall be given to the aggrieved party as well as the Association committee. The matter shall be considered resolved unless appealed to Step c within five (5) days of the receipt of the Chief's decision.

Step c) If the grievance is not resolved at Step b, the original grievance and subsequent response by the Chief shall be forwarded by the Association to the Mayor or City Administrator at the option of the aggrieved party, for further review. The Mayor or City Administrator shall hold a hearing, or hearings, at which the Association, the aggrieved, the Chief and other appropriate personnel shall be present within ten (10) days of the receipt of the original grievance and the Chief's response. The Mayor or City Administrator shall thereafter within ten (10) days of the hearing submit his decision as to the merits of the grievance to the aggrieved, the Association and the Chief. If the matter is not appealed to Final and Binding Arbitration within fifteen (15) days of the issuance of the Mayor's or City Administrator's decision, the matter shall be considered resolved.

5. Rules and Regulations:

Section 1. No firefighter or other association member shall be required to perform any duty not fire-related other than those duties heretofore required in 1972. In no event shall any member be required to perform major construction, maintenance or repair work otherwise traditionally done by union or other trades workers outside the department. "Major" work shall be deemed to specifically include, but not be limited to, any work which would require the issuance of a permit, license and/or an inspection by an agent of the City of Wauwatosa, if done by non-fire personnel. No rule or regulation shall modify nor contradict any provision of this agreement.

Section 2. Work rules, regulations and conditions of employment as established and enforced in 1972 may be applied without further action. The creation of any new work rule, regulation or condition established after January 1, 1973, or the modification or cancellation of a pre-existing rule, regulation or condition of employment as defined herein shall be subject to negotiation and mutual accord between the Chief and the association's executive council prior to becoming effective.

Section 3. Nothing herein shall be construed to divest either party of any rights of collective bargaining per Section 111.70 of the Wisconsin Statutes. Disputes arising with regard to the application of any work rules, regulations or conditions of employment shall be subject to the grievance and arbitration procedures as set forth in this agreement.

Section 4. All off-duty hours shall be free of City control except for the customary call-back.

6. Retroactivity: All changes previously agreed to or subsequently resolved in arbitration to be effective and made retroactive to January 1, 1973.

FINAL OFFER OF THE EMPLOYER

1. Wages: A 3.5% across the board salary increase effective January 1, 1973; and an additional 2.0% increase across the board effective July 4, 1973, applied to the June 30, 1973 wage schedule; the above to be retroactive for 1973.

2. Health Insurance: Continuation of the 1972 formula as follows:

	Monthly Contributions	
	Employee	City
Family Plan	$9.75	$55.24
Single Plan	3.52	19.97

3. Longevity: None shall be provided.

4. Grievance Procedure:

Section 1. The Association and the City recognize that grievances involving interpretation, application or enforcement of the terms of this Agreement and application of work rules, and regulations affecting wages, hours and working conditions, should be settled promptly and in a just manner.

Section 2. Any grievance by a department employee relative to the above must be submitted to the Chief within five (5) days of an alleged contract violation or within five (5) days of the aggrieved being aware of an alleged contract violation, but not more than thirty (30) days from the date of the actual occurrence of the incident complained of. Any grievance not filed within the stated time limits shall be invalid. Except where expressly referred to otherwise in this article, days for processing of grievances are to be consecutive days exclusive of Saturdays, Sundays and holidays.

Section 3. Nothing contained herein shall be construed to divest the Police and Fire Commission of the City of any rights, responsibilities or authority provided by Section 62.13 of the Wisconsin Statutes.

Section 4. The Association shall advise the Chief of the department and the Employee Relations Director of the stewards on each shift as soon as possible following selection.

Section 5. PROCEDURE

Step a) The aggrieved party shall prepare a written grievance which shall be submitted to the Chief of the Department. The Association shall have standing to process and support a position with regard to the grievance, through its committee or officers, in the same manner as an individual aggrieved could act.

Step b) The Chief shall, within five (5) days subsequent to its receipt, hold an informal meeting with the aggrieved party, one or more members of the grievance committee and/or Association officers, and any other principals deemed necessary. Within three (3) days subsequent to the meeting the Chief shall respond in writing. A copy of such response shall be given to the aggrieved party as well as the Association committee. The matter shall be considered resolved unless appealed to Step C within five (5) days of the receipt of the Chief's decision.

Step c) If the grievance is not resolved at Step b, the original grievance and subsequent response by the Chief shall be forwarded by the appealing party to the City Administrator for further review. The City Administrator shall hold a hearing, or hearings, at which the Association, the aggrieved, the Chief and other appropriate personnel shall be present within ten (10) days of the receipt of the original grievance and the Chief's response. The City Administrator shall thereafter, within ten (10) days of the hearing, submit his decision of the grievance to the aggrieved, the Association and the Chief. If the matter is not appealed to Final and Binding Arbitration within fifteen (15) days of the issuance of the City Administrator's decision, the matter shall be considered resolved.

5. Rules and Regulations: Identical to the proposal of the Association except that it shall not include that paragraph designated "Section 2" in the Association proposal, supra.

6. Management Rights:

Section 1. Except as otherwise specifically provided herein, the Management of the Fire Department of the City of Wauwatosa and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

Section 2. The powers and authority retained by the City are not to be exercised in a manner to undermine the Association.

MONETARY ISSUES:

WAGES - LONGEVITY and INSURANCE

Using the monthly maximum salary of Journeyman fireman as the base of reference, the following amounts and percentages are arrived at.

Wauwatosa 1973 Rate - 889.50

City Proposal
3.5% x 889.50 = 31.13 x 6 mo. = 186.78
2.0% x 920.63 = 18.41 + 31.13 = 49.54 x 6 mo. = 297.24
297.24 + 186.78 = 484.02
484.02 = Total increase for contract year. (40.335 per month average)

Association proposal
6.9% x 889.50 = $736.50 = Total increase for contract year. ($61.375 per month average)

Under the wage Board guidelines, wage increases were recommended as being 5.5% of the adjusted gross earnings paid employees. Such gross earnings under the Wage Board's formula included almost all fringe benefits. If one assumes the fringe benefits to be in the area of 20 percent additional (such percent is a rule of thumb amount accepted and used by many negotiators), one would find that the gross earnings of the Journeyman Fireman at the maximum rate herein would be $1,068.00. If one applied the pay Board standards on such basis, one would find the following:

$1,068.00 x 5.5% = $58.70
$58.70 - 40.335 = $18.365 below the pay board formula (City proposal)
$58.70 - 61.375 = 2.675 above the pay board formula (Assn. proposal)

Additionally, the pay board formula provided an additional .7 percent for fringes bringing the total percentage to 6.2%. From the exhibits submitted by the parties, the undersigned has computed the Association's request on hospital and surgical insurance as costing an average of $9.17 per month per employee and the longevity request as costing an average of $9.58 per month per employee. The total monthly monetary increase attributable to the Association's proposal for the journeyman fireman at the maximum rate is as follows:

Salary -	61.375
Insurance -	9.17
Longevity -	9.58
Total	$80.125

Total monthly monetary value of Assn. proposal = $80.13
Total monthly monetary value of City proposal = $40.34
Difference $39.79

If one applies the wage board formula of 6.2% toward the gross earnings of $1,068.00, one finds the following relationship of the parties proposals to such formula.

1068 x 6.2% = $66.22 (Pay Board formula)
40.34 ÷ 1068 = 3.78% or 2.42% below (City offer)
80.13 ÷ 1068 = 7.50% or 1.3% above (Assn. offer)

From the above computations one would arrive at the conclusion that the Association monetary proposal would be the most reasonable.

Evaluation of the respective proposals to the cost of living rise would reveal the following: (using the national series, U.S. Dept. of Labor)

Dec., 1971 index	123.1
Dec., 1972 index	127.3
	4.2 points

127.3 ÷ 123.1 = 3.4% increase

Arguably, had the parties negotiated a settlement for calendar year 1973, they would have had only the above information available to them at such time. As such, the cost of living argument would be much less cogent than it is at the time of hearing where hindsight has revealed a substantial cost of living increase for 1973.

The 1973 increase was as follows:

Dec., 1972 index	127.3
Dec., 1973 index	138.5
	11.2 points

138.5 ÷ 127.3 = 8.8% increase

Realistically it would seem that the increase in cost of living known at the time of negotiations should be the proper yardstick. On such basis the comparison would be as follows:

1972 cost of living increase = 3.4%
City's proposal = 3.78% or .38% above
Assn.'s proposal = 7.5% or 4.1% above

The clear conclusion to be reached from such comparison is that the City's offer is the most reasonable for the purpose of maintaining status quo with the cost of living.

The Association took the position at hearing that Wauwatosa was falling behind other comparable municipalities with respect to wages and fringes. Using the data presented in the exhibits of both parties one finds the following relationship existing for the year 1973.

	MUNICIPALITY	MONTHLY MAXIMUM SALARY	SALARY PLUS 20 YEARS LONGEVITY
1.	Milwaukee County	$1,010	$
2.	Fox Point	985	1,005
3.	Franklin	974	1,013
4.	Milwaukee	972*	
5.	West Milwaukee	967	987
6.	Cudahy	966	981
7.	West Allis	962	982
8.	Shorewood	952	952
	Wauwatosa	950 (Assn. proposal)	970
9.	Whitefish Bay	950	950
10.	Oak Creek	947	
11.	South Milwaukee	946	946
12.	Brown Deer	942	942

	MUNICIPALITY	MONTHLY MAXIMUM SALARY		SALARY PLUS 20 YEARS LONGEVITY
	Wauwatosa	939	(City proposal)	939
13.	Glendale	939		959
14.	Brookfield	915		945
15.	Greendale	894		894
16.	Waukesha	886		906
17.	St. Francis	826		841

* City of Milwaukee had not settled and a 5.5% increase is assumed for comparative purposes.

For comparison purposes, the highest and the lowest have been omitted The average wage without longevity of #'s 2 through 16 is therefore determined as follows:

14,197 ÷ 15 = $946.47 average

City's offer = 939.00 = 7.47 below
Assn.'s offer = 951.38 = 4.91 above

With respect to the column including longevity, the following is shown: (Excludes those not showing longevity such as Milwaukee County, Milwaukee, and Oak Creek. St. Francis is excluded as the lowest one.)

12,462 ÷ 13 = 958.62

City's offer = 939.00 = 19.62 below
Assn's offer = 970.00 = 11.38 above

With respect to longevity, the survey reveals that 8 out of the 13 used in the comparison, provide a longevity plan. If one compares the City's offer with that of the Association's including longevity, one finds the following:

Average wage rate including longevity - 958.62

City's wage rate proposal = 939.00 or $20.00 below
Association's wage rate proposal = 959.58 or $.96 above 950.00 + 9.58 (longevity average cost)

On the basis of the above comparison it would appear that the Association proposal including longevity is the most appropriate. From all the testimony and exhibits presented by the parties, the undersigned can find no justification for Wauwatosa firemen being below the mean average of those surveyed. On the basis of tax data supplied, services rendered by the department as a first-run department, population, and location within the exact contingent area of those surveyed, it is the judgment of the undersigned that Wauwatosa should appropriately be at or slightly above the mid-point average. The Association proposal accomplishes such comparative placement. While the City's proposal would result in a $939.00 wage rate during the last six months of 1973, the fact that the proposal is in two steps would result in an average wage rate yield for 1973 of $929.84 per month. Such fact makes the City's offer effectively yield substantially less than the mean average yields to those compared.

H.1/4

With respect to the insurance proposal of the Association, the undersigned has reviewed the exhibits of both parties. City's exhibit #5 at page 5 reveals that 10 of the 14 surveyed, the employer pays the full cost of both single and family coverage. Four require the employer to pay part of the cost, ranging from $2.68 to $4.00 per month for family coverage. The City's offer would leave the employee to pay $9.75 per month toward family coverage.

The City's exhibit reveals that the average payment by the employer's surveyed is $60.93. Under the City's proposal, Wauwatosa would pay $55.24 or $5.69 less than the average of all others. The average cost of the Association proposal on insurance is $9.17 per employee as computed from the exhibits.

On the basis of the above comparison, it would appear that the more equitable position is that of the Association. If the undersigned had the option to do other than grant one or the other position without alteration, the principle advanced by the City to have the employees pay a portion, would be awarded as the reasons and premise of their position is well founded. Such choice, however is not available and on the basis of the comparative two positions, that of the Association is the most equitable in the premises.

The undersigned has computed the actual average cost of the longevity proposal of the Association from the exhibits as being $9.58 per month per employee.

From such exhibits the undersigned has also computed the average cost per employee for insurance as being $9.17 per month per employee.

From such computations one arrives at the gross monthly average cost of the Association proposal as follows:

Wages		Longevity		Ins.		Total Increase
60.00*	+	9.58	+	9.17	=	$78.75

* Although the Association proposal of 6.9% = $61.38, the parties have consistently referred to the new proposed rate of 950.00, therefore indicating a rounding off to a $60.00 per month proposal on wages.

Total annual Increase

Association proposal = $945.00
City proposal = $480.00*

* (Assumes the City offer of 3.5% being $31.00 per month increase for 6 months and the 2% increase on 7-1-73 being an additional $18.00 per month)

If one applies such increases against the annual gross rate as hereinabove estimated at $1,068 per month under pay board guidelines, one finds the following percentage comparison exists:

1,068 x 12 = 12,816 (gross annual pay)
945 + 12,816 + 7.37% (Association proposal)
380 + 12,816 = 3.75% (City proposal)

Association proposal = 1.17% above the 6.2% Wage Board guideline.
City proposal = 2.45% below the 6.2% Wage Board guideline.

If one adopts a lower percentage attributable to fringes as being 12 percent rather than 20%, one would find the following.

> 890 x 12% = \$106.80 or gross monthly wage of 996.80
> 996.80 x 12 = 11,962 (annual gross compensation)
> 945 ÷ 11,962 = 7.9% (Association proposal)
> 480 ÷ 11,962 = 4.0% (City proposal)
>
> Association proposal would be 1.7% above the Wage Board guideline.
> City proposal would be 2.2% below the Wage Board guideline.

In the judgment of the undersigned, the position of Wauwatosa firemen in relation to the seventeen comparable departments set forth in the survey would more equitably call for the implementation of the Association proposal. The cost of living consideration is not sufficient to counterbalance the comparative considerations. The purchasing value of a dollar to each is relatively equal. It would seem that the Association proposal would serve to provide a catch up in purchasing power to a more equitable comparative position. Eight of the seventeen would still be higher than Wauwatosa and nine would be lower.

GRIEVANCE PROCEDURE PROPOSALS

The City opposes the Association proposal in four basic areas.

AREA #1

The City opposes the Section 2 language of the Association proposal wherein they provide that:

> ". . . The filing of any grievance pertaining to non-fire and/or non-emergency functions, shall cause a stay of the ordered activity and possible resulting disciplinary action, pending the ultimate determination of the merits of the grievance providing that the executive board of the Association invokes such stay by including such in the filing of the grievance submitted to the Chief as hereinafter required."

The City contends that the Association would undoubtedly construe non-fire and/or non-emergency functions very broad. They contend that such clause could operate to disrupt and interrupt vital functions of the department.

The Association contends that they were basically content with the grievance procedure that has been in effect since 1968 and that the stay provision proposal was submitted by them only after the City submitted a number of proposed changes in other areas to the grievance procedure. They contend that one other municipality has a similar provision to their knowledge and that they feel that the inclusion of such provision would serve to preserve the status quo as it affects their wages, hours and working conditions until a joint determination could be made.

The impact of such provision upon the prerogative of the employer to implement and upgrade its procedures and services is difficult for the undersigned to assess. Provisions of similar import are frequently found in private industry contracts wherein restrictions are placed upon the employer's right to make unilateral changes in job content of classifications. In such private contracts, the employer is often

permitted to make such job content changes but is required to re-evaluate and/or negotiate appropriate rates for such revised jobs consistent with specific job evaluation criteria. In some contracts, employers are restricted from assigning work across trade lines.

In view of the reasons for such restrictions and the considerations generally applied thereto, it would seem that the proposed stay proceedings contained in the Association proposal would reasonably be limited to those non-fire and/or non-emergency activities that would create a substantial impact on the wages, hours and working conditions of the employees. It is not likely that a change in function or activity tending to upgrade or improve the operation or service of the employer, where such function or activity would not adversely affect the status quo of the employees with regard to wages, hours and working conditions, that a meritorious grievance could be sustained. The element of the Association's proposal that appears particularly troublesome, however, is the fact that a stay of such activity is possible merely from the filing of a grievance. On such basis, it apparently would operate as an automatic stay, thereby preventing the Employer from implementation, even if the change were an extremely desirous one, and even though the grievance may be without merit in every respect. The effective impact of such a provision depends to a large extent upon the good faith and intent of the Association. Clearly, if the Association seeks to use such provision for obstructionism purposes, it could be a very prohibitive item.

While such clause, on its face, would be undesirable from the City's viewpoint, the fact remains that it becomes a problem, only if the parties abuse it. If it involves a non-fire and/or non-emergency function, it is excluded. Additionally, if it does involve such covered matter, the parties may very well reach mutual accord thereon. As a further saving, in the event that mutual accord cannot be reached, there is nothing to prevent the parties from seeking an immediate bench-type determination of the matter. In the judgment of the undersigned, predicated upon the wise and good faith use only of such provision, the undersigned will not determine the outcome of the total proposals and relative equity of each based upon such single item.

The second portion of the Association proposal with which the City raises issue involves that of Section 4, wherein the Association spells out the composition of the grievance committee. The City contends that the inclusion of such specific language constitutes a violation of Section 111.70 of the Wisconsin Statutes by involving the Employer in contractual provisions that are properly internal affairs of the Association.

The undersigned is of the opinion that the City's position is not well founded. Numerous private contracts contain provisions specifying the number of grievance committeemen and the locations and/or shifts of each to be selected. If the Association wishes to specify such matters in the contract, the City should have no objection to its inclusion. In the opinion of the undersigned, the purpose of such section is to specify to the Employer the number of appropriate Union officials that will be designated to handle grievances so that the Employer will be advised and will know who to deal with on grievance matters. In the opinion of the undersigned, such type provision is a desirable provision to have in a contract.

The third item of the Association proposal with which the City raises an issue involves the language contained in Step a of Section 4, wherein it provides that any aggrieved member shall first present his grievance orally to one or more members of the grievance committee or to an Association officer. The City contends that this deprives an employee from directly presenting a grievance to the Employer. Specifically, such matter becomes important if it involves a non-Association member.

The City's argument presumes the situation wherein the grievance committee or Association officer reviewing a grievance of a non-Association member would be discouraged or thwarted by the committee or officer, leaving the non-Association member without a right to individually present and pursue any grievance.

At page 49 of its statement of issues and argument presented at the hearing, the Association stated their rationale for the contract containing such provision as follows:

> "The grievance procedure originally agreed upon in March will also show that both sides were proposing a system by which the executive committee would review a proposed grievance of a member before its submission to the Chief. The purpose was obviously to have those who were actively engaged in the negotiation of the contract review the grievance lest the spirit of the contractual provisions was actually being complied with and the employee's interpretation was in controvention of such intended spirit of the law. This would eliminate unnecessary hearings and procedures. It was designed actually to assist the City in this regard. It was also though that multiplicity of grievances could be avoided in the event that several members might have different interpretations of a proposed order of the Chief and object to it on varying grounds. In that event, one grievance would be filed if deemed meritorious rather than the separate complaint of each aggrieved party. In this respect, the Association really has no objection to the City's about face and probably would have agreed had such been proposed during the negotiations prior to the 'last offer' if that is what the City deemed most workable for it."

In the judgment of the undersigned, it would seem that the reasons for the inclusion of such provision in the Association proposal as stated in its position paper would be desirable. The law requires a bargaining representative to fairly represent all members of a bargaining unit whether they be actual members of the Association or not. If a non-member of the Association presented a grievance which the Association failed to allow or pursue in good faith, such non-member would clearly have a right of action and redress against the Association under the Wisconsin Statutes. It would seem that such provision, consistent with the expressed intent and purpose of the Association for its inclusion, would serve as a safeguard against the possibility of spurious grievances being filed under the previously discussed stay provision.

The City also objects to the language contained in Step c of Section 4 which provides that the grievance may be submitted to either the Mayor or City Administrator at the option of the aggrieved party, for further review. The City contends that such provision constitutes forum shopping and is therefore undesirable.

The Association contends that such language was inserted in the previous contract because of the fact that the City Administrator position was a new position in the City and the parties were not sure as to whether the Mayor or City Administrator would be the appropriate person at such step to which a grievance should be submitted for review prior to going to arbitration. The Association, in its brief, specifically stated that they did not care who might choose to hear the grievance as part of their job.

While it would seem desirable to specify but one forum for such review, it seems to the undersigned, that under the language proposed by the Association, that the Mayor and City Administrator could administratively determine which one of them would respond in such step. If the City determines that all grievances in Step c are to be handled by the City Administrator, in the event that one is submitted to the Mayor, it would seem that the Mayor could refer such grievance to the City Administrator for processing. Such construction is consistent with the expressed stated reason given by the Association for naming both positions. Such stated reason was that they did not know at the time such language was originally drafted who would be given such job function. Such stated reason specifically infers that the City has the unilateral right to designate the official responsible in Step c.

The City raises a further issue with the language of Step c as presented by the Association with respect to the provision that the Mayor or City Administrator shall submit his decision "as to the merits" of the grievance. The City contends that under such terms, the only basis for resolving the conflict is to find the arguments of one of the parties to be completely without merit and thus to identify the winner by default. They contend that the Mayor or City Administrator could not reject the grievance on procedural matters.

The City's position appears to the undersigned to be a highly technical form of objection. Where such provision specifically contains time limits concerning presentation of grievances and appeal, it would reasonably follow that despite such reference to a decision as to the merits, such procedural defenses remain available to the Employer. The City's interpretation would serve to make meaningless the specific procedural provisions. It is basic to contract interpretation, that contracts must be interpreted so that all provisions are given their fullest effect and any interpretation that would render any part of the contract meaningless should be avoided. It is generally held by most arbitrators, that procedural defects must be raised at the earliest step at which it is permissible to raise such procedural defenses. Under such maxim, it is possible that if a procedural defense exists and it is not raised at the earliest step where it is applicable, that one would be estopped from subsequently raising such procedural defense. The Association proposal, in the judgment of the undersigned, would not estop or prevent the Employer from raising any procedural defense at any step wherein it might arise. Undoubtedly it would remove any doubt if reference to the merits were deleted from such provision, however, in the opinion of the undersigned, such language would not prevent the Employer from raising any proper procedural defense to any grievance.

RULES AND REGULATIONS

Section 2 of the Association's proposal would prohibit the Employer from establishing any new work rule, regulation or condition or modifying any existing rule, regulation or condition without first negotiating and reaching agreement thereon with the Association. Such provision amounts to a clear veto power in the Association.

In the experience of the undersigned, such restrictive provision is unique. I have searched the confines of innumerable private and public contracts in an attempt to find any similar provision. I have been unable to find any. At the hearing, the Association offered no evidence or testimony to the fact that a similar provision was contained in any other contracts known to them.

By far the most common way that rule making is handled in most contracts, is that the Employer has the unilateral right to establish reasonable plant rules not inconsistent with law or the collective bargaining agreement. The parties involved in this dispute have included a provision in Section 1 of their agreement which provides that no rule or regulation shall modify nor contradict any provision of this agreement. Such provision is one commonly found in many contracts. The provision that any new rule or revision of an existing rule must be bargained and agreed upon by the parties before implementation, however, is unique. Generally, the Employer has the unilateral authority to place into effect new rules or to modify existing rules and the Union then has a right to grieve such rule as not being reasonable or of conflicting with other provisions of the agreement.

In the judgment of the undersigned, the Association proposal on this point, at least insofar as being obtained through the final and binding arbitration process is without merit and carries with it substantial potential disadvantage to the Employer. In some contracts, a provision is found wherein new or changed rules must be discussed with the Union before being implemented, and in a number of cases must also be posted before they can become effective. Such type provisions however, do not prevent the Employer from implementing such new rules if need be, without obtaining prior approval and agreement. The undersigned views such proposal on the part of the Association as mitigating strongly against otherwise meritorious considerations of their total package proposal. If an Employer wishes to grant such right to a Union, it should be done through voluntary negotiations between two parties. The Association proposal, as the undersigned reads it, leaves unanswered as to what if any remedy the Employer would have in the event that agreement were not reached on a proposed new rule. Presumably it could be taken to arbitration, although there is nothing in such provision that so provides.

The one saving feature in this case, is the fact that the instant arbitration involves a proposal that is to be effective for the calendar year 1973. Such year has already passed. As such, it follows that it could not be effective to prevent a rule being imposed or modified that has already occurred. It may serve to make negotiable at this time, any such rule or modification that occurred during the contract year. Presumably, after implementation of any award in this proceeding, the parties will proceed to immediately negotiate a new contract covering the calendar year 1974. On the premise that the subject provision will be modified in conformance with the more common rule making prerogatives, or else negotiated with or without modifications to the satisfaction of both parties, the undersigned is not inclined to view such Association proposal as being so totally repugnant as to justify rejection of their total package proposal.

MANAGEMENT RIGHTS

The City is requesting a relatively standard Management's Rights Clause. The Association objects to such clause on the basis that it is too broad and that for the Association to accept a management's rights clause, beneficial counter-benefits in other contractual areas should be exchanged to the benefit of the Association.

The undersigned can find no merit in the position of the Association on this issue. It is a generally accepted view by the majority of arbitrators that absent any management rights language in a contract, all management rights not specifically covered in the contract are reserved to management under the residual or reserved rights theory. There are, however, a few arbitrators who do not subscribe to such majority theory. The absence of such clause in a contract does leave

such matter in an indefinite state. Where management rights clauses are found in contracts, again most arbitrators impose a standard of reasonableness upon all the rights and powers enumerated in any such clause. .

The City presented evidence showing that it does have management rights clauses in contracts with other groups of its employees. In the judgment of the undersigned, it would seem desirable to also have a management's rights clause in the instant contract so as to remove any indefiniteness as to application of the residual rights theory. As long as most arbitrators in the field subscribe to the residual rights theory in the absence of a management's rights clause, the City, however, is not likely to be prejudiced by its non-inclusion. The undersigned would only observe that in view of its inclusion within contracts of other municipal employees, and for the purpose of providing definiteness in establishing by contract the residual rights in the Employer, that such clause should more appropriately be included in the agreement of the parties.

SUMMATION

In summary, it is the judgment of the undersigned that the City's positions relative to the non-monetary contractual issues presented herein are for the most part, more reasonable. The City's request for a management's rights clause is reasonable, although the Association proposal for a contract without a management's rights clause is not deemed so objectionable so as to outweigh the total comparative merits of the relative proposals. The City's proposal with respect to the rules and regulations issue is clearly more reasonable than that proposed by the Association. The effect of the Association's proposal however will be for the calendar year 1973 which has already passed. Its effect will be a nullity. The parties presumably will and should negotiate a modified and mutually acceptable alternative for the year 1974. On such premise, the undersigned will therefore not give such issue substantial weight in favor of the City that it otherwise would receive in contravention of the other equities existent in the total proposals of each.

With respect to the grievance procedure issue, the undersigned is of the opinion that the City's position on most of such items contains merit. The Association proposal on such issue, however, is also worthy of some merit. It would seem that subsequent negotiations between the parties should seek to incorporate and compromise the meritorious aspects of both proposals into one that will remove the ambiguities existing in the Association proposal. The undersigned, however, does not find the Association proposal unreasonable or so inconsistent so as to warrant a finding of substantial merit to be attributed to one or the other of the parties proposals.

The undersigned views the issues involving the monetary considerations herein as being the determining factor of the total package proposals of the two parties. Although the discussion involving the monetary issues hereinbefore set forth has dealt primarily with the cost of living and comparison to other municipalities in contiguous and comparable public employment areas, the undersigned has studied in detail and given consideration to all items in evidence including comparison to the increases and wages received by other employees of the Employer, private employment employees within the area, and has reviewed all such exhibits and data in compliance with the factors as set forth in Section 111.77(6) of the Wisconsin Statutes.

It is the considered judgment of the undersigned that the total proposal of the Association is the more reasonable and that the amount by which the Association proposal exceeds the offer by the City, being the amount upon which settlement was reached with other employees of the City, is an appropriate amount destined to correct the relative position of Firemen and place it in an equitable relative position.

AWARD

On the basis of the above facts and discussion thereon, it therefore follows and it is the Award of the panel that the Association proposal is the more reasonable and that it be placed in effect pursuant to statute and the stipulation and submission of the parties.

Dated at Madison, Wisconsin, this 15th day of March, 1974.

Robert J. Mueller /s/
ROBERT J. MUELLER
Arbitrator

I assent:

/s/ Theodore T. Ryan

I dissent:

/s/ Jerome H. Rusch