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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

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In the Matter of the Petition of

CALEDONIA FIREFIGHTERS
PROTECTIVE ASSOCIATION
LOCAL NO. 2740, IAFF

For Final and Binding Arbitration
Involving Firefighting Personnel
in the Employ of

TOWN OF CALEDONIA

* *

Case XIII
No. 26963
MIA-508
Decision No. 19566-A

INTRODUCTION

On October 24, 1980, the Caledonia Firefighters Protective Association, Local No. 2740, IAFF (hereafter Union) petitioned the Wisconsin Employment Relations Commission (WERC) to initiate binding arbitration pursuant to Sec. 111.77(3) Wisconsin Stats. to resolve a collective bargaining impasse between the Union and the Town of Caledonia (hereafter Employer or Town). On April 28, 1982, the WERC ordered arbitration and on May 25, 1982 appointed Arlen Christenson of Madison, Wisconsin to arbitrate. A hearing was held in the Town of Caledonia on July 28, 1982 at which the parties had full opportunity to present evidence and argument. Post hearing briefs were filed with the final brief being received by the arbitrator on September 21, 1982.

APPEARANCES

Richard V. Graylow, Attorney at Law, Lawton & Cates, Madison, appeared for the Union.

Kenneth F. Hostak, Attorney at Law, Thompson & Coates, Ltd., Racine, appeared for the Town of Caledonia.

FINAL OFFERS

TOWN OF CALEDONIA

ARTICLE XII
HOLIDAY PAY

All full-time Employees shall each receive the following number of paid holidays per year:

1. In 1980, eleven (11) paid holidays of twenty-four (24) hours each.

2. In 1981, eleven (11) paid holidays of twenty-four (24) hours each.

3. In 1982, eleven (11) paid holidays of twelve (12) hours each.

The holidays shall include New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, the day following Thanksgiving Day, Christmas Day, the last full working day preceding December 25, and the first full working day preceding January 1, and one (1) floating holiday to be approved by the Fire Chief. Employees who are unable to take holiday time off because of work schedules can elect from the following options:

a. One-half (1/2) holiday per year will be accumulated over two (2) years.

b. One day's pay at the regular rate for up to four (4) days maximum per year, or

c. The right to take holidays in advance.

In the event of death or termination, the Employee will be paid for days accrued.

As and for a one-time holiday pay adjustment all full-time, non-probationary Employees shall be paid the sum of $400.00, payable on or before December 1, 1982; provided the Employee is an employee on such date.

ARTICLE
Overtime - Shift Extension

An Employee shall be paid the rate of one and one-half (1½) times his normal rate of pay when the Employee is required to work beyond the normal twenty fourt (24) hour shift. The Fire Chief or the Assistant Fire Chief shall approve all overtime. This rate of pay will apply only for shift extension.

UNION'S FINAL OFFER

(1) All tentative agreements;

(2) All wages and benefits retro to 1-1-80;

(3) (omitted)

(4) Fair Share as attached;

(5) Overtime as attached;

(6) Holidays as attached.

HOLIDAYS

During the third year of the agreement the employer shall pay back, from each regular fulltime employee one (1) of the paid holidays referred to herein at the rate of twenty-four (24) hours at the affected employees hourly rate of pay.

OVERTIME

The Town agrees to pay employees at the following rate for overtime:

1. For work in excess of employees 24 hour shift an employee shall be paid at the rate of 1½ times his normal pay.

2. Any employee who is called in outside of his normal duty hours shall be paid at the rate of 1½ times his normal pay for a minimum of 2 hrs.

FAIR SHARE AGREEMENT

1. The Town shall deduct monthly Union dues or an equivalent amount for non-union members from the wages of all fulltime employees covered by this Agreement. The Union shall submit in writing with the Union Seal what the dues will be and such notification will be signed by the Union Officers.

2. The Union, as the exclusive representative of all employees in the bargaining unit, will represent all such emploiyees, Union and non-union, fairly and equally, and all employees in the unit will be required to pay, as provided in this Article, their proportionate share of the costs of representation by the Union. No employee shall be required to join the Union, but membership in the Union shall be made available to all employees who apply consistent with the Union constitition and by-laws. No employee shall be denied Union membership because of race, creed, color, or sex.

3. The Town agrees that it will deduct from the monthly earnings of all employees in the bargaining unit, such amount being the monthly dues certified by the Union as the current dues uniformly required of all members, and pay said amount to the treasurer of the Union on or before the end of the month following the month in which such deduction was made. Changes in the amount of dues to be deducted shall be certified by the Union at least thirty (30) days prior to the effective date of said change. As to new employees, such deduction shall be made from the employee's pay, in the third month of employment. The Town will provide the Union with a list of employees from whom such deductions are made with each monthly remittance to the Union.

HOLIDAYS

The 1978-79 Agreement provides for eleven paid holidays calculated at the rate of 24 hours per day. The Employer's final offer provides for a continuation of this provision for

1980 and 1981 with a reduction to eleven holidays of 12 hours each for 1982. Employees would be compensated for the reduction in holidays by a one-time payment of $400 each. The Association final offer would continue holiday pay based upon a 24 hour day but would provide for a "buy-back" of one holiday during 1982 at the regular rate of pay for a 24 hour day. After 1982, the Union's final offer would provide for 10 holidays of 24 hours each.

The Employer argues that the firefighters, although their 1978-79 agreement provides the same number of paid holidays as other Town employees, actually received a greater holiday benefit because their holiday pay was based on 24 hour days rather than the 8 or 8.5 hours in the other bargaining units. As a result, firefighters are paid for 264 hours of holidays each year while highway and police department employees receive 93.5 and 96 hours respectively. The Town's final offer would reduce the holiday hours for firefighters from 264 to 132 per year.

The Employer also points out that collective bargaining agreements governing firefighters in other comparable communities are not uniform. Viewed in terms of holiday hours rather than days, holiday benefits vary from 79.2 hours in the Town of Mt. Pleasant to 264 hours in Greenfield.

The Union argues that the present holiday benefits were negotiated by the parties in good faith and should not be taken away in arbitration. Moreover, the Union argues, the present holiday benefits are not out of line with those in comparable communities or in other bargaining units in the Town. Seven other communities have 10 or more holidays and the Caledonia Highway and Police Departments have 11 and 12 respectively.

It is clear, in comparing the holiday benefits under the 1978-79 agreement with those provided in collective bargaining agreements in other comparable communities, that the Caledonia firefighters rank at the top of the list. Whether one counts the number of days or the number of hours none of the other communities exceeds the 11 days or 264 hours under the most recent agreement. The Union's final offer would reduce the number of holidays for 1982 to 10, making the number of hours 240, but would require the Town to pay for the 11th holiday. After 1982, presumably, the number of holidays would continue at 10. The matter would, of course, be open for bargaining in a new contract. The comparison with other communities clearly supports the Employer's position on this issue. Given its wealth, population and location there is no persuasive argument for Caledonia to lead in holiday benefits.

The Union argues forcefully, however, that an arbitrator ought not to take away a benefit negotiated by the parties. The Employer responds to the argument equally forcefully contending that an arbitrator would be failing to apply the required statutory criteria if he applied such a "tenet" rigidly. In my view, as I have stated in previous awards, the statutory criterion which requires an arbitrator to take into account "factors . . . normally or traditionally taken into consideration [in] collective bargaining . . .," requires me to take account of the fact that previously negotiated benefits are not often bargained away. This, as another arbitrator has said, suggests that any "take away" proposals "should be scrutinized carefully." Such careful scrutiny, however, does not mean that no take away proposals should ever be adopted in final offer arbitration. Under some circumstances, even after careful scrutiny, a take away element in a final offer may be preferable to the alternative.

The Town contends that its initial agreement to pay for eleven 24 hour holidays was the result of a mistaken attempt to provide uniformity among Town bargaining units. The Police, Highway and Fire Departments were all afforded 11 days and apparently no one remembered that the Firefighters were paid for 24 hours rather than the shorter days of the other two units. In my view it would be in error to assume that this benefit was a mistake. It was a negotiated benefit and the more reasonable assumption is that it was bargained in good faith and was part of the give and take of the process.

If I were asked to choose, as a matter of first impression, between the Union's final offer provision calling for 240 hours of holiday and the Town's 132 hours I might well choose the Town's. Eleven holidays of 12 hours each is nearer the norm for comparable communities. This is not, however, a matter of first impression. The parties have previously agreed upon eleven holidays of 24 hours. In reaching that agreement through collective bargaining it must be assumed that there was some quid pro quo for this agreement. The Town's proposal that it compensate for the loss of 132 hours of holiday by the one time payment of $400 per employee does not seem adequate. Each employee would suffer a substantial loss of benefits worth in the neighborhood of $1,000 a year. Again, given the collective bargaining process, it must be assumed that these lost benefits would be regained, whether in the form of holidays or in some other form, only by giving something else in return.

The current agreement is unusually generous in terms of holidays. The Town, however, proposes a very substantial reduction in benefits with little in the way of a quid pro quo. The Union's proposal for a reduction of one day in holidays paid for at the full hourly rate is preferable.

OVERTIME

The 1978-79 agreement contains no provision for premium pay for overtime. Both final offers, however, would provide for overtime pay at 1-1/2 times regular pay in some circumstances. Under the Employer's final offer time and one half would be paid for "shift extension" time when an employee is required to work beyond his normal 24 hour shift. The Union's offer included a similar provision and, in addition, calls for time and one half for a minimum of 2 hours for any employee "called in outside his normal duty hours."

The Employer contends that the Union's proposal is confusing and its application uncertain. Employees, the Employer points out, are called in outside their normal working hours for several different reasons including emergencies, filling vacancies, mandatory training, and required schooling. Another provision contained in the 1978-79 agreement and which the parties have agreed should be carried forward into the current agreement provides in part:

> The rate of pay for call-in time to fill a vacancy shall be at regular rate of pay for full-time . . .

Another agreed upon section provides:

> The Town shall pay to each fulltime employee for one and one-half (1-1/2) hours each month to attend mandatory training, sessions for firefighters; provided, however, that such payments shall only be paid for sessions attended while otherwise off duty.

Thus, the Employer argues, the Union's final offer, taken with the contract language already agreed upon, would create a situation where the contract requires time and one half for a minimum of 2 hours when an employee is called in outside his normal working hours while at the same time a call in to fill a vacancy is compensated at straight time and mandatory training is covered under still another provision. The language which appears all inclusive is thus subject to at least two qualifications.

The Union argues that its proposal is clear and has repeatedly been explained. Its proposal means that employees who are ordered to work overtime must be paid time and a half and those who volunteer are paid straight time.

I do not find the Union's interpretation of the proposed contract language persuasive. It seems clear that any employee called in to fill a vacancy, whether a volunteer or not, is entitled only to straight time pay under the agreed upon language. This language is either in conflict with the Union's general proposal contained in its final offer or is an implied exception to it. With respect to other call ins, the distinction the Union draws between voluntary and mandatory overtime must also be implied. Nowhere is it made explicit.

The Employer argues persuasively that ambiguous final offers should not be subject to a narrowing interpretation during the arbitration process. The parties should be entitled to rely upon the apparent facial meaning of contract proposals when they have to decide whether to accept them or go to final offer arbitration. In this case the Union's proposed language, on its face, requires time and one half for any employee called in outside normal duty hours. The evidence in the record does not support the Union's contention that this was understood to mean only mandatory overtime. Nor is such a distinction consistent with the other agreed upon contract language cited above.

Applying some generally accepted principles of contract construction it is possible to construe the various provisions on overtime in a consistent way. A basic principle is that specific language controls more general. Language governing call ins to fill vacancies, mandatory training, job related appearances, and paid on call which the parties have agreed will be continued in the new agreement, would apply in those situations rather than the general language calling for time and a half for a minimum of 2 hours contained in the Union's final offer. Moreover, the

Union's explanation of the meaning of its proposal, as well as the doctrine the language is construed against its drafters, lead to the conclusion that the Union's overtime language applies only when an employee is called in and not when he volunteers.

Given these principles and the Union's explanation of its proposed language it seems clear the provision has a very narrow application. It is a general provision that applies only when the activity is not covered by another contract provision. The second paragraph of the Union's overtime proposal would therefore apply only to mandatory overtime other than that covered by the contract provision on job related appearances, mandatory training, filling vacancies, or paid on-call work.

FAIR SHARE

The Union's final offer includes a provision entitled "Fair Share" which would require the Employer to deduct from the wages of each full time employee an amount equal to Union dues. Neither the present contract nor the Employer's final offer contain any provision for dues deduction.

Section 111.70(2) Wis. Statutes authorizes a fair share agreement of the type contained in the Union's final offer. Despite a number of legal challenges to the Union's proposal raised in the Employer's brief, the Union's language seems entirely consistent with state law. To the extent the Employer's challenges are based on constitutional objections, they are beyond my authority to consider as arbitrator. The legislature has authorized the inclusion of fair share agreements in collective bargaining agreements. It has not, however, required such provisions. The matter has been left to collective bargaining subject to the right of the members of the bargaining unit to seek a referendum.

When the parties to a collective bargaining agreement fail to agree on a fair share provision and it appears in a final offer it must be dealt with as are other bargaining issues. The arbitrator must decide, applying the statutory criteria, which offer is preferable. In this case one criterion emphasized by both parties is comparability. The Union points out that 7 of the 11 comparable communities in its sample have collective bargaining agreements containing fair share agreements. In the Employer's sample, 8 of 14 have such agreements. Taking the two samples together the figure is 10 of 16.

The Employer argues that the fair share agreement is not necessary because 14 of the 15 full time members of the bargaining unit now pay Union dues voluntarily. The Union, on the other hand, cites this as a reason for adopting its proposal. It argues further that the proposal would impose little, if any, added cost on the Town.

Whether or not a fair share agreement ought to be included in a collective bargaining agreement is largely a subjective decision. Reasonable minds can differ. The one "objective" criterion in evidence consists of the comparables showing the majority of collective bargaining agreements having fair share provisions. In view of this the balance tips slightly in favor of the Union on this issue.

OVERALL COMPENSATION

Section 111.77 requires that I take into account "The overall compensation presently received by the employes . . ." in the bargaining unit. The Town contends that the total compensation received by these firefighters compares very favorably with other communities. The evidence supports this contention.

The collective bargaining agreement now provides for a cost of living adjustment (COLA) that has resulted in substantial upward wage adjustments in the past three years. As a result

the wages earned by the full time firefighters are exceeded by only two of the comparable communities for which data were presented. It is, however, difficult, if not impossible, to make intelligent comparisons of overall compensation packages among the several comparable communities. The data show, for example, that Caledonia pays 100% of the cost of employee health insurance but there is no way of determining whether or not the coverage is comparable. The same is true of life insurance. Other fringe benefit information is similarly imcomplete. The data indicates that the overall compensation paid these employees is probably equal to that of employees in comparable communities but little else can be said with certainty.

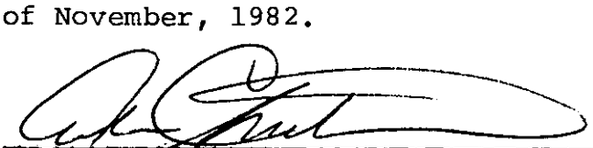
CONCLUSION

The choice between these final offers is a close one. The advocacy on both sides has been forceful and effective. Both offers have strengths and weaknesses. Applying the appropriate statutory crtieria, however, I conclude that the Union's offer is slightly preferable. It calls for only modest changes in the status quo. To the extent that it would require changes they are spported by comparables. The Town's offer, on the other hand, calls for a substantial reduction in holiday benefits without a clearly adequate quid pro quo. Accordingly, the Union's final offer is chosen.

AWARD

The application of the criteria contained in Wis. Stats. Sec. 111.77(6) leads to the conclusion that the Union's final offer should be selected. It is my Award, therefore, that the Union's final offer is hereby selected and shall be incorporated, without modification, in the collective bargaining agreement between the parties.

Dated this 21 day of November, 1982.



Arlen C. Christenson, Arbitrator