STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of GREENFIELD LOCAL 1963, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO For Final and Binding Arbitration Involving Firefighting Personnel in the Employ of CITY OF GREENFIELD (FIRE DEPARTMENT)	WERC Case LIV No. 22662 MIA-374 Decision No. 16283-A

Appearances:

Mr. Ed Durkin, 5th District Vice President, IAFF, appearing on behalf of Fire Fighters Local 1963, AFL-CIO.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mark F. Vetter, appearing on behalf of the City of Greenfield.

ARBITRATION AWARD:

On April 18, 1978, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission, to issue a final and binding arbitration award in the matter of a dispute existing between Greenfield Local 1963, International Association of Fire Fighters, AFL-CIO, referred to herein as the Union, and City of Greenfield (Fire 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 June 9, 1978, at Greenfield, 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, which were received posted by the parties on June 28 and June 30, 1978, and were exchanged by the Arbitrator on July 3, 1978.

THE FINAL OFFERS:

The sole issues involved in these proceedings are wages, as set forth in Appendix A, and whether the cost of living provisions, which have been a part of the prior contracts, will continue in the Agreement effective January 1, 1978. The final offers of the parties are set forth below:

FINAL OFFER OF THE EMPLOYER:

1. ARTICLE 26 WAGES

   (A) Section 26.01 - Wage schedules set forth in Appendix "A" attached shall be effective January 1, 1978 through December 31, 1979. (Appendix "A" is attached to this final offer)

   (B) Section 26.03 - Delete this provision from the agreement.

2. All prior tentative agreements which have been agreed upon and all articles in the prior agreement which neither side has proposed to modify would be incorporated in the new agreement.

3. All proposals of the City and Association (Union) which have not been agreed upon would be considered withdrawn and not part of the final offer.

APPENDIX "A"

FIREFIGHTER SALARY RANGE

	MONTHLY 1978	1979
A. Starting	$ 1,243.63	$ 1,330.68
B. After one (1) year of employment	1,308.05	1,399.62
C. After two (2) years of employment	1,355.43	1,450.31
D. After three (3) years of employment	1,413.98	1,512.96

CAPTAIN SALARY RANGE

	MONTHLY 1978	1979
A. Starting	$ 1,444.67	$ 1,545.80
B. After one (1) year of employment	1,491.98	1,596.41
C. After two (2) years of employment	1,539.28	1,647.03
D. After three (3) years of employment	1,586.58	1,697.64

FINAL OFFER OF THE UNION:

All issues were agreed upon or dropped by the parties with the exception of Salary Schedule for the two year period 1978 - 1979.

Unions Final Position is as follows:

APPENDIX "A"

FIREFIGHTER SALARY RANGE

	ANNUAL 1978	1979 *
A. Starting	$ 12,365.75	
B. After one (1) year of employment	$ 13,109.88	
C. After two (2) years of employment	$ 13,656.94	
D. After three (3) years of employment	$ 14,333.23	

CAPTAIN SALARY RANGE

	ANNUAL 1978	1979 *
A. Starting	$ 14,687.64	
B. After one (1) year	$ 15,233.98	
C. After two (2) years	$ 15,780.34	
D. After three (3) years	$ 16,326.68	

* In the event the cost-of-living escalator clause contained in Appendix B reflects an amount over seventy-five cents ($0.75) per hour after the adjustment for the last bi-monthly period of 1978 has been computed, the 1979 salary schedule shall be amended as follows: that portion of the cost of living adjustment over seventy-five ($0.75) per hour shall be multiplied by 2920 hours and added to the 1978 base salaries. Then a 2.5% increase across-the-board increase for Firefighters and Captains will be applied to that adjusted base.

APPENDIX "B"

Cost-Of-Living Escalator Clause:

A. Formula: A cost-of-living allowance shall be granted based upon one cent (1¢) per hour increase or decrease for each full four tenth (.4) change in the Milwaukee Area Consumer Price Index, Urban Wage Earner & Clerical Workers (1959=100) hereinafter referred to as Index.

B. Payment Schedule: Adjustments shall be calculated and made provided there is at least a four tenths (.4) change in the Index. Any changes of less than a full four tenths (.4) of a point shall be accumulated and applied towards the next bi-monthly

computation. Such increase or decrease shall be made according to the following Schedule:

1. Effective March 1, 1978, for the difference, if any, between the November, 1977 Index and January, 1978 Index.

2. Effective May 1, 1978 for the difference, if any, between the January, 1978 Index and the March, 1978 Index.

3. Effective July 1, 1978 for the difference, if any, between the March and May Index.

4. Effective September 1, 1978 for the difference, if any, between the May and July Index.

5. Effective November 1, 1978 for the difference, if any, between the July and September Index.

6. Effective January 1, 1979 for the difference, if any, between the September and November, 1978 Index.

7. Effective March 1, 1979 for the difference, if any, between the November, 1978 and January, 1979 Index.

8. Effective May 1, 1979 for the difference, if any, between the January and March Index.

9. Effective July 1, 1979 for the difference, if any, between the March and May Index.

10. Effective September 1, 1979 for the difference, if any, between May and July Index.

11. Effective November 1, 1979 for the difference, if any, between July and September Index.

12. Effective December 31, 1979 for the difference, if any, between September and November Index.

SAMPLE CALCULATION

207.7 = January, 1978 Index
205.0 = November, 1977 Index

2.7 = 6 full .4 increases
6 x 1¢ = 6¢ per hour increase wages

c. Limitations: Cost-of-living adjustment shall be considered an "add on" and shall not be deemed part of the employees standard hourly rate. Such adjustments shall be included with hourly rate only in the calculation of pay for hours actually worked, vacation pay and holiday pay. In the event that the Bureau of Labor Statistics does not issue the Index in timely fashion, the adjustment listed above shall be made effective retroactively at the beginning of the first pay period after the receipt of the Index.

d. Reduction Index: In the event that the Index decreases during a monthly period, the above formula shall be applied and the amount decrease shall be deducted from the cost-of-living allowance.

e. Change in Basis: If the Consumer Price Index specified in this article is discontinued, changed or otherwise unavailable during the term of this Agreement and if the Bureau of Labor Statistics issues a conversion table by which changes in the present Index can be determined the parties hereto agree to accept such conversion table. If no such table is issued, the parties will

promptly undertake negotiations solely with respect to agreeing upon a substitute formula for determining a comparable cost-of-living adjustment. Any such conversion table or substitute formula, will however, retain the same maximum limitations set forth in this Article.

THE ISSUES:

In addition to the evidence and arguments submitted with respect to which final offer is preferred, based on the merits of the respective final offers, the Employer has raised two procedural issues, asserting that the Union's final offer is legally defective and, therefore, cannot be adopted by the undersigned. The Arbitrator will first consider the procedural matters raised by the Employer, which will be identified below as Issue No. 1 and Issue No. 2. In the event the procedural issues are dismissed, the undersigned will then proceed to decide the matter on the merits, applying the statutory criteria found at 111.77 (6). The procedural issues can be stated as follows:

ISSUE NO. 1: Is the Union offer so ambiguous that if accepted it would not constitute a final and complete resolution of the issue?

ISSUE NO. 2: Whether portions of the Union final offer were never the subject of negotiations between the parties, thereby excluding the entire matter from the jurisdiction of the Arbitrator?

DISCUSSION:

ISSUE NO. 1: IS THE UNION OFFER SO AMBIGUOUS THAT IF ACCEPTED IT WOULD NOT CONSTITUTE A FINAL AND COMPLETE RESOLUTION OF THE ISSUE?

The Employer argues that the Union offer is not clear on its face, and is subject to at least three possible interpretations as to how the cost of living monies which were in effect at the expiration of the 1976-77 Contract would be continued forward into the successor Agreement. The Employer contends first that the offer could be construed to imply that no cost of living monies in effect as of the end of the 1976-1977 Contract would be continued forward into the successor Agreement. Second, the Employer asserts that the Union offer could be interpreted to require continuation of all cost of living monies from the 1976-1977 Contract be added to the monthly rate proposed by the Union. Thirdly, the Employer notes that the Union sets forth a third interpretation of its final offer as follows: 1) all cost of living monies in effect on January 1, 1978, over 75¢ per hour would be folded into the base rate in effect in 1977; 2) a percentage increase of 2.5% would be applied to that wage rate resulting in a new 1978 base wage of $14,333.23 or approximately $1,194 per month; 3) thereafter, the 75¢ COLA, which was not folded into the base rate, would carry forward into 1978.

From the foregoing three potential interpretations of the Union language proposal, the Employer contends that the Union offer is replete with ambiguity, and, therefore, does not instruct either the Employer or the Arbitrator as to its true intent. The Employer further argues that the Union is obliged to place a clear and unambiguous offer before the Arbitrator, and where a meeting of the minds does not exist an offer must not present the opportunity for further controversy. Further, the Employer argues that any clarification of the Union final offer by the Arbitrator would exceed the scope of the submission in the instant matter, and be beyond the Arbitrator's jurisdiction and, further, that accepting the announced intent of the Union with respect to said language would be in effect to allow an amendment to the final offer to which the Employer has not agreed and which is prohibitive by Wisconsin law.

The undersigned rejects the Employer contention with respect to the ambiguity of the Union final offer. The Employer has relied on the statute at 111.77 (4)(b), which prohibits either party from amending its final offer after the investigation by the Commission Investigator is closed; and on the law as enunciated by the Wisconsin Supreme Court in Manitowoc v. Manitowoc Police Department 70 Wis. 2d 1006 (1975). In Manitowoc the Employer points to the language of the Court as follows:

> That the arbitrator shall select the final offer of one of the parties and then issue an award incorporating that offer 'without modification,' [and] such language does not forbid restatement of

the offer to comprise a proper, final arbitration award. The statutory language clearly refers to alterations of items in the offer contrary to the intent of the offering party. (Emphasis added)

The Arbitrator agrees with the Employer that the proposed language of the Union with respect to the 1978 Contract here is vague and subject to several interpretations when considering the proposed language standing alone. The ambiguity of the Union language, however, is dissipated when considering the evidence adduced at hearing by the Union, and the argument which the Union advances based on said evidence. In Union Exhibit 5-16 the Union has set forth clear data which shows how the Union offer is to be implemented if it were to be accepted by the undersigned, thereby establishing the true meaning of their final offer placed before this Arbitrator.

In interpreting the Contract language which is subject to several meanings, the principle rule of construction relied on by arbitrators is to determine the intent of the disputed language, based on the bargaining history leading up to said language. In the opinion of the undersigned the offer of evidence at Union Exhibit 5-16 which clearly sets forth the application of the disputed language, establishes history of bargaining and meaning of the unclear language pursuant to the enunciated principle. The Manitowoc decision of the Wisconsin Supreme Court, in clarifying the statutory language of 111.77 (4)(b), indicated that the statutory language clearly refers to alteration of items in the offer contrary to the intent of the offering party. Since the Union in this matter is the offering party; and since the undersigned has concluded that Union Exhibit 5-16 sets forth the intent of the offering party; it follows that the Union offer in this matter is properly clarified by the Union, and that such clarification does not constitute a modification of the final offer of the Union which would exceed the scope of submission and is, therefore, not beyond the Arbitrator's jurisdiction.

ISSUE NO. 2: WAS THE UNION OFFER THE SUBJECT OF BARGAINING BETWEEN THE PARTIES?

The Employer argues that the parties never bargained with respect to the continuation, termination or fold in of cost of living adjustment in effect at the end of the 1976-1977 Contract; and the Employer cites Milwaukee Deputy Sheriffs' Association in which the Supreme Court vacated the portion of an Award which was not the subject of collective bargaining because the Arbitrator lacked jurisdiction over any offer which has not been bargained over by the parties. Additionally, the Employer cites Greendale Professional Policemen's Association vs. Village of Greendale in which the Arbitrator rejected the Union offer because it contained a matter over which the parties had not bargained and the Arbitrator, therefore, concluded he had no jurisdiction.

The undersigned rejects the Employer contention that the Union offer must be rejected based on lack of jurisdiction, because the issues had not previously been bargained between the parties. Given the history of the cost of living provision which is in dispute here; and given the position of the Union in this matter, who throughout bargaining proposed to continue cost of living in the successor Agreement; and given the clarification of language by reason of the bargaining history created in Union Exhibit 5-16; the undersigned concludes that the issue of cost of living in the 1978-79 Agreement, which is before this Arbitrator, has been bargained by the parties, and that impasse occurred over the issue of cost of living. While the method of implementing the Union's proposed language may not have been clarified during bargaining, the record simply does not support a finding that cost of living was not bargained for; and consequently, the undersigned concludes that the matter is properly within the jurisdiction of the undersigned on its merits.

CONSIDERATION OF THE FINAL OFFERS:

In considering the merits of the final offers of the parties, the undersigned will rely on those statutory criteria found at 111.77 (6) to which the parties addressed their proof and argument. The Employer relies on the following criteria: 111.77 (6)(d) and (f), specifically, the comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees in public and private employment in comparable communities, and comparison with wages and fringe benefits of other employees in the City of

Greenfield; 111.77 (6)(e), the average consumer prices for goods and services, commonly known as the cost of living; 111.77 (6)(h), other factors which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation and arbitration.

The Union relies on the same statutory criteria as the Employer set forth in the preceding paragraph, and found at 111.77 (6)(d), (e), (f), and (h), and additionally relies on those criteria found at 111.77 (6)(b), the stipulations of the parties; 111.77 (6)(c), the financial ability of the unit of government to meet the costs, and 111.77 (6)(g), changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

The undersigned will first consider the additional statutory criteria relied on by the Union. With respect to criteria (b) the Union argues that the cost of living provision in the Collective Bargaining Agreement, which expired at the end of 1977, came into being by reason of stipulation entered into between the Union and the Employer in 1973 to settle a prohibitive practice complaint regarding sick leave. The undersigned is persuaded that the stipulation to which the Union refers is not the criteria to which the statute is addressed. While there is no question that the cost of living provision which the Employer seeks to eliminate has been in effect since 1973, the decision to continue the cost of living or discontinue it will not be based on the criteria of the stipulation of the parties. This is not to say that a provision of a contract should be removed without considerable reason shown by the party proposing the removal, and that matter will be discussed later in this decision.

The Union has argued that since the criteria of ability to pay at (c) of the statute is such a persuasive fact if it works in the favor of the Employer, then conversely if the Employer has the ability to pay, it should weigh heavily in favor of the Union position. The undersigned is of the opinion that the criteria of ability to pay is not the determining factor in this dispute. There is no issue in this matter as to whether the Employer can afford the proposal of the Union, but to adopt the Union's proposal merely because the Employer can afford it, would result in the undersigned's failing to consider the other statutory criteria which clearly would run contrary to the statutory intent. The undersigned, therefore, does not consider the ability to pay argument raised by the Union to be controlling in this matter.

Additionally, the Union has argued that the criteria found at (g) would militate in favor of the Union proposal. The criteria at (g) directs the Arbitrator to consider changes in any of the foregoing circumstances during the pendency of the arbitration proceedings. The Union focuses the Arbitrator's attention to the changes in cost of living since January 1, 1978. There is no question that the annualized projection of the rate of cost of living since 1978 has increased, and that said change should properly be considered under the criteria found at (g). In view of the data which shows the annualized rate of cost of living to be on the increase since January 1, 1978; when considering criteria (g), the Arbitrator is persuaded that the criteria found there favors the Union position. In this case, however, the undersigned, because of the facts peculiar to the instant matter cannot determine that the Union offer should be accepted based solely on the criteria found at (g). The conclusion that the Union's offer is favored based on criteria (g) will be weighed later in this opinion when considering the other factors which still are to be discussed.

With respect to the criteria found at (d) and (f) on which both parties rely, the undersigned is persuaded that neither party has demonstrated that his offer is superior to the offer of the other, when considering the wages and total compensation of the instant employees, compared to firefighters in comparable communities. The comparative ranking under either final offer places these employees at the top of the comparison.[1] The foregoing comparison is based on the salaries actually paid to firefighters and does not consider whether a cost of living provision is contained in contracts in comparable communities. The record clearly shows that cost of living

1) This conclusion is based on the interpretation of the Union offer as set forth in Union Exhibit 5-16.

provisions in the contract are unique to the City of Greenfield and the City of South Milwaukee when comparing collective bargaining agreements of comparable cities in Milwaukee County. The undersigned is persuaded, however, that a cost of living provision should not be removed from an agreement solely because it is a unique provision when compared to agreements in comparable communities and, therefore, concludes that based on the criteria found at (d) and (f) of the statute the Union offer is preferred.

The criteria found at (h) directs the Arbitrator's consideration of such other factors normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, and arbitration. Under criteria (h), other factors, the Union asks the Arbitrator to consider the fact that the fire fighters of this Employer are covered by social security, thereby reducing their gross pay by 5.85%. The Union further points to the fact that the cost of living provision has been in existence since 1973, and cites Elkouri's statement that the prevailing practice as reflected by the cost of living provision in the prior agreement provides a strong argument that it be continued.

The Employer under criteria (h) makes a three fold argument: 1) the Employer is unable to budget on a sum certain for wages of employees with cost of living provision in the Agreement; 2) the cost of living provision, which has been in force since 1973, has resulted in the wages of employees of this Employer accelerating much more rapidly than the wages of other employees performing similar work in similar communities; 3) the Employer argues that he has been successful in reaching voluntary agreements with other bargaining units which deleted the cost of living provision for represented employees of the Police Department (two agreements); and additionally, reached voluntary agreement with represented employees in the Department of Public Works for the removal of the cost of living agreement. The Employer cites City of Greenfield (Police Department), WERC Case XLI, No. 20663, MIA-255, which was decided by Arbitrator James L. Stern on March 28, 1977, in support of his position. In Greenfield Police the Employer points to the portion of the Stern decision which reads as follows:

> The conclusion that the arbitrator draws from the argument advanced by the employer in regard to the Public Works Department is probably quite the opposite of what the Employer intended. It seems to the arbitrator that if a clause is such a problem in the public works department Agreement with AFSCME Local 2, the Employer should negotiate its deletion. After doing so, the Employer would be in a stronger position to argue before arbitrators for removal of the clause from police and fire fighters agreements. (p. 8)
>
> If the Employer had taken away the maintenance of standards clause from AFSCME Local 2 or if the prior existence of the clause had been shown to have hampered efficiency, the arbitrator would have sided with the Employer on this issue. (p. 8-9)
>
> Furthermore, the arbitrator believes it to be particularly important that the Employer has not negotiated the removal of the maintenance of standards clause from its agreement with another union, not subject to statutory binding arbitration, even though the Employer testified that its ability to manage efficiently had been hampered by the existence of the clause in the other Union's agreement. (p. 10)

In rebuttal to the argument advanced by the Employer with respect to the Stern decision, the Union contends that Stern held that in addition to showing that he successfully bargained out a similar provision on a voluntary basis with other units, that the Employer must also show that the existence of the clause in dispute had affected the employer adversely.

The undersigned has considered the arguments of the parties with respect to criteria (h), and after careful analysis and deliberation rejects the Union contention that the fact that the employees in the instant dispute are covered by social security would favor the Union position. Social security, while it reduces immediate take home pay, is a form of deferred income, which accrues to the benefit of the employees at a later date. Consequently, the undersigned finds the immediate reduction of income by reason of social security to be offset by the later benefits which accrue.

The undersigned has considered the argument that since the Employer has successfully bargained out cost of living with three other units; and said agreements were settled on the basis of wage offers either equal to or less than the wage offer made by the Employer in the instant dispute; the final offer of the Employer should be adopted. The undersigned finds the Employer argument with respect to agreements reached with its other bargaining units to be quite persuasive. If the undersigned were to find for the fire fighters in this dispute, it would mean that the fire fighters here would have the benefit of a cost of living clause which no other bargaining unit of the Employer would enjoy for the years involved under the terms of the Agreement in dispute here. The Employer has achieved precisely the objective which Arbitrator Stern spoke to in the City of Greenfield Police matter cited supra. The Union argument that the Employer has failed to show that the provision has adverse effect is rejected because the criteria set forth by Stern for removal of an existing provision simply does not say that, where the Employer has persuaded other units to delete the provision in a voluntary settlement. From the foregoing, the undersigned concludes that criteria (h), other factors, would favor the Employer offer, notwithstanding the fact that on its face it appears unusual that the Employer was successful in bargaining out the cost of living provision in other units during this period of inflation.

CONCLUSIONS:

From the foregoing discussion the undersigned has concluded that the criteria found at (d), (f) and (g) favor the Union position, while the criteria found at (h) favors the Employer position. Additionally, the undersigned has concluded that the criteria found at (b) and (c) are not persuasive in the instant matter. In considering the dispute in its entirety, the undersigned concludes that based on the entire statutory criteria as relied on by the parties, the preference for the Employer offer established under criteria (h), outweighs the preference for the Union offer established under criteria (d), (f) and (g), and the Employer offer is preferred.

The above conclusion is buttressed when considering the Union evidence adduced at hearing, which shows that the Employer offer would establish an annual rate as of January 1, 1978, for fire fighters of $16,967.76 (Union Exhibit 5-16), while the Union offer would establish a rate of $16,863.53 (Union Exhibit 5-16). Again, in 1979 the Employer offer would establish a rate of $18,155.52 (Union Exhibit 5-16), whereas the Union offer would establish a rate effective January 1, 1979, of $18,000.04 (Union Exhibit 5-16). From the foregoing it is clear to the undersigned that at least as of the first of each year the Employer has more value.

AWARD

The final offer of the Employer is to be incorporated into the Collective Bargaining Agreement for the years 1978-1979.

Dated at Fond du Lac, Wisconsin, this 17th day of August, 1978.

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

JBK:rr