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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between Ozaukee County (Sheriff's Department) and Ozaukee County Law Enforcement Employees Local 540, AFSCME, AFL-CIO	AWARD and OPINION Case IX No. 25563 MIA-473 Decision No. 17676-A

APPEARANCES: Roger E. Walsh, Esq., Milwaukee,
for the Employer

Michael J. Wilson, District Representative,
WCCME, Manitowoc,
for the Union

On January 7, 1980, Ozaukee County (Sheriff's Department) (referred to as the Employer or County) filed a petition with the Wisconsin Employment Relations Commission (WERC) pursuant to Section 111.77(3) of Wisconsin's Municipal Employment Relations Act (MERA) to initiate arbitration. The County and the Ozaukee County law Enforcement Employees, Local 540, AFSCME, AFL-CIO, (referred to as the Union) had begun negotiations for a successor collective bargaining agreement to its 2-year 1978-79 contract but failed to reach agreement on all issues in dispute covering this unit of approximately 34 employees. On March 19, 1980, following an investigation by a WERC staff member, the WERC determined that an impasse existed and that arbitration should be initiated. On March 31, 1980, the undersigned, after having been selected by the parties, was appointed by the WERC as arbitrator to resolve the impasse. She conducted an arbitration hearing on May 23, 1980 in Port Washington, Wisconsin, at which time the parties were provided a fair and full opportunity to present evidence. Briefs were subsequently filed and exchanged.

ISSUES AT IMPASSE

The parties were unable to resolve the following two issues:

1. 1980 wages.
2. Wage rates (premium pay) for work on contractually designated holidays.

On the issue of wages, the County has offered a 9% increase to all rates effective January 1, 1980. The Union's offer is 9 1/2% to all rates effective the same date.

As to the second issue of holiday premium pay, the Union proposes the continuation of the 1978-79 contractual language relating to holiday premium pay. Under the 1978-79 contract, if an employee's regularly scheduled work day falls on a paid holiday, the working employee receives one and one-half regular pay for that work. If an employee works overtime on a paid holiday, then the employee is paid twice the regular rate. The Employer's offer differs from that of the Union's in that the County proposes that when an employee works his or her regular work day which falls on a paid holiday that employee receives straight time pay. If there is overtime worked by an employee on a paid holiday, the County proposes that the regular overtime rate of time and one-half should be applicable. Both parties' offers require the payment of holiday pay for all bargaining unit members, whether working or not, and they have agreed to add Good Friday to the list of paid holidays for 1980. (For 1980, there will be 10 paid holidays, 9 listed in Article XIV

and a floating holiday specified in Article XV.) A copy of the County's offer on holiday premium pay is annexed hereto as Appendix A.

The undersigned is required under MERA to choose either the entire final offer of the Union or the entire final offer of the Employer since the parties did not agree prior to the hearing that conventional arbitration (form 1) shall control.

STATUTORY CRITERIA

In reaching a decision, the undersigned is required by Section 111.77(6) of MERA to 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

To support its total package as the more reasonable one in this proceeding, the Employer makes essentially five distinct arguments. First, the Employer objects to the Union's selection of comparables herein on two separate grounds. The Employer believes that, with some modifications, the parties should accept the comparables used by Arbitrator Joseph Kerkman in his 1979 arbitration award resolving a prior wage and premium holiday pay dispute between these same parties for their 1978-79 collective bargaining agreement. Specifically, the Employer challenges the appropriateness of the inclusion of Racine County along with Washington and Waukesha Counties since it believes Racine County is distinctive and should be excluded. The Employer also suggests that the "Kerkman Method" of looking at the total of wages, educational incentive, and longevity pay should be modified to use actual averages for educational incentives and longevity pay instead of the maximum payment allowed. In addition, the Employer strongly argues for using the same comparables for both the wage and holiday premium pay issues herein, in distinct contrast to the Union's approach both in this and at the prior arbitration proceeding.

Second, the Employer argues that the Ozaukee County wage rates for members of this bargaining unit under the County's 1980 offer are very favorable as compared to Waukesha County and Washington County, as well as other secondary Kerkman comparables.

Next, the County contends that since Arbitrator Kerkman disregarded wages of other County employees in the prior proceeding, they should be disregarded now as well.

Fourth, and most important, the County points out that its holiday premium pay offer is not an elimination of a regular benefit which became a part of the collective bargaining agreement as a result of collective bargaining. Instead holiday premium pay is a contractual benefit involuntarily included in the parties' 1978-79 collective bargaining agreement as a result of an interest arbitration award, an award which specifically preferred the County's position on this very issue in dispute (although the Union's total package was ultimately selected because of the Arbitrator's preference for the Union's wage offer). Accordingly, the Employer contends that all it seeks in this proceeding is a return to pre-1978-79 practices in a situation where the disputed benefit was not selected on its merits by the arbitrator. Moreover, the Employer notes the Union's position on holiday premium pay is not supported by the Union's own comparables.

Finally, the Employer argues that ten paid holidays (the existing nine plus Good Friday) are not justified by comparables and are greater holiday benefits than those enjoyed by other County employees. Thus this concession by the County increasing paid holidays from nine to ten is a valuable one which must be considered in determining whether the County or the Union's position is more reasonable.

For all the above reasons, the Employer concludes that its package would place Ozaukee County "at the top rank among comparable counties" and thus should be selected as the more appropriate one.

The Union

Like the Employer, the Union believes that the holiday premium wage issue is the core of the parties' dispute and marshalls most of its arguments to support the retention of existing contractual provisions relating to this benefit. The Union's primary argument is that the burden is upon the Employer to show "persuasive reasons" for any change when, as herein, the Employer wishes to change the existing status quo. The Union believes that the Employer in this proceeding has not met this burden of justification since the only economic improvement agreed to between the parties for 1980 is an additional paid holiday (Good Friday). The Union views the Employer's 9% wage offer as "illusory" because the Employer's "take back" on holiday premium pay effectively reduces the total compensation package of bargaining unit members by approximately $5000 from the existing level of benefits. According to Union calculation, this loss of benefit, amounting to slightly less than 1%, reduces the County's net salary offer to slightly more than 8% (in contrast to the Union's 9 1/2%). The Union concludes this portion of its argument by stating that there is no quid pro quo from the Employer for the loss of this existing and important contractual benefit. Therefore, the Employer's position is necessarily less reasonable than that of the Union which is seeking only the continuation of an existing benefit plus a salary increase in line with the County's 1980 policy in regard to its other employees (represented and unrepresented).

The Union further supports its holiday premium pay position by referring to recent rapid increases in the cost of living which have adversely affected all bargaining unit members. Specifically, the Union has calculated that bargaining unit members have lost 10.1% over the 2-year term of the past contract (28% increase in the cost of living minus 17.9% two year wage increase), an amount more closely approximated by the Union's wage offer than the County's. In addition, the Union argues that to take away an existing benefit (in the form of holiday premium pay) amounting to almost 1% of pay overall further aggrevates the adverse effects of inflation upon bargaining unit members.

Finally, the Union argues on behalf of its final offer by pointing to what it considers to be appropriate comparability data. On the comparability issue, the Union believes that it is perfectly appropriate to use different comparables for the wage issue and for the holiday premium pay issue. Moreover, the Union argues herein that the comparables selected by Arbitrator Kerkman as his primary and secondary groupings of comparables are too restrictive. According to the Union, appropriate comparables for wage purposes should include Milwaukee County and the communities within Milwaukee County. For comparables on the holiday premium pay issue, the Union argues that comparables should include Sheboygan, Fond du Lac, Winnebago, Outagamie, Calumet, Manitowoc, Brown, Kewaunee and Door plus selected communities within these counties. In contrast to the Employer, it strongly supports Arbitrator Kerkman's inclusion of Racine in his primary grouping. The Union concludes by pointing out that its 9 1/2% wage offer is strongly supported by agreed upon comparables within Ozaukee County (noting that where the percentage is lower than 9 1/2% it is a wage increase earlier negotiated for the second year of a two year agreement).

For all these reasons, the Union concludes that its offer should be selected as being more in conformity with the statutory factors and generally accepted arbitration practice.

DISCUSSION

Both parties expressly agree that the primary and determinative issue in this case is not that regarding wages but holiday premium pay. This is apparent since the parties' wage offers differ only by one-half percent (or a dollar difference amounting to $2,858). Accordingly, this arbitration decision must necessarily begin with a consideration of the holiday premium pay issue about which the parties vigorously disagree on numerous aspects. They particularly disagree about whether any distinction should be made between an existing contractual benefit which was the result of free collective bargaining and one which was the result of an interest arbitration proceeding mandated by statute. On one side, the Union argues that since the parties' 1978-79 collective bargaining agreement contained the holiday premium pay provisions which it is seeking to continue for the term of the 1980 collective bargaining agreement, the burden is upon the Employer to justify the removal of this existing benefit because the Employer is proposing to change the status quo. In the Union's judgment, the Employer has failed to carry its burden of justification for this "take back" since one extra paid holiday (Good Friday) is the sole agreed upon economic improvement for 1980. Moreover, according to the Union, the Employer's wage offer is less than is justified by appropriate comparables, wage increases already granted to other County employees (represented and unrepresented), and needed to keep pace with cost of living increases. On the other side, the Employer reminds the Union and the arbitrator that the 1978-79 contractual holiday premium pay provision became part of the parties' prior collective bargaining agreement solely as a result of Arbitrator Kerkman's interest arbitration award in a 1979 arbitration proceeding. Moreover, the County further points out that in Arbitrator Kerkman's prior award, he clearly stated that the Employer's position on holiday premium pay (the same one the County is arguing for in this proceeding) was preferable to the Union's because the Union's holiday premium pay demand was not supported by prevailing practices and comparables (although Arbitrator Kerkman went on to select the Union's final offer package because of his judgment that the wage issue in that prior proceeding was critical). The Employer believes that the same reasoning and analysis which convinced Arbitrator Kerkman to prefer the Employer's holiday premium pay proposal in 1979 is also applicable in this 1980 proceeding. Since the parties' substantive positions and comparables are basically the same now as they had been in the prior Kerkman proceeding, the Employer concludes that this arbitrator must reasonably reach the same conclusion as to holiday premium pay as did Arbitrator Kerkman.

To summarize this important dispute, according to the Union's approach, no distinction should be made in regard to the holiday premium pay and similar existing contractual benefits regardless of whether they resulted from traditional collective bargaining or were a result of interest arbitration, including Wisconsin's Form 2 of final offer whole package interest arbitration. The County sharply disagrees with this position and argues instead that parties

should be able to litigate de novo any disputed clause which became incorporated into a collective bargaining agreement, in the absence of agreement, particularly when, as herein, the disputed benefit became a contractual term solely because of the nature of the final offer whole package form of interest arbitration. While the parties disagree on other aspects of the holiday premium pay issue (discussed below), their differing positions just summarized are at the very core of their dispute in this proceeding. These differing approaches constitute a difficult issue to resolve. It is certainly an issue about which reasonable labor relations professionals may differ.

Unfortunately, there is no direct expression of legislative intent or history to guide an arbitrator in choosing between these conflicting approaches as to what is obviously an important policy choice. Although the sequence of events herein in regard to the contractual holiday premium pay benefit is not unique to these parties, no already issued rulings on this matter have been brought to this arbitrator's attention. Guidance must be sought, therefore, by reviewing the basic public policies made by the Wisconsin Legislature in enacting the interest arbitration provisions of Section 111.77 of MERA, particularly as they relate to Form 2 and its final offer whole package choice feature. In enacting this particular form of interest arbitration, the Legislature must have contemplated that, from time to time, clauses would become part of collective bargaining agreements solely because they were included in a final offer by one party which was selected by an arbitrator even though the arbitrator considering the merits of a particular clause might reach the conclusion that the other party's position on that issue was more reasonable. The problem herein is inherent in the risks of the final offer whole package form of interest arbitration adopted by the Wisconsin Legislature. When mandatory interest arbitration is substituted for the parties' right to strike or lockout, the normal weapons of free collective bargaining, there are strong policy reasons to conclude that, absent special circumstances, the product of interest arbitration, as it relates to fringe benefits such as holiday premium pay, should be considered in the same general light as the product of traditional collective bargaining. Since at the point of impasse, mandatory interest arbitration becomes the statutory substitute and equivalent for collective bargaining's normal strike or lockout pressures, drawing a critical distinction between the two would encourage parties to dispute and relitigate de novo "lost" issues in later arbitration proceedings. If this happens, two interrelated policy values associated with interest arbitration, finality and stable labor relations, would be seriously threatened.

Having reached the above conclusion that more stable labor relations will result if disputed provisions such as the holiday premium pay provision of the parties' 1978-79 collective bargaining agreement is treated in this proceeding as an existing contractual benefit regardless of its prior arbitration proceeding history, the arbitrator now must turn to an examination of whether the Employer herein has provided sufficient justification to remove an existing benefit for the parties' 1980 collective bargaining agreement. In determining whether the Employer has succeeded in meeting the burden customarily imposed upon the party wishing to delete an existing contractual benefit, the arbitrator must examine the more specific arguments of the parties presented in this proceeding.

In both the prior proceedings as well as in the present one, the Union views premium pay for holiday work as part of bargaining unit members' total compensation package. This is certainly a well accepted approach and one that this arbitrator adopts. For members of the bargaining unit, the Union calculates that the 1980 value of the benefit is approximately .84% of salary. If the Union takes seriously its position that holiday premium pay is an integral part of an employee's overall compensation package, then, in the judgment of this arbitrator, it necessarily follows that the same comparables which are appropriate to the wage issue are also appropriate to the holiday premium pay issue, a position argued by the County. The Union's approach in urging different comparables for different wage related issues appears inconsistent with the statutory standards contained in MERA and with the Union's previously noted position that holiday premium pay should be considered as an integral part of an employee's total compensation package.

In determining what are appropriate comparables applicable to both issues in dispute herein, this arbitrator has concluded that, with minor modifications, Arbitrator Kerkman's approach set forth in his 1979 arbitration award is a reasonable one and one that should be followed in this proceeding. This arbitrator would place, however, Racine County in a third grouping of comparables along with Milwaukee County communities (excluding both the City and County of Milwaukee). She also would place evidence of County treatment of its other employees in this grouping. Using this modified Kerkman approach (and making the further modification suggested by the County that actual averages rather than maximum educational incentive and longevity pay should be considered in calculating total compensation packages),it is clear that the Employer's position on holiday premium pay is more reasonable _if_ the holiday premium pay issue were considered in a single issue, _de novo_ interest arbitration proceeding. However, in view of the arbitrator's earlier judgment that in this proceeding the burden is on the Employer to justify its proposed cutback in holiday premium pay benefits, the question still remains as to whether the Employer's evidence of favorable comparability data is sufficient to uphold the County's position in the light of other evidence and arguments presented by the Union.

This is a close issue. To resolve it, it is helpful at this point, in this arbitrator's view, to consider the disputed holiday premium pay issue in conjunction with the general wage issue and then look at other factors such as already agreed upon concessions by the Employer for this bargaining unit and for its other employees and cost of living arguments. As has already been noted, the Union has estimated that the value of the continuation of contractual holiday premium pay in 1980 is equal to slightly less than 1% of wages. Therefore, the net value of the Employer's final offer would not be 9% but slightly more than 8%, in contrast to the Union's 9 1/2% (and the continuation of contractual holiday premium pay). When these net salary increase percentages are balanced with 1) the one additional paid holiday, the sole economic improvement agreed upon by the parties herein for their 1980 collective bargaining agreement, 2) the wage increases granted by the County to its other employees, 3) patterns of recently negotiated 1980 wage increases in nearby comparable communities, and 4) cost of living increases, the undersigned concludes that the Employer has not sustained its burden justifying its net package.

AWARD

Based upon the statutory criteria, the evidence and arguments presented herein by the parties, and the discussion set forth above, the Arbitrator selects the final offer of the Union and directs that the Union's final offer be incorporated into the parties' 1980 collective bargaining agreement.

Dated: October 13,1980
Madison, Wisconsin

June Miller Weisberger
Arbitrator

Article XIV - Holidays

"Section 1. Each employee shall receive in addition to their regularly established salary, one (1) day's pay for each of the following holidays:

January 1	Thanksgiving Day
Good Friday	December 24th
Memorial Day	December 25th
July 4th	December 31st
Labor Day	

Such payment will be made in the pay period during which the holiday occurs.

"Section 2. At the discretion of the Sheriff employees working a 5-2 schedule may, in lieu of the additional pay provided in Section 1 above, be allowed time off with pay on any of the above holidays which fall on one of their regular workdays."

Appendix A