

FEB 09 1989

EDWARD B. KRINSKY, ARBITRATOR

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
THE LABOR ASSOCIATION OF	:	Case 86
WISCONSIN, INC.	:	No. 39148
	:	MIA-1241
and	:	Decision No. 25635-A
	:	
ST. CROIX COUNTY	:	
(SHERIFF'S DEPARTMENT)	:	
	:	

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Stephen L. Weld, for the County.

Mr. Patrick J. Coraggio, Labor Consultant, for the Association.

On September 9, 1988, the Wisconsin Employment Relations Commission appointed the undersigned as arbitrator "to issue a final and binding award in the matter pursuant to Sec. 111.77(4)(b) of the Municipal Employment Relations Act." A hearing was held at Hudson, Wisconsin, on November 10, 1988. Prior to the start of the hearing the parties tried unsuccessfully to resolve the issues in dispute. At the hearing both parties had the opportunity to present evidence, testimony and arguments. No transcript of the proceedings was made. Both parties filed briefs. The record was completed on January 30, 1989, with the receipt by the arbitrator of the County's post-hearing reply brief and notification by the Association that it would not file a reply brief.

The issues in dispute involve shifts and payment for same for the 1987-88 Agreement. Under the most recent Agreement, (1986) the deputies work rotating shifts and get shift premiums. The 1986 Agreement specifies the same terms for jailers. In fact, however, the jailers select fixed shifts by seniority and get no shift premium, an arrangement that was made in 1984 by a side letter between the jailers and the County. For the 1987-88 Agreement, in dispute in this case, the parties have agreed to modify the terms for jailers to provide fixed shifts selected by seniority. They disagree with respect to shift premium. The County proposes no shift premium, while the Association's final offer includes shift premium. In its final offer the County proposes to continue the existing conditions for deputies; that is, rotating shifts and payment of shift premium. In its final offer the Association proposes to give deputies fixed shifts by seniority with payment of shift premiums.

The statute enumerates factors which the arbitrator must weigh in making his decision. There is no dispute with respect to most of these factors and, because of the nature of the dispute, the parties did not present data with regard to most of them. The factors which are relevant to the case are: that portion of (c) dealing with "the interests and welfare of the public"; (d) comparisons of wages, hours and conditions of employment . . . with other employes performing similar services and with other employes generally . . . in public employment in comparable communities." and (h) "such other factors . . . which are normally or traditionally taken into consideration in . . . arbitration . . ."

Since comparability is one of the relevant factors, the initial question which must be addressed is the issue of which jurisdictions should be considered as comparable. The parties disagree about that. The Association urges the use of six comparable counties. Four are contiguous to St. Croix County (Polk, Pierce, Dunn and Barron) and two are contiguous to those counties (Eau Claire and Chippewa). The County, while not objecting to those comparables, argues that the remaining counties of the "second concentric circle" should also be considered (Pepin, Rusk, Sawyer, Washburn and Burnett). In addition, the County argues that the following counties should be considered comparable because they were used by Arbitrator Yaffe in the only interest arbitration award in which St. Croix County has been involved. These, it argues, "must stand as precedent." (Calumet, Columbia, Dodge, Door, Fond du Lac, Green Lake, Jefferson, La Crosse, Manitowoc, Marathon). 1/

The arbitrator does not agree with the County that the comparables used by Yaffe must be used in this case. Yaffe approved the use of the contiguous counties. The parties in this case and the arbitrator do not disagree with that aspect of the decision. Yaffe selected the list of comparables which were being used by the County in his case. In so deciding, Yaffe stated that he was dealing with insufficient data for the issues in dispute. He favored the County's comparables, in part, because "sufficient data has been provided with respect to the salaries paid to social service employees in said counties and the promotion plans affecting said employees . . ."

In the present case there are adequate data available for comparable counties close to St. Croix, and there is no necessity to use the geographically diverse counties which Yaffe felt it necessary to use. Moreover, Yaffe stated, "although alternative

1/ St. Croix County Department of Social Services, Dec. No. 18491-A, MED/ARB-1019, 1981.

comparables clearly might be appropriately used by the parties, absent evidence which would allow for the formulation of an alternative set of comparable counties more geographically homogeneous, the County's proposed set of comparable counties will be utilized herein." In the present case it is the opinion of the arbitrator that there are adequate data which allow use of a more geographically homogeneous group of comparables.

The parties have presented County population figures for their proposed comparables. St. Croix (47,911) is somewhat larger than the contiguous counties which both parties find appropriate as comparables. Their populations range from 33,040 to 40,700. It is also comparable in size to Chippewa County (54,150). The arbitrator would view the contiguous counties plus Chippewa (Polk, Pierce, Dunn, Barron and Chippewa) as the primary comparability group. The Union urges the addition of Eau Claire County (83,448). Eau Claire is considerably larger than St. Croix. If Eau Claire is used, there is just as much reason to use the other "second concentric comparables" which, though much smaller than St. Croix, bear the same relationship to St. Croix's population size as does Eau Claire (that is, within a range of about 40,000 population difference from St. Croix). The populations of this group range from 7,309 to 15,566. The arbitrator would use as secondary comparables: Eau Claire, Pepin, Rusk, Sawyer, Washburn and Burnett. 2/

The primary issue in this case is whether or not there should be rotating shifts or fixed shifts for the deputies. Viewing the primary comparability group, Polk and Barron counties have rotating shifts by contract; Dunn County has rotating shifts by practice, although there is no mention of shift schedules in the contract; Pierce County's contract leaves scheduling to the discretion of the Sheriff. The shifts worked are rotating shifts. Chippewa County does not have rotating shifts.

In the secondary comparability group, Eau Claire does not have rotating shifts. There is not data presented for the other counties with respect to whether their shifts rotate.

The County argues that in addition to the question of rotation of shifts, there is a question of how shifts are selected. The Association's proposed language would have shifts selected by seniority.

2/ The Association also presented data about square miles covered and numbers of employees in each department. These data are not presented by the County for its comparables. The arbitrator has considered the Association's data, but they do not affect his conclusions about which counties to utilize as comparable.

Of the primary comparability group, Chippewa is the only one with contract language providing for shift selection by seniority. There is shift selection by seniority allowed in Dunn and Pierce counties, although not specified by contract. Polk and Barron Counties do not have shift selection by seniority.

In the secondary comparability group, only Rusk and Eau Claire have shift selection by seniority. The others do not.

In summary, using the primary comparable group, if contract language is used, two of five counties specify rotating shifts and one of five has shift selection by seniority. 3/ Using the secondary comparable group, if contract language is used, there is incomplete data with respect to rotating shifts, and two of six have shift selection by seniority.

Based on comparisons of contract language, there is no compelling basis for supporting the Association's final offer to change the existing system of a rotating shift schedule to one of fixed shifts selected by seniority.

The other issue for which comparables are relevant is payment of shift premium. It appears to be the case that for deputies, three of the primary comparables pay shift premiums, and two do not. For jailers, four do, and one does not. Among the secondary comparables, the data show that two pay shift premiums and four do not.

In addition to comparisons between this bargaining unit and other similar units in comparable counties, it is appropriate under the statute to consider comparisons with other public employees generally. One such group of employees is the remainder of the County's work force.

The Association notes that the County has three other groups of employees which, like this bargaining unit, work in positions that function round the clock, every day. These three groups are (1) employees of the County's nursing home; (2) dispatchers in the Sheriff's Department represented by the Courthouse union; and

3/ If practice is used, four of five have rotating shifts and three of five have shift selection by seniority. It is the arbitrator's opinion, however, that for purposes of comparisons in arbitration, contract language should be used, not practices. It is difficult, generally, for parties to get accurate, undisputed information about practices, and practices are subject to change under a variety of circumstances. It should be noted that the arbitrator's conclusions about this case would not be different if practices were used for comparisons.

(3) jailers in the Sheriff's Department represented by the Association. For each of these groups, the Association argues, the County has agreed to fixed shifts by seniority. The County does not dispute these facts. The County does not present arguments to differentiate the bargaining unit employees from the dispatchers and the employees of the nursing home with respect to shifts and premiums. With respect to differentiation from the jailers, the County cites "legitimate business-related reasons" (see below) which, it argues, apply to deputies but not jailers. The absence of any testimony from department management concerning these reasons makes these arguments less persuasive than they might otherwise be, in the arbitrator's opinion.

Another group of employees legitimately considered under the statute is municipal police departments. The parties agreed at the arbitration hearing that of three organized municipal police departments in the area, two have shift selection by seniority and one does not.

It is the arbitrator's conclusion that the comparability factor favors the Association when internal comparables are considered. The external comparability picture is a mixed one which does not strongly favor either party's final offer.

The arbitrator must also consider "the interests and welfare of the public" factor. The County lists a variety of "legitimate business-related reasons" for its view that the present system is better for the efficiency of the department, and thus is better for the public. These reasons include: (1) assurance that "rookies" will work with "veterans" and thus "gain valuable experience;" the least experienced employees will continue to work with and have the experience of more experienced colleagues, especially when they work "the often-times difficult second and third shifts." (2) rotation allows all employees to have "exposure to the various departmental supervisors, most of whom are required to work days;" (3) rotation gives employees "a variety of work experiences they would not otherwise have;" (4) with rotation, court appearances and meetings with District Attorney's staff can be scheduled during working time; (5) facilities like crime lab and library can be used during working time; (6) "a rotating schedule allows the Sheriff to schedule training sessions during regular work time and gives employees an opportunity to attend seminars put on by others - almost always held during the day;" (7) "it also allows the employee to schedule meetings/investigatory interviews with witnesses at the witnesses' convenience at any time during the day and still be within the officer's regular hours;" (8) the Sheriff believes that rotation provides better law enforcement "because the police do not get into a pattern or rut . . ."

In rebuttal to the County's arguments the Association presented testimony by its President Schrank that during his twenty-three years with the department there has been no

formalized training within the department and only on one occasion did he recall that the District Attorney met with the department in any type of formalized training. Schrank testified also that during his work on day shift over the years he has had no experience with, or knowledge of, one-on-one counseling of employees by supervisors, except perhaps when he first joined the department.

Deputy Hake testified that in Fall 1986, the County expressed concern that a change to fixed shifts would result in all senior employees choosing to work day shifts. The bargaining unit then took a straw poll which showed that employees' preferences would be divided between shifts, partly because of shift premiums.

It is the arbitrator's opinion that the arguments raised by the County, while perhaps meritorious, have not been presented in persuasive fashion in this case. They were made as argument at the hearing and in post-hearing briefs, but there was no presentation of direct evidence to support these assertions. For reasons not specified at the hearing, no one from the management of the Sheriff's Department appeared or was present at the arbitration hearing. Given these facts, the arbitrator is not persuaded that there is reason to favor the County's position because of the "interests and welfare of the public."

The Association argues that the public is best served by having a work force with high morale, and the morale of the deputies would be greatly improved if they were permitted to work fixed shifts of their choice. Deputy Hake testified that in his opinion, and that of other unit members, fixed shifts would have a big impact on health and productivity. There would be a better understanding by employees of what regularly happens during those hours on a fixed shift, and there would be a lot less stress. He testified that he is now an Investigator, and he changed from rotating shifts to a fixed shift. He cited the following improvements: (1) his wife found him easier to live with; (2) he had better biological rhythm; (3) he had better feelings about himself; (4) he could enjoy certain activities on a regular schedule (he cited use of a health club as an example); (5) his family life improved. Hake also testified that two articles, put into evidence by the Association, argue in favor of fixed shifts. Both appeared in "Law and Order" magazine. One was entitled "Surviving Shift Work" (May 1987) and the other was "Steady Duty Tours Get Enthusiastic Response" (February 1988).

In rebuttal the County argues that one of the above-quoted articles concludes that fixed shifts are not necessarily better than rotating shifts in reducing stress. The County argues, too, that given the hours that health clubs are open, it would be possible for employees to use them on rotating shifts as well as fixed shifts.

Hake testified that he has brought the problems caused by rotation to the Sheriff's attention. Except for providing a brochure about marriage and job problems and available counseling, the Sheriff has not provided in-service training or advice about on-the-job stress, according to Hake.

The arbitrator is willing to accept the argument that the employees in this unit have a preference for fixed shifts, and that as a consequence their morale might improve. Whether this would result in better efficiency or productivity, or would be better for the administration of the department, is not clear based on the evidence presented.

Hake testified concerning his opinion about the adverse effects of rotating shifts; however, there was no data presented by the Association which documents problems in the department with such things as rates of sickness or accidents, or problems of inefficiency or employee health which problems would be remedied by a move to fixed shifts. These are some of the measures discussed in the articles introduced by the Association. There was also no data presented about any problems the department is having with retention of employees. One of the Association's arguments is that a move to fixed shifts would enhance retention.

In conclusion, the arbitrator does not have any sound basis for determining that the interests and welfare of the public would be better served by one of the party's final offer than the other.

Next the arbitrator will consider factor (h), "other factors . . . which are normally or traditionally taken into consideration in . . . arbitration."

The Association's final offer is a change in the existing shift arrangements. The County argues that the Association has not presented adequate basis for compelling a change in the status quo through arbitration.

One factor to consider is bargaining history. In 1984, the jailers, then represented by another union, agreed with the County to a change whereby the jailers would work fixed shifts by seniority and would give up their shift premium. The side letter by which this arrangement was made is not signed by a union representative. However, given the very small size of the bargaining unit, it is the arbitrator's opinion that there could not have been any lack of mutual awareness by all concerned that jailers were now working fixed shifts, selected by seniority, without shift premium. That practice continued in effect thereafter, but the Agreement was not changed to reflect the practice. The 1986 Agreement continues to provide rotating shifts for jailers, with shift premium. The parties' stipulations for a 1987-88 Agreement provide for fixed shifts for jailers with shift selection by seniority.

The County regards the demand by the Association that jailers receive shift premiums as reneging by the Association on an agreement to give up shift premiums. The arbitrator does not give weight to that argument by the County, since the side agreement was not made by the Association and was not even made during the collective bargaining process by the predecessor union.

Another element of bargaining history to be considered is that until approximately five years ago there were separate County Traffic and Sheriff's Departments. At that time there were rotating shifts in the Traffic Department and straight shifts selected by seniority in the Sheriff's Department. The two departments were merged and thereafter all employees rotated. Hake testified that he has no recollection that these changes were negotiated.

At the time the employees were represented by a different union. There is no evidence in the record to indicate what bargaining took place or that there were any grievances, arbitrations, or other challenges to the changes. Although the Association was not involved, it would appear that there was voluntary agreement between the County and the then-existing bargaining agent that there be rotating shifts, since the 1986 Agreement reflects such an arrangement.

The County argues also that the Association "has shown no reason, much less a compelling reason, for a change in the practice of assigning shifts," and argues that the Association "has offered nothing in exchange for the proposed change in the status quo." The County notes that the Association has accepted the same wage increases as those given to the County's other bargaining units in 1987 and 1988. It states:

(The Association) wants the wage settlement pattern, it wants a shift premium even when not rotating, and it wants to select shifts on the basis of seniority. There is no quid pro quo in terms of a reduced wage settlement or a trade similar to that made by the Jailers (seniority shift selection in exchange for no shift premium).

With respect to its proposal that jailers should now receive shift premium under its final offer, the Association states:

Currently the seven jailers who work a fixed shift do not enjoy shift premium. This is a benefit that they did enjoy prior to their side agreement with the County to work fixed shifts. The Association believes that shift premium is a benefit that should be paid to all members of the Association and not be discriminatory in its application.

In its brief, the County cites a statement by this arbitrator in a 1984 decision involving Stevens Point Schools, (Dec. No. 20952-A):

Absent a compelling reason for changing basic contract language, and no such reason has been demonstrated here, the arbitrator believes that language changes should be reached through voluntary collective bargaining and not by an arbitrator's decision.

The arbitrator notes that a majority of comparison districts have similar language, but this does not alter his conclusion that such changes ought to be made voluntarily in bargaining.

The arbitrator has stated similar views both prior to and since the quoted decision. As stated above the internal comparables favor the Association. However, the arbitrator is of the opinion that more weight should be given to what other Sheriffs' departments do on this issue because of the nature of police work. The external comparable present a mixed picture, not a compelling one. Moreover, the Association has not offered a quid pro quo to the County for implementing its proposed changes. Also, there is no evidence that the bargaining unit has been trying unsuccessfully over the years to bring about these changes in shift scheduling and/or that the County has acted arbitrarily. The County's willingness to bargain on the shift issue is evidenced in part by its agreement to contractualize the fixed shift arrangements for jailers in the present round of bargaining.

Based upon the "other factors" criterion, the arbitrator favors the County's final offer.

Summary

The arbitrator does not favor either final offer based on the interests and welfare of the public factor. Based upon external comparability of contract language the County's final offer is favored since a majority of the primary comparables do not have rotating shifts, shift selection by seniority and shift premium, and the same holds true when the secondary comparables are considered. Based upon internal comparability, the Association's position is favored. Based upon the "other factors" taken into account by arbitrators in considering changes in the status quo, the County's final offer is preferred.


By statute the arbitrator is required to select one final offer or the other in its entirety. On balance, it is the arbitrator's opinion that the County's final offer is preferred.

Based upon the above facts and discussion, the arbitrator hereby makes the following

AWARD

The County's final offer is selected.

Dated at Madison, Wisconsin, this 7th day of February, 1989.



Edward B. Krinsky
Arbitrator