BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF WAUKESHA	
and	AWARD AND OPINION
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 407, AFL-CIO	Decision No. 23250-B

Case No.	58 No. 34703 MIA-0995
Hearing Dates	September 4 and 5, 1986
Appearances:	
For the Employer	Mulcahy & Wherry, S.C. Attorneys at Law, by MR. ROBERT W. MULCAHY
For the Union	Brendel, Flanagan, Sendik & Fahl, S.C., Attorneys at Law, by MR. JOHN K. BRENDEL
Arbitrator	MR. ROBERT J. MUELLER
Date of Award	March 3, 1987

BACKGROUND

The above-entitled matter came on for hearing before the undersigned as a result of a petition having been filed by the Association with the Wisconsin Employment Relations Commission to initiate final and binding arbitration pursuant to Section 111.77 of the Wisconsin Statutes. The procedural requirements leading to the appointment of the undersigned were held, a

deadlock was determined to exist by the investigator assigned by the Wisconsin Employment Relations Commission, the Wisconsin Employment Relations Commission submitted a panel of arbitrators to the parties and the undersigned was selected therefrom to hear and resolve the issues which remained unresolved between the parties.

A hearing was thereafter held at which time the parties were present and were afforded full opportunity to present such evidence, testimony and arguments as they deemed relevant.

The Association submitted written argument in conjunction with its exhibits at the hearing. A brief on behalf of the City was thereafter filed with the arbitrator and with counsel for the Association. The agreement between the parties for filing reply briefs, which agreement is contained at pages 146-147 of the transcript, Volume II, failed to result in the filing of reply briefs for admission and consideration into the record.

FINAL OFFERS

App. "A"

November 25, 1985

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FINAL OFFER

City of Waukesha to the
International Association of Firefighters
Local 407, AFL-CIO

I. ARTICLE 6 - HOURS/WORK CYCLE - Effective 4-15-86 or upon implementation of the Arbitrator's award (whichever comes later). See attached.

II. ARTICLE 12, Section 3 - HEALTH INSURANCE FOR RETIREES and their family - effective 9-1-85. See attached language.

III. ARTICLE 13 - VACATIONS - See attached.

IV. ARTICLE 14 - HOLIDAYS - See attached.

V. ARTICLE 15 - SICK, INJURY, MILITARY AND FUNERAL LEAVE - See attached.

VI. ARTICLE 20, Section 1 - SALARY SCHEDULE:

Effective 1-1-85	3% across the board increase.
Effective 7-1-85	3% across the board increase.
Effective 1-1-86	3% across the board increase.
Effective 7-1-86	2.5% across the board increase.
Effective 1-1-87	Reopen on wages under Article 20, Section 1.

VII. ARTICLE 30 - TERM OF AGREEMENT - A three-year contract with a wage reopener under Article 20, Section 1 - Salary Schedule only to be effective 1-1-87. The parties agree to commence negotiations no later than 8-1-86.

VIII. Status quo on balance of contract. All stipulations and tentative agreements as initialled.

For the City of Waukesha:

Robert W. Mulcahy

Robert W. Mulcahy
Labor Negotiator

December 2, 1985

CITY OF WAUKESHA - FIRE DEPARTMENT

ARTICLE 6 - HOURS/WORK CYCLE:

Section 1: Workday. Status quo through April 14, 1986. Effective 4-15-86 or immediately following implementation of the Arbitrator's award (whichever comes later), the workday (duty day) for the Fire Department shall consist of a 24 hour and 10 minute period, starting at 7:50 a.m. and ending at 8:00 a.m. the following day, except for inspection personnel who shall work eight hour days in accordance with the existing hourly schedule. Each workday shall include a paid 10 minute roll call (payable at straight time and Article 7 - Overtime shall not apply.) For each 24 hour and 10 minute employee, they agree that if each employee receives at least five uninterrupted hours of sleep up to a maximum of eight hours of uninterrupted sleep, that such hours of uninterrupted sleep will not count as hours worked for purposes of computing overtime. Sleep means time that the employee is relieved of duties, provided with adequate sleeping facilities and is able to sleep, if desired. The City shall schedule in accordance with a 27 day work cycle.

It is understood that where allowable by law, meal time and sleep time may be deducted from hours worked for purposes of determining overtime under the Fair Labor Standards Act. 29 C.F.R. Part 785.22 and 29 C.F.R. Part 553.15. In the event the Regulations are changed, the City agrees to abide by the new regulations during the term of this agreement.

Section 2: Work Week and Work Cycle. Delete the first sentence.

November 25, 1985

City of Waukesha

Effective 9-1-85:

ARTICLE 12 - Section 3 - Health Insurance for Retirees

Upon retirements or terminations only as defined in this Section, the City shall pay 50% of the total premium required for substantially similar standard and major-medical continuing health coverages as provided active unit employees at the time of the retirement or termination herein under the following circumstances:

A. Upon retirement at age 55 or thereafter with 15 years of service in the Waukesha Fire Department.

B. Upon termination due to disability as defined in Section 40.65(4) Wis. Stats., Laws of 1982, as amended from time to time.

Such premium payment by the City shall continue thereafter unless any of the following events are applicable to the employee:

1. The employee is deceased.

2. The eligibility of the employee to apply for a medicare program. If rejected, the employee returns to the City plan.

3. The acceptance of the employee into a substantially similar program of health insurance coverage of another employer.

The spouse and/or dependent children of an employee whose death is a result of a job related injury, illness or disease shall be provided at City expense with such identical coverages for a period of 12 additional premium months next following the employee's death. Upon termination of the one year period the spouse and/or dependent children shall be permitted by the City to continue within its health insurance group, at their expense, for an additional 18 months, provided the premium is paid monthly, in advance, to the City.

CITY OF WAUKESHA - FIRE DEPARTMENT

ARTICLE 13 - VACATIONS:

Section 1: Revise to provide for a 24 hour and 10 minute duty day.

ARTICLE 14 - HOLIDAYS:

Section 1: Revise so that it indicates a 24 hour and 10 minute duty day. Revise first sentence as follows:

> "Every employee working a 24 hour and 10 minute duty day shall be entitled to 120 hours of compensatory off time in lieu of Holidays beginning in 1987."

ARTICLE 15 - SICK, INJURY, MILITARY AND FUNERAL LEAVE:

Section 5: Revise so that all references are to 24 hour and 10 minute duty periods.

CITY OF WAUKESHA

FIRE DEPARTMENT

ARTICLE 20

SALARY SCHEDULE

(Bi-weekly)

	Effective 1/1/85	Effective 7/1/85	Effective 1/1/86	Effective 4/15/86	Effective 7/1/86
Firefighters					
1st year	$ 917.49	$ 945.01	$ 973.36	$ 980.17	$1,004.67
2nd year	967.88	996.92	1,026.83	1,034.02	1,059.87
3rd year	1,002.59	1,032.67	1,063.65	1,071.10	1,097.88
4th year	1,016.85	1,047.36	1,078.78	1,086.33	1,113.49
5th year	1,025.41	1,056.17	1,087.86	1,095.48	1,122.87
Equipment Operator	1,056.17	1,087.86	1,120.50	1,128.34	1,156.55
Paramedic	1,076.68	1,108.98	1,142.25	1,150.25	1,179.01
Lieutenant or Inspector	1,129.03	1,162.90	1,197.79	1,206.17	1,236.32
Lieutenant-Inspector	1,159.46	1,194.24	1,230.07	1,238.68	1,269.65

REAFFIRMED
January 9, 1986

WAUKESHA FIREFIGHTERS, LOCAL 407

FINAL OFFER OF 5/31/85
(As amended to accommodate City's objections)

TERM: Two years; calendar 1985 and 1986; benefits retroactive to 1/1/85 unless designated otherwise.

1985

1) ACTING PAY: Language Per Attached.

2) HEALTH INSURANCE: Language Per Attached.

1986

1) HOLIDAY BENEFIT: Language Per Attached.

UPON RATIFICATION

1) PARAMEDIC LANGUAGE: (As amended per City objection to original language) - Copy attached.

SALARY:

In view of City's present change in position on hours and salary, the Association reaffirms its agreed salary position, as follows:

Effective 1/1/85: 3% across board.
7/1/85: 3% across board additional.
1/1/86: 3% across board additional.
7/1/86: 2.5% across board additional.

REAFFIRMED
January 9, 1986

FINAL OFFER
WAUKESHA FIREFIGHTERS; LOCAL 407
5/31/85

ARTICLE 9

ACTING PAY

Any employee assigned by the department to "act" for any part of a tour in the position of another department employee shall be paid the daily difference between the top firefighter wage scale and the top wage scale of the position of the employee being acted for, in addition to the actor's own normal daily wage. (i.e., no change from City's current payment practices)

REAFFIRMED
January 9, 1986

FINAL OFFER
WAUKESHA FIREFIGHTERS; LOCAL 407
5/31/85

ARTICLE 12

Section 3: Commencing 1/1/85, upon an employee's "normal" retirement (as defined per Wis. Stat. Sec. 40.23) or upon an employee's termination due to disability (as defined in Sec. 40.65(4) Wis. Stats., as amended) the City shall contribute one-half (50%) of the premium necessary to provide the employee with a single or family plan, as applicable, of group health insurance with choices of coverage or plan as may be then available for active employees. Such premium payment by the City shall continue thereafter until any of the following events become applicable to the employee:

a) The employee is deceased;

b) The employee is qualified for Medicare benefits; or,

c) The employee is a participant in a substantially similar group health insurance plan provided by a subsequent employer, during the period of such participation.

The spouse, and/or dependent children surviving an employee whose death is a result of a job related injury, illness or disease shall receive fully paid health coverages for 12-months next following the employee's death. Thereafter, the spouse and/or dependents shall be permitted to participate in the City's group plan but at the spouse's and/or dependents' sole expense, paid monthly, to the City, in advance.

REAFFIRMED
January 9, 1986

FINAL OFFER

WAUKESHA FIREFIGHTERS: LOCAL 1407

ARTICLE 14

(as amended) HOLIDAYS

Section 1: Every 56 hour unit employee shall be entitled to 144 hours of compensatory off time in lieu of holidays. The City may, by agreement with the employee, on or before 6/1 annually, compensate any employee at the employee's regular hourly rate in exchange for any number of hours agreed to.

Commencing 1/1/86, each 56 hour employee shall be entitled to leave of one additional duty day (24 hours) per year as and for a "personal day" which shall be treated in the same manner as a holiday except that it need not be selected at the time of scheduling vacations if the employee chooses not to do so. In the latter event, the employee shall provide the City with not less than 72 hours advance written notice of his selection date and such date shall be subject to the approval of the Chief, or the employee's commanding officer. The employee shall earn the entitlement as of January 1st, annually and such must be utilized during the calender year of entitlement.

FINAL OFFER

REAFFIRMED
January 9, 1986

PARAMEDIC LANGUAGE

In view of the City's threatened demands for declaratory rulings on certain portions of the Association's Final Offer language, not heretofore challenged, the Association will voluntarily amend the following portions of its Final Offer.

ARTICLE 20(2)(b):

The class hours during what is referred to as didactic training sessions for paramedic trainees shall constitute their regular duty day.

ARTICLE 20(2)(c):

1. Any paramedic or other unit employee, required on any tour of duty by the City to perform any of the following functions shall be additionally paid for such tour a premium equal to 3% of a "daily" paramedic salary:

(a) To in any manner be personally responsible for the correct performance and/or compliance with the rules of the Department for the operation or maintenance of the paramedic vehicles or the people assigned to such service;

(b) To coordinate paramedic equipment breakdowns, temporary locations or shortages thereof, between shifts;

(c) To coordinate, inventory or reorder medical supplies:

(d) Train shift EMTs with regard to current procedures and/or practices for paramedic assistants;

(e) Arrange for appearances and/or content of presentation in matters of public relations.

2. The City, at its option, may elect to appoint a single employee per shift to coordinate and perform all such functions providing that such employee be selected through the promotional procedure and be paid such additional 3% as a monthly salary.

3. The provisions of this sub-section shall be effective with the date of ratification of this agreement.

DISCUSSION

Article 6 - Hours/Work Cycle Issue

On February 19, 1985, the Supreme Court of the United States issued its decision in Garcia v. San Antonio Metropolitan Transit Authority. Such case overruled the Court's prior decision issued in National League of Cities v. Usery, 426 US 833 (1976) which case held that the Fair Labor Standards Act did not apply to employees of state and local governments. Upon issuance of Garcia (supra), employees of local governments became subject to the Fair Labor Standards Act and its overtime provisions.

The parties had exchanged proposals and began bargaining on the contract that is at issue in this proceedings on November 27, 1984, prior to the issuance of the Garcia decision. Subsequent to that date, the parties engaged in negotiations on the issues that existed between them for a successor contract. One of such issues involved negotiations on a proposed solution,other than the one contained in the City's final offer, concerning the matter of complying with the Fair Labor Standards Act and its application to employees. At page 49 of Volume II of the transcript of the hearing, the parties stipulated that the first time that the City's proposal of changing the tour of duty to 24 hours and 10 minutes was presented to the Association was when the Association received the City's final offer which was dated November 25, 1985.

The record evidence shows that on November 13, 1985, the Fair Labor Standards Amendments of 1985 was signed into law. Said law provided among others, that April 15, 1986 was a critical date for many purposes in accomplishing compliance by employers. It appears from the record, that the final offers of the parties were received by the Wisconsin Employment Relations Commission and became finalized at some point between the earliest date received shown of November 26, 1985 and January 8, 1986. By letter dated February 1, 1986, counsel for the City submitted its proposed language as contained in its final offer for inclusion in Article 6 of the contract to the U. S. Department of Labor and requested an administrative opinion as to whether or not such proposed language would be in compliance with the FLSA. On or about the middle of April 1986, the Department of Labor issued proposed rules for 29 CFR Part 553. Under date of April 24, 1986, the City received a response to its initial inquiry from the U. S. Department of Labor which stated in their opinion that the proposed method of scheduling and paying for hours of work within the City's proposed language to be included in Article 6 would comply with the requirements of FLSA.

The evidence revealed that the Fire Department is divided into three duty shifts or platoons. Each duty shift or

platoon is on duty for 24 hours, they are off 24 hours, they are on duty for 24 hours, they are off 24 hours, they are on duty for 24 hours, and then they are off 96 hours. Each of the three platoons work the same type schedule beginning at 8:00 a.m. their assigned work day, with each platoons respective schedule repeating itself on a 9-day work cycle.

The Fair Labor Standards Act requires basically that employees must be paid overtime pay at a rate of not less than one and one-half times their regular rate of pay after 40 hours of work in a work week. The FLSA defines a work week as a period of 168 hours during 7 consecutive 24-hour periods. Generally there can be no averaging of 2 work weeks with minor exceptions not applicable to firefighters. The Fair Labor Standards Act as amended created an exception to such specific work week definition for firefighters and law enforcement personnel and permitted employers to establish a "work period" as a regular reoccurring period of work consisting of not less than 7 consecutive days nor more than 28 consecutive days. A maximum hour standard was also established for such work period exceptions wherein the maximum hours standard for a 7-day work period for fire protection was 53 hours and the maximum hour standard for a 28-day work period for fire protection was 212 hours.

Under the current 9-day work cycle, each employee worked

a total of 72 hours within each 9-day work cycle. Under the normal work week definition as defined in the FLSA of 1938 as amended, the applicable work week would be 7 consecutive 24-hour periods or 7 days. As presently scheduled, one platoon of employees out of the three would actually work 72 hours in a 7-day work period while the other two platoons in the same week would work 48 hours in such same 7-day week. Each succeeding week a different platoon would end up working 72 hours and the other two working 48 hours. In the absence of the FLSA amendments of 1985 and the interpretative bulletins issued thereunder which permitted exceptions from the 40 hour per week application, all employees would be entitled to overtime pay at time and one-half for all hours in excess of 40 in each 7-day work period.

By the FLSA amendments of 1985 and the interpretative bulletins issued thereunder, municipalities were afforded alternative solutions for purposes of minimizing the impact of the Garcia decision upon them with respect to firefighters and law enforcement personnel. Such amendment established the option of allowing a municipal employer to compensate employees for overtime due them under FLSA by allowing compensatory time in lieu of pay within certain limitations and restrictions.

Section 7 (k) of the FLSA provides partial overtime pay

exemption for certain employees employed in fire protection or law enforcement activities. Under such provision a work period of 7 to 28 consecutive days for overtime pay purposes within the application of FLSA is provided. Pursuant to such provision, the City, by certified letter dated July 22, 1986 to the Association, implemented a 27-day work period. Said letter entered into evidence as Employer's Exhibit No. 26, stated in part as follows:

> I am sorry that due to John Brendel's illness we were unable to proceed with the interest arbitration hearing on Thursday, July 17, 1986.
>
> Because of the fact that payments for any overtime due after deductions for any paid leave must be made by August 1, 1986, according to the Fair Labor Standards Act, we are hereby designating a 27-day work cycle. A work period is hereby created for the Waukesha Fire Department consisting of 27 days effective April 15, 1986. Please be advised that the City intends to comply with all provisions of the Fair Labor Standards Act (S207(k) of the Act and 29 C.F.R. Part 553). This action is being taken pursuant to the Department of Labor regulations 553.224 (b) and because of the impending August 1, 1986, deadline.

Under the City's implementation of a 27-day work period, the maximum hour standard is 204 hours under Section 553.230(c) of 29 C.F.R. Part 553.

Under such work period, employees would then be permitted to work a total of 204 hours at straight time with all hours in excess of 204 hours in each 27-day work period subject to payment at time and one-half. Under the regular 9-day cycle of scheduling employed previously and which is not

proposed to be changed under either the offer of the City or Association, each employee would factually work 216 hours in each 27-day work period. As such, without further adjustment or change, each employee would then be entitled to 12 hours of overtime pay at time and one-half at the end of each 27-day work period.

An interpretative bulletin of Title 29, Part 75 of the Code of Federal Regulations, entered as Employer's Exhibit No. 18, contains provisions detailing the conditions under which sleeping time and certain other activities, such as meal time, can be excluded as hours worked for purposes of computing overtime under the FLSA. It in essence provides that any employee who is required to be on duty for 24 hours or less, but is permitted to sleep or engage in other personal activities when not busy, will nevertheless have all time counted as time worked for purposes of computing overtime under FLSA. (Section 785.21)

Section 785.22, however, provides that:

> (a) GENERAL. Where an employee is required to be on duty for 24 hours or more, the Employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the Employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (Citations omitted)

Said interpretative bulletin further sets forth conditions with respect to interruptions of sleep, etc. which must be met before such time may be excluded for purposes of counting toward overtime under FLSA.

The City's final proposal in this case seeks to take advantage of the option to exclude hours spent sleeping within the application of the FLSA where qualified and to take advantage of the option to establish a 27-day work period with a maximum standard hours of 204 hours per work period.

The Association's proposal is to retain the Article 6 language that was present in the prior agreement. Section 1 thereof provides as follows:

> Section 1: The workweek for the Fire Department shall consist of a 56 hours duty week conducted and scheduled in accordance with the 1977-78 nine day cycle. The employee shall report for duty at 8:00 a.m. Inspection personnel shall work a 40 hour week in accordance with the existing hourly schedule.

The City interprets the Association's offer to retain the old Section 1 language of Article 6 to result in the establishment of a 9-day work period. The Association has not argued that it means something different and the undersigned will therefore interpret it as one intended to establish a work period of nine days.

The Association argued that the City's proposal to enlarge the work day from 24 hours as it has currently existed for

many years, to that of 24 hours and 10 minutes, constitutes an unwarranted deviation from the long and historical work week of Waukesha Firefighters and that such proposal is totally unsupported by any comparables. They argue that granting the City's proposed 24 hour 10 minute work day would break tradition, break the spirit of firefighters families, and defeat firefighters efforts over the years to reduce the number of hours away from their families. Finally, the Association argues that the City's offer is an outrageous attempt to deprive the firefighters from overtime pay to which they should have been entitled to and should have received since its inception. Even after the act has been clarified and the Supreme Court has ruled, the City is attempting to escape through loopholes their existing obligation to compensate the firefighters for overtime that has always been their due.

Finally, the Association argues that despite the City's language of agreement expressed in their proposed final offer, there specifically is disagreement on the part of the firefighters to the establishment of a 27-day work period and to the establishment of a work day consisting of 24 hours and 10 minutes. The Association supports such contention by submitting exhibits containing signatures of the vast majority of firefighters specifically reciting that they do not agree to the proposed work week period and the proposed work day.

The city argued that its proposal is in compliance with the FLSA and serves to maximize efficiency without causing harm to the employees. Prior to the Garcia case, the employees were working an average of 56 hours per week and being paid straight time for all such hours. The Employer's proposal which enlarges the work day by an additional 10 minutes serves two useful purposes. First, it brings the arrangement into compliance with the FLSA so as to permit the Employer to utilize the time spent at meals or sleeping as exclusions for purposes of computing overtime as permitted by the law. Secondly, such additional 10 minutes is needed for reporting time and exchange of information between employees during the shift change. The City argues that there is a clear need to improve communications and efficiency within the Fire Department by providing a report time to facilitate those goals. The City contended that the identification of numerous activities through testimony establishes the desirability and need for such type reporting time.

The City also argued that adoption of the Association's offer would result in a substantial windfall to the employees. They contend the estimated annual windfall to the employees as a result of the Garcia case absent changes such as contained in the City's proposal that would take advantage of the options presented to employees under the law would be in the amount

of $52,311 annually as cost of overtime based upon 1986 wages. They contend that such amount would not be once in a lifetime windfall but that the cost would continue to occur each year. They argue that the legislature specifically passed amendments to cushion the impact of the Garcia case upon municipal employers, including setting future dates by which compliance was to be required.

The City further argued that at the time of negotiations the outcome of the Garcia case was not known and no moneys were budgeted nor considered as part of a total package that would otherwise result if the Association's final offer was accepted and the employees received the overtime windfall. The City argued that their proposal does not negate any of the contractual overtime otherwise paid to firefighters pursuant to the various provisions of the contract involving call-back, minimum staffing, etc.

The City also argued that its proposal which takes advantage of efficiencies available under the FLSA would be in conformity with what other employee groups negotiated with the City. Work schedule changes were negotiated with other represented and non-represented groups of employees following the Garcia case wherein work schedules were modified whereby overtime was agreed to be paid for all hours in excess of 40 as opposed to that of 37.5 hours per week which had existed prior thereto.

The City further contends that the comparables involving the fire departments at Brookfield, Greenfield, Wauwautosa and West Allis show that each of such comparables have adopted a 27-day work period the same as that adopted by the City and as contained in their final offer for purposes of achieving compliance with the Fair Labor Standards Act.

The arbitrator is of the opinion that were there to be no adjustments made so as to take advantage of the procedures available to employers under the FLSA and the Amendment of 1985, that it would result in a significant monetary benefit to firefighter employees that would serve to increase the total package settlement for the firefighter group of employees significantly greater than the corresponding total package costs granted other City employees. Aside from the simple ruling in the Garcia case that municipal employees were covered by the overtime provisions of FLSA, no other consideration has been presented in this case to establish that the firefighter unit of employees as a result of the Garcia case are somehow entitled to a much greater increase in monetary benefits than are all other City employees.

The legislature specifically recognized that special consideration and exceptions should be permitted with respect to payment of overtime to employees such as firefighters and law enforcement personnel due to the fact that the nature

of their work and employment requires scheduling and hours of work that are abnormal as compared to the normal 8-hour per day and/or 40-hour per week employee. The fact that the legislature enacted special provisions applicable to such groups of employees contemplates that such special provisions and exceptions would in fact be utilized.

The undersigned finds that the enlargement of the work day by an additional 10 minutes per shift, being compensated as straight time in addition to their regular 24-hour shift, constitutes a minimal deviation from a status quo situation compared to the significant change that would result through overtime payments resulting from the Association's final proposal.

The arbitrator recognizes that the parties were in a most difficult situation in this case. Suddenly they were faced with the Garcia decision that required compliance with FLSA. The City had not anticipated such type event and as a result had not budgeted for what would be its full monetary impact absent actions permitted and provided under the law that were intended to soften the impact of such case. The arbitrator can understand the difficult quandry in which the City found itself and the arbitrator can understand also the difficult position and quandry that the Association and employees found themselves in. Interpretative bulletins were

not available to either party so that both parties were placed in a position to try and anticipate and guess what the fallout would be from such case and to anticipate and guess what rules and regulations would be passed for implementation of the law to the public employee area. How does one make a proposal when one does not know what the law will require or permit. How does one determine whether to agree or not agree on a particular proposal until one knows the rules of the game and has opportunity to study and evaluate the impact. The City was in the former position described and the employees were clearly in the second position. The undersigned has an advantage in this case that clearly was not available to either party. By the time the case came to presentation in this arbitration, interpretative bulletins had been issued, the Garcia case and its impact had been analyzed and the parties have been able to point out various guideposts in the various publications to assist the arbitrator. Neither the City nor the Association had the advantage of all such guideposts at the time that they were required to make decisions.

In the final analysis in consideration of this issue, the arbitrator is of the considered judgment that the final offer of the City is the most supported by the applicable criteria bearing on the issue. Maintaining the present Article 6 language as proposed by the Association would in

the judgment of the arbitrator, result in a windfall to the employees that is not supported by other statutory factors and in particular, by the internal comparisons.

Retiree Health Insurance Eligibility

Both parties propose that the City pay 50% of the premium for retirees.

The Union interpreted the City's final offer language as creating an issue as to what coverage retired employees would receive. The Union interprets the City's proposal as one limiting each retiree's coverage. The Union described its interpretation in its brief as follows:

> ...Waukesha has agreed to pay 50% of the contribution to premium but has spelled out a new concept of limiting their coverage to whatever coverage is in effect on the day that the employee retires. This wold seem to be an ill-conceived arrangement as each employee retires in future years, the insurance company will be expected to maintain an individual policy equal to those coverages he had when he or she was an active employee. The administration from a claims standpoint of such a program would seem to be most difficult. It is also too early to tell what premium ramifications might be involved with such a concept. It is also not beyond comprehension that some coverages may change over the years because of changes in medical technology or government intervention and that coverages now in effect may not even then be available, or needed.

The City presented rebuttal Employer's Exhibit No. 36, which was a letter from counsel for the City to counsel for the Union dated June 25, 1985 wherein the City contends

they clarified their proposal so that there is no issue or difference between the City and Union on such point. The relevant portion of said letter stated:

> The City has always given any increase in the level of benefits to its retirees...because the City is willing to give the increase in benefits to the retirees, there are not going to be separate programs administered for different employees depending upon their retirement dates. Accordingly, I believe that would eliminate your concern regarding the health insurance for retirees.

It appears to the arbitrator that there remains some difference in the offers of the parties. It would appear that the coverage afforded retired employees would be the same as afforded other employees in the group at any given time. If the group coverage changes for the group, it would similarly change for the retirees covered by the group plan.

The sole difference in the proposals appears to involve sharing of the premium cost. According to the City's explanation in its letter of June 25, 1985 (Employer's Exhibit No 6) the 50% share of premium for which the City is committed is fixed in dollar amount based on the premium charged at the time of retirement. The City states in such letter,

> The distinction is that if there is an increase in premiums the retirees would pay the difference in the health insurance premiums.

The Union proposal would retain a 50% sharing of the premium without regard to whether it increased or decreased.

The other points of difference between the two offers concerns, 1) difference in retirement age - the City's proposal would limit such coverage to employees who retire at age 55 or thereafter while the Union's proposal would include employees who retire at age 50 or thereafter; 2) service eligibility - the City's proposal would require that an eligible employee who retires have at least 15 years of service with the Waukesha Fire Department. The Union's proposal contains no such type qualification; 3) effective date - the City proposes that such provision be effective as to any employee who retires after September 1, 1985. The Union's proposal would make it retroactive to the first day of the contract or January 1, 1985; and 4) spouse and/or dependent children extended coverage - the proposals of both parties provide that where the spouse and/or dependent children survive an employee whose death results from a job-related injury, illness or disease, they will receive fully paid health coverages for 12 months following such employee's death. The parties are not in agreement in their respective proposals concerning the coverage afforded a spouse and/or dependent children after such 12-month period. Under the City's proposal, a spouse and/or dependent children would be permitted to continue group coverage at their own expense for an additional 18 months. The Union's proposal would

permit the spouse and/or dependent children to continue such group coverage for an indefinite period of time at their sole expense.

The Union argued that the City's selection of age 55 as the point after which a retiring employee would qualify for coverage is based upon what previously was regarded as the "normal" retirement age. Normal retirement for fire-fighters as defined under the Wisconsin Retirement Fund can now be at age 50. The Union argues that current standards would call for age 50 to be utilized as opposed to age 55. Additionally, the Association argues that comparisons to other municipalities shows that the cities of Wauwatosa and West Allis provide the age 50 standard. The Union contends that such lower age,

> ...gives the men an opportunity to retire earlier which permits them to maintain a younger force and perhaps eliminates an older staff which might be more likely to ultimately contract serious illness or might conceivably be prone to more injury. (Union brief)

With respect to the difference in the proposed effective date of such benefit, the Union contends the City has offered no justifiable argument for proposing a September 1, 1985 date as opposed to making all matters effective as of the first day of the contract. It has been a general practice to make any changes in the contract effective as of the first date of each renewal contract. The Union suggests that the

only reason the City has proposed a date later than the first date of the contract involved in this proceedings is because they were aware that two of the unit employees were scheduled to retire in 1985 and that both did retire prior to the submission of the final offers of the parties. The Union argues that there is absolutely no justification for depriving such two employees from this benefit simply because they retire before an arbitrary date proposed by the City.

With respect to the City's proposed limitation of 18 months for a spouse and/or dependent children of an employee whose death results from a job-related injury, illness or disease, the Union argues that such position is not consistent with the City's position wherein retirees are allowed to stay in the group without such similar limitation. The Union argues that the impact and hardship upon a spouse and/or dependent children on the death of a spouse employee is much greater than in the case of a retiree which is foreseen and planned for. The Union contends that their proposal is more up to date, better defined, more practical and fairer to employees already retired and is therefore the more reasonable proposition presented.

The City argues that retiree health is a new benefit for firefighters during the current round of negotiations. The Police Department received the identical benefit as a new benefit during this round of negotiations in terms identical

to the proposal of the City to the firefighters in this case. In the police unit, several retirees were denied the benefit by virtue of the September 1, 1985 effective date by a matter of days. The City contends that some start up date is necessary and that whatever date one utilizes, some employees will be deprived of the benefit. They argue that the first time benefit of a retiree health insurance was negotiated fairly and equitably between the City and the Police Department and no reason has been advanced by the Union as to why the same benefit is not fair as to firefighters.

Because this benefit is a new benefit during this round of negotiations, and because the Police Department employees have in place a 15-year service eligibility requirement, internal comparability would call for the same to be applied to firefighters. No other unit of employees has the wide open service eligibility requested by the Association. The City argues absent some type of inequity or other compelling need, new benefits should not be awarded through the arbitration process. In this case, the Association has not been able to demonstrate any inequity because the parties have agreement on the wage increases which increases are comparable to external comparatives as well as internally to other employee groups and units within the City and because all other units within the City contain service eligibility requirements similar to that proposed for firefighters. They contend the City's

proposal on this issue should be selected as the most reasonable.

On full consideration and evaluation of the total record evidence, arguments of the parties and consideration of the statutory factors applicable to the issues presented, the arbitrator finds the positions of both parties to be reasonable with respect to the proposed retirement age at which a retiring employee would be entitled to continue group insurance coverage. The City has proposed age 55 and the Association has proposed age 50. Arguments advanced by both parties contain merit. The Association correctly observes that several of the comparables, namely West Allis and Wauwatosa, provide and make available health insurance benefits to employees retiring at age 50. It does not appear, however, that Wauwatosa went to the age of 50 at the time such benefit was first negotiated into the contract. The terms show that age 55 was utilized beginning 1-1-79 and thereafter and that age 50 apparently came into being as stated for the first time effective 12-31-83. It would appear that the West Allis contract was also upgraded from the age of 55 to the age of 50 in 1983. It is understandable that an employer would not offer the best features of all other comparables in a first benefit contract offer nor would one expect that employees would reasonably anticipate that upon attainment of a new

benefit into a contract, that they would obtain one that contains all of the best features of all other comparables. Specifically, those would be the reasonable expectations between the parties on a new benefit negotiated into a contract absent there being some quid pro quo given by the employees in other areas of consideration in exchange for the employer granting a new benefit containing all of the best features provided by the comparables.

The arbitrator therefore is unable to conclude that the City's offer is unreasonable in that it does not provide for benefits after age 50 as one similarly cannot conclude that the Association's offer is unreasonable in requesting such benefit. The arbitrator notes from an examination of Employer's Exhibit No. 65 and No. 70, that the agreed upon salary schedule increases negotiated between the parties is equal to and in fact slightly more than the increase granted to the comparables on an average. Employer Exhibit 65 shows the ranking of firefighters at Waukesha is slightly improved in comparison to the comparables. Such fact would show that the Association has not therefore extracted from the wage area consideration to serve as a quid pro quo so as to obtain somewhat greater improvement in the retiree health insurance area.

With respect to the effective date for implementation

of such benefit, the arbitrator finds that other than the fact that the City has successfully negotiated that specific date of September 1, 1985 with the Police Department unit, no other basis exists to support such date. In the judgment of the arbitrator, the Association's argument contains significantly greater merit. The evidence shows that it has been the general practice to negotiate improvements in the contract and that all such improvements have as a matter of course, become fully effective on the first day of the new contract. It factually appears that the September 1 date was chosen simply for the purpose of depriving employees retiring during the 1985 year of such benefit. There has been no argument made concerning the monetary impact of making it effective on the first day of the contract as opposed to the September 1 proposed date. The arbitrator finds the City's proposal on such matter to be inequitable and to be without support.

The issue between the parties concerning the prequalification limit of requiring retiring employees to have 15 years of service with the City before being eligible along with the 18-month limitation on allowing spouses and/or the dependent children of a deceased firefighter to continue insurance coverage, are issues subject to the same type of considerations as have been discussed above concerning the age 55 versus age 50 issue. The City argues that internal

comparison should be given greater weight while the Association argues that comparison should be made to the better benefits that are afforded employees in comparable communities. In the final analysis, the arbitrator is of the judgment that on this total issue, the Association's offer is the most preferable primarily based upon the effective date proposal of the City which deviates from the normal standard implementation date which normally coincides with the term of the contract.

Acting Pay

The Association contends their proposal is necessary to clarify the acting pay provision of the contract as a result of premiums previously payable to paramedics and equipment operators being incorporated into a separate wage rate for each during the term of the contract.

The City contends the Association proposal does not retain the present practice but, in fact, does change the existing practice as it would be applied from January 1, 1985 to July 1, 1986 at which time the premiums do in fact become incorporated into the wage rate. A review of the contractual provisions in consideration of the arguments leads the arbitrator to conclude that the Association has failed to establish that their proposed revisions would factually accomplish what they contend would be the fact and they further failed to establish that the existing provision would not effectively continue the current and

existing practice.

Holidays

The Association's proposal would add one additional floating holiday as a personal day to the existing 144 hours of compensatory time off in lieu of holiday provision contained in the present contract.

The City's proposal is to amend the holiday provision so as to conform to their proposed work day of 24 hours and 10 minutes and to reduce the number of hours of compensatory time payable in lieu of holidays from 144 to 120 hours beginning in 1987.

The Association argues that the one additional holiday would put it more closely in line with the other comparable communities. They point out that employees at the Greenfield Fire Department receive 11 days or 264 hours time off in lieu of holidays. The holiday benefits afforded Wauwatosa employees exceeds that of Waukesha employees. The Association further argues that providing an additional personal holiday would not pose any problem with scheduling. Alternatively, the parties' contract permits the City to buy back any holiday time at straight time if they desire. That same option is available in the Cities of Wauwatosa, West Allis and Brookfield. The Association points out that the additional holiday is the only fringe benefit contained in the Association proposal that is applicable to all members of the Association. All

other proposals involve either contract language changes or a change that would benefit but a few of the employees.

The City contends that the holiday pay provisions contained in the contracts of the comparable cities is highly individualized and varies considerably from one municipality to the other. They point out however, that none of the other comparables provide a personal day holiday benefit. The City argues that the Association's proposal would enlarge the already existing disparity in the amount of holiday time allowed firefighters compared to other employee groups of the City. The City contends its offer on holidays was intended to effectuate the dicta set forth in the previous arbitration case between the parties. The arbitrator in such case discussed the disparity between the number of holiday hours afforded firefighters compared to the number of holiday hours afforded other employees employed by the City of Waukesha. The City described its ratio analysis at page 35 of its brief as follows:

> ...the holiday time earned by 40-hour week employees is 84 holiday hours/2080 hours worked. Ratio analysis shows that Firefighters working the average 56-hour weeks should receive 117.6 holiday hours/2912 hours worked in order to maintain internal comparability. Obviously the City's final offer reflects this ratio while the Association offer would push the ratio even further away fromthe already disproportionate number of holiday hours.

The City further argued that the difference between the two holiday pay proposals is significant with respect to cost. The difference for such two holidays is $37,712.00.

The arbitrator finds on the basis of the total record evidence on the holiday pay issue, that the City's final offer is the more reasonable of the two. The ratio of holiday pay of firefighters to that of other City employees shows a great disparity exists. The Association proposal would enlarge such disparity while the City proposal would decrease it. There is nothing in the record to justify such type disparity between employees working for the same employer. Finally, it would appear to the arbitrator that the holiday proposal of the City, which does constitute a take away, is offset by the somewhat larger wage increases that are reflected in the parties' agreement on that issue. The agreed upon wage increases at Waukesha are shown by Employer's Exhibit No. 70 to be somewhat greater than the other comparable municipalities for both 1985 and 1986.

Paramedic Issue

The Waukesha Fire Department has 12 paramedics, 4 per shift. They utilize one paramedic ambulance that is staffed with either three paramedics or at other times with two paramedics and one EMT driver (emergency medical technician). Up until 1981, the City assigned a lieutenant to the paramedic van and was the one in charge of such service and employees. In 1981, two

additional fire stations were opened and at that time the lieutenants were removed from the paramedic crews. The Association contends that the lack of a single person to serve in the responsibility of a leader of the crew, creates numerous problems. One part of their proposal is directed at addressing such problem and would call for the assignment of one of the employees serving on each tour of duty to serve as a leader or as the one responsible for the duties previously performed and assumed by the lieutenant. The Association has referred to such duty as a leader, coordinator, or similar type reference.

The Association contends the second part of its proposal, namely the proposed language to be Article 20 (2)(b) is primarily for the purposes of clarification. They state that the purpose of such language is to clarify that the trainees who are given approximately 14 weeks of classroom instruction at the University Hospitals in Madison, are to have their classroom hours at such training considered as being their tours of duty so that they are not expected to drive back from Madison daily and stand duty in Waukesha in addition to their class hours so as to fill out a full tour of duty.

The City argues that under the Association's proposal, it would be impossible for the City to continue to have current work performed in the future without either creating a new position or paying all of the paramedic employees the additional

3% premium. The City argues that the whole concept of the paramedic service is based upon a team concept. All members of the team perform all of the functions as needed. All share in all of the required duties. The paramedics receive 5% above firefighters pay because they are expected to perform the responsibilities listed in paragraphs (a) through (e) of the Association proposal. They argue that if the City were to then single out one of the employees as a coordinator or leader and pay such person 3% more than the others where all would be performing all of the duties of the job, the City foresees a serious morale problem developing. To avoid such result, the City would be forced to pay the 3% amount to all team members. They contend that the Association's proposal is cleverly packaged with the intent to achieve a 3% increase for all paramedics. The alternative would be to effectively force the City to designate one coordinator per shift which would then infringe upon management's right to create any new position.

With respect to the didactic training issue, the City argues that the Association's proposal would not be limited to the training taken by employees in Madison only. They argue that didactic training is obtained at other locations from time to time and that when employees attend such training during their tour of duty, they are expected to return to work and complete their tour of duty when not attending such training classes. They argue that the Association's proposal would change such

practice and procedure.

The City attaches what it terms improper motives to the Association's proposal. It contends the Association is attempting to obtain through the back door what it could not obtain directly under threat of the City filing for a declaratory ruling. The arbitrator is of the judgment that the City's contentions of improper motives are invalid.

The arbitrator is persuaded by the evidence that prior to 1981 there was a lieutenant assigned to each shift who exercised sole responsibility for the supervision and coordination of the team of which he was a part. Subsequent to that date there has been no single person so designated to exercise the responsibility as a single person for various coordination and supervision functions. While it is not the usual concern of employees as to the amount of supervision an employer assigns to a particular function or group of employees, the Association by its proposal in this case, is attempting to address that area of concern. The Association entered testimony concerning various matters that required coordination between one shift and another concerning equipment, supplies, etc. One can understand that where three employees are working on a crew that each one may assume one of the other members of the crew will pass on necessary information to the crew coming on to duty and that as a result information frequently may not be passed on to the oncoming crew

and inefficiencies and possibly serious problems could result. The arbitrator can understand the concern of employees where there is a lack of coordination or placement of responsibility in at least one person of a crew to be responsible to pass on necessary or required information to an oncoming crew. One can visualize circumstances where critical information is not relayed onto an oncoming crew and something serious occurs and there may be attempts to hold each employee responsible.

On consideration of the total record evidence on such issue, the arbitrator is persuaded that the Association has pointed out an area of concern that is valid and one that needs to be addressed. I am not, however, of the opinion, that the Association's proposal properly or appropriately addresses that problem without improperly infringing upon the authority of management to make those type decisions. It seems to the arbitrator that the Association's proposal goes somewhat beyond limiting itself to addressing that specific problem and, in fact, would appear to open up an open invitation to grievances once the language was incorporated in the contract by every paramedic contending they were entitled to the 3% premium pay by virtue of their performing various of the duties therein listed.

The problem sought to be addressed by the Association is somewhat like a jellyfish. Some approaches to the problem may take the form of permissive subjects of bargaining.

Other approaches while mandatory in nature when slightly modified may merge into the permissive category. Such type issues are difficult to address absent a dedicated effort on the part of both parties to honestly and directly resolve an issue of mutual concern.

The arbitrator is of the judgment that the Association has identified some actual or potential deficiencies in the paramedic service operation. The undersigned is not persuaded that the Association's proposal addresses the problem in a constructive manner without creating additional or greater problems of equal or greater magnitude.

With respect to the didactic training proposal, the parties are not in agreement as to specifically what didactic training encompasses. The Association verbalized the position that they regarded the training obtained in Madison, Wisconsin as being the sole didactic training involved. The City argued that employees receive didactic training in other locations as well as in Madison. If one then literaly applies the Association's proposed language, and views training other than that obtained in Madison as consisting of didactic training, there would be significant deviation from the practice employed by the parties under the previous contract. The City contended that when employees went for training of a short duration at local locations that involved a period of one to

five hours during their duty day at a training session, that such employees returned to the station and completed their scheduled tour of duty. It appears to the arbitrator that under the Association's proposed language, upon completing a class at a local area that would have entailed a period of two hours, that upon completion of such two-hour session, an employee would have been regarded as having completed their 24-hour tour of duty.

As to the full paramedic language issue presented herein, the arbitrator is of the considered judgment that the City's proposal to retain the current Article 20, Section 2 contract provision to be the more reasonable.

Term of Agreement

The Association has proposed a two-year agreement while the City has proposed a three-year agreement with a reopener on salary only.

The Association argues that it has been the historical pattern of negotiations between the parties since at least 1971 to negotiate two-year contracts. They contend the City has offered no justification for deviating from such past history. In addition, the Association argues that because of the FLSA application to firefighters for the first time, the parties should have an opportunity to address the application of such law and to their operation to address problems that undoubtedly will arise.

The City argues that although two-year labor agreements have been the practice between the parties for years, since 1985 there has been an internal settlement pattern of three-year agreements. The City's final offer of a three-year contract with wage reopener in the third year is identical to the police contract and the clerical/custodial agreement. Additionally, all other City bargaining units have agreed to three-year contracts.

The arguments made by both parties contain merit on this issue with neither being entitled to prevailing weight over the other. This issue therefore is not determinative of the total package selection with which the arbitrator is faced. It is not a controlling issue to the overall package selection.

Vacation - Sick, Injury, Military and Funeral Leave

Such matters involve issues that are derivative to the City's proposal involving Article 6 of the labor agreement. They simply provide for modifying the language of such provisions so as to make such provisions consistent with Article 6 in the event the City's final offer is adopted and the 24-hour 10-minute work day is placed into effect. Said items are not in and of themselves influencial with respect to selection of one final offer over the other.

Conclusions

The arbitrator finds the dominant issues that are entitled

to the greatest consideration in this case to be those involving Article 6, hours/work cycle; Article 9, acting pay; Article 12, health insurance for retirees; Article 14, holidays; and Article 20, paramedic proposals.

On due consideration of the total record evidence, arguments of the parties and application of the statutory factors set forth in Section 111.77(6) of the Wis. Stats., the arbitrator comes to the conclusion that on the basis of the total final offer evaluation, the final offer of the City is the one most supported and the one hereby selected and directed to be incorporated into and made a part of the agreement between the parties.

It therefore follows that the undersigned issues the following decision and

AWARD

That the final offer of the City shall be included in the parties 1985-88 contract along with all of the provisions of the previous agreement as modified pursuant to the parties' stipulations and/or tentative agreements as initialed.

Robert J. Mueller
Arbitrator

Dated at Madison, Wisconsin
this 3rd day of March, 1987.