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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of an Arbitration between CITY OF SUPERIOR, WISCONSIN (POLICE DEPARTMENT) and WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION, SUPERIOR LOCAL NO. 27	Case 84 No. 36737 MIA-1122 Decision No. 23757-A

Steven H. Schweppe, City Attorney, City of Superior, appearing on behalf of the City of Superior Police Department.

S. James Kluss, Executive Director and Richard T. Little, Bargaining Consultant, Wisconsin Professional Police Association/LEER Division, appearing on behalf of Superior Local No. 27.

Background

The Employer and the Association have been parties to a collective bargaining agreement the terms of which expired on December 31, 1985. In the Spring of 1986 the parties commenced negotiations for a successor agreement with respect to wages, hours and working conditions for law enforcement personnel for the years of 1986 and 1987. On March 27, 1987 the Association filed a petition with the WERC for final and binding arbitration and the Commission finding that the parties were at impasse certified the final offers of the parties on June 17, 1986 and thereupon ordered arbitration.

On October 9, 1986 the Wisconsin Employment Relations Commission, pursuant to 111.77 of the Municipal Employment Relations Act appointed the undersigned as arbitrator in the matter of a dispute existing between the City of Superior (Police Department), hereafter referred to as the Employer, and the Wisconsin Professional Police Association/LEER Division, Superior Local No. 27, hereafter referred to as the Association. On January 22, 1987 a hearing was held in the city of Superior, Wisconsin at which time both parties were present and afforded full opportunity to give evidence and argument. No transcript of the hearing was made. Post hearing briefs were exchanged through the Arbitrator on March 10, 1987 and reply briefs were filed on March 24, 1987.

Statutory Factors to be Considered

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.

(d) Comparison of the wages, hours and conditions of employment of the employes involved in the arbitration

proceeding with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally:

1. In public employment in comparable communities.
2. In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Final Offers of the Parties

Employer

1) Wages: a) Effective January 1, 1986, increase Appendix A base rate by 2%.

b) Effective July 1, 1986, increase base rates by 2%.

c) Effective January 1, 1987, increase base rates by 3%.

2) Article 9(A): Add to Article 9(A) the following sentence to be placed after the third sentence of said article:

Compensatory time may be taken only upon the prior mutual agreement of the employee and the Chief of Police.

3) Article 25: Delete Article 25.

Association

1) Article 6-Salaries: Amend to read:

(E) Change to (D): .....for the years of 1986 and 1987 as shown in Appendix "A".

January 1, 1986: Two Percent (2.0%) Across the board increase, for all officers in the bargaining unit.

July 1, 1986: Two Percent (2.0%) Across the board increase for all officers in the bargaining unit.

January 1, 1987: Two Percent (2.0%) Across the board increase, for all officers in the bargaining unit.

July 1, 1987: Two percent (2.0%) Across the board increase, for all officers in the bargaining unit.

I. The Issue of Wages

Association Position

The Association's wage offer rests, in part, on its choice of comparables. In this regard, it argues that

> "the City of Superior lies in a unique location, being the only metropolitan city in the northwestern section of the state. Therefore the list of comparables suggested by the Association is also unique."

Excluding police departments without a 1986 collective bargaining agreement or those falling within the economic influence of Milwaukee the Association finds the following cities as most appropriate for comparison purposes: Beloit, Neenah, West Bend, Wisconsin Rapids, Duluth(Minn), Marshfield, Watertown, Fond du Lac, Wausau and Stevens Point.

Using its comparable cities, the Association finds that under either offer, the 1986 base salaries of Superior patrolmen will fall below the rates paid in Stevens Point "for the first time in recent history." In addition, the Association also contends that its analysis shows that the City's patrol and squadmen have received lower overall wage increases than a majority of the comparable police departments.

The Association also challenges the City's reference to other Superior bargaining unit settlements stating,

> "The most important and relevant factor regarding those settlements is that they were voluntary in nature and the law enforcement unit had absolutely no input on same. The mere fact that some units may have voluntarily agreed to a settlement that is less that sought by a uniquely different unit should not restrict the latter from pursuing a settlement which is more appropriate and fair for its members."

Beyond the comparables criterion in the law, the Association makes reference to additional statutory factors to be considered by the parties and the arbitrator. First, with regard to the cost of living, the Association maintains that settlements within comparable areas have consistently exceeded the Consumer Price Index. In taking the position that cost of living measures should be given little weight in any resolution of the dispute, the Association cites Arbitrator Gundermann (City of Superior, Dec. 20422-A) to the effect that cost of living factors have not been controlling.

Second, the Association also asserts that its wage offer best serves the interests and welfare of the public "by recognizing the need to maintain the morale of its officers and to retain the best and most highly qualified officers." It will do this, concludes the Union, by maintaining long standing relationships between the members of the bargaining unit and law enforcement employees in similar classifications.

Employer's Position

First, the City rejects the comparison cities which form the basis of the Association's position on wages. On the one hand, it argues that it can find no arbitral or other basis to support the conclusion that the City of Superior has ever been used as a benchmark for negotiation or impasse arbitration by the cities

making up the Union's set of comparables. On the other, the City also holds that the wide differences in wages between Superior and the Union's comparison cities is "probably the best evidence that no such 'historical relationship' exists or ever has existed." Thus, the Employer maintains,

> "By including the Neenahs, West Bends, Watertowns, Fond du Lacs, and Duluths in its 'comparisons', the Union attempts to use cities and unions which have not compared their wages with those of the City of Superior employees and which are affected by labor markets, economic developments, equalized values (see City Exhibit #31) and geography far different from the City of Superior."

In the specific case of Duluth departmental size, population and special circumstances of Minnesota statutes combine to make Superior's sister city an inappropriate point of reference according to the Employer. Further, the City also contends that its position on the exclusion of Duluth from any set of comparables has been recognized in the awards of Arbitrators David B.Johnson (General Drivers, Dairy Employees et al & Douglas County Sheriff's Department, MIA-165, 3/77) and Richard John Miller, (General Drivers, Dairy Employees et al * Douglas County Sheriff's Department, MIA-775, 12/83).

As a substitute for the Association's comparables the City offers three points of comparison: (1) the Douglas County Sheriff's Department; (2) other City of Superior employee settlements; and (3), selected Northern Wisconsin law enforcement agencies. Beginning with Douglas County Sheriff's Department, the Employer contends that precedence for comparison was established by the awards of Arbitrators Johnson and Miller (cited above). These awards, in turn, were based on the rationale that the both law enforcement agencies occupy the same building, have parallel functions and regularly exchange information.

As its second comparison grouping, settlements in the City's other bargaining units, the Employer asserts an arbitral basis here as well. For example, the City relies heavily upon Arbitrator Gallagher's award involving the parties in an earlier dispute (MIA-728, 10/83), but also cites Arbitrators Gordon Haferbecker (Superior City Employees Union #235 and the City of Superior, MED/ARB-2116) and Neil Gundermann (City of Superior and Superior City Employees Union Local #244, MED/ARB-2116, 9/83). These particular awards, contends the City, undermine the Union's claim that the City of Superior Police bargaining unit is unique, requiring a set of statewide comparables.

Third, the City, drawing on communities in Northern Wisconsin, proposes its own set of law enforcement agencies for comparative purposes. Following a similar rationale to that by which it justifies its previous sets of comparables, the Employer constructs a grouping of some twelve cities and counties including among others Menomonie, Bayfield County, Sawyer County, Stevens Point, Wausau and the City of Ashland.

Applying these three sets of comparables, the City finds that, for example, eventhough police officers in its employ lack a system of educational incentives the wages for various Departmental positions exceed those for law enforcement personnel working for Douglas County and the gap will grow over the term of the Contract. Moreover, contends the City, the County Sheriffs agreed to 3% for each of the years 1986 and 1987 and in doing so agreed to a significant concession. That is, the wage increases were not retroactive but rather take effect on November 1, 1986 and November 1, 1987.

In terms of the City's other bargaining units, the Employer states that the clerical unit (AFSCME #244) settled voluntarily for increases of 2% (1/1/86), 2% (7/1/86) and 3% (1/1/87) while at the same time agreeing to major concessions. In the case of the City's Fire Fighters, the increases were 3% (1/1/86) and 3% (1/1/87). The latter made no concessions and was the recipient of a mandated increase of 1.4% though the Fair Labor Standards Act. According to the City, the Police Officers, under the Union's proposal would move 2% ahead of the Fire Fighters.

The City also contends that insurance premiums and claims for Superior's police officers are appreciably above those of other City employees. As a result the health insurance plan covering other City employees has had to subsidize the health care costs generated by police officers in the amount of $111.51 per month, per officer. This, in turn, asserts the Employer, is the equivalent of an additional $.64 per hour for members of the Police Department.

As a final point with regard to its comparables the City maintains that Superior officers are paid well in comparison to other Northern Wisconsin law enforcement agencies. It finds that only Wisconsin Rapids has a higher base rate and in addition, the City's offer is better than that agreed upon by other area public employees.

Beyond the matter of comparables, the City has also raised the relevance of cost of living criteria. In this regard, the Employer takes note of the fact that recent reports indicate that the consumer price index rose only 1.1 percent during all of 1986. In the first place, the City makes reference to the previously cited award of Arbitrator Gundermann to the effect that the role of cost of living factors can best be judged through the voluntary settlements of comparable public employees. Second, the City also argues that rising medical costs have played a substantial part in general price increases. In the case of Superior police officers, however, medical costs are largely covered by insurance. As a consequence, asserts the City, "the effect of inflation on Superior police officers in(sic) even less than the 1.1% increase in the CPI and, conversely, the City's offer is an even greater real 'income' increase in police income."

Discussion

The Arbitrator finds little in the Association's evidence or testimony to support its contention that the circumstances of the City of Superior are unique thereby requiring the application of a set of statewide comparables. Such cities as Beloit, West Bend, Watertown and Fond du Lac, by their sheer distance from Superior are, as the Employer argues, subject to different labor markets, economic factors and metropolitan influences. Moreover, from a practical standpoint, only three of the cities have settled police contracts for 1987 (Beloit, West Bend and Wisconsin Rapids) thus making difficult valid generalizations.

In addition, the Arbitrator also agrees with the City's position that Duluth should be excluded from any bench marks used to judge the fairness of the respective wage offers. While Superior's Minnesota sister city might otherwise be appropriate by location the fact that it is governed by a different set of state rules, policies and statutes particularly as they relate to collective bargaining precludes Duluth from consideration.

In contrast, the Association does not successfully rebut the City's position that Douglas County Sheriff's Department is not a valid comparison. The physical proximity, parallel functions, and cooperation as recognized in earlier arbitration awards make this law enforcement agency a logical point of reference.

Secondly, it would otherwise also be of value to draw up a comparison set of other law enforcement agencies geographically proximate and comparable by size, function and related characteristics. Both the City and the Union provide an initial step in this direction. Unfortunately, although there is some overlap between the two sets (Stevens Point, Wausau, Wisconsin Rapids and Marshfield) only Wisconsin Rapids is settled for 1987.

Remaining then is the City's set of comparables composed of the Employer's other settled bargaining units: Fire Fighters Local #74; the clerical employees (AFSCME Local #235); and the street employees (AFSCME Local #244). Local #244 is settled for 1986 wages and language items but is in arbitration over other issues. While the Arbitrator would give less weight to the AFSCME unit settlements and none to the City's handling of its nonunion employees the settlements for these other bargaining units can not be dismissed entirely as the Union would have us do. This is particularly true for the Fire Fighters. In the latter case, particulary, the long history of tandem relationships between police and fire employees is sufficient cause for the consideration of the two groups of employees for comparative purposes.

While comparisons between police and other city workers such as those engaged in clerical or street duties is less justifiable than for fire fighters reason still exists under the circumstances herein to make such comparisons. For one thing, given a common public employer economic, political and administrative pressures are similar for all bargaining units. Further, the need for consistent and equitable treatment across all bargaining unit employees both shapes the Employer's policies and the workers' response. Thus, settlements occurring within one or more of the Employer's bargaining units have important implications for all the others. We can not, therefore, dismiss these other settlements as irrelevant to the matter at hand.

It should also be kept in mind that we are engaged here in attempting to fit together pieces of a puzzle from diverse and disparate bits of information and evidence. As such no single piece can reliably provide a complete picture or definitive answer. When taken together, however, the individual pieces suggest a pattern by which the other pieces can be fit and the puzzle ultimately resolved.

The patterns which emerge from the record of the instant case do not support the Association's position on wages. The wage increases achieved across the comparable bargaining units for the two years in question are all below that sought by the Union. While the differences are often not large they become significant in the face of concessions such as retroactivity, reduction in starting rates, right for the City to subcontract and so forth. As the City points out, the employees of these other bargaining units have bought the increases obtained with important work rule or other concessions. The Association, however, has chosen not to follow suite.

The Employer has not argued ability to pay and there is no dispute over this criterion. The Association, has, however, introduced the matter of the public interest. This has been raised by the argument that the selection of the Employer's offer will result in low police morale, turnover and similar adverse employee behavior. This may well be accurate, although as the City contends, the record is devoid of evidence to support such a conclusion. There is no doubt that the public interest is in deed served by efficient, productive and satisfied public employees in all job categories. Were the record on the matter of the public interest different this criterion rightfully would merit heavier weight.

Finally, the role of the cost of living as a factor in the outcome of this dispute was also argued by the Parties. In reviewing these arguments the Arbitrator concludes that they support the City's position. Arbitrators have for some time taken the position that the impact of inflation is reflected, and accounted for, through the voluntary settlements in comparable bargaining units. As a consequence, bargained wage changes may exceed or fall below the absolute changes measured through such cost of living standards as the Consumer Price Index. If that principle is applied to the instant dispute we find that it supports the City's wage offer. As we have seen above, the settlements across the comparables, while they are well above current price level changes, are less than that sought by the Association.

In summary, the Arbitrator finds the City's offer on wages to be preferable to that of the Association.

II. The Issue of Compensatory Time (Article 9(A)

Association's Position

The matter in dispute here is the City's attempt to add the following language to Article 9(A): "Compensatory time may be taken only upon the prior and mutual agreement of the employee and the Chief of Police." The Association's basic position on this issue is that the City carries the burden of proof in establishing (1) that a legitimate problem exists requiring contractual attention; and (2), whether the proposal under consideration is reasonably designed to effectively address the problem. According to the Association, these are arbitral standards that have been applied consistently in many awards. The City's demand to change the language governing compensatory time off, argues the Union, fails on both counts.

City's Position

The City argues first of all that its proposal on compensatory time "merely incorporates into the contract an understanding that has long governed compensatory time." That is, under current practice, police officers must obtain approval from the Chief before taking compensatory time. In the absence of the Chief, supervisory officers have the power to review requests for compensatory time.

Second, referring to its set of comparable law enforcement agencies for Northern Wisconsin, the City contends that the language on compensatory time it proposes is common in the law enforcement agency labor contracts of the area.

Third, the City takes issue with the Association's position that arbitrators are reluctant to change contract language once it has become the status quo. For arbitrators to do so, asserts the City is to require a higher burden of proof for language issues than for wage issues. No statutory basis exists for

(3), the presentation of evidence that its final offer is comparable to the contracts of other comparable bargaining units.

Discussion

As the Association argues, Arbitrators have traditionally been reluctant to impose major changes in the contractual status quo between parties to a labor agreement in the absence of good and sufficient cause. The undersigned subscribes to this rule and believes that it is applicable herein. Therefore, the Employer bears a burden of proof by which it must justify its efforts to add language to Article 9(A) requiring that compensatory time be taken "only upon the prior mutual agreement of the employee and the Chief of Police."

On the one hand, the parties are not in disagreement that the language sought by the City reflects the current practice in the Superior Police Department. The rule, eventhough not contractually stated, has apparently been understood for some time within the Department and acted upon accordingly. In this respect, then, the addition of the language would not deprive the members of the Association of a right or benefit they have previously enjoyed.

On the other hand, there is much to commend the codification contractually of prevailing practice. Without formal statement, such rights and obligations are at best ambiguous and a potential source of conflict over application and enforcement.

Finally, the City has provided evidence that among comparable law enforcement agencies the practice is widespread that such langauge be incorporated in labor agreements.

In view of the above the Arbitrator concludes that the City has successfully carried its burden on this issue and therefore on compensatory time the City's offer is to be preferred.

III. The Issue of Prevailing Rights (Article 25)

Association's Position

As it did in response to the City's effort to change the provision on compensatory time off the Association mounts a status quo attack on the Employer's attempt to delete Article 25. That is, the "prevailing rights" clause has remained essentially unchanged since 1976. Yet, the City, avers the Union, fails to establish a legitimate need to delete the clause. Quoting extensively from the awards of several arbitrators, the Association concludes that "In impasse proceedings, it is undeniable(sic) that arbitrators are unwilling to change working conditions thru a binding arbitration award in the absence of an affirmative demonstration of need by the moving party."

In its reply brief, the Union also maintained that if the comparison set of law enforcement agencies were narrowed to Douglas County Sheriff's Department examination of the agreement for that bargaining unit would reveal a prevailing rights clause similar to that which the City seeks to remove.

City' Position

The arguments of the City with regard to the so-called prevailing rights clause of Article 25 parallel quite closely those it offered to support its position on Article 9(A). Certain differences do exist, however, and it is therefore appropriate to take note of them here. First, the City contends that the Association has presented no evidence to support the continuation of Article 25. "[The Union's] sole argument has been that it does not agree to the removal of the article. Such

an argument, if accepted, would eliminate the need for arbitration."

Second, its exhibits, maintains the City, establish a legitimate problem. Citing a grievance involving one Floyd Peters whose settlement, according to the City, was made complicated by the question of "past practice" under Article 25, the City states:

> "Management must, under the language, look not only to the immediate problem and its solution, but must also anticipate any similar or comparable problem which might arise someday. Such a requirement creates conflict not resolves it. Rather than encouraging clear, complete labor contracts, the clause creates a maze of 'practices' which no one has defined and which can be classified(sic) only by litigation."

Finally, the City also holds that the use of custom for interpreting contract language remains even after Article 25 is removed. And in a similar manner, the duty to negotiate language changes also remains. As a consequence, concludes the City, Article 25 is a legitimate problem but its "removal is not as *significant as the Union presupposes.*"

Discussion

The disputed language of Article 25 - Prevailing Rights reads as follows:

> "All rights, privileges and working conditions which are manditory(sic) subjects of bargaining enjoyed by the employee at the present time, which have not been included in this agreement, shall remain in full force, unchanged and unaffected in any way during the term of this agreement unless they are changed by mutual consent. The City of Superior shall retain all rights given by the statutes of the State of Wisconsin.

As previously stated, the Arbitrator holds to the theory that the moving party must justify a significant change in the status quo. As the undersigned applies this principle, he finds the circumstances pertaining to this issue at odds with those for the compensatory time issue. Thus, here we find no mere matter of the contractual incorporation of prior understandings and existing practice. On the contrary, Article 25 is a clear and important statement of Association rights enjoyed for more than ten years. Moreover, these are rights which go beyond those minimally afforded under the duty to bargain provisions of the Municipal Employment Relations Law or by means of the availability of custom and practice doctrine under arbitration "law".

Second, consideration of comparable bargaining units indicates a mixed pattern in the handling of prevailing rights. Thus, for example, the Douglas County Sheriff's Department apparently contains a prevailing rights clause. In the case of the City's fire fighters' unit, in its most relevant part, the language is identical to that presently found in the police officers' agreement. Bayfield County and the City of Wisconsin Rapids as well contractually cover the issue. In a number of other instances, however, including the City's AFSCME units, the cities of Ashland, Wausau, Stevens Point and Marshfield agreements are silent on the issue. Given the emphasis placed by the City on the Douglas County Sheriff's Department along with the mixed picture we see from the other comparables one would have to conclude that, on this evidence, the City's position is *not supported.*

Finally, the City has argued that it has a legitimate and real problem which it is seeking to redress through the deletion of Article 25. Citing the Floyd Peters arbitration case the City contends:

> "While the City won the Peters' case by establishing a clear bargaining history and a clear record of Common Council Action, such evidence will usually be unavailable. The Union's argument places any generosity or flexibility on the part of management at risk. How can management deal with individuals or special circumstances with the threat of a binding unchangeable contractual obligation occurring at every turn."

The Arbitrator is unpersuaded by the City on this line of reasoning. Review of the evidence indicates, for example, that the City, in fact operated for nearly ten years under Article 25 with flexibility. The injuries to Officers LaTour and Dalbec were apparently treated in the Peter's case by Arbitrator Block as exceptions to the City's general rule on extended sick leave and not constituting binding past practice. Moreover, with regard to Article 25, Arbitrator Block commented, "the Union's claim that this 'past practice' (of granting extended full pay without reduction of sick leave) is guaranteed by Article 25, Prevailing Rights, must be denied as an inappropriate interpretation."

Thus, as the City argues, a problem may exist. If so, however, the evidence in the record does not support the conclusion that its magnitude or severity warrant the finding that the "prevailing practice' clause must be deleted. For this, and the reasons stated above, the Arbitrator prefers the Union position on Article 25.

Summary

On balance, the Arbitrator has found for the City on the wage and compensatory time issues and for the Association on the prevailing rights issue. The law does not permit the award to be made on an item by item basis but rather the entire package must be awarded. The Arbitrator acknowledges that the third issue is important and should be weighted heavily in any determination of the final outcome. The Arbitrator, however, does not believe that the disposition of the instant dispute should turn on this single issue. The matter of the bargaining unit's wages for 1986 and 1987 is also significant and that fact when taken together with the Arbitrator's preference for issue two outweighs the finding on issue three. In its entirety, therefore, the Arbitrator is constrained to select the City's final offer.

AWARD

In light of the above discussion and after careful consideration of the statutory criteria enumerated in Section 111.77 Wis. Stat. the final offer of the City of Superior together with all prior agreements and stipulations shall be incorporated into the Collective Bargaining Agreement for the period beginning January 1, 1986 and extending through December 31, 1987.

Dated at Madison, Wisconsin this 7th day of April, 1987.

Richard Ulric Miller, Arbitrator