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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of SHAWANO COUNTY SHERIFF'S DEPARTMENT LOCAL 1520 A, AFSCME, AFL-CIO For Final and Binding Arbitration Involving Law Enforcement Personnel in the Employ of SHAWANO COUNTY	WERC Case XXIII No. 22315 MIA-345 Decision No. 16330-A

Appearances:

Mr. James W. Miller, District Representative, Wisconsin Council of County and Municipal Employees, appearing on behalf of Local 1520 A, Shawano County Sheriff's Department.

Mulcahy & Wherry, S.C., Attorneys and Counselors at Law, by Mr. Dennis W. Rader, appearing on behalf of Shawano County.

ARBITRATION AWARD:

On May 8, 1978, the undersigned was appointed impartial arbitrator by the Wisconsin Employment Relations Commission to issue a final and binding arbitration award in the matter of a dispute existing between Shawano County Sheriff's Department, Local 1520 A, AFSCME, AFL-CIO, referred to herein as the Union, and Shawano County, 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 21, 1978, at Shawano, 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 exchanged by the Arbitrator on August 14, 1978.

THE ISSUE:

Only one issue is involved in the instant dispute: that of the assignment of extra work. The Union proposal would give the right of first refusal for extra work to members of the bargaining unit before it was offered to non members. The Employer offer would leave the assignment of extra work to the discretion of the Sheriff. The final offers of the parties with respect to the issue in dispute are as follows:

UNION FINAL OFFER:

Extra work such as snowmobile patrol, Boat Patrol, Prisoner transfer and pickup, and shotgun riding shall first be offered to the available bargaining unit member before non-members are solicited to do the work. The rate of pay for this extra work shall be at the employee's regular rate of pay with the exception of contract work such as stock car races, village work, etc., which shall be paid at the contractor rate of pay. The Sheriff shall use his discretion in offering this work to the bargaining unit members and shall insure that all employees shall be treated equally and fairly in the application of this provision. This work shall not interfere with nor supercede the intent of Article XVIII or Article XIX of the Labor Agreement.

EMPLOYER FINAL OFFER:

Voluntary deputy work at the straight hourly rate of pay shall be offered to employes at the discretion of the Sheriff. Nothing in this provision shall be construed to mean that bargaining unit employes shall be deprived of voluntary deputy work.

It is further understood that the Union may reopen this provision for negotiations and/or arbitration between Dec. 1, 1978 and Dec. 31, 1978.

DISCUSSION:

The issue involved here involves the limitation of the right of the Employer to contract out work. The predecessor Collective Bargaining Agreement, with respect to contracting out work, provides at Article IV F: "To contract out for goods or services so long as current employees are not deprived of their opportunity to work their normal work week." The final offer of the Union would further limit the right to contract out certain work defined as snowmobile patrol, boat patrol, prisoner transfer and pickup, and shotgun riding by requiring that said work be first offered to members of the bargaining unit before assigning said work to non members of the unit. The Union offer would further require that the work described above be paid at straight time regular wages of the deputies, rather than at a special deputy part time rate as has heretofore been the practice; except for such work as stock car races, village work, dance hall patrol, which would be paid at the contracted rate of pay with the parties to whom the services are being provided. The Employer offer on the other hand leaves the matter of extra work assignment to the discretion of the Sheriff, so long as in the exercise of his discretion it cannot be construed that bargaining unit employees shall be deprived of voluntary deputy work. The Employer offer further provides that the Union may reopen this provision for further negotiations and/or arbitration between December 1, 1978, and December 31, 1978.

The Employer advances the following arguments to support his position that the Employer offer is most reasonable.

1. The Employer's offer, by fostering a negotiated settlement of the extra work issue, is the more reasonable proposal.

2. The Union's request for preferential consideration on extra work is not guaranteed by contract or practice in comparable counties or in the Shawano County Contract.

3. The County's offer guarantees substantial opportunities for extra work to full time deputies.

The undersigned has considered the foregoing arguments advanced by the Employer at length, and rejects the Employer arguments for the reasons discussed below.

EMPLOYER ARGUMENT NO. 1

Regarding the first Employer argument, which advances the proposition that the Employer offer by fostering a negotiated settlement of the extra work issue is the more reasonable proposal; the undersigned concludes that under the facts involved herein, the argument is not persuasive.

The Employer has cited prior arbitration awards to support his position as follows:

Sheboygan County, Decision No. 14859-A, 11/24/76, Arbitrator Haferbecker, in which the arbitrator commented that a management rights clause is best negotiated by the parties so that a mutually acceptable solution might be reached.

City of Muskego, Decision No. 14345-A, 7/15/76, Arbitrator Bilder, who noted that difficult issues should be determined by the parties themselves.

City of Cedarburg, Decision No. 11617-A, 7/16/73, Arbitrator Moberly, who upheld an educational reimbursement policy and refused to unilaterally impose another policy upon the employees without the parties negotiating that provision.

From the foregoing citations the Employer argues that it would follow that the extra work time involved herein is too closely connected with the management function of work assignment to be determined by the arbitration process. The undersigned concludes, however, that the cases cited by the Employer are inapposite. The sole issue in dispute centers around an issue which the Employer would have the undersigned leave to the parties for resolution. The undersigned considers it a breach of his responsibilities to determine the matter in dispute if he were to leave the issue undecided, or to find for the Employer solely on the basis that the parties should have done the job themselves.

The Employer further contends that his offer provides a trial period under which the Employer's language could function, and then provide a reopener for further negotiations if the Union felt the Employer proposal was unsatisfactory. This argument has some appeal to the undersigned, however, in the instant matter where the timing of the reopener provision would follow this decision within a three month period of time, the Employer argument loses its force of persuasion. The period of time of less than three months in which to test the language is simply too short a period for the parties to determine its workability. Predictably, the instant dispute would resurface on December 1, 1978, when the parties would again be confronted with further negotiations, and, potentially, an additional arbitration proceeding over this matter. The undersigned concludes that the prospect of additional negotiations and arbitration regarding this issue should be avoided, based on the facts that presently exist.

EMPLOYER ARGUMENT NO. 2

The Employer argues that the preferential consideration contained in the Union final offer is not guaranteed by contract or practice in comparable counties or in the Shawano County Contract. The Employer has entered evidence with respect to collective bargaining agreements for Marathon, Langlade, Oconto, Lincoln, Portage, Marinette, Wood and Vilas counties, and argues that only Waupaca County has a contract provision requiring the county to give first preference of extra work to full time deputies. Additionally, Vilas, Marathon, Lincoln, Portage and Langlade counties have the contractual right to contract out work with no restriction of maintaining a practice or negotiating a subcontracting decision. At first consideration the foregoing might lead the undersigned to conclude that based on provisions in collective bargaining agreements in comparable communities, the Employer offer in this matter should be preferred. In view of the Union testimony and Union exhibits 1 through 7, which show that in Langlade, Marinette, Door, Marathon, Portage, Waupaca and Oconto counties, the practice with respect to snowmobile patrol, boat patrol, second man in car, prisoner pick up, and prisoner transfer is either equivalent to the provision for which the Union is asking here; or not applicable because the work is not being performed in the foregoing counties; the evidence of the contracts submitted by the Employer loses its persuasive effect. Since the unrefuted evidence introduced by the Union shows that the practice existing in the foregoing counties is equivalent to the provision sought by the Union; the undersigned concludes that the comparisons with comparable counties favor the Union position in this matter.

EMPLOYER ARGUMENT NO. 3

With respect to the Employer argument that the Employer offer guarantees substantial opportunities for extra work to full time deputies, the undersigned concludes that the language is too broad and vague so as to determine with any degree of certainty precisely the opportunities for extra work which the Employer is offering. At hearing the Employer attempted to adduce testimony from Lorraine Zehren in an effort to show how the Employer proposal would be admin-

istratively implemented. The undersigned has carefully reviewed the testimony of Administrative Deputy Zehren, and notes that she was unable to testify with respect to certain information contained within the exhibits introduced by the Employer because it was outside the scope of her knowledge. Furthermore, there is doubt in the mind of the undersigned whether the Administrative Deputy's testimony, with respect to how the assignments for extra work would be made under the Employer proposal, can be assigned more than limited credit in view of the language of the Employer's last offer, which provides that it is the Sheriff's discretion to offer extra work to full time employees. It is the opinion of the undersigned that in matters involved in interest arbitration, it is incumbent upon the proposer of his language to present evidence to support his position. In the instant case, because the Employer proposal leaves to the discretion of the Sheriff the assignment of the extra work involved herein, the undersigned concludes that the testimony of the Administrative Deputy gives no assurance that the Sheriff will exercise his discretion in accordance with her testimony. If the Employer wished to convince the undersigned that the assignment of extra work within the Sheriff's discretion would be done in a certain fashion, the testimony of the Sheriff on that point would have been much more persuasive. For the foregoing reasons, the undersigned concludes that Employer Argument No. 3 must fail.

Additionally, the Employer would have the undersigned consider the cost factor involved in the Union proposal, which the Employer represents to be $14,775 per year. The undersigned considers the foregoing cost estimate to be unpersuasive, because there was no argument presented that the Employer had an inability to pay the cost; and, further, because it is within the discretion of the Employer to determine whether the additional cost is warranted to put a second man in a car on certain shifts. If the Union proposal had required full time deputies at their regular rate to fill the second seat, the estimate of $14,775 cost would appear to be accurate. The Union proposal, however, only gives first preference for those assignments to full time deputies and part time deputies may be assigned if no full time deputies express an interest. The $14,775, therefore, represents the maximum cost exposure. While the maximum may well become a reality by reason of the Union proposal, it is unknown as to whether full time deputies will claim all of said work. If the experience set forth in Employer exhibit #15 were to predict the experience with respect to filling the second seat with full time deputies, the undersigned would conclude that all of the work will not be claimed by full time deputies. As the Employer points out on page 12 of his brief, full time employees received first choice to work during the Shawano County Fair (Employer Exhibit #15), and not all of the shifts were filled by full time deputies, so the remaining openings were allowed to be filled by part time deputies. In any event, the $14,775 is the top side cost to the Employer, and given the conclusion arrived at by the undersigned that the Union offer is the more reasonable in the instant dispute, and absent the Employer's inability to pay said cost, the fact that the Union proposal has a potential cost of $14,775 is not reason to reject the Union proposal.

CONCLUSION:

Based on the statutory criteria (111.77) (6), the exhibits, the testimony at hearing, the arguments of the parties, and for the reasons as stated in the discussion above, the Arbitrator concludes that the Union offer is the more reasonable, and makes the following:

AWARD

The final offer of the Union is to be incorporated into their Collective Bargaining Agreement.

Dated at Fond du Lac, Wisconsin, this 13th day of September, 1978.

JBK:rr

Jos. B. Kerkman, Arbitrator