STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of PIERCE COUNTY (SHERIFF'S DEPARTMENT) For Final and Binding Arbitration Involving Law Enforcement Personnel in the Employ of GENERAL TEAMSTERS UNION LOCAL #662	Case 70 No. 41573 MIA-1380 Decision No. 26029-A

Appearances:

Mulcahy & Wherry, S. C., Attorneys at Law, by Mr. Richard J. Ricci, appearing on behalf of the Employer.

Ms. Christel Jorgensen, Business Agent, Teamsters Local 662, appearing on behalf of the Union.

ARBITRATION AWARD:

On June 12, 1989, the Wisconsin Employment Relations Commission appointed the undersigned Arbitrator, pursuant to Section 111.77 (4) (b) of the Municipal Employment Relations Act, to issue a final and binding Award to resolve an impasse arising in collective bargaining between Pierce County (Sheriff's Department), referred to herein as the Employer, and General Teamsters Union Local #662, referred to herein as the Union, with respect to issues as specified below. The proceedings were conducted pursuant to the provisions of Wis. Stats. 111.77 (4) (b), which limits the authority of the Arbitrator to the selection of the final offer of one party without modification. The proceedings were conducted at Ellsworth, Wisconsin, at which time the parties were present and given full opportunity to present oral and written evidence and to make relevant argument. The proceedings were not transcribed, however, briefs and reply briefs were filed in the matter. Final briefs were exchanged by the undersigned on October 3, 1989.

THE ISSUE:

The sole issue remaining in dispute as reflected in the final offers of the parties involves a proposed change in the hours of work and overtime provisions of the Collective Bargaining Agreement which was proposed by the Union. The final offers of the parties with respect to the dispute are:

EMPLOYER OFFER:

The Employer proposes maintaining the provisions of the predecessor Collective Bargaining Agreement which reads as follows:

ARTICLE 15 - HOURS OF WORK AND OVERTIME

The work period for patrol officers and jailer/dispatchers (if allowed under the Fair Labor Standards Act) shall be based on twenty-eight (28) days and worked in accordance with the work schedule prepared by the Sheriff. Overtime shall be paid at the rate of time and one-half the employee's rate of pay for all qualifying hours worked in excess of 171 hours per work period.

For the purpose of determining whether overtime applies above, paid leave of any nature shall be subtracted from the total hours.

All overtime shall be paid in monies at the rate of time and one-half unless mutually agreed between Employer and employee to be paid in compensatory time at time and one-half.

All hours worked as the Recreational Patrol Officer shall be paid at straight time pay, except for emergencies approved by the Sheriff in excess of eight (8) hours per day, in which case he shall be paid at the rate of time and one-half.

During those times of the year when this officer is working as a Deputy Sheriff, he shall work under the same hourly schedule and overtime compensation as other Deputy Sheriffs.

UNION OFFER:

The Union offer proposed to revise the terms of the predecessor Agreement is as follows:

ARTICLE 15, HOURS OF WORK AND OVERTIME

The work period for Patrol Officers and Jailer/Dispatchers shall be based on a six/three (6/3) schedule, eight and one-half (8½) hours per day or an equivalent hour schedule. Time and one-half (1½) shall be paid for all hours in excess of regular scheduled hours. All time paid shall be considered time worked.

All hours worked as the Recreational Patrol Officer shall be paid at straight time pay, except for emergencies approved by the Sheriff in excess of eight (8) hours per day, in which case he shall be paid at the rate of time and one-half (1½).

During those times of the year when this officer is working as a Deputy Sheriff, he shall work under the same hourly schedule and overtime compensation as other Deputy Sheriffs.

BACKGROUND FACTS:

Article 15 (Hours of Work and Overtime) of the Collective Bargaining Agreement which became effective January 1, 1987, and remained in full force and effect by its terms through December 31, 1988, contained new language which appeared for the first time in that Agreement. The Employer and the Union had impassed in their

efforts to reach an agreement for the Collective Bargaining Agreement which became effective January 1, 1987, and as a result of that impasse submitted last best offers for selection by an Arbitrator. The items over which the parties impassed were Wages, Hours of Work and Overtime, and Sick Leave. In the Agreement which was in force prior to the Agreement which became effective January 1, 1987, Article 15 provided that overtime was to be paid in excess of forty hours per week, calculated on a monthly basis of 173.3 hours. In its final offer to modify Article 15, the Union proposed that if a shift was extended beyond one hour, all hours worked from the beginning of the extension should be at overtime rates of time and one-half. The Union further proposed to include the work schedule in the Agreement fixed at six consecutive days on duty followed by three consecutive days off duty. The Union also proposed that the work day for officers on the 6/3 work schedule would be an 8½ hour day, and that the 8½ hour day schedule be extended to Jailers/Dispatchers, which heretofore had worked an 8 hour day. Juvenile officers, Investigators, Day Sergeants and Secretaries were proposed to continue working a Monday through Friday schedule, 8 hours per day. The Employer proposed the language now found in Article 15 of the Collective Bargaining Agreement which became effective January 1, 1987. The Arbitrator adopted the Employer final offer, and in so doing, found that the hours of work and overtime issue was the primary issue, and that wages was secondary, and sick leave was a tertiary issue. The Employer's offer was preferred with respect to the hours of work and overtime issue. In arriving at that conclusion, the Arbitrator determined that the statutory criteria of lawful authority of the Employer, stipulations of the parties, and interest and welfare of the public did not serve to distinguish between the final offer of the Union and the Employer on the overtime issue. The Arbitrator further determined that the comparability data was too sparse in the record to conclude that either offer was supported by how comparable counties identify the threshold for the payment of overtime. The Arbitrator also determined that in considering the overall compensation criteria, there was no data available in the record so as to show that the $42 proposed by the Employer as a quid pro quo for the overtime change was inadequate or an adequate sum. The Arbitrator drew no conclusions when considering the changes in circumstances during the pendency of the dispute. The Arbitrator relied primarily on the criteria of such other factors normally considered in bargaining in determining that the Employer offer was preferred with respect to the modifications proposed by the parties to Article 15, Hours of Work and Overtime. In so doing, the Arbitrator rejected the Union proposal, pointing to the fact that the Union proposal limited the authority of the Sheriff to change the work schedule, despite the fact that the 6/3 schedule was arrived at through the cooperative efforts of the Sheriff and the Officers of the Department, and on the fact that the Union attempted to have the Arbitrator alter the level of service provided in Pierce County by including in its proposal that the work day for Jailer/Dispatcher be increased from 8 to 8½ hours per day to provide for an overlap of shifts. In analyzing the Employer's proposed language which is now embodied in the predecessor Agreement, the Arbitrator noted that the language contained ambiguities which ought to have been avoided, if possible. The Arbitrator selected the final offer of the Employer, however, based on his judgment that the bargaining history and assurances provided by the Employer as to the meaning of the language was part and parcel of the Employer proposal.

The Employer, in the instant dispute, seeks to retain the language which the Arbitrator awarded in the predecessor Collective Bargaining Agreement. The Union argues that its present proposal removes the defects found by the Arbitrator in the arbitration for the predecessor Collective Bargaining Agreement, and that it has provided the evidence which the Arbitrator noted was missing from the record in the arbitration for the predecessor Contract, which related to how overtime is paid among comparable communities.

DISCUSSION:

Wis. Stats. 111.77 (6) set forth the factors to which the Arbitrator shall give weight in determining which party's final offer should be adopted. The factors are:

(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.

The Arbitrator, therefore, will consider the record evidence and the parties' arguments in light of the statutory criteria found at 111.77 (6), a through h.

The present language of Article 15 as it relates to the payment of overtime is based on the 7K exemption for law enforcement personnel from the Fair Labor Standards Act. For law enforcement personnel, the exemption provides that employees involved in law enforcement activities that are on a 28 day work period must be paid one and one-half times their regular rate for any hours worked over 171 hours. The Union proposal would require overtime to be paid outside the regular schedule, and proposes a 6/3 work schedule or its equivalent. Over a period of 28 days the 6/3 work schedule provides for 161.5 hours of work. Consequently, the Union proposal could generate 8½ hours of overtime more than would be generated under the overtime provisions presently in effect in the predecessor Agreement in each 28 day period.

In the opinion of the undersigned, it is criteria d and criteria h which are to be accorded the most weight in determining the selection of the final offer of either the Union or the Employer. Criteria d provides that the Arbitrator consider a comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

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

Criteria h provides that the Arbitrator give consideration to "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."

CRITERIA D

There is no evidence in the record with respect to the overtime provision for employees in private employment in comparable communities. Consequently, the Arbitrator cannot rely on that portion of criteria d in making a determination as to which final offer should be adopted.

There is, however, record evidence with respect to overtime provisions for other employees performing similar services, both in the same community of Pierce County and for "comparable communities". We will look first to the evidence as it relates to employees within the employ of Pierce County. Union Exhibit No. 7 reveals that other employees in the employ of the Sheriff's Department receive time and one-half payment after 40 hours. Those employees are investigators and secretaries. Outside of the Sheriff's Department, employees in the employ of Pierce County also receive time and one-half after 40 hours. Those employees are professionals and nonprofessionals in the Human Services Department; employees in the Courthouse; and employees in the Community Health Department. Employees of the Highway Department receive time and one-half for all hours worked outside of the standard work day and/or standard work week, and also receive time and one-half for all time worked on Saturday, Sunday and holidays. From Union Exhibit No. 7 it is clear that it is only Patrol Officers and Jailer/Dispatchers who the Employer proposes work more than the equivalent of a 40 hour work week before overtime is triggered. It is clear from the foregoing that the internal comparables support the proposal of the Union.

The Employer has argued that the distinction to trigger overtime pay for Patrol Officers and Jailer/Dispatchers is warranted by reason of the 7K exemptions to the Fair Labor Standards Act, which are applicable to that group, and not to other employees of the Employer. That argument is unpersuasive to the undersigned. While it is true that the Fair Labor Standards Act provides an exemption to the number of hours worked before overtime is triggered as it relates to law enforcement personnel, that fact becomes less compelling when one considers the overtime provisions for the Highway Department. The Fair Labor Standards Act requires that overtime be paid after 40 hours in a work week for Highway Department employees. The Employer, however, has negotiated overtime provisions that are more restrictive than the requirements of the Act for Highway Department employees when those employees, pursuant to their Collective Bargaining Agreement, are paid time and one-

half for all hours worked outside of the standard work day and for Saturday, Sunday and holidays as such. The Fair Labor Standards Act has no requirement that hours worked outside of the standard work day be compensated at time and one-half, nor that Saturday, Sunday or holidays be paid for at premium rates. Because the Employer has negotiated more stringent overtime provisions for Highway Department employees, the Employer's reliance on the exemptions to the Fair Labor Standards Act to support its continuation of the overtime provisions in the Agreement is not persuasive, because it was willing to negotiate terms requiring payment of overtime to Highway Department employees in excess of the requirements by law. As a result, the reliance the Employer places on the Act in support of its position that the Patrol Officers and Jailer/Dispatchers should be paid overtime only as required by the Act pales. It follows from all of the foregoing, that the internal comparables support the Union final offer.

We look now to the practice of overtime payments for Sheriff Department employees in other counties. Union Exhibit No. 8 is a 7 page document which sets forth the work schedule, the work day/work week and time and one-half provisions of the 72 Wisconsin counties. A review of Union Exhibit No. 8 establishes that Pierce County is the only county with an overtime provision that pays overtime in excess of 171 hours in a 28 day cycle. Thus, the state-wide overtime provision supports the Union offer as well.

It could be argued that state-wide comparisons are too broad, and that only the comparable communities should be used for the purpose of making these comparisons. If we were to rely only on the Employer proposed comparables, we would look to the following counties: Barron, Burnett, Chippewa, Dunn, Polk, Rusk, St. Croix and Washburn. From Union Exhibit No. 8 we find the following data with respect to time and one-half provisions in the County proposed comparables:

1. Barron County - Time and one-half in excess of regular schedule.
2. Burnett County - Time and one-half outside of the normal work schedule.
3. Chippewa County - Time and one-half after 8 hours a day or 40 hours per week.
4. Dunn County - Time and one-half outside of standard work schedule.
5. Polk County - Time and one-half after regular schedule.
6. Rusk County - Time and one-half outside of normal schedule.
7. St. Croix County - No overtime provisions listed in Union Exhibit No. 8.
8. Washburn County - Time and one-half outside of the normal schedule.

Thus, it is clear that even if we were to rely solely on the Employer proposed comparables, the Union proposal for the change of the status quo is supported by those comparables.

CRITERIA H

We turn now to a consideration of criteria h, other factors which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment. The Employer argues that its final offer should be adopted, because it is proposing to continue the status quo language found in Article 15 of the predecessor Agreement; and because the Union proposes no quid pro quo for its proposed modifications of Article 15. In support of its position, the Employer relies on School District of LaCrosse, Dec. No. 19714-A (1/1983); Webster School District, Dec. No. 23333-A (11/1986); City of Greenwood-Clerical, Dec. No.

22413 (8/1985); D. C. Everest School District, Dec. No. 24678-A (2/15/88); Waukesha County (Sheriff's Department), Dec. No. 24603-A (5/1988). In School District of LaCrosse (supra), Arbitrator Yaffe held that: "because the Association is proposing a major change in the agreement, it has the burden of demonstrating not only that a legitimate problem exists which requires contractual attention . . . but that its proposal is reasonably designed to effectively address that problem." In Webster School District (supra), Arbitrator Kessler stated that: "Benefits which change the economic relationship between the employer and the employees should be the subject of bargaining and not imposed by an arbitrator", opining that:

> The preferable final offer regarding insurance is the District offer. It preserves the status quo. The inclusion of the provision in the Union's proposal would make a major structural change in the economic relationship between the employer and the employees. Only with a great deal of caution should a change of that value be imposed by arbitration.

In City of Greenwood (supra) Arbitrator Grenig held: "Interest arbitration should not be used to expand the rights of either party beyond what they might be absent compulsory arbitration."

The undersigned has considered the teachings of City of Greenwood, School District of LaCrosse and Webster School District relied on by the Employer, and finds them to be unpersuasive under the facts existing in the instant dispute. In the opinion of this Arbitrator, the Employer's reliance on the status quo is misplaced. While it is true that the Employer proposes to continue the language of the predecessor Agreement, that language was placed in the Agreement in the last round of bargaining by an Arbitrator, and not by the mutual agreement of the parties. Significantly, the language imposed on the parties by the Arbitrator in the prior round of bargaining at Article 15 was awarded with significant reservations on the part of the Arbitrator. In Decision No. 25009-A, issued on May 9, 1988, by Arbitrator Malamud, the Arbitrator found at pages 14 and 15 that the Union had mounted a legitimate challenge to the Employer offer on overtime, which the Arbitrator found to be ambiguous. Furthermore, the Arbitrator explained his rejection of the Union proposal on overtime, which he concluded was the primary issue in dispute in that arbitration, because in its proposal the Union proposed to limit the authority of the Sheriff to change the work schedule when it fixed the work schedule as a 6/3 schedule, and in addition, because the Union attempted to have the Arbitrator alter the level of service provided in Pierce County by including in its proposal that the work day for Jailer/Dispatcher be increased from 8 to 8½ hours per day to provide for an overlap of shifts.

The Union correctly argues that it has remedied the flaws which Arbitrator Malamud perceived in its final offer for the preceding Collective Bargaining Agreement, which caused Malamud to reject the Union proposal then. The undersigned has reviewed the distinctions present in the present Union offer as opposed to the circumstances which existed at the time of the Malamud arbitration. First of all, there no longer exists a Union attempt to change the level of service by reason of the Jailer/Dispatcher hours which the Union proposes at 8½ hours. The record establishes that subsequent to the Malamud arbitration, the Employer converted Jailer/Dispatcher to an 8½ hour day, which they are presently working. Consequently, that flaw, which was pointed out by Malamud in the prior arbitration, no longer exists.

The Union also argues that the flaw which Arbitrator Malamud found in its

prior final offer in the preceding arbitration has been removed by reason of inclusion of "or an equivalent hour schedule" in its proposed Article 15. The undersigned agrees with the Union that the Employer is no longer strapped with only a 6/3 work schedule under the language which the Union now proposes, because the Sheriff is free to change from a 6/3 work schedule to an equivalent hour schedule under the terms proposed by the Union.

Because the status quo language of the predecessor Agreement continues to perpetuate the ambiguities which Arbitrator Malamud found to exist in what is now Article 15 of the predecessor Agreement; and because the Union's proposed modifications to Article 15 no longer contain the flaws which Arbitrator Malamud found to exist in the arbitration for the predecessor Agreement which caused him to reject the Union offer; the undersigned concludes that the Union offer is preferred for those reasons.

The undersigned has also considered the holdings of Arbitrator Malamud in D. C. Everest (supra), and Arbitrator Gunderman in Waukesha County (supra) dealing with the requirement that a quid pro quo be offered in return for a proposed change in the Collective Bargaining Agreement. The Employer argues that since the Union has not proposed a quid pro quo for its modification to Article 15, the Union's offer should be rejected. The Employer is correct that the Union has not proposed a quid pro quo in return for the language it now proposes. The undersigned, however, finds that is not a fatal flaw to the Union's proposal for several reasons. While there existed a proposed quid pro quo on the Employer's part when its offer of Article 15 was adopted by Arbitrator Malamud by reason of a $42 per month salary adjustment, it is clear that Arbitrator Malamud did not consider that quid pro quo to be a controlling factor in arriving at his decision. At page 15 of his Award, the Arbitrator states:

> But for the tentative agreement and understanding reached by the parties as to the meaning and intent of the Employer's proposal, this Arbitrator would have selected the final offer of the Union with its proposal on wages and sick leave had the Union proposed the retention of the status quo and made no modifications to Article 15 of the expired Agreement.

Thus, the Arbitrator determined that the Union's proposal on wages was an acceptable one in the predecessor arbitration. While it is true that the Union did not propose a $42 increase on all rates, which the Employer proposed as a quid pro quo for its overtime language, that fact was unpersuasive, however, because, the Union, in the arbitration for the predecessor Agreement had proposed a 3.5% increase in the first year and a 4% increase in the second year, compared to a 2.5% increase in the first year and a 3% increase in the second year which the Employer offered. As a result, the Union offer approximated the same wage increase over the two years of the Agreement which the $42 flat increase in the first year of the Agreement, plus the percentage increases, generated in the Employer offer. Therefore, because the Arbitrator found the Union's proposal on salary to be acceptable in the predecessor Agreement which approximated the increases generated by the Employer offer including the $42. bump, the quid pro quo argument advanced by the Employer is unpersuasive.

Furthermore, the evidence with respect to wage rates found in Union Exhibit No. 5 satisfies the undersigned that the wage rates in Pierce County for 1989, which includes what the Employer describes as the $42 quid pro quo, are not excessive compared to what the Union comparables reveal. The Union relies on comparisons with

Chippewa County, Dunn County, St. Croix County and Barron County. Union Exhibit No. 5 reveals that the 1988 wage rates for Deputy/Patrolman range from $8.96 to $11.33 after five years. The record establishes that the parties are in agreement that there is a 3% increase to be placed on wage rates for Sheriff's Department employees of Pierce County for 1989. The 3% increase for 1989 establishes a range of $9.23 to $11.67 for Patrolman/Deputy in Pierce County for 1989. Chippewa County Deputies range from $10.54 to $11.61 after 30 months for 1989; Dunn County Deputies range from $9.18 to $12.49 after 24 months for 1989; St. Croix County Deputies range from $10.87 to $12.52 after 10 years for 1989; and Barron County pays $11.89 top rate for 1989 for its Patrolman/Deputy position. Thus, it is clear from the foregoing, that among the Union comparables the wage rates generated by the agreed upon wage increases for 1989 place Pierce County Deputies at comparable wage rates with its surrounding counties. From the foregoing, the undersigned concludes that the quid pro quo offered by the Employer in the prior round of bargaining merely maintained competitive wage rates with what the Union considers to be comparable communities. Consequently, the lack of a quid pro quo offered by the Union is not a fatal flaw to the Union's offer in this dispute.

Buttressing the foregoing conclusion in the preceding paragraph is the fact that the comparable wages paid in Chippewa, Dunn, St. Croix and Barron Counties are paid against a backdrop of overtime provisions set forth in Union Exhibit No. 8 which reveal that Barron County pays overtime in excess of the regular schedule, which consists of a 6/3 schedule and an 8 hour work day; that Dunn County pays overtime outside of the standard work schedule, where the work schedule is a 6/3 schedule and the work day is an 8½ hour day; that Chippewa County pays overtime after 8 hours or 40 hours and has a 5/2, 5/3 work schedule and an 8 hour day for Deputies; and that St. Croix County has a 6/3 work schedule and an 8½ hour day or 40 hour week. (Union Exhibit No. 8 is silent as to the time and one-half provisions for overtime in the St. Croix Agreement) Thus, among the Union comparables, the wage rates generated for 1989 are comparable, where three of the four counties (Barron, Dunn and Chippewa) pay overtime at time and one-half for work outside the regular work schedule rather than pursuant to the 7K exemption proposed by the Employer here. The foregoing evidence buttresses the undersigned's earlier conclusions that the lack of a quid pro quo in the Union's proposal for Article 15 is not fatal to its offer.

The undersigned has considered all of the statutory criteria and the evidence and argument relating thereto, and concludes that the Union's offer is preferred in this matter.

Therefore, based on the record in its entirety, after considering all of the arguments of the parties and the statutory criteria, the Arbitrator makes the following:

AWARD

The final offer of the Union, along with the stipulations of the parties as filed with the Wisconsin Employment Relations Commission, and those terms of the

predecessor Collective Bargaining Agreement which remained unchanged throughout the course of bargaining, are to be included in the parties' written Collective Bargaining Agreement for 1989 and 1990.

Dated at Fond du Lac, Wisconsin, this 1st day of December, 1989.

Jos. B. Kerkman,
Arbitrator

JBK:rr