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 * In the Matter of Arbitration *
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 * between * Case XII, No. 22706 *
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 * CITY OF MIDDLETON, WISCONSIN * MIA - 376 *
 * (Police Department) * Decision No. 16340-A *
 * * * * *
 * and * Wisconsin Employment *
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 * LOCAL 695 - DRIVERS, SALESMEN, * Relations Commission *
 * WAREHOUSEMEN, MILK PROCESSORS, * *
 * CANNERY, DAIRY EMPLOYEES AND * *
 * HELPERS UNION * Thomas P. Gilroy *
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DECISION AND AWARD: November 28, 1978

APPEARANCES:

For The Employer:

Jack D. Walker, Attorney

For The Union:

Merle Baker, Business Representative

I. BACKGROUND

This arbitration arose pursuant to the provisions of Section 111.77 (4) (b) of the Municipal Employment Relations Act and as a result of a negotiation impasse between the City of Middleton, Wisconsin (the Employer) and Local 695, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union (the Union).

On May 15, 1978 this Arbitrator was appointed by the Wisconsin Employment Relations Commission and a hearing was held before this Arbitrator on August 22, 1978 at the City Hall, Middleton, Wisconsin. A transcript of the proceedings was taken with post-hearing briefs being subsequently filed by the parties. The Arbitrator is empowered to select the final offer of one of the parties and to issue an award incorporating that offer without modification.

In reaching a decision the arbitrator shall give weight to the following factors:

- (a) The lawful authority of the employer.
- (b) Stipulations of the parties.
- (c) The interests and welfare of the public and the financial ability of the unit of government to meet the costs.
- (d) 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 generally:
 - 1. In public employment with comparable communities.
 - 2. In private employment with comparable communities.
- (e) The average consumer prices for goods and services, commonly known as the cost of living.

- (f) The overall compensation presently received by the employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

II. ISSUES IN DISPUTE

The issues at impasse, as stipulated by the parties, are as follows:

- 1. Article 4.03 Shift Scheduling
- 2. Article 4.08 Acting Shift Commander
- 3. Article 5.01 Length of Vacation
- 4. Fair Share Agreement

III. FINAL OFFERS

Article 4.03 - Shift Scheduling

The Union

Employees shall receive time and one-half (1-1/2) their straight time hourly rate for all hours worked in excess of their normal daily or normal monthly schedule. Employees attending required schooling or required pistol range activities outside their normal daily or normal monthly work schedule shall receive their straight time hourly rate for all such required hours involved. The specific schedule shall be made monthly and posted ten (10) days in advance. Normal work weeks will be scheduled to result in an average 39.5 hour week, for overtime purposes. In making up the specific schedules, an employee's shift preference by seniority shall be honored. Shift selections shall be at a time designated by the chief of police to be at least one (1) selection per year. Shifts may also be selected by seniority when there is a permanent vacancy on a shift.

The Employer

Employees shall receive time and one-half (1-1/2) their straight time hourly rate for all hours worked in excess of their normal daily or normal monthly schedule. Employees attending required schooling or required pistol range activities outside their normal daily or normal monthly work schedule shall receive their straight time hourly rate for all such required hours involved. The specific schedule shall be made monthly and posted ten (10) days in advance.

The usual scheduling pattern shall be six (6) days duty and three (3) days off duty except that the department may schedule additional days of work so as to result in an average 39.5 hour work week, for overtime purposes. In making up the specific schedules, an employee will be scheduled with twelve (12) hours off between shifts.

Article 4.08 - Acting Shift Commander

The Union

Any officer acting as shift sergeant for all or part of a shift (2 hours or more) shall be compensated at a One Dollar (\$1.00) per shift rate.

The Employer

Any officer acting as shift commander in excess of two (2) hours shall be compensated on a \$1.00 pro-rata per shift basis.

Article 5.01 - Length of Vacation

The Union

(b) Two (2) weeks after each year thereafter up to and including eight (8) years of service;

(c) Three (3) weeks after eight (8) years of service up to and including fifteen (15) years of service.

The Employer

Employees shall earn annual paid vacation as follows:

Two weeks vacation	First year through the completion of the eighth year of continuous service
Three weeks vacation	Ninth year through the completion of the fifteenth year of continuous service
Four weeks vacation	Sixteenth year and continuous employment thereafter.

Fair Share

The Union

Membership in the Union is not compulsory. An employee may join the Union and maintain membership therein consistent with its constitution and by-laws. No employee will be denied membership because of race, color, creed or sex. This Article is subject to the duty of the Wisconsin Employment Relations Commission to suspend the application of this Article whenever the Commission finds that the Union has denied an employee membership because of race, color, creed or sex.

The Union will represent all of the employees in the bargaining unit, members and non-members, fairly and equally, and therefore all employees shall pay their proportionate share of the costs of the collective bargaining process and contract administration by paying an amount to the Union equivalent to the uniform dues required of members of the Union.

The Employer agrees to deduct the amount of dues certified by the Union as the amount uniformly required of its members from the earnings of the employees affected by this Agreement and pay the amount so deducted to the Union on or before the end of the month in which such deduction is made.

In the event that an employee shall not have sufficient earnings due him during the pay period when dues or fees are normally withheld to equal or exceed the amount of the certified deduction, no dues or fees shall be withheld.

Liability. The Union shall indemnify and save the Employer harmless against any and all claims, demands, suits or other forms of liability which may arise out of any action taken or not taken by the Employer for the purpose of complying with the provisions of this Article.

The Employer

The Employer agrees to deduct monthly Union membership dues from the pay of those employees who individually request in writing that such deduction be made. The amounts to be deducted shall be certified to the

City by the officers of the Union and the aggregate deduction shall be remitted monthly to the treasurer of the Union. The City shall be saved harmless in the event of any legal controversy with regard to the application of this provision, provided each employee will be able to terminate such authorization in any manner provided in Wis. Stat. 111.70 (3) (2) (6).

IV. CONTENTIONS OF THE PARTIES

Article 4.03 - Shift Scheduling

The Union

1. The intent of the 1977 collective bargaining agreement was to have a schedule of six days on duty and 3 days off with a 1/2 hour per week reduction from the previous 40 hour week due to a decrease in the number of training hours per year.
2. The Employer seeks occasional 7 day weeks to use up training hours that have not been used since Spring, 1978.
3. Monona and Sun Prairie have a 6 - 3 week with no 20 minute report time and only Stoughton has a forty hour week.
4. Regarding shift preference by seniority, of comparable employers, Dane County, Monona, Village of Oregon, Stoughton, Sun Prairie, Verona, and Union have choice by seniority. Only the City of Middleton does not. The present system is one of unilateral assignment.

The Employer offered the testimony of a Professor on the disadvantage of shift selection by seniority. This Professor is a management teacher, a former manager with limited experience whose testimony was based on opinion only.

5. It is not true that the most experienced officers will always choose the day shift and the evidence presented refutes this argument. In addition, the present system of shifting assignments creates a hardship on family and social life.

The Employer

1. The Employer sees no difference between the final offers regarding 6 - 3 scheduling since this is included in the Employer's final offer, though the Union has perhaps by oversight deleted the 12 hours off between shifts.
2. Seniority is an arbitrary means of assigning work and is not consistent with the need for flexibility in police work. The work varies, with most crises on the evening shifts. Shifts are assigned annually to have a balance of experience, etc. on a shift, provides for some change, and avoid "ruts", to broaden experience, meet skill needs, avoid personal conflicts, etc. Shifts are assigned considering a variety of factors.
3. Testimony was that a seniority system would not meet community nor employee needs and that a seniority system is not appropriate to as small a force as in Middleton.
4. "Cover" shifts are assigned on a need basis and particular case assignments and, with only nine officers, handling these shifts on a seniority basis would conflict with the 6 - 3 work schedule.
5. Only Monona, of comparable communities, has shifts by seniority.
6. The Union has the burden of showing why present language should be changed and has not sustained that burden.

Article 4.08 - Acting Shift Commander

The Union

1. The difference in the proposals is paying \$1.00 additional for the shift versus 12 1/2 cents per hour. For a complete shift the offers are identical unless an officer worked over two hours but less than eight.

The Employer

1. There is no compelling need for this Union to have fair share.
2. Of comparable cities, only Sun Prairie has fair share. No other contract of the Employer has fair share.
3. The Employer has granted checkoff, seniority for layoff and just cause for discharge which protect the security of the Union.
4. Non-members testified that they object to joining or paying dues for personal reasons and because of the public image of the Teamsters Union.
5. The economics of police bargaining and contract administration with the Teamsters Unit is not dependent on dues from small units.
6. The Union's proposal is illegal since it requires full dues payment by non-members while Wisconsin law forbids the use of fair share funds for purposes unrelated to collective bargaining and contract administration. Testimony is that 44¢ per month of local dues goes to Teamsters Joint Council 39 which neither bargains nor administers the local contract. Additional dollars go to the International Union which neither bargains locally nor administers the Agreement.
7. The Employer, under these circumstances, does not have the lawful authority to withhold full dues for non-members in light of state and U.S. Supreme Court decisions. At the minimum, the Union proposal is a potential source of litigation.
8. Testimony adduced indicates that the Union will not clarify what portion of dues goes to local negotiations and contract administration.

V. DISCUSSION

The Arbitrator is required by statute to select the final offer of one of the parties based on the criteria spelled out under Section I of this decision. This decision is based on a careful review of the criteria provided by statute and the evidence and argument presented by the parties.

With respect to the criteria, often referred to by the parties, of public employment in comparable communities the cities of Monona, Sun Prairie and Stoughton are, according to the Union post-hearing brief most comparable (Union Brief, p. 3) in population and bargaining unit size. The Employer does not challenge that basis of comparison and the Arbitrator concludes that these three cities are the best basis for comparison.

In terms of shift scheduling, the seniority issue in Section 4.03 is clearly the major issue. Using the criteria of comparable jurisdictions, Monona makes shift assignments by seniority, Sun Prairie limits seniority by considering employee preference, and the Stoughton agreement provides that "The Union and the employees shall be given an opportunity to bargain about shift assignment changes prior to implementation, except in case of emergency." (Article XII, Section 8). The Union position is that Stoughton has shifts by seniority. The Employer position is that it does not. In reviewing the Stoughton Agreement, (Joint Exhibit 7) the Arbitrator finds no clear provision for shift assignment by seniority.

The "comparables" on this issue provide at best a "mixed bag." In addition, there has been no clear showing that the present language has presented a clear problem in terms of either maintaining a needed mix of experience on shifts or compelling personal problems for employees. An approach that balances management, employee and community service needs seems reasonable. The record does not clearly demonstrate that the present system need be changed.

With respect to the remainder of 4.03, the Arbitrator's judgement is that no case has been made for accepting the Union's language.

Regarding Article 4.08, the Arbitrator's judgement is that there is no substantial difference between the parties and that the issue is not crucial to accepting the total final offer of the Employer or the Union by any of the criteria in the Wisconsin statute.

2. If there is any difference, policy in comparable communities supports the Union position.

The Employer

1. The main difference in these offers is referring to the individual as an Acting Shift Sergeant or Acting Shift Commander.

2. The Employer does not have "Acting Shift Sergeants" and the Union language of "\$1.00 per shift rate" is not clear as to whether this is paid regardless of time spent or not. It should be clear that pay is for time actually worked.

Article 5.01 - Length of Vacation

The Union

1. The issue here is the effect of three weeks vacation during the ninth year of service.

According to the Union brief, their position is that:

"The Union wants the current language with this entitled to three (3) weeks vacation. There has been no negotiation of any other language changes between the Union and the City on this issue. It is apparent, looking at City exhibits number 1, 2 and 3, that the vacation issue has been negotiated with other City employees. In fact, the other City employees have the same policy in this Collective Bargaining Agreement as the City ordinance calls for.

Does ordinance necessitate conformation of a Collective Bargaining Agreement? Certainly, acceptance of the Police Department Collective Bargaining Agreement by the City Council must be in ordinance form when it is ratified. Therefore, that ordinance should supercede.

Again, in summary, it appears that if there is a dispute on anything other than the amount of time necessary to receive three (3) weeks vacation, it has not been a negotiated issue and is, since the City does not agree to the Union's offer of acceptance during the hearing, a benefit that the employees should retain."

The Employer

1. The difference is in phrasing and in moving the 6 month eligibility from the schedule to a descriptive statement following the vacation schedule. The Union's proposal is not clear as to whether a new employee might be entitled to an extra week vacation in the first year.

2. The Employer's language is uniform with its other bargaining units and its policy for unrepresented employees. This language was accepted by the Union in contract negotiations.

Fair Share

The Union

1. Any employee can dispute the terms of a fair share agreement in the courts or by other means.

2. The Union final offer protects the Employer from liability.

3. Of comparable communities, all either have fair share or 100% Union membership. The Employer has 12 in the unit and 8 union members.

4. One of the employees in Middleton, for example, who is not a member has attended union meetings, requested that certain proposals be made in negotiations, receives all negotiated benefits but does not pay dues. Employees that object to fair share can petition the W.E.R.C. for a referendum vote or challenge in court.

With respect to Section 5.01 and vacations, the Arbitrator's judgement is that the Employer's concern regarding the Union language related to one week vacation is not supported by the record. That an employee receives one week vacation after six months service seems clear. Regarding the eligibility for three weeks vacation, Monona provides 3 weeks after the completion of 9 years; (Article VI) Stoughton provides 3 weeks "with more than six (6) full years of service," and Sun Prairie provides "three weeks with pay after completion of five years of continuous service." The Union proposal of three weeks after eight years of service is supported by the record.

The fair share issue has been a most difficult one for many parties in many public sector jurisdictions. The parties have presented the classic arguments for and against such a union security proposition. The Arbitrator is not convinced that this issue is basically one of a "national image" that may or may not be projected by the international organization with which this local bargaining unit is affiliated. Nor is the Arbitrator in a position, based on the record presented, to fully evaluate or define what "fair share" really means in terms of local collective bargaining services and contract administration.

The Arbitrator has nothing new or novel to add to the classic debate on this union security issue. In terms of comparable data, Monona and Stoughton have no fair share while Sun Prairie does. The Arbitrator recognizes that this issue may be a matter of principle between the parties as well as for individual employees. The Arbitrator also recognizes that, as the Employer points out, it may be a source of future litigation. The Employer makes a strong argument that the "full dues proposal" of the Union falls on the ground that it lacks specificity as to the funds that will be used directly for representing local members in contract negotiations and contract administration. The Union has not demonstrated that the traditional "free rider" arguments - which may have merit - justify a full dues deduction for non-members in this instance. The Union argument on this issue fails - not on the concept of paying a fair share - but on demonstrating what constitutes a fair share.

The foregoing discussion indicates that this Arbitrator, were it on an issue-by-issue basis, would reach a conclusion that neither party would prevail on all issues at impasse. The Arbitrator is required to make the difficult choice as to which parties' total final offer most nearly meets statutory standards.

The Arbitrator's judgement is that while the record supports the Employer position on Articles 4.03, 4.08 and Fair Share and the record supports the Union position on Vacations (Section 5.1), on balance, the Arbitrator's conclusion is that the weight of evidence and argument supports the Employer's final offer.

VI. DECISION AND AWARD

The final offer of the Employer is selected by the Arbitrator and is to be incorporated in the Agreement without modification.

November 28, 1978

Thomas P. Gilroy /s/
Thomas P. Gilroy, Arbitrator

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