

STATE OF WISCONSIN

ARBITRATION AWARD

In the Matter of the Petition of
GREENDALE PROFESSIONAL POLICEMEN'S
ASSOCIATION
For Final and Binding Arbitration
Involving Law Enforcement Personnel
in the Employ of
VILLAGE OF GREENDALE

Case XXVIII
No. 21516
MIA-313
Decision No. 15481-A

Appearances:

Gimbel, Gimbel & Reilly, Attorneys at Law, by Franklyn M. Gimbel, appearing on behalf of Greendale Professional Policemen's Association.

Lindner, Honzik, Marsack, Hayman & Walsh, Attorneys at Law, by Roger E. Walsh, appearing on behalf of the Village of Greendale.

ARBITRATION AWARD:

On August 8, 1977,¹ the undersigned was appointed impartial arbitrator to issue a final and binding arbitration award in the matter of a dispute existing between Greendale Professional Policemen's Association, referred to herein as the Union, and the Village of Greendale (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 August 8, 1977, at Greendale, Wisconsin, at which time the parties were present and given full opportunity to present oral and written evidence and to make relevant argument. A transcript of the proceedings was made, and original briefs were filed in the matter, which were exchanged by the Arbitrator on October 11, 1977. Pursuant to arrangements made at hearing, the parties filed reply briefs, which were received by the Arbitrator on October 25, 1977.

THE ISSUES:

Set forth below are the final offers of the Union and of the Employer:

FINAL OFFER OF THE UNION

ASSOCIATION'S FINAL OFFER 4/28/77

ARTICLE II - MANAGEMENT RIGHTS

Section 2.01 (G) shall be amended to read as follows:

(G) To suspend, demote or discharge employees for just cause.

ARTICLE XV - CLOTHING ALLOWANCE

Section 15.01 shall be amended to read as follows:

15.01 Employees shall be allowed an annual clothing allowance of \$175.00, such allowance to be handled on the voucher system as in the past.

1) The parties advised the Commission of their selection by letter dated June 8, 1977. However, because said letter erroneously referred to a request for the appointment of an arbitrator in another dispute, the order of appointment herein was not issued until August 8, 1977.

ARTICLE XVI - INSURANCE

Section 16.01 shall be amended to read as follows:

16.01 - Health Insurance. The Village shall continue to pay the full cost of full-time employees Blue Cross, Surgical Care - Blue Shield, or its equivalent.

ARTICLE XXIV - DURATION

Section 24.01 shall be amended to read as follows:

24.01 This Agreement shall become effective January 1, 1977, and shall remain in full force and effect up to and including December 31, 1977; provided, however, that in the event no successor agreement is reached prior to December 31, 1977, the terms of this agreement shall remain in full force and effect until such time as a successor agreement has been executed by the parties.

The following salaries, on an annualized basis, shall be paid to employees in the classifications listed below:

<u>PATROL MAN</u>	Effective January 1, 1977
Start	\$11,951.25
After Six (6) Months	13,345.95
After One (1) Year	14,297.29
After Two (2) Years	14,571.75
After Three (3) Years	14,872.30
After Four (4) Years	15,488.31

SERGEANT

Start	\$16,072.03
After One (1) Year	16,322.90
After Two (2) Years	16,883.02

All terms and conditions of the 1975-76 contract will remain the same.

FINAL OFFER OF THE EMPLOYER

Village Final Offer (4/28/77)

The provisions of the 1976 agreement will be continued for a one year term from January 1, 1977 through December 31, 1977, with the following modifications, all effective January 1, 1977:

	<u>Patrolman</u>	
1. Wages (Appendix A)	Start -	11,837.97
	After 6 months	13,219.45
	After 1 year	14,161.77
	After 2 years	14,433.63
	After 3 years	14,731.33
	After 4 years	15,341.50

Sergeant

Start	15,894.79
After 1 year	16,132.58
After 2 years	16,663.50

2. Health Insurance: Revise Section 16.01 to read:

"16.01 - Health Insurance. Employees shall be provided with medical and hospitalization insurance, provided by the Employer for full-time employees. Health insurance coverage will remain as under the contract effective May 1, 1977 or its equivalent. The Employer shall

pay up to \$104.86 per month toward the cost of the family premium and up to \$34.42 per month toward the cost of the single premium. Effective May 1, 1977, the Employer shall pay up to \$124.56 per month toward the cost of the family premium and up to \$44.52 per month toward the cost of the single premium."

3. Duty Incurred Injury Pay: Revise the first sentence of Section 12.01 to read:

"When an employee sustains an injury within the scope of his employment as provided by Chapter 102 of the Wisconsin Statutes and is eligible to receive Worker's Compensation payments for temporary-total or temporary-partial disability, he shall receive full payment for time lost within the first sixty (60) working days from the date of the original injury or illness.

4. In Section 24.01, change "1976" to "1977" in both places.

DISCUSSION:

The Employer has raised an issue in the instant proceedings contending that the final offer of the Union submitted a new proposal under the termination language of the Agreement for the first time on April 28, 1977, subsequent to the date on which the Union filed its petition for final and binding arbitration. The Employer then contends that the Union offer cannot be considered in view of the decision of the Wisconsin Supreme Court, Milwaukee County Deputy Sheriff's Asso. vs. Milwaukee County (64 Wis. 2d 651 (1974)) which held:

The final offer, although it can be amended and submitted to final arbitration, must, if amended, be germane to the matters subject to negotiations in the prior bargaining sessions. We conclude that the interjection of a new contract time period in an amended final offer after the petition is filed presents a question not germane to the previous negotiations and is beyond the statutory jurisdiction of the arbitrators. (p. 658)

The trial judge properly concluded that, under the statutes, arbitrators cannot consider issues raised for the first time after negotiations have closed and the arbitration proceeding begun. (p. 655)

It seems clear that the 'sudden death' result of compulsory arbitration should never result in the making of the award when the offer made in arbitration was not the subject of bargaining prior thereto. (p. 657)

The Employer argues that since the Union offer first introduced the issue of termination language on April 28, after filing of the petition; and since the Union offer cannot be modified, the Union's total offer must be rejected, and the Arbitrator can only select the final offer of the Employer.

The undersigned disagrees with the Employer that the Arbitrator cannot properly find for the Union if the proposal with respect to termination was raised for the first time in bargaining subsequent to the filing of the petition in this matter. While the Supreme Court, in Milwaukee County Deputy Sheriff's Association vs. Milwaukee County, held that a new issue raised for the first time after filing the petition for arbitration was invalid, the Court decision was made when the relevant statutory language at 111.77 (4)(b) read:

Form 2. Parties shall submit their final offer in effect at the time that the petition for final and binding arbitration was filed. Either party may amend its final offer within 5 days of the date of hearing. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification. 2

After the Milwaukee County Deputy Sheriff's Association matter arose, the relevant statutory language was modified by the legislature to read at the time the instant matter arose as follows at 111.77 (4)(b):

The Commission shall appoint an investigator to determine the nature of the impasse. The Commission's investigator shall advise the Commission in writing, transmitting copies 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 the investigation is closed. Neither party may amend its final offer thereafter, except with the written agreement of the other party. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification. 3

In the instant case the record is clear that the Union modified its final offer prior to time that the Commission investigator concluded his investigation on April 28, 1977. Since the pertinent language of the statute relative to timeliness of change of final offers was modified so as to permit a change of offer by either party until the investigation is closed by the Commission investigator; and since in the case at bar the Union changed its final offer prior to the close of the investigation; the undersigned concludes that the Union's final offer was changed within a proper period of time providing that the parties had bargained over the provision contained in the change prior to the close of the investigation by the Commission investigator.

The Supreme Court, in Milwaukee County Deputy Sheriff's Asso. v. Milwaukee County, not only held that the final offer may not be amended after the filing of the petition; but also that bargaining over all terms embodied in the parties' final offer must have occurred in order to put the matter properly within the jurisdiction of the arbitrator, when it said at page 657:⁴ "The 'sudden death' result of compulsory arbitration should never result in the making of an award when the offer made in arbitration was not the subject of bargaining thereto." The Court then concluded at page 658:⁵ "We conclude that the interjection of a new contract time period in an amended offer after the petition is filed presents a question not germane to the previous negotiations and is beyond the statutory jurisdiction of the arbitrator."

While the change of the statutory language now provides for a different time frame within which a final offer can be modified, said change does not eliminate the requirement set forth by the Supreme Court that the parties must have bargained over the terms embodied in the final offer of the parties before the arbitrator has jurisdiction.

The question in the instant case then is: did bargaining occur over the Union's proposed change to Article XXIV, Section 24.01? The undersigned concludes that the parties did not bargain over the Union's proposed modification to Article XXIV, Section 24.01. The record discloses that the Employer first learned of the Union's proposed modification at the investigation conducted by the Commission investigator on April 28, 1977. At hearing Roger Walsh, counsel for the Employer, testified as follows on this point:

I reviewed my notes for April 28th, 1977, and I have listed here new proposal and have made reference to that particular item. In all the discussions that I had in negotiations, two previous negotiations sessions, this issue was not presented to the village negotiating committee by the Association directly or by the mediator, and this was a new proposal as far as we were concerned presented for the first time on April 28, 1977. 6

3) Chapter 65, Laws of 1975

4) 64 Wis. 2nd pp. 657-8

5) Ibid

6) Transcript of proceedings, pp. 82 and 83

Witness John M. Kuglitsch's testimony corroborates the testimony of Walsh as follows:

- Q. Exhibit 2 which is the union's final offer. Did that initial position of the Association include the item of duration, section 24.01?
- A. You mean at the April 28th meeting?
- Q. Yes.
- A. Yes, it did.
- Q. All right. At the initial position of the association -- was that offer given orally and then later put into writing or that particular proposal given orally initially and then later put into writing?
- A. Yes, it was given orally and then put into writing, yes.
- Q. Was Mr. Gimbel present at that meeting?
- A. Yes, he was.
- Q. And was he the spokesman on behalf of the association?
- A. Yes, he was.
- Q. In response to that -- did Mr. Gimbel then give the offer including that particular proposal?
- A. Yes, he did.
- Q. Was I present at that meeting?
- A. Yes, you were.
- Q. And was I acting as spokesman of the village?
- A. Yes, you were.
- Q. Did I in response to that ask Mr. Gimbel any question with regard to that particular proposal?
- A. Yes.
- Q. About the duration clause?
- A. Yes, you did.
- Q. And what was my question?
- A. You made particular emphasis that this is a, a proposal that was not included at previous meetings and this was a last minute item that you would put in the record under advisement.
- Q. I asked Mr. Gimbel if this was the first time this had been presented to the village?
- A. Yes, you did.
- Q. And what was Mr. Gimbel's response?
- A. He said he understood and that he was aware that this still could be done under final offer procedure.
- Q. Well, did he agree that this was the first time that that particular proposal --

A. Yes, he did.

Q. Did you make any notes of that?

A. Yes, I did.

Q. Do you have those notes available?

A. Yes, I do.

Q. Would you come back and get your notes?

MR. WALSH: I'd like those notes marked as exhibits.

HEARING OFFICER: All right. We'll mark them as Employer's B.

(Employer's Exhibit B marked for identification.)

BY MR. WALSH:

Q. I show you what has been marked as Employer's B and ask you to identify that.

A. These are my notes taken as a synopsis of what happened on the 28th of April, 1977, bargaining session with the Association and Village.

Q. And is there anything on those notes dealing with the proposal to, referring to duration?

A. Yes, there is.

Q. What do those notes say?

A. Item number ten, automatic renewal, "in full force and effect until a new contract is reached by the parties."

Q. Are there any notes which you made with regard to that proposal on your pad of notes?

A. Yes, I did identify it as a new request and dated it 4-28-77 as a margin footnote.⁷

From the foregoing testimony the undersigned concludes that bargaining did not occur over the Union's proposed modification to Article XXIV, Section 24.01.

There is testimony in the record, by Curtiss Peck, witness for the Union, and a participant in the negotiations between the parties, that in mediation the Union discussed with the mediator the effect of the Employer's action in refusing to pay education increments; and the Employer's refusal to proceed to arbitration. However, said discussions were internal to the Association committee and were not communicated to the Employer.⁸ Since the discussions were internal to the Union committee only, and not transmitted to the Employer, the undersigned concludes that bargaining over Article XXIV, Section 24.01 did not occur as a result of said discussion.

There is further testimony in the record by Franklyn Gimbel, counsel for the Union, that during a conversation held in March, 1977, with Roger Walsh, counsel for the Employer, they discussed the grievance of the Union regarding payment of education increments, and the Employer's refusal to proceed to arbitration because the predecessor contract was no longer in effect. Gimbel further testified that during said conversation he advised Walsh that the Union would want some clarification of the termination date

7) Transcript of proceedings, pp. 8 through 11

8) Transcript of proceedings, pp. 20 through 23

of a contract in a Collective Bargaining Agreement that would be reached for 1977.⁹ While Walsh has testified that he has no recollection of Gimbel mentioning a clarification of expiration date in the 1977 Contract, it is not necessary to resolve this conflict in testimony, because even if Gimbel's testimony is credited, the mention of the termination date problem outside the context of bargaining, does not fulfill the obligation to bargain on the issue before it is properly within the jurisdiction of the Arbitrator. Since the undersigned concludes that the conversation of Walsh and Gimbel in March of 1977 did not constitute bargaining, the matter falls outside the Arbitrator's jurisdiction in line with the Supreme Court decision in Milwaukee County Deputy Sheriff's Asso. v. Milwaukee County.

The Union argues that the Employer proposed a change in Article XXIV, Section 24.01 when it proposed a change from 1976 to 1977 in both places where the date appeared in the previous Agreement, and that said proposal satisfied the requirement that bargaining over the duration language occur prior to arbitration. The undersigned rejects the Union argument. It is clear that the Employer proposal is ministerial in nature in order to accommodate the term of a one year Agreement which was satisfactory to both parties. The Union proposal on the other hand modifies Section 24.01 of Article XXIV so as to extend the expiring Agreement until a successor Agreement is executed. This Arbitrator has concluded the issue of extension of the expiring Agreement was never bargained over prior to arbitration, and for that reason, as enunciated in Milwaukee County Deputy Sheriff's Asso. v. Milwaukee County, cannot be incorporated into the successor Agreement.

Having concluded that the Union's final offer contains a provision over which this Arbitrator has no jurisdiction, it follows that the undersigned cannot adopt the Union position which contains that provision, regardless of how meritorious the balance of the Union's position might be. The Arbitrator, therefore, makes the following

AWARD

Based on the record in its entirety, the argument of counsel, 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 of the parties for the year 1977.

Dated at Fond du Lac, Wisconsin, this 28th day of December, 1977.

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

JBK:rr

9) Transcript of proceedings, p. 133