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WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION

WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE ARBITRATOR

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In the Matter of the Arbitration  
Between  
BROWN COUNTY SHERIFF-TRAFFIC DEPARTMENT  
LABOR ASSOCIATION  
and  
BROWN COUNTY (SHERIFF-TRAFFIC DEPARTMENT)  
\*\*\*\*\*

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\* OPINION AND AWARD  
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\* Case L  
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\* No. 24464  
\*  
\* MIA-436  
\*  
\* Dec. No. 17155-A  
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Appearances:

Thomas J. Parins, Esq., Parins & McKay, S.C., Green Bay,  
for the Association

Kenneth J. Bukowski, Esq., Corporation Counsel, Brown County,  
Green Bay, for the Employer

BACKGROUND

On April 27, 1979, the Brown County Sheriff-Traffic Department Labor Association (referred to herein as the Association) filed a petition with the Wisconsin Employment Relations Commission (WERC) pursuant to Sec. 111.77(3) of Wisconsin's Municipal Employment Relations Act (MERA) to initiate final and binding arbitration. The parties had previously begun negotiations for a successor to their existing 1978 collective bargaining agreement but failed to reach agreement on all issues in dispute covering this unit of law enforcement personnel. On July 26, 1979, following an investigation by a WERC staff member, the WERC determined that an impasse existed within the meaning of the statute and that arbitration should be initiated. On August 28, 1979, the undersigned having been selected by the parties, was appointed by the WERC to resolve the impasse. She held a hearing in Green Bay, Wisconsin, on October 25, 1979, at which time the parties were given a full opportunity to present evidence through exhibits and testimony and to make oral arguments. Thereafter briefs were exchanged and submitted to the arbitrator. Additional briefs were subsequently requested and received by the arbitrator (see DISCUSSION section below). The undersigned under Form 2 of the statute is required to choose either the entire final offer of the Association or the entire final offer of the Employer.

ISSUES AT IMPASSE

Although the parties were able to reach agreement on several matters in dispute through collective bargaining, including wages, two issues remain

unresolved and are the subject matter of this arbitration proceeding. These issues relate to Employer payments for health insurance premiums after retirement based upon a bargaining unit member's unused accumulations of sick leave and Employer payments for judgments and legal fees incurred when bargaining unit members are sued and found liable for certain of their acts within the scope of their employment. The final offer of the Association on these two issues is annexed hereto as Appendix A. On the health insurance premium/sick leave conversion issue, the Employer proposes continuing the 1978 contract provision relating to cash payment of 25% of accumulated sick leave at retirement and the Employer has no counterproposal on issue #2.

#### STATUTORY CRITERIA

Section 111.77(6) of the Wisconsin Statutes requires that:

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 these costs.
- (d) Comparison of the wages, hours and conditions of employment of the employes involved in the arbitration proceeding with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally:
  1. In public employment in comparable communities.
  2. In private employment in 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.

#### POSITIONS OF THE PARTIES

##### The Employer

In its initial brief, the Employer argues on three distinct grounds against the Association's final offer as it relates to the health insurance premium/sick leave conversion issue. First, the Employer claims that the Association's proposal is in violation of the federal law relating to age discrimination in employment. The Employer further opposes the Association's proposal on the grounds of its high cost. Finally, the Employer disagrees with the Association's exclusive use of the City of Green Bay's two units of uniformed services as appropriate comparables. It disagrees primarily on the basis that there are significant differences as to duties between members of this bargaining unit and the Green Bay Police bargaining unit as well as significant differences in economic fringe benefits. The Employer believes that other private and public sector employers are more appropriate comparables, notes that its agreed upon concessions are already in line with other total packages, and concludes that the application of the statutory criteria contained in Section 111.77(6) require the arbitrator to select its final offer on this issue as the one more in line with the listed criteria

As to the second issue in dispute, payment for legal judgments and legal fees, the Employer emphasizes that the Association has presented no comparables and that Employer exhibits indicate only one comparable with similar language. The Employer further notes that the language of the

Association's offer may be interpreted to require the Employer to pay both worker's compensation and any judgment taken against a coemployee, certainly an unintended result. Finally, no one has been harmed by the present status quo. Thus, the Employer concludes that on this issue too the arbitrator is required under the statute to select the Employer's final offer as the one more closely in conformity with the statutory standards.

### The Association

The Association contends that its proposal, converting unused sick leave accumulations into health insurance premium payments by the Employer upon retirement of bargaining unit members, should be selected since it is patterned after provisions already agreed to in collective bargaining agreements covering the City of Green Bay's Police and Fire Departments. The Association presented testimony to establish its position that historically the uniformed services units in the city are the appropriate comparables and that there has been parity between this bargaining unit and the Green Bay Police unit for over two decades. Moreover, the Association argues that its proposal will result in the long term in substantial savings to the Employer due to the earlier retirement of present members in the bargaining unit and their replacement by new, less experienced employees.

In supporting its second proposal relating to protection against legal fees and judgments, the Association notes an anomaly which exists since 1978 when Brown County repealed its Civil Service ordinance: while members of the bargaining unit acting as traffic officers are covered by a state law which requires the employing political subdivision to pay legal costs and judgments, they are not similarly covered while acting as sheriff's deputies. Since there is no rational basis for continuing this exclusion from generally state mandated protection and since the potential individual liability is high, the Association believes that its final offer on this second issue is more reasonable. Indeed, the Association notes that during negotiations between the parties, the substance of its legal liability proposal became incorporated into A. B. 105. (That bill eliminated the exception for Deputy Sheriffs not under Civil Service from Section 895.46. At the time of the arbitration hearing, this bill had been passed by the state legislature but had not yet been signed by the Governor.)<sup>1/</sup> For all these reasons, the Association concludes that its final offer package should be selected.

### DISCUSSION

Although this arbitration proceeding involves only two bargaining demands which were not settled by the parties, there is an array of issues which have arisen during the course of this arbitration proceeding, including one as to which exhibits had been admitted. In the judgment of the arbitrator, the outcome of this proceeding depends upon her determination of only two disputed issues, both of which relate to the Association's first proposal. In the arbitrator's view, the enactment of A.B. 105 into law, following the arbitration hearing, while not completely disposing of the Association's demand relating to the payment of judgments and legal fees, nevertheless goes a long way towards settling the parties' differences. Thus, the arbitrator concludes that only the first issue in dispute, relating to the conversion of unused sick leave into health insurance premium payments upon retirement should be determinative of the outcome of this proceeding.

In analyzing issue #1, two disputed questions must be settled. Since the parties strongly disagree, the first one relates to what should be the appropriate comparables. The Association looks exclusively to the City of Green Bay's Police and Fire Departments, based upon a parity pattern which it claims has been in effect for over two decades. The Employer looks to a much broader array of comparables, including numerous communities in the Fox River Valley. Based upon the testimony presented, the arbitrator believes that the Association's comparables on this issue are entitled to greater weight.

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<sup>1/</sup> In view of this legislative development, the Association indicated that it wished to drop this item from its final offer but the Employer refused to consent to this amendment.

(Before going on to consider the next disputed question which will determine the outcome of this proceeding, the arbitrator would like to note that the disputed and speculative nature of the cost figures presented by both parties on the Association's first demand present so many difficulties that she is unable to evaluate them as to their validity. However, in view of the following discussion, a determination as to the cost implications of the Association's proposal becomes unnecessary.)

For the first time during the arbitration hearing, the Employer challenged the legality of the Association's health insurance premium upon retirement demand as a violation of federal law prohibiting age discrimination. Following the hearing, as the arbitrator studied the parties' briefs and exhibits, she concluded that it would be very desirable for the parties to brief specifically this legality question. She requested that the parties submit supplementary briefs on this issue and also requested that the parties address themselves to the further question: "If after review of all the parties' arguments, the arbitrator concludes that the law is unclear as to whether a proposal contained in a final offer is legal or illegal, how does this affect the application of Section 111.77(6)(a) of the Wisconsin Statutes?" The arbitrator has found the supplementary briefs she received to be very helpful on both issues.

In reviewing the supplementary briefs, the arbitrator concludes that the Employer has raised a serious question concerning the legality of the Association's proposal.<sup>2/</sup> While the arbitrator acknowledges that the Employer's argument is not a clearly established point of law, the rapidly developing law in this substantive area indicates that on its face, the Association's proposal presents a prima facie case of age discrimination which is not clearly covered by any statutory or administrative agency exception. Accordingly, inclusion of this type of clause in a collective bargaining agreement will present a serious and continuing problem for the parties, straining their future labor relations. Therefore, the arbitrator questions the wisdom of including such a clause as a result of an arbitration proceeding in contrast to voluntary collective bargaining. These doubts are reinforced by technical objections raised by the Employer to specific language in the Association's proposal which are in addition to the age discrimination argument already noted.<sup>3/</sup> Therefore, the arbitrator concludes that although comparability analysis would lead her to select the Association's proposal, legal and other problems with the wording of the Association's proposal on health insurance premium/sick leave conversion raised by the Employer leads the arbitrator to select the Employer's final offer on issue #1. As has already been noted, this selection of the Employer's position on issue #1 determines the outcome of this proceeding.

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<sup>2/</sup> Both parties agree that the heart of the legality issue concerns whether or not the Association's proposal falls within the exception set forth in 29 U.S.C. § 623(f)(2) which is commonly known as the 4(f)(2) exception. The Employer notes that the Association's express rationale for its proposal is to encourage early retirement and further supports its position by citing portions of the Federal Register, Vol. 44, No. 103, May 25, 1979, pp. 30648-62, containing a revised Interpretive Bulletin with respect to employee benefit plans under 4(f)(2) (as amended in 1978) of the Age Discrimination in Employment Act of 1967. The Employer concludes that the Association's proposal does not fall within the delineated exceptions and therefore is in violation of the Act.

The Association, on the other hand, argues that its proposal is covered by 4(f)(2) based upon its 1978 legislative history and, in addition, is also covered by the exception contained in 4(f)(1) since the differentiation is based on a reasonable factor other than age, i.e. the decreasing individual need of a retiring employee resulting from later retirement.

<sup>3/</sup> Addressing the specific language of the 1979 Green Bay Police agreement, the Employer notes a serious problem relating to the reference to "normal retirement" since retirement policies of the two employing municipalities differ significantly. There is another similar inappropriate reference to "in accordance with regular City policy" in regard to coverage for dependent children.

AWARD

Based upon a full and fair consideration of all the evidence and argument presented by the parties and based upon consideration of the statutory criteria contained in the Municipal Employment Relations Act and for the reasons stated above, the arbitrator selects the Employer's final offer.

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June Miller Weisberger  
Arbitrator

DATED: February 16, 1980  
Madison, Wisconsin

the Brown County Sheriff-Traffic Department Labor Association makes the following proposals as ~~its~~ their final offer in the interest arbitration pending between it and Brown County:

1. HEALTH INSURANCE AFTER RETIREMENT

That the County provide medical and hospital insurance after retirement under its group insurance policy, in such amounts limited to the value of the accumulated and unused sick leave upon retirement of each officer in question, upon the same terms and conditions as are in force pursuant to the 1979 labor agreements between the City of Green Bay and the Green Bay Police and Fire Non-supervisory Bargaining Units.

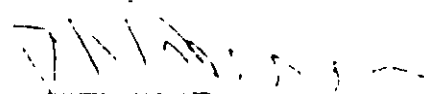
2. LIABILITIES TO BE AGAINST MEMBERS AND LEGAL FEES AND COSTS INCURRED

The County shall with any judgment as to damages and costs entered against any member of the bargaining unit in excess of any insurance applicable to the member, and where the County does not provide legal counsel to the member, all reasonable attorney's fees and costs of defending the action, where the member is proceeded against as an individual because of acts committed while carrying out the members' duties as a member of the Sheriff-Traffic Department, and the jury or court finds that the member in question was acting within the scope of his employment. Failure by the member to give notice to the department head of any action or special proceedings commenced against the member as soon as reasonably possible shall be a bar to recovery by the member from the County of reasonable attorneys fee and costs of defending the action. Such attorneys fees and expenses shall not be recoverable if the County offers the member legal counsel and such offer is refused by the member.

Dated this 24th day of June, 1979.

For the Brown County Sheriff-Traffic  
Labor Association

Signed:

  
THOMAS J. FARINO

Appendix A

Health Insurance Payment Program. All employees reaching normal retirement or disability prior to attaining such age shall be eligible to continue in the City's health insurance group plan until the age of sixty-five (65). The City shall pay all of the monthly premium payable, provided that the total amount expended for such insurance for each retired employee shall be limited to an amount equal to the percentage set forth below of the value of any accumulated and unused sick pay standing to the credit of that employee as of that employee's date of retirement:

100% for employees retiring under disability retirement.

100% for employees retiring in their 55th year of age.

90% for employees retiring in their 56th year of age.

80% for employees retiring in their 57th year of age.

70% for employees retiring in their 58th year of age.

60% for employees retiring in their 59th year of age.

50% for employees retiring in their 60th year of age.

40% for employees retiring in their 61st year of age.

30% for employees retiring in their 62nd year of age.

25% for employees who retire after reaching age 62.

After the amount expended for any employees reaches the limit for such employee, the monthly premiums shall thereafter be paid by the employee.

1. Surviving spouses, until remarriage, will be eligible to apply the escrowed amount for health insurance premium payment purposes.

2. Dependent children, in accordance with regular City policy, will be eligible to apply the escrowed amount for health insurance premium payment purposes upon the death of the surviving spouse. Remarriage of the surviving spouse will terminate the eligibility of dependent children for this benefit.

3. Any funds remaining in the escrow account after death of the retiree, death or remarriage of the surviving spouse, or death or ineligibility of dependent children shall revert back to the City.

4. This health insurance premium payment program for protective employees is mandatory for all covered employees upon retirement and supersedes all previous sick leave payment programs upon retirement sponsored by the City of Green Bay.

5. If death of a covered protective service employee occurs before retirement, the existing 25% payment of accumulated sick leave will apply to the estate of the deceased employee for purposes of payment of health insurance premiums in accordance with the above policy.