In the Matter Between

LOCAL 1801, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

and

CITY OF CUDAHY

Re

Final & Binding Arbitration
WERC Case XVI, No. 18695, MIA-142

ARBITRATION AWARD

Arbitrator: James L. Stern

Decision No. 13260-A

INTRODUCTION

On December 30, 1974, Local 1801, International Association of Fire Fighters, AFL-CIO, hereinafter identified as the Union, filed a petition with the Wisconsin Employment Relations Commission (WERC) requesting final and binding arbitration pursuant to Section 111.77(3) of the Municipal Employment Relations Act (MERA) in order to resolve the dispute between the Union and the City of Cudahy, hereinafter identified as the Employer. On January 15, 1975, the WERC found that, despite prior negotiating sessions including mediation efforts by a staff member of the WERC on December 12 and 24, 1974, an impasse existed and ordered that binding arbitration be initiated. The WERC order confirmed the request of the petitioner that the arbitrator be limited to the last and final offer of the Union or the Employer in accordance with the provisions of Form 2 of 111.77 of the MERA.

The Union and the Employer were furnished a panel of arbitrators from which they selected a person. Thereupon, the WERC issued an order appointing the undersigned James L. Stern as the impartial arbitrator. The parties agreed that the arbitration hearing would be conducted February 24, 1975 and that amended final offers would be mailed to each other with copies to the WERC and the arbitrator no later than five days from the date of the hearing, that is, postmarked no later than February 19, 1975. Appearing for the Union was Ed Durkin, Vice President, IAFF; appearing for the Employer was Mark F. Vetter, Attorney, Mulcahy & Wherry.

At the hearing, the parties stipulated to the many issues on which they had reached agreement, listed the items on which they were still in disagreement, and presented exhibits and explained their positions on the matters at impasse. As agreed at the hearing, post-hearing written briefs, postmarked by March 17, 1975, were sent to the arbitrator. A procedural problem arose during the course of the arbitration which, in the opinion of the arbitrator, necessitated a bench ruling. This procedural problem is discussed in the following section.

ARBITRATOR'S PROCEDURAL RULING

The amended offer of the Employer contained an Alternative I and Alternative II. Under Alternative I the Employer proposed that employees be granted a 10% wage increase and no change in the amount paid to an employee for a holiday ($42). Under Alternative II, the Employer proposed that employees be granted a 9% wage increase and that the amount paid to an employee for a holiday be increased from $42 to $85 for each 24-hour-day holiday.

The Union informed the arbitrator by letter dated February 21, 1974, with copies to the Employer and the WERC that it believed that the Employer offer violated the requirement of 111.77(4), Sub (b), Form 2. The Union stated that, nevertheless, it wished to proceed with the scheduled hearing but that it wanted to record that this action did not constitute a waiver of any rights that it might exercise in the future.

At the commencement of the hearing, however, the arbitrator, on his own initiative, ruled that the amended final offer of the Employer was defective and that he was precluded from proceeding with the hearing until the defect had been remedied. The basis for the arbitral ruling was that the Form 2 provision of the MERA under which the hearing was conducted required that the arbitrator pick the offer of either party in its entirety without modification. Since the Employer offer contained an alternative, it would be impossible for the arbitrator to do this without violating the statute. In effect, the Employer was submitting two final offers rather than one. But the statute specifically required the arbitrator to pick either the offer of the Union or the Employer in its entirety without modification, a selection which could not be accomplished when the final offer of the Employer consisted of two offers.

The arbitrator made this ruling and requested the Employer to remove this defect by striking one of the two alternatives. The Employer agreed to do so, in effect further amending its offer, and the Union in turn agreed to waive its right to postpone the hearing until five days from the receipt of this amended Employer final offer.

ISSUES

The five issues on which the Union and the Employer are in disagreement and their respective positions on each are summarized below and then discussed in some detail in the following discussion section, first individually and then as a whole.

1. Wages: The Union proposes that wages be increased by 10%; the Employer proposes that wages be increased by 9%.

2. Definition of Work Period as Required Under the Fair Labor Standards Act: The Union proposes a nine day work period; the Employer proposes that the definition of work period be deferred until the 1976 contract negotiations.

3. Grievance Procedure: The Union proposes that the grievance procedure be amended in several respects including the placing of discipline and discharge within the purview of the grievance and arbitration clause instead of the police and fire commission procedure. The Employer proposes that the present contract language be retained.

4. Sick Leave: The parties disagree about the language relating to the need for a doctor's certificate when an employee is sick.

5. Educational Incentive Program: The parties disagree about the nature and scope of the program to be instituted.

DISCUSSION

Wages:

The arbitrator directed considerable time and attention to the comparable wage data submitted by the Union and the Employer. He wishes to compliment both of them on the extent of the data they collected and presented in support of their respective positions -- namely, to increase the scale by 10% (Union) or 9% (Employer). The difference between them is relatively small (and would have been non-existent if the employer had selected his other alternative) and it is impossible to say that, on the basis of comparable wage data for firefighters in the area, one figure is wrong and the other right. It appears to the arbitrator, however, that on the basis of two aspects of the wage comparability criteria, that is, the 1975 wage increase granted to other firefighters and the level of the 1975 wage of other firefighters, the position of the Union is to be preferred slightly over that of the Employer for the reasons noted below.

Union Exhibit #2 shows the Cudahy maximum MPO or FF wage to be seventh in the ranking of 13 cities in the area, exactly in the middle. The Union brief contends that the granting of a 10% increase will not move the Cudahy firefighters up in rank (p. 4). The Employer contends, however, that some of these 13 cities (Brown Deer, Shorewood, Glendale, Whitefish Bay) are not comparable on grounds that they are further away from Cudahy (on the north side of Milwaukee rather than the south) and that they are more affluent and residential in character. The Employer further contends that three of the 13 cities are so much larger (West Allis, Wauwatosa and Milwaukee) and therefore have so much bigger firefighting departments that they also are not comparable. The Union in turn argues that one city (St. Francis) -- not included in its list of comparable communities but included in the Employer's list -- should be excluded.

The arbitrator reviewed the exhibits carefully and decided to focus on the relationship of wage levels and increases in five communities. It is not that the other communities are not important -- he concedes that they well may be. It happens in this instance, however, that data are not available for 1975 in many of these communities and that they must be excluded for that reason alone, if not for the other reasons cited by the parties. Union Exhibit #2 which shows percentage wage increases is limited to eight communities (not including Cudahy) because of lack of 1975 wage data. From these eight, the arbitrator would exclude three more. Shorewood is excluded because, as the Employer points out, this is a unique arrangement (for the reasons noted on p. 13 of the Employer's brief). Brown Deer is excluded because of the Employer's contention that a 1975 agreement had not been concluded (see letter from Brown Deer Village Manager to Employer, dated March 10, 1975). In addition, it should be noted that comparisons with both of these cities are less compelling than some of the others because they are in the northern tier of Milwaukee area communities.

Finally, the arbitrator decided to exclude Glendale and St. Francis. The first city, used by the Union is objected to by the Employer because it is one of the northern affluent residential communities. St. Francis is objected to by the Union and not included on its list because it is not represented by the IAFF and relies heavily on volunteers. The arbitrator notes that on Employer Exhibit #1, St. Francis is shown to have only 7 men in the department as compared with a range of 17 to 33 in the other departments with which it makes comparisons.

The arbitrator is left with the cities of South Milwaukee, West Milwaukee, Oak Creek, Greendale and Greenfield for the purpose of comparing wage increases and wage levels. This is somewhat restrictive and is not intended to suggest that wider comparisons would not be warranted in other cases. In this instance, however, for the reasons given above, it seems to be the most sensible base to use for determining comparable wage levels and increases.

Table 1, below, shows the number of men in the department, the maximum 1974 and 1975 salaries included guaranteed or estimated cost of living allowances, and the average increase in pay that firefighters in these cities will receive in 1975. The assumptions and necessary clarifications of the data are explained in footnotes to the table.

It is clear from Table 1 that Cudahy firefighter salaries will be reasonably comparable with those of the other 5 communities included in the table regardless of which offer prevails. The Union offer is preferred by the arbitrator as it continues Cudahy in third place in the table, both in terms of the increase granted and of the 1975 salary ranking. Under the Employer offer the Cudahy maximum salary ranking might drop to fourth (if the COL increases by the amount estimated) and the monthly increase would be the fourth ranked. Since the cities in the table are those relied on by the Employer, it seems sensible to maintain the ranking of the Cudahy firefighters.

Another criterion by which to judge the wage offer of the parties is the wage increase granted by the Employer to other municipal employees. Employer Exhibit #4 shows that the police were granted a 10% increase and that employees represented by Local 742 AFSCME received a 9% increase effective January 1, 1975 and will receive an additional 2% increase effective July 1, 1975. By this criterion, the Union 10% offer is preferable to that of the Employer's 9%.

Table 1

Comparative Data: Cudahy and Five Other Cities (Number of Men in Department, Maximum Firefighter or MPO 1974 & 1975 Salaries Including C.O.L., and Average Monthly Increase Scheduled for 1975)

City	Number of Men[1]	1974 Annual Salary	1975 Annual Salary	Monthly Increase
Cudahy-Union Offer	26	$12,164[1]	$13,380[2]	$101[2]
Cudahy-Employer Offer	26	12,164	13,258[2]	91[2]
South Milwaukee	17	12,267[3]	13,622[4]	113[4]
West Milwaukee[5]	33	12,264	13,464	100
Oak Creek[6]	33	11,989	13,068	90
Greendale	17	11,544[7]	12,583[7]	107[8]
Greenfield	37	11,677[9]	13,298[9]	81[9]

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[1]Taken from Employer Exhibit #1.

[2]Calculated by arbitrator from Appendix A of Cudahy 1973-1974 Agreement and Employer Exhibit #1.

[3]Taken from Union Exhibit #2.

[4]Calculated by arbitrator from documents 10 and 11 of addendum to Employer brief (excerpts from 1974 & 1975 South Milwaukee agreements). The 1974 salary is derived by multiplying the monthly salary of $998 by 12 and adding the contractually guaranteed 10¢/hr x 56 (hrs/wk) x 52 (wks/yr). The same procedure was used for determining the 1975 annual salary from the monthly salary of $1083 and the guaranteed COL payment of 21.5¢/hr.

[5]Wage data taken from Union Exhibit #2 and Employer brief addendum documents, Nos. 13 and 14.

[6]Data taken from Employer brief addendum documents #6 & 7.

[7]Taken from Employer brief addendum documents #3 & 4.

[8]Calculated by arbitrator. Monthly difference in salary between 1974 & 1975 is $86.58 but will be received for only 10.5 months and therefore on the average is an increase of $76/mo. Added to this is $31, representing the 3% increased pension contribution pickup by the employer.

[9]Calculated by the arbitrator. The $11,667 1974 salary taken from Union Exhibit #2 contains $399 COL. The $13,298 1975 salary reflects the increase in annual salary of $583 plus an additional $1048 COL increase. The COL is assumed to rise approximately 2.3%/qtr over the 12/74 National CPI figure of 155.4, or 9¢/qtr, or 36¢ by 1/76 (.36 x 56 x 52 = 1048). The average monthly increase of $81/mo is calculated by adding to the $48.60 salary increase, the average COL received during 1975. Assuming quarterly payments effective 4/1, 7/1, and 10/1 of 9¢ an hour, the worker would receive an average of $32.76 COL during the year.

Another criterion cited by the Union is the increase in the Cost of Living. The Union stated that the Milwaukee Consumer Price Index increased by 10.5% between November 1973 and November 1974. Although the real income of the average Cudahy firefighter is not depressed by exactly this percent, the Union 10% increase is not improper under this criterion.

Another point to be considered in connection with the wage increase issue is whether the impact of the increased pay for working on holidays is sufficient to tip the scale in favor of the Employer. The arbitrator finds that it is not, primarily for the reason cited in the Union brief (p. 2). Although it is possible for a firefighter to increase his pay by working on a holiday, it does not seem appropriate to offset the gains accrued by doing this against the basic salary.

Finally there is the question whether the fringes (holidays, vacations, holiday pay, overtime pay, uniform allowance, longevity, hospital-medical insurance, etc.) of the Cudahy firefighters are higher than those of comparable communities, and, if so, does this fact tip the scale in favor of the Employer. Although some data on fringes were presented by the Employer, (see Employer Exhibits #13 and #15, for example) the arbitrator was not given sufficient information about differences in fringes to justify overturning the conclusion reached on the grounds discussed earlier.

Therefore, insofar as the wage issue alone is concerned, the arbitrator believes that the Union offer is the preferable one. It should be noted, however, that, as the Union has stated in its brief, "wages are not a primary difference between the parties" (Union brief, p. 2).

Definition of Work Period:

The arbitrator does not believe that this problem is as important as the other unresolved issues. The Union proposes that the work period be defined as 9 consecutive twenty-four hour days and that this definition become effective when the U. S. Supreme Court makes it ruling about the Fair Labor Standards Act. The Employer argues that "the definition of a 'work period' shall be subject to negotiation for the contract year 1976" (Employer Final Offer of 2/19/75, p. 1) because there is no need to resolve this problem until it arises. Since any liability which may occur because of the failure to negotiate a definition of a work period at this time will fall upon the Employer and since the Employer evidences no concern on this point, the Union claim that its position is more helpful to the Employer than the Employer's position is rejected by the arbitrator.

Since the Employer sees no need to negotiate the definition of the work week at this time and since the Union does not claim that failure to do so will harm the firefighters in any way, the arbitrator favors the Employer offer on this point.

Grievance Procedure:

The Employer brief argues extensively on several grounds that the present grievance and arbitration procedure should be maintained. The Union argues, in essence, that the present procedure excluding discipline and discharge from the procedure should be discontinued and that the new procedure should be the typical one found in the private sector. The arbitrator finds the Union arguments more persuasive than those of the Employer for the reasons noted below. It should be noted, however, that, in the opinion of the arbitrator, this issue is not as important from a practical point of view as some of the other issues.

The fact that the present arbitration procedure has not been used is not in itself a reason to preserve it when one of the parties involved (in this case, the Union) states that it is unfair and not used for that reason. Without agreeing with the Union contention in this specific instance, the arbitrator accepts the general argument that the police and fire commissioners, as appointees of the Mayor, are part of the management and are not impartial, in the same sense that an outside neutral is when appointed by the WERC after selection from a panel by the parties.

The Employer also questions whether it is legal for it or the arbitrator to accept the Union procedure which abrogates rights of the fire and police commission under Wisconsin Statutes 62.13. The test of legality is the Wisconsin court system,

not the arbitrator. This arbitrator believes that the historic need to insulate police and firefighter job security from the political spoils system by use of the device of the police and fire commission has diminished if not disappeared. Civil Service, modern personnel practices and the advent of collective bargaining now provide greater protection, and, in the future, the police and fire commission may become obsolete. In any event, if the arbitrator's reasoning is faulty and his conclusion thought to be illegal, it is only by challenge to the appropriate Wisconsin court that the claim of illegality can be tested.

One other argument raised in connection with this issue is whether it is the prevailing practice to refer discipline and discharge cases to the police and fire commission for final disposition. The Employer states that it is; the Union questions the assertion. Employer Exhibit #12 shows that in two comparable cities, discipline and discharge are subject to grievance arbitration and that in one it is not grievable. In the other 3 cities cited, there is no grievance arbitration procedure. The Union notes in its brief that absence of an arbitration clause permits the Union to file a prohibited practice charge with the WERC and to thereby resolve the dispute before an impartial body. It seems that there are three routes, none of which prevails in most instances. Therefore this argument does not carry great weight.

Sick Leave:

The briefs and exhibits make clear to the arbitrator that the language of the sick leave clause is a bone of contention. The City proposal of December 10, 1974 (Union Exhibit #14b) requires an employee to furnish a doctor's certificate after a one day absence as opposed to the current contract language requiring a certificate after an absence of three consecutive work days.

The Union agrees that the sick leave language can be tightened by requiring a doctor's certificate after an absence of two consecutive work days, and so proposes in its final offer. Union Exhibit #14c shows that in 10 cities in the area, a doctor's certificate is required after an absence of 3 consecutive days and that in 4 other cities, a doctor's certificate is required after an absence of 2 consecutive days. The Union proposal is in line with the practice in comparable cities. Union Exhibit #14d and Employer Exhibit #19 show that the number of sick days per year per man taken by Cudahy firefighters is not out of line with the experience of other cities in the area.

The Employer proposal in its final offer is identified as a trial proposal and is advanced as a means of ending claimed abuses of sick leave by a minority of the firefighters. Employer Exhibits 17 and 18 support its position of possible abuse by six to eight men who have taken one day of sick leave at the outset or end of days off for other reasons such as holidays and thereby have extended their consecutive days off from work. No evidence was introduced indicating whether or not employees were actually sick on these days, but the presumption of possible abuse seems warranted.

The arbitrator believes therefore that the final sick leave language of the Employer is reasonable and, despite its variance from current practice, might be given a trial. The evidence of possible abuse is strong enough to support this approach and the arbitrator would select the Employer position on this issue except for one argument raised in the Union brief.

The Union claims that the Employer did not advance its final-offer position during negotiations, and that if it had "the item would not have been before the arbitrator" (Union brief, p. 7). The arbitrator is ambivalent on this issue because, although he believes the Employer position is sound, he does not wish to reward a bargaining strategy which involves the failure to make a reasonable proposal during negotiations.

Educational Incentive Program:

The Union points out in its brief (p. 10) that the major difference between it and the Employer centers about the type of educational-incentive-pay program to institute. The Union argues that firefighters should be given the same program as that offered to Cudahy policemen hired after January 1, 1975 on grounds of equal treatment. The Union notes that such a program which provides for payment of $10

per credit per year up to a maximum of $600 is less lucrative than the one covering policemen hired before January 1, 1975, and that therefore the Union proposal is a reasonable one. The Union also states that post-high school training of firefighters is of benefit to the citizens of Cudahy.

The Employer argues that no comparable city offers its firefighters a program similar to the one suggested by the Union. The Employer offers to institute an educational reimbursement program which is similar to those offered by the few comparable cities that have such programs. The Employer also states that a majority of the comparable cities have no educational incentive program (Employer Exhibit #14).

The program suggested by the Employer would provide for reimbursement of tuition and books and is estimated by the Employer to cost "slightly in excess of $1000 per year, non-cumulative for the entire Department" (Employer Brief, p. 39). The Employer states that the program advanced by the Union would cost $3,380 in 1976 and eventually could increase "to a maximum of $15,600 per year to the entire Department" (Employer Brief, p. 39). Both the Union and the Employer offers provide for a one year preparation period and specify that the respective education incentive programs become effective January 1, 1976.

The arbitrator thinks that the Employer proposal on this issue is more reasonable than that of the Union. The Union does not cite a single example of a Wisconsin city which has a program similar to the one it proposes. Essentially the Union argument rests on the idea that, since the Employer provides such a program for the police, it is only fair that the Employer also should offer it to the firefighters.

Other cities, however, which may have instituted education-incentive-pay plans for police, apparently have not extended the same plans to firefighters -- although the record in this dispute is barren of information on this point. In any case, without stating how prevalent police education-incentive-pay programs are, in no case has it been shown that the same program has been extended to firefighters.

It is important to note that the Employer was dissatisfied with its prior police education-incentive-pay program and has reduced the pay premium for further education. Although the Employer brief stops short of saying so, it appears to the arbitrator that there is substantial sentiment on the part of the Employer to eliminate the police education-incentive-pay program entirely. If the Employer were to offer the reduced police program to the firefighters, as the Union proposes, this would make it more difficult to terminate this type of program in the future.

There is also the question of whether, from the point of view of the welfare of the citizens of Cudahy, an education-incentive-pay program is superior to an education-reimbursement program. No evidence on this point was introduced and possibly very little data are available. The Employer's complaint against the education-incentive-pay program seems to be limited to its cost. No mention is made of any benefits derived from it and whether such benefits are superior to those to be gained from the less costly education-reimbursement program.

It should be noted also that many bargained fringe benefit programs start small and are improved in subsequent negotiations. It is easier to build from a sound foundation than it is to cancel or reduce a new substantial program which does not produce the results that it is supposed to generate. In future negotiations, it will always be possible for the Union and the Employer to amend the education-reimbursement program in a way which will increase the pay of firefighters who participate in it.

The arbitrator notes the argument of the Union (Union Brief, p. 11) to the effect that the Employer claim of similar wage treatment of firefighters and police excludes the substantial cost of the police education-incentive-pay program. This seems to be true but in itself is not sufficient reason to extend the same program to firefighters if there are not other grounds to institute such a program.

The Union may wish to review whether, in the future, it is better served by continuing to seek a relatively expensive education-incentive-pay program or whether firefighters would profit more by using the fact of such Employer expenditures for police as part of their argument in favor of some other additional fringe benefit which is uniquely important to firefighters.

All Issues Considered As A Whole:

As has already been indicated, the arbitrator prefers the offer of the Union on the issues of wages and scope and type of arbitration; the arbitrator is ambivalent on the sick leave issue; and he prefers the offer of the Employer on the issues of work period and education-incentive-pay program. In considering the final offers as a whole, the arbitrator rejects the use of a weighting scheme in this instance and prefers instead, taking into account the criteria in the statute and the exhibits and arguments of the parties, to estimate which offer as a whole is less satisfactory and then to select the other.

The Employer offer would give firefighters an annual wage which is slightly less than is proper but only by a small amount. The continued reliance for another contract on the present dual arbitration procedures is not a great drawback as the extent of usage of the procedure appears to be minimal. Postponing the negotiation of the definition of a work period causes no problems. Institution of the more restrictive sick leave policy on a trial basis for the duration of this contract will give the parties an opportunity to determine whether this new language eliminates abuses without unfairly treating individuals who do not abuse the sick leave provision of the contract. Establishment of the education-reimbursement plan starts the parties on a program which they can modify and expand as future experience dictates. On the whole, selection of the Employer offer would not subject the firefighters to any great injustice.

The Union offer would give firefighters a proper wage increase and a modern arbitration procedure. Adoption of a nine day work period apparently would cause no problems. Adoption of sick leave language which requires a doctor's certificate after an absence of two consecutive work days would place Cudahy in line with other comparable cities. If there were abuses under that language, the Employer would have to seek further relief in the next agreement. Institution of the education-incentive-pay plan would give firefighters a pay program which, so far as the record shows, would be unique. Furthermore, it would tend to impose more firmly on the Employer a type of plan which it does not favor and wishes to curtail or abandon. Selection of the Union offer would not damage the Employer except for the institution of an educational-incentive-pay plan which it opposes and which may have unknown long run effects.

Because of the Union position on the educational-incentive-pay plan, the arbitrator will select the final offer of the Employer. The plan advanced by the firefighters may well be adopted in the future, but it seems sensible to proceed cautiously as proposed by the Employer at this time.

FINDINGS AND AWARD

For the reasons explained in the prior discussion section and in view of the criteria of the statute and the arguments and exhibits of the Employer and Union, the arbitrator hereby selects the final-offer of the Employer and orders that it be incorporated into the Agreement as amended by the stipulations of the parties and placed into effect, effective January 1, 1975.

4/9/75
April 9, 1975

James L. Stern /s/
James L. Stern
Arbitrator