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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

ARBITRATION OPINION AND AWARD

In the Matter of Arbitration	)	
	)	
Between	)	
	)	
CITY OF WATERTOWN	)	
	)	
And	)	WERC CASE 32
	)	NO. 35391
WATERTOWN FIRE FIGHTERS	)	MIA-1011
LOCAL NO. 877	)	Decision No. 23156-A
	)	

Impartial Arbitrator

William W. Petrie
1214 Kirkwood Drive
Waterford, Wisconsin 53185

Hearing Held

April 28, 1986
Watertown, Wisconsin

Appearances

For the Employer

LINDNER & MARSACK, S.C.
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For the Association

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS
By Richard Gallup
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BACKGROUND OF THE CASE

This is a statutory interest arbitration proceeding between the City of Watertown, Wisconsin and the Watertown Fire Fighters, Local #877 of the International Association of Fire Fighters, with the matter in dispute the terms of a two year labor agreement running through December 31, 1986.

The parties had reached a tentative settlement on the terms of a renewal labor agreement early in 1985, which agreement had been ratified by the Association. Prior to the City's ratification of the labor agreement, the United States Supreme Court rendered its 1985 decision in Garcia v. SAMTA, 105 S. Ct. 1005, 27 WH Cases 65, which expressly overruled its 1976 decision in League of Cities v. Usery, 426 U.S. 833, 22 WH Cases 1064. Prior to the 1974 amendments to the Fair Labor Standards Act, employees of local units of government were excluded from the overtime pay and the minimum wage requirements of the Act. The Supreme Court's 1976 decision overturned Congress' attempt to apply the Act to local units of government, and in its 1985 decision the Court reversed its earlier decision. The City's failure to ratify the parties' tentative 1985 renewal agreement was based solely upon the perceived increases in overtime costs due to the Court's 1985 decision in the Garcia case.

The parties resumed negotiations following the Garcia decision and each modified their previous bargaining positions. The Union's modified offer offset approximately one-half of its estimation of the additional costs of the FLSA overtime pay requirements, by reducing its wage increase proposals for the two year contract. The City modified its offer to reflect costs estimated by it to be essentially identical to those reflected in the tentative agreement, before the Garcia decision; in other words, the City reduced its offer to fully offset the anticipated increases in overtime costs incidental to the application of the FLSA to those in the bargaining unit.

Following the parties' inability to achieve a negotiated settlement, the Association on July 23, 1985, filed a petition requesting the initiation of final and binding arbitration pursuant to Section 111.77(3) of the Municipal Employment Relations Act. After preliminary investigation, the Wisconsin Employment Relations Commission on January 3, 1986 issued certain findings of fact, conclusions of law, certification of results of investigation and an order requiring arbitration, and on January 21, 1986 it issued an order appointing the undersigned to hear and decide the matter.

A hearing took place in Watertown, Wisconsin on April 28, 1986, at which time both parties received a full opportunity to present evidence and argument in support of their respective positions. Each of the parties submitted timely post hearing briefs, after which the record was closed by the Arbitrator on May 29, 1986.

THE STATUTORY CRITERIA

The decision and the award of the Arbitrator are governed by the criteria described in Section 111.77(6) of the Wisconsin Statutes, which provide in part as follows:

> "(6) In reaching a decision the arbitrator shall give weight to the following factors:
>
> (a) The lawful authority of the employer.
> (b) The 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 covered in the arbitration proceedings 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."

THE FINAL OFFERS OF THE PARTIES

The certified final offers of the parties are incorporated by reference into this decision and award. In essence the parties remain apart only on wage/salary issues during the two year duration of the renewal labor agreement.

(1) The final offer of the City would essentially convert from a salaried to an hourly rate for those in the bargaining unit, would contain certain overtime guarantees, and would provide an employer described equivalent of a 4% increase in wages during 1985, and an additional 5% increase in 1986.

(2) The final offer of the Association would provide principally for general wage increases of 3% on 1/1/85, 1% on 7/1/85, 3% on 1/1/86 and 2% on 7/1/86.

The unratified agreement reached by the parties prior to the Garcia decision would have provided for a 4% increase on 1/1/85 with an additional 5% increase effective 1/1/86. The Police and the DPW units in the City received 4% increases in each year of their two year labor agreements, and also received the benefit of a 1% increase in employer contribution to the State Retirement Fund during the second year; since there was no pension contribution increase for those in the fire fighter bargaining unit, the parties originally agreed to an additional 1% increase in the second year of the agreement for these employees.

POSITION OF THE EMPLOYER

In support of its contention that the final offer of the City was the more appropriate of the two offers before the Arbitrator, the Employer cited a variety of considerations.

(1) In general, it emphasized the following preliminary arguments:

(a) That the City's offer on wages would ensure that each fire fighter would receive a 4% increase in wages during 1985 and a further 5% increase in wages during 1986; that these increases would be achieved by converting from salaried to hourly rates of pay, and by guaranteeing each fire fighter 12 hours of overtime for each 27 day cycle, whenever the employee is either working or on a paid leave status.

(b) That the City's offer would preserve the same wage increases which would have been received by those in the bargaining unit, if the Supreme Court's decision in the Garcia case had come down with the opposite result.

(c) That the City's final offer is consistent with the wage increases granted to other bargaining unit and non-bargaining unit City employees.

(d) That the City's final offer would exceed recent increases in cost of living.

(e) That the City's offer is justified by consideration of the appropriate comparables.

(2) That the arguments advanced by the Union largely ignore the statutory criteria, and are not appropriate for arbitral consideration.

(a) That while a tentative agreement had been reached by the parties, it was subject to ratification by the City Council; that the failure to ratify was due to a change in circumstances which would have significantly increased the cost of the tentatively agreed upon package.

That the failure to ratify under the circumstances is understandable and appropriate; that the tentative agreement is of no direct import in these proceedings, other than to underscore the fact that both parties are fully aware that the Garcia decision had a definite impact upon the earnings of fire fighters.

(b) That various Union arguments relating to the possible use of compensatory time off in lieu of overtime should not be persuasive to the Arbitrator: that no provisions concerning compensatory time are contained in the final offers of the parties; that not until November 18, 1985 did Congress pass certain 1985 amendments to the FLSA, which made compensatory overtime legal; that while compensatory time does not require an immediate cash outlay by the Employer, it represents costs to the Employer in the same manner as holiday time off or vacation time off; that if the City added 12 hours of compensatory time off for each 27 day work cycle, the potential time off is almost equal to one additional full time employee per year. In summary, that the compensatory time is not a viable alternative, and was illegal until long after the final offers of the parties were submitted.

(c) Contrary to the arguments of the Union, that the City's final offer is not illegal under Section 8 of the 1985 amendments to the FLSA. That Section 8 provides that from November 18, 1985 until August 1, 1986, public employees are protected from discrimination by their employer because they assert coverage under the FLSA, and after the last date, that they are entitled to the narrower coverage under Section 15(a)(3) of the Act, which prohibits employer retaliation for cooperation or participation in investigatory proceedings.

In any event, that the City's final offer could not reasonably be construed as reducing employee wages to achieve compliance with the FLSA; by way of illustration, that the hourly rate for a top fire fighter in 1984 was $6.87 per hour, which under the new agreement the rate would increase to $6.96 and to $7.31 in 1985 and 1986 respectively.

In any event that the Arbitrator lacks authority in these proceedings to interpret the FLSA and to make a finding of illegal action; that such determinations should appropriately be made within the court system.

(3) That selection of the City's final offer is warranted by consideration of the various statutory criteria.

(a) That the City's offer was to convert to a true hourly rate, and to guarantee the employee earnings which will yield a 4% pay increase in 1985 and a 5% pay increase in 1986. That the City's offer and these increases will not be affected by any future changes in administrative regulations, legislation or court rulings relative to the FLSA; further, that the City offer would ensure that each fire fighter receives his overtime each nine days regardless of whether he works or is on a paid leave of absence basis.

Further, that the City's offer would establish a higher contractual overtime rate which is 4% higher in 1985 than in 1984, and 5% higher in 1986 than in 1985.

(b) That the Union's offer is much more complex than the City's in that it creates five different pay rates for each step in the pay schedule over the two year contract term, and it denies FLSA overtime to any fire fighter who is off during a work cycle due to such reasons as vacation, sick leave and holiday pay.

(c) That the actual cost of the Union's final offer would be an increase of 4.6% the first year and 6.1% the second year; that such increases would be substantially higher than raises received within any other bargaining unit in the City.

(d) That consideration of cost of living considerations favors the selection of the Employer's final offer, in that it exceeds the actual rate of increases in cost of living for 1985, and also exceeds projected increases for 1986.

(e) That consideration of internal comparables favors the selection of the final offer of the City; in this respect that neither the Police nor the Department of Public Works units have overtime pay problems under the FLSA, and each settled for 4% and 5% increases in 1985 and 1986.

(f) That consideration of external comparisons with fire fighters in the City of Beaver Dam favors the selection of the final offer of the City; that Beaver Dam and its fire fighters settled the FLSA overtime pay issue in a manner identical to that proposed by the City in this dispute.

(4) That various general considerations favor the selection of the final offer of the City.

(a) That this is not a situation where the parties are seeking to add new benefits, to take away old benefits, or to otherwise innovate.

(b) That while the parties have used annual salaries in the past, this was for administrative convenience only; that an hourly wage has always been used and must be used in the computation of wages and overtime.

(c) Contrary to the assertions of the Union, that the Employer is not attempting to take away any benefit handed to the employees by the Supreme Court or the Department of Labor; to the contrary, it is simply a case where a change in governmental regulations has forced the parties to compute wages and costs in a manner differently than in the past.

Indeed, that bargaining unit fire fighters have already benefited from one governmental change which increased City contributions to the State Retirement Fund by 1% on January 1, 1986 for those in the Police and Department of Public Works bargaining units; since the pension increase did not apply to fire fighters, the City passed on the savings by increasing its wage proposal to 5% for fire fighters.

(d) That the number of hours worked within each cycle by fire fighters is not excessive and contrary to public policy.

(e) That the City's final offer recognizes the costs of 1985 and 1986 increases within the bargaining unit, and that it is both fair and equitable.

POSITION OF THE UNION

In support of its position that the Arbitrator should select its final offer rather than that of the Employer, the Association submitted a post hearing brief divided into three, separately authored parts.

The portion of the brief authored by the Union's Research and Labor Issues Director emphasized the following principal arguments:

(1) That the overtime pay provisions of the FLSA of 1938 were passed for the legislative purpose of fairly and fully compensating employees who were forced to work long hours, and to provide economic incentives to employers to reduce hours and/or to hire additional persons.

(2) That the original purposes of the FLSA were not altered when Congress amended the Act in 1974 and extended coverage to state and municipal employees. Due to the unusual working conditions and long tours of duty of fire fighters and some law enforcement employees, however, Congress added special overtime provisions which basically require payment of overtime after 212 hours worked within a 28 day work period.

(3) That it was never the intent of Congress to have employees bear the cost of FLSA compliance.

   (a) That the above conclusion is reflected in the Conference Committee explanatory statement issued after the 1985 amendments to the Act.

   (b) That the 1985 amendments softened the impact of the Supreme Court's Garcia decision by removing any overtime pay liability for state and local governments prior to April 15, 1986.

   (c) That the 1985 amendments contain a non-discrimination provision giving state and local government employees a higher level of protection against discriminatory treatment; that the Conference Committee explanatory statement makes it quite clear that any reduction in regular pay or fringe benefits by an employer in order to reduce or eliminate the cost of compliance with the overtime requirements of the Act would be illegal.

(4) That the City's refusal to ratify the tentative agreement between the parties due to the requirements of the FLSA, constitutes a violation of the non-discrimination provisions of the Act.

The section of the brief authored by the I.A.F.F. State Representative emphasized the following principal arguments:

(1) That the City of Watertown and the Watertown Fire Fighters satisfactorily concluded negotiations on a renewal agreement, that the settlement was ratified by the Association, and that the sole reason for refusal to ratify by the City was its wish to offset the impact of the FLSA by reducing the cost of the negotiated settlement. That this action violated the non-discrimination provisions of the FLSA as reflected in the Conference Committee Statement, a copy of which was submitted as Union Exhibit #20.

(2) That the Association attempted to lessen the impact of the FLSA to the City by offering the use of compensatory time, and finally by proposing a reduction in the tentatively agreed upon wage package. Further, that the good faith of the Association is indicated by its failure to return its final offer to the original level prior to arbitration; that the Association is interested in a fair and reasonable settlement between the parties, and is not seeking any windfall in these proceedings.

(3) That the changing of the salary structure proposed by the City is a drastic and radical change in the status quo, and the full implications of the change are unknown at this time. That the City, for example, could eliminate mandatory overtime, thus causing a reduction in salary for all bargaining unit employees.

(4) That the City's expressed concern with the cost impact of FLSA compliance in 1985 is not justified, as state and local governments were excused from compliance with the Act's overtime provisions prior to April 15, 1986.

(5) That the City has the option to use compensatory time as a means of complying with the FLSA, and that it has used this approach with other City employees.

(6) That the City has no choice but to comply with the FLSA requirements in the other bargaining units, due to the fact that the contract renewals had been agreed upon, ratified and signed.

(7) That while the Association attempted a negotiated settlement of the dispute with the City, it has borne the full brunt of the failure of agreement; that the City has benefited from the wage increases not paid to the Fire Fighters since December, 1984.

(8) That there can be no doubt that the Congress intended the Employers to bear the cost of FLSA compliance. That the Association really did more than was necessary in attempting to reach a negotiated settlement; that its modified offer is absolutely more reasonable and just, and should be adopted by the Arbitrator.

The section of the brief authored by the President of the Local Union was devoted largely to a detailed review of the testimony and exhibits offered by the City, followed by a summary of why the Association feels that it should prevail in these proceedings.

FINDINGS AND CONCLUSIONS

Preliminarily it must be emphasized that interest arbitrators act as an extension of the negotiation process and, within the limits of the various statutory criteria, attempt to arrive at the same settlement that the parties would have reached had they been able to achieve a negotiated settlement. These considerations are rather well described in the following excerpt from the widely cited book by Elkouri and Elkouri: 1./

"Arbitrator's Functions in Interest Disputes

* * * * *

In a similar sense, the function of the interest arbitrator is to supplement the collective bargaining process by doing the bargaining for both parties after they have failed to reach agreement through their own bargaining efforts. Possibly the responsibility of the arbitrator is best understood when viewed in that light. This responsibility and the attitude of humility that appropriately accompanies it have been described by one arbitration board speaking through its chairman, Whitley P. McCoy:

> 'Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon considerations of policy, fairness, and expediency, of what the contract rights ought to be. In submitting this case to arbitration, the parties have merely extended their negotiations - they have left it to this board to determine what they should, by negotiations, have agreed upon. We take it that the fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men, have voluntarily agreed to? ***We believe that an unusual demand, that, one that has not found substantial acceptance in other properties, casts upon the union the burden of showing that, because of its minor character or its inherent reasonableness, the negotiators should, as reasonable men, have voluntarily agreed to it. We would not deny such a demand merely because it had not found substantial acceptance, but it would take clear evidence to persuade us that the negotiators were unreasonable in rejecting it. We do not conceive it to be our function to impose on the parties contract terms merely because they embody our own individual economic or social theories. To repeat, our endeavor will be to decide the issues as, upon the evidence, we think reasonable negotiators, regardless of their social or economic theories might have decided them in the give and take process of bargaining. We agree with the company that the interests of stockholders and the public must be considered and consideration of their interests will enter into our conclusions as to what the parties should reasonably have agreed on."

Section 111.77 of the statutes identifies the criteria which must be considered by interest arbitrators in the resolution of appropriate interest disputes, and the primary criteria emphasized by the parties in their presentations included the following: the lawful authority of the Employer; comparisons of the wages, hours and conditions of employment of those in the bargaining unit versus other fire fighters, and other employees of the City of Watertown; cost of living considerations; change in the FLSA during the pendency of these proceedings; and certain other factors typically taken into consideration in collective bargaining, such as the negotiations history leading to the impasse at hand, and the overall equities of the situation.

For the purpose of organization and clarity, the Arbitrator will separately address each of the arbitral criteria prior to selection of the more appropriate of the two final offers under consideration.

The Lawful Authority of the Employer Criterion

One of the major arguments advanced by the Association was that the Employer had discriminated in violation of the Fair Labor Standards Act in its reduction of the wages and benefits tentatively agreed upon prior to the Supreme Court's decision in the Garcia case. In this respect it emphasized that it was not the intent of the Congress to have employees bear the cost of compliance with the Act, submitted that the 1985 amendments to the Act specifically provide against employer discrimination arising out of compliance with the Act, and cited those provisions of the law which preclude any reduction in regular pay or fringe benefits by an employer, in order to reduce or to eliminate the cost of compliance with the overtime pay requirements of the Act.

Initially the City submitted that the Arbitrator lacked authority to interpret the FLSA. Without prejudice to this position, it also submitted that the parties'prior tentative agreement had been expressly made subject to ratification by the City Council, which ratification simply did not take place; it emphasized that failure of ratification may take place for a variety of reasons, including those involved in the case at hand. Further, it emphasized that there had been no proposed reduction by the Employer in wages and benefits to be paid to fire fighters as a result of the Garcia decision; in this respect it urged that it was properly proposing increases in wages and benefits which merely took into consideration the cost of overtime pay compliance with the Act.

In first addressing the question of arbitral authority raised by the Employer, the Arbitrator must consider the fact that the lawful authority of the employer is one of the express statutory criteria in Wisconsin, which logically and necessarily creates the authority for an arbitrator to look to external law to determine the extent of such lawful authority. While questions relating to an employer's lawful authority more typically arise in connection with state rather than federal law, there is nothing in the statute to persuasively suggest to the undersigned that the legislature intended a restrictive interpretation of the terms "lawful authority." The Association argued that the City lacks authority to disregard and/or to violate the external law found in the Fair Labor Standards Act, and the undersigned has preliminarily determined that he has full authority to hear and decide this question.

In next addressing the merits of the allegation that the Employer had violated the FLSA, the Arbitrator must credit the Employer's arguments relating to the tentative nature of the settlement reached by the parties prior to the Garcia decision, and the fact that the selection of the Employer's final offer would entail an increase rather than a decrease in wages and benefits.

Had the Employer unilaterally reduced benefits for unrepresented employees, for example, or had it rescinded a negotiated labor agreement which had already been ratified by the parties, it would have constituted a clear violation of the non-discrimination provisions of the FLSA. As emphasized by the City, however, no final agreement had been reached in the renewal negotiations, and no reduction of fire fighter wages has been proposed by the City. Regardless of the general intent of Congress that employers bear the cost of FLSA compliance, it would be impossible to enforce a prospective obligation upon employers not to take statutory overtime pay obligations into consideration in arriving at future decisions in connection with either unilateral or negotiated wages and benefits increases.

On the basis of the above, the Impartial Arbitrator has preliminarily concluded that the actions of the Employer in failing to ratify the tentative agreement of the parties, and in thereafter reducing its final offer, did not violate the non-discrimination provisions contained in the Fair Labor Standards Act.

In summary, the Impartial Arbitrator has concluded that he possesses authority to determine the question of Fair Labor Standards Act compliance, and also concluded that the Employer's actions did not violate the Act. Accordingly, I have concluded that consideration of the lawful authority of the employer criterion does not definitively favor the selection of the final offer of either party.

The Comparison Criterion

During the course of the hearing and in their post-hearing briefs, the parties cited both external and internal comparisons. Specifically the City urged external comparison only with fire fighters employed by the City of Beaver Dam, arguing that other comparable, area cities such as Whitewater, Sun Prairie, Oconomowoc, Fort Atkinson and Hartland should be disregarded due to the fact that they employ only part time rather than full time fire fighters. The City also urged comparison with other employees of the City of Watertown, both organized and unorganized, and argued that its final offer was comparable and consistent with wages and benefits adjustments for these employees.

The Association did not address external comparisons, but it cited internal comparisons in the form of the 1985-1986 renewal agreements between the City and the unions representing employees in the Police and the DPW bargaining units. These agreements were fully ratified in advance of, and were unaffected by the Supreme Court's Garcia decision, and were thought by the parties to be fully comparable to the rejected fire fighter renewal agreement which is the subject matter of this arbitration.

While comparisons are frequently the most persuasive of the arbitral criteria, the Arbitrator must recognize the fact that the only external comparison urged by the Employer was the Beaver Dam 1986 labor agreement. It is difficult to extend determinative importance to a single comparison, unless there is persuasive evidence that this single comparison had been extended inordinate weight by the parties in their past negotiations and/or interest arbitration proceedings. The evidence indicates that the City of Beaver Dam is comparable in size and in firefighting approach, and that it has adopted a settlement similar to that proposed by the City; on this basis, the Impartial Arbitrator has preliminarily concluded that this external comparison somewhat favors the selection of the final offer of the Employer.

In next addressing attention to internal comparisons, each party has offered arguments in support of their respective positions. The Association urged that the Police and the DPW contracts were ratified prior to the Garcia decision, and that it would be appropriate for the City to do the same thing for the Fire Fighters. The City, on the other hand, urged that overtime costs are most significant in the Fire Fighters unit, and that its final offer is comparable to those in the Police and the DPW units, when these FLSA overtime costs are taken into consideration.

It seems clear to the undersigned that consideration of the internal comparisons with the Police and the DPW units somewhat favors the position of the Association in these proceedings. These contracts were fully negotiated in advance of the Garcia decision, at a time when they were considered to be comparable to the rejected settlement with the Fire Fighters; in proposing a reduced settlement in the Fire Fighters unit, the argument that the settlement is still comparable becomes untenable.

In summary, the Impartial Arbitrator has preliminarily concluded that consideration of external comparisons somewhat favors the selection of the final offer of the Employer, while consideration of internal comparisons somewhat favors the position of the Association.

Cost of Living Considerations

In connection with consideration of the cost of living criterion, the Employer urged that adoption of its final offer would result in a 4% increase in earnings during 1985 with an additional 5% increase during 1986. It submitted that its proposed increases were in excess of actual and projected 1985 and 1986 increases in living costs as summarized in Employer Exhibit #4, and urged that arbitral consideration of cost of living considerations favored the adoption of the Employer's final offer.

The Association did not comprehensively address cost of living considerations in the presentation of its case, rather arguing that such considerations were simply not pertinent; in the latter connection it emphasized that the City was not arguing inability to pay.

While the legislature has identified the major arbitral criteria to be considered by arbitrators in the handling of interest disputes, it has not established any priority of importance for the various criteria. The relative importance of the cost of living criterion will vary considerably depending largely upon the degree of volatility in the various measures of living costs. When living costs are either increasing or decreasing rapidly, consideration of the cost of living criterion is relatively important in the resolution of interest disputes; when living costs are relatively stable, however, the criterion is generally accorded a lower level of relative importance in the final offer selection process.

The legislature has provided that the various criteria shall be considered by arbitrators, and there is no basis for concluding that cost of living consideration are not material and relevant to the resolution of the dispute at hand. As reflected in the record, living costs have been and are projected to be relatively stable during the period covered by the contract in question, and the increases contained in the final offers of either party would rather clearly exceed actual and anticipated increases in living costs. Since the final offer of the Employer is closer to the actual and projected levels of increases in living costs, arbitral consideration of the cost of living criterion somewhat favors the selection of the final offer of the Employer.

Changes in the FLSA During the Pendency of the Proceedings

During the course of these proceedings, the Association emphasized the significance of two of the changes in the FLSA which were undertaken by the Congress in 1985, which changes were undertaken as a result of the Supreme Court's decision in the Garcia case:

(1) The use of compensatory time off in lieu of overtime was restored for local government employees.

(2) Local government employers were relieved of liability for the payment of overtime prior to April 15, 1986.

The described changes in the law have had the obvious effect of softening the overtime pay impacts of the Garcia decision upon certain local units of government,and increasing employer flexibility with respect to the use of compensatory time off as an alternative to the payment of statutory overtime.

The Employer submitted that compensatory time off was not a viable alternative and argued that the changes in the law were not enacted until November of 1985, well after the final offers of the parties were submitted for arbitration purposes. It also urged that the effective date of the overtime pay obligations was not April 15, 1986, but rather April 15, 1985.

In addressing the positions of the Employer the Arbitrator must recognize that Section 111.77(6)(a) and (g) of the Statutes provide that the Arbitrator shall consider the lawful authority of the employer and changes in such authority during the pendency of the arbitration proceedings. Accordingly, the later 1985 changes in the FLSA, relating to the City's overtime pay obligations and authority, are appropriately before the Arbitrator for consideration, despite the fact that they may have been undertaken after the submission of the final offers of the parties.

While the use of compensatory time off may not be expressly provided for in the final offers of either of the parties, it is similarly not prohibited in either of the offers. The Union has expressed its receptiveness to the use of this alternative to the conventional payment of overtime,

and its use could very well reduce the costs of FLSA overtime compliance. This is an appropriate consideration for the Arbitrator in these proceedings.

Arbitral examination of the Fair Labor Standards Act as amended, shows that Section 7(o), which was added in 1985, provides in part as follows:

> "- (1) No State, political subdivision of a State or interstate governmental agency shall be liable under Section 16 of the Fair Labor Standards Act of 1938 for a violation of Section 6 (in the case of a territory or possession of the United States), 7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in Sections 775.2 and 775.3 of title 29 of the Code of Federal Regulations.
>
> - A State, political subdivision of a State, or interstate governmental agency may defer until August 1, 1986, the payment of monetary overtime compensation under Section 7 of the Fair Labor Standards Act of 1938 for hours worked after April 14, 1986..."

These changes have rather clearly cushioned the impact of the Garcia decision upon the City of Watertown and call into question the underlying assumptions and various of the cost computations submitted by the Employer in support of its final offer.

On the basis of all of the above, the Impartial Arbitrator has preliminarily concluded that he is required to consider the changes in the lawful authority of the Employer as reflected in the 1985 changes in the FLSA, and that the changes allowing compensatory time off and in deferring the enforcement of the City's overtime pay obligations, favor the selection of the Association's rather than the City's final offer.

The Bargaining History Criterion

Although bargaining history is not one of the explicit arbitral criteria referenced in Section 111.77 of the Wisconsin Statutes, it is frequently a consideration in collective bargaining, and it falls well within the coverage of Section 6(h) of the statutes, which references the use of other considerations normally or traditionally considered in the determination of wages, hours and terms and conditions of employment. The significance of bargaining history, the reluctance of arbitrators to eliminate or to significantly disturb previously negotiated provisions, and the fact that interest arbitration awards should normally fall within the expectations of the parties is discussed in the following excerpts from the Elkouris' book: 2./

> "Past Practice and Bargaining History
>
> Arbitrators may require 'persuasive reason' for the elimination of a clause which has been in past written agreements. Moreover, they sometimes order the formalization of past practices by ordering that they be incorporated into the written agreement.
>
> In arbitrating the terms of a renewal contract, one arbitrator would consider seriously 'what the parties have agreed upon in their past collective bargaining, as affected by intervening economic events ***.' The past bargaining history of the parties, including the criteria that they have used, has provided a helpful guide to other interest arbitrators.
>
> Prearbitration Negotiations
>
> It has been said that the award in a wage dispute seldom falls outside the area of 'probable expectancy' and that this area is the normal resultant product of the parties' negotiations and bargaining prior to submitting their differences to arbitration. In this regard, too, one arbitration board concluded:
>
> > 'An examination of the wealth of evidence submitted in this matter in conjunction with the provisions of settlement worked out by the parties indicates that the most satisfactory award which the Board could render would be one in general agreement with those terms on which the parties were able at one time to

> substantially agree. Obviously, these terms are not what either party wanted. They represent compromise by both parties. However, since the general terms indicate a meeting of the minds, the Board considers that they hold the basis of a just award."

The Employer submitted that the Arbitrator should place no reliance upon the unratified, tentative agreement of the parties. It also argued that the City's offer was not a radical change, but would merely convert to a true hourly rate of pay, and would guarantee employee earnings increases approximating 4% in 1985 and 5% in 1986, which earnings increases would not be affected by future changes in administrative rulings, legislation, or court rulings relative to the FLSA. It argued that the parties prior use of annual salary figures was merely an administrative convenience, and that in reality, neither of the parties was seeking to add new benefits, to take away old benefits, or to otherwise innovate.

As referenced earlier, an interest arbitrator is an extension of the contract negotiations process, and he or she would normally prefer to arrive at a renewal agreement which approximates the settlement the parties would have reached, but for their failure to agree. When considered in this light, the parties' original but unratified agreement must be accorded significant weight by the Arbitrator, as it is a rather clear indication of the original expectations of each of the parties. The rejected settlement was characterized as similar to the agreements previously reached and ratified within the DPW and the Police bargaining units, which settlements were unaffected by the Garcia decision.

The Arbitrator must also consider the fact that the Employer is proposing a significant change in practices by moving from a salaried to an hourly approach and by proposing additional overtime changes; as the proponent of change it bears the risk of non-persuasion. While the Employer has explained what it would like to have in the agreement as a result of the Garcia decision, it has failed to fully explain the possible implications of the changes and has also failed to fully justify the purported need for the changes.

On the basis of the above, the Impartial Arbitrator has preliminarily concluded that consideration of the bargaining history criterion, including consideration of the parties' tentative renewal agreement, rather clearly and strongly favors the selection of the final offer of the Association.

The Overall Equities Criterion

Principals of fairness and equity are frequently applied in various types of arbitral disputes, and they also fall well within the scope of Section 111.77(6)(h) of the Wisconsin Statutes. In rights disputes where an arbitrator is called upon to arrive at the intended meaning of ambiguous contract language, or in interest disputes where the outcome of the dispute is not clearly indicated by application of more specific arbitral criteria, the neutral will attempt to arrive at decisions which are fair and equitable, rather than those which would give one party an unfair or unreasonable advantage.

It should be recognized by the Arbitrator that the Employer's

Summary of Preliminary Conclusions

As addressed in more significant detail above, the Impartial Arbitrator has reached the following summarized,principal preliminary conclusions.

(1) The primary goal of an interest arbitrator is to operate as an extension of the negotiations process, and to attempt to arrive at a settlement which puts the parties into the same position they would have occupied if they had been able to achieve a voluntary settlement.

(2) The principal arbitral criteria emphasized by the parties in their presentations were the lawful authority of the employer, external and internal comparisons, cost of living considerations, changes in the Fair Labor Standards Act during the pendency of the proceedings, the parties' negotiations history, and the overall equities of the situation.

(3) In connection with consideration of the lawful authority of the employer criterion, the Arbitrator has concluded that he has the authority to address questions of FLSA compliance, and concluded also that the Employer had not violated the Act in reducing its final offer below the level reflected in the original tentative agreement. Beyond these considerations, consideration of the lawful authority criterion did not definitively favor the selection of the final offer of either party.

(4) Consideration of external comparisons somewhat favors the selection of the final offer of the Employer, while consideration of internal comparisons somewhat favors the position of the Association.

(5) Consideration of the cost of living considerations somewhat favors the selection of the final offer of the Employer.

(6) Changes in the Fair Labor Standards Act during the pendency of the proceedings must be considered by the Arbitrator, and the substance of these changes clearly favors the selection of the final offer of the Association.

(7) The parties' bargaining history and their original unratified agreement should be accorded significant weight by the Arbitrator. Consideration of the bargaining history criterion clearly and strongly favors the selection of the final offer of the Association.

(8) Various equitable considerations clearly favor the adoption of the final offer of the Association.

Selection of Final Offer

After a careful consideration of all of the statutory criteria, and the entire record before me, it is clear to the Impartial Arbitrator that the final offer of the Association is a closer approximation of the agreement that might reasonably have been reached in the negotiations process, and is the more appropriate of the two final offers. The selection of the Association's rather than the City's final offer is principally based upon the preliminary conclusions summarized in paragraphs (1), (6) and (7) above.

NOTES

1. Elkouri, Frank and Edna Asper Elkouri, How Arbitration Works, Bureau of National Affairs, Fourth Edition - 1986, pp 104-105.

2. Ibid. pp 843-844.

AWARD

Based upon a careful consideration of all of the evidence and argument, and pursuant to the various statutory criteria provided in Section 111.77(6) of the Wisconsin Statutes, it is the decision of the Impartial Arbitrator that:

(1) The final offer of the Association is the more appropriate of the two final offers.

(2) Accordingly, the Association's final offer, herein incorporated by reference into this award, is ordered implemented by the parties.

William W. Petrie

WILLIAM W. PETRIE
Impartial Arbitrator

June 26, 1986