STATE OF WISCONSIN

ARBITRATION AWARD

In the Matter of the Petition of APPLETON PROFESSIONAL POLICEMEN'S ASSOCIATION For Final and Binding Arbitration Involving Law Enforcement Personnel In the Employ of THE CITY OF APPLETON	Case LXXXVI No. 21150 MIA - 286 Decision No. 15225-A

Appearances:

Herrling, Hamilton, Swain & Drengler, Attorneys at Law, by Dennis W. Herrling, appearing on behalf of the Appleton Professional Policemen's Association.

David F. Bill, Director of Personnel, City of Appleton, appearing on behalf of the City of Appleton.

ARBITRATION AWARD:

On February 16, 1977, the undersigned was appointed impartial arbitrator to issue a final and binding arbitration award in the matter of a dispute existing between Appleton Professional Policemen's Association, referred to herein as the Union, and the City of Appleton (Police Department), referred to herein as the Employer. The appointment was made pursuant to Wisconsin Statutes 111.77 (4) (b) which limits the jurisdiction of the Arbitrator to the selection of either the final offer of the Union or that of the Employer. Hearing was conducted on March 15, 1977, at Appleton, Wisconsin, at which time the parties were present and given full opportunity to present oral and written evidence, and to make relevant argument. No transcript of the proceedings was made; however, briefs were filed in the matter and were exchanged by the Arbitrator on March 31, 1977.

THE ISSUE:

THE EMPLOYER FINAL OFFER

1. The city proposes a 6.7% increase in wages effective January 1, 1977.

2. The city proposes an increase in life insurance coverage from $6000 to $10,000 effective the first day of the month following the issuance of the arbitrator's award. The city further proposes payment of $1.92 per month to each employee to be effective from January 1, 1977 to the date the increased life insurance becomes effective.

3. The city proposes to provide the vehicle for dental insurance coverage at no cost to the city provided that the employees meet any enrollment requirements of the insurance carrier.

4. The city proposes no further changes in contract language.

THE UNION FINAL OFFER

AMENDED MAINTENANCE OF BENEFITS CLAUSE, as follows:

> "Provided further that nothing contained in this agreement shall give the City the right to change past practice and procedure insofar as they relate to wages, hours and conditions of employment. Present and past benefits not specifically referred to in this agreement affecting wages, hours and conditions of employment to

be maintained in substantially the same manner as previously in existence, except with respect to retirement policy, which shall be maintained as it existed prior to the city's change in policy of December 1975."

The Association proposes the same 6.7% wage increase the city has offered retroactive to January 1, 1977.

The Association proposes the same $1.92 increase toward the cost of increased life insurance the city has offered retroactive to January 1, 1977.

The Association proposes the same payroll deduction administration for dental insurance at no cost to the city as proposed by the city.

The Association proposes no other contract language change except the addition of a maintenance of benefits clause as set forth above.

DISCUSSION:

While the final offers of the parties as set forth above each contains four separate issues, it is obvious from comparing the respective offers that the sole matter in dispute between the parties is whether the maintenance of benefits clause proposed by the Union should be included in the Collective Bargaining Agreement between the parties for the year 1977. The Union offer and the Employer offer on the remaining three items is identical. This discussion then will be confined to the issue of whether a maintenance of benefits clause should be included in the final agreement between the parties. The Employer has raised an issue with respect to the Arbitrator's authority to find for the Union position. This matter will be discussed first.

ARBITRATOR'S AUTHORITY

The Employer has argued that the Union revised its proposed maintenance of benefits clause during the investigative stages of these proceedings so as to include for the first time the specific reference to retirement policy which reads "except with respect to retirement policy, which shall be maintained as it existed prior to the city's change in policy of December 1975". In support of its position the Employer cites Milwaukee County Deputy Sheriffs Association v. Milwaukee County (64 Wis 2d 251) in which the Wisconsin Supreme Court held that arbitrators cannot consider issues raised for the first time after negotiations have closed and the arbitration proceedings begun, and that permitting arbitrators to consider issues raised in an offer for the first time after negotiations have closed would frustrate the legislative intent to provide meaningful and productive negotiations prior to arbitration. In the instant case the record is clear that prior to the petition for arbitration by the Union the maintenance of benefits clause proposed by the Union had no specific reference to retirement benefits being preserved as they were in existence prior to December 1975. The record is also clear that subsequent to the petition and during the course of investigation by Donald B. Lee of the Wisconsin Employment Relations Commission, the Union modified its maintenance of benefits provision to include the language specifically referring to maintaining retirement benefits as they existed prior to December 1975.

While the law is settled by the decision of the Wisconsin Supreme Court referred to in the preceding paragraph, the Arbitrator is satisfied from the record that in the case at bar the maintenance of benefits provision as originally proposed by the Union contemplated as one of the benefits to be maintained, the retirement policy that was in existence in December 1975. The Arbitrator is further satisfied from the record that during the course of bargaining the Employer had full knowledge that the retirement benefits as they existed prior to 1975 were one of the benefits that the Union desired to maintain. It was the specific testimony at hearing of David Bill, Personnel Director for the Employer, that during negotiations prior to the petition for arbitration, when the maintenance of benefits proposal of the Union was being discussed that the retirement policy of the Employer was discussed as one of the underlying reasons for the maintenance of benefits proposal. From this testimony the Arbitrator concludes that the reference to retirement benefits in the negotiations gave sufficient notice to the Employer that the maintenance of benefits provision proposed by the Union was intended to encompass the retirement policy.

Having concluded that negotiations over the maintenance of benefits clause prior to the petition for arbitration contemplated maintaining the retirement policy in force as it existed prior to December 1975; and since the record clearly reflects that both parties to the negotiations had full knowledge that the maintenance of benefits provision contemplated the retirement policy as one of the benefits to be maintained; the fact that the revision of the maintenance of benefits provision by the Union occurred during the investigative stage by the Wisconsin Employment Relations Commission does not run contrary to either the arbitration statutes which provide at 111.77 (4) (b), or to the Wisconsin Supreme Court decision in the case of Milwaukee County Deputy Sheriffs Association v. Milwaukee County (64 Wis 2d 251).

Wisconsin Statutes at 111.77 (4) (b) provide:

> The Commission Investigator shall advise the Commission in writing, transmitting a copy of such advice to the parties of each issue which is known to be in dispute. Such advice shall also set forth the final offer of each party as it is known to the Investigator at the time that the investigation is closed. Neither party may amend its final offer thereafter, except with the written agreement of the other party.

From the foregoing statutory language it is clear that either party may amend its position while the investigation by the Wisconsin Employment Relations Commission is in progress. From the record, as well as the certification provided by the Commission's investigator, it is clear to the undersigned that the modification of the maintenance of benefits provision by the Union occurred during the investigative stage of the arbitration proceedings and, therefore, said modification is appropriate under the statutes.

The undersigned has already concluded that the parties in negotiating over the Union's original proposal for maintenance of benefits provision clearly understood that the retirement policy of the Employer was intended to be encompassed within the framework of the Union's original proposal. The undersigned, therefore, concludes that negotiations did occur prior to the petition by the Union for arbitration; and the undersigned further concludes that since negotiations for preservation of retirement benefits was contemplated in the Union's original proposal for maintenance of benefits, the facts in the case at bar are clearly distinguishable from the decision rendered by the Supreme Court in the case of Milwaukee County Deputy Sheriffs Association v. Milwaukee County (64 Wis 2d 251). Bargaining did occur prior to the petition on the retirement policy of the Employer when the Union made its original proposal for maintenance of benefits and it is, therefore, proper that the maintenance of benefits provision as modified by the Union during the investigative stage of the arbitration proceedings be considered by the undersigned.

MERITS OF THE OFFERS

In support of its position that a maintenance of benefits clause be included in the Agreement between the parties, the Union has introduced evidence which is intended to persuade the Arbitrator that the absence of a maintenance of benefits provision worked adversely to the interests of the Union. The Union has introduced testimony and exhibits on the following items that are intended to demonstrate the need for an inclusion of a maintenance of benefits provision to balance the rights retained by the Employer as set forth in Article XXVIII, Function of Management Clause contained in the Agreement:

1. One to One Car Plan. (Exhibit 4 and testimony of Officer Steward).
2. Change in Retirement Policy. (Exhibits 5, 8, 9, 10, 11, and testimony of Officer Steward and David Bill.)
3. Proposed Layoff of Police Officers. (Exhibit 6.)
4. An adverse arbitration award finding that the City did not violate the Agreement in bypassing a senior employee for promotion. (Exhibit 7.)
5. A change in the Work Schedule affecting employees. (Testimony of Officer Steward.)
6. A memorandum from Inspector Thiel on vacation policy. (Exhibit 21 and testimony of Officer Steward.)

The undersigned has carefully reviewed the exhibits relating to the enumeration in the preceding paragraph. The undersigned has further carefully analyzed the proposed language of the Union with respect to maintenance of standards. From the analysis the undersigned concludes that the maintenance of benefits provision proposed by the Union would not afford the protection the Union is seeking in any of the areas listed above, with the exception of the change in retirement policy that the Employer has made. The Arbitrator notes that the language proposed by the Union for maintenance of benefits specifically refers to maintaining those benefits not specifically referred to in this Agreement. The Arbitrator further notes that the Agreement between the parties does specifically refer to items involving vacation selection at Article VIII; hours of work at Article III; one to one car plan at Article XXX; seniority application for promotions at Article XXVIII; and layoff of employees at Article XXVIII.

Since the language of the proposed maintenance of benefits clause pertains to those benefits not specifically referred to in this Agreement; and since, as noted above, the evidence with respect to all the areas of concern raised by the Union with the exception of retirement policy, are specifically referred to in the Agreement; the undersigned concludes that the inclusion of the maintenance of benefits clause would be of no value to the Union for any item in the foregoing enumeration, except for retirement policy.

It remains then to determine whether the issue of retirement policy standing alone is sufficiently persuasive so as to have the undersigned find for the Union position. The retirement issue has been litigated by the parties in a prohibited practice proceeding before the Wisconsin Employment Relations Commission, in which the Commission Examiner dismissed a complaint by the Union after concluding that the Employer did not violate Section 111.70(3) (a) 1 and 4 of MERA because the Union had waived its right to bargain over the promulgation and implementation of a new retirement policy. Obviously it is not the function of this Arbitrator to review or comment upon the decision of the Wisconsin Employment Relations Commission Examiner in the prohibited practice proceedings, and he will not do so. After careful scrutiny of the language proposed, measured against the objectives that the Union is attempting to achieve, the undersigned is persuaded that the maintenance of benefits clause proposed by the Union should not be incorporated into the Agreement between the parties.

In an earlier arbitration decision by Russell L. Moberly involving these same parties, the Arbitrator found for the Employer position, and as part of that position incorporated into the Agreement the management functions clause. (Exhibit 1). At the time of his decision, August 12, 1973, Mr. Moberly was confronted with five issues in dispute between the parties. In his decision Mr. Moberly disposed of the function of management clause in one sentence by saying "This issue should probably have been reserved for further negotiations, but under the circumstances the arbitrator has no option except to rule for the statement of the City." From Mr. Moberly's statement with respect to the function of management clause in 1973, it is obvious that the incorporation of said clause was swept along with other issues that were more persuasive to Mr. Moberly. The undersigned considers the maintenance of benefits provision of the Union to be of the same categorical type as the function of management clause, and since there are no other issues in dispute between the parties in the case at bar, there is no magnetic effect of any compelling issue that would persuade the undersigned to "sweep along" the maintenance of benefits provision proposed by the Union.

This Arbitrator is further persuaded that the language of the maintenance of benefits provision as proposed by the Union will not accomplish the objectives that were stated by the Union in its argument at the hearing; or the objectives inferred in examination of Mr. Bill at the hearing. Under examination by Mr. Herrling, Bill testified that the retirement policy had been unilaterally changed. In response to Herrling's question "Would it have been fair to negotiate the change?" Bill replied, "It could have been done". Herrling further queried, "Would you concede that the Union is not intransigent?", Bill replied, "Generally, yes, I would concede so." From the foregoing testimony elicited by Mr. Herrling this Arbitrator concludes that the Union is seeking the language of the maintenance of benefits clause in order to require the Employer to bargain a change of retirement benefits with the Union. The Arbitrator further notes that in its opening statement the Union postured that if a change in retirement policy were required during the term of the Agreement the Employer should negotiate such change and give the opportunity to the Union to provide input into the policy via the collective bargaining mechanism.

In comparing the objectives stated by the Union, that is, to negotiate changes of retirement policy, with the specific language of the Union proposal, which mandates that the retirement policy as it existed in December 1975 not be changed; the undersigned concludes that the language as proposed would not fulfill the objectives to require the Employer to bargain as stated by the Union. It is true that under the Union's proposed language the Union could agree to waive the specific language requiring the retirement policy to be maintained as it existed prior to December 1975, but they would not be required to do so. The undersigned makes no judgment with respect to whether the Union would or would not enter into such waiver, but is persuaded that the specific language proposed, in the absence of a waiver, would not meet the objectives stated by the Union. While the undersigned is satisfied that the Union would have modified its proposed language with respect to retirement policy so as to provide for negotiations rather than specifically maintaining the benefits at the December 1975 level; the parties are precluded from modifying their offers under the statutes, and the Arbitrator has no authority to make such modification under the statutes.

Evidence was received into the record at the hearing which showed nine collective bargaining agreements in the surrounding geographic area which contain maintenance of benefits provisions. (Exhibits 12 through 20). In view of the balancing testimony of Mr. Bill at the hearing, which is undisputed in the record, that the Employer has entered into thirteen collective bargaining agreements with thirteen different units, five of which have management clauses, and that none of the thirteen have maintenance of benefits clauses; the undersigned is not persuaded that the inclusion of the maintenance of benefits provision in nine collective bargaining agreements in the surrounding geographic areas has sufficient weight so as to find for the Union position.

AWARD

Based on the statutory standards, the evidence adduced at hearing, the arguments of the parties, and for the reasons as stated in the discussion above, the Arbitrator determines that the final offer of the Employer be incorporated into the Collective Bargaining Agreement between the parties for the year 1977.

Dated at Fond du Lac, Wisconsin, this 25th day of April, 1977.

Jos. B. Kerkman /s/
Jos. B. Kerkman,
Arbitrator