EDWARD B. KRINSKY, ARBITRATOR

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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

In the Matter of the Petition of

DePERE PROFESSIONAL FIREFIGHTERS ASSOCIATION

For Final and Binding Arbitration Involving Firefighting Personnel in the Employ of

CITY OF DePERE

Case 46
No. 42243 MIA-1432
Decision No. 26250-A

Appearances:
Mr. James M. Kalney, City Attorney, for the City.
Mr. Thomas J. Parins, Attorney at Law, for the Association.

On December 19, 1989, the Wisconsin Employment Relations Commission appointed the undersigned as impartial arbitrator to issue a final and binding award in this matter pursuant to Sec. 111.77(4)(b) of the Municipal Employment Relations Act.

A hearing was held at DePere, Wisconsin, on February 1, 1990. No transcript of the proceedings was made. At the hearing the parties had the opportunity to present evidence, testimony and arguments. The record was completed with the receipt by the arbitrator of the parties' post-hearing reply briefs on April 16, 1990.

The parties negotiated a 1989-1990 proposed Agreement but the Association's membership rejected it. The only disputed issue at that time was duration. The proposed Agreement was for two years. The Association wanted a three-year term. Subsequently, the parties submitted final offers which were certified by the WERC. The parties agree that they are now in dispute over three items. They agree on a two-year term for the Agreement. The City's final offer is the above-mentioned 1989-1990 proposed Agreement, which includes the terms of the parties' prior Agreement as modified and amended by agreed-upon stipulations. The Association's final offer is the above-mentioned 1989-1990 proposed Agreement with three additional items.

The three issues, and the differences between the final offers, may be summarized as follows:

1) Conversion of sick leave for payment of health insurance premiums upon retirement. The City's final offer is 66.6% of 90 day maximum accumulation. The Association's final offer is 100% of 90 day maximum accumulation.

2) Pay for purposes of sick leave conversion. The City's final offer is to continue the existing arrangement. The Association's final offer is to provide that day personnel be paid an amount equal to that paid to line personnel of equivalent rank.

3) Duty disability. The City's final offer is to continue the existing arrangement in which there is an exchange of an employee's sick leave for the payment by the City of the difference between full pay and workers compensation for a maximum period of 90 days. The Association's final offer is that the City should pay the difference between full pay and workers compensation for a period of 180 days.

In making his decision in this case, the arbitrator is required to give weight to the factors specified in the statute. In this dispute the parties have presented no issues with regard to the following factors: a) lawful authority of the Employer; b) stipulations of the parties; c) that portion of (c) which deals with the financial ability of the unit of government to meet the costs of the final offers; and g) changes in circumstances during the pendency of the hearing.

The arbitrator is required to consider factor (c) which, in part, is the interests and welfare of the public.

The City's objections to the Association's proposals are both philosophical and economic. With regard to the sick leave conversion, the City takes issue with the Association's assertion that the cost of the Association's final offer will be an additional $2,000 per year. Using the Association's analysis, but making what it views as more realistic assumptions based upon what is known about the current work force, the City shows that by increasing the cost $2,000 per year, the result will be a fund balance in the year 2015 of -($557,174), and not -($17,952) as calculated by the Association's accountant consultant.

Also, the City's calculation is that an average firefighter, now age 42, will contribute $5,362 towards the sick leave conversion benefit through age 55. This contribution results from the 1% reduction in base salary which is the parties' agreed-upon trade-off for implementing sick leave conversion. The City's calculation is that under its final offer, this benefit will increase in value by 6 1/3% per year, and be tax

free, while under the Association's final offer it will increase 17.9% per year. "The City submits that an almost 18% return on investment for a tax free benefit is an unduly high return and cannot be viewed as reasonable."

The Association takes issue with the City's calculations. The Association argues that its final offer is in the public's interest more so than is the City's, because by providing more City-paid health insurance dollars after retirement, the Association's final offer creates greater incentives for early retirement.

The City argues that normal retirement age for firefighters is 55, and the public does not gain more than is now the case by increasing its expenditures for retirees.

The Association argues also that the costs of both final offers, and the differences between them, in relationship to the size of the departmental wage and benefits budget are insignificant, amounting to a small fraction of 1%.

With respect to the issue of duty disability pay, the City argues that it is contrary to good public policy for a person on duty disability to receive more income than another employee who works a normal schedule. The City acknowledges that it now pays to the police the duty disability benefit sought by the Association but, it argues, it discovered this "discrepancy" during administration of the police contract and it is "intent on changing this inconsistent language . . ." For its part, the Association argues, "The Association's position does not rest on tax law. Rather it rests on fairness, considering the hazardous nature of the employment. We do not believe that firefighters injured on duty . . . should be required to use sick leave while recuperating for that person's return to duty . . ." The City argues that the exchange of sick leave "mitigates against the otherwise unreasonable result present in the Association's final offer."

The arbitrator does not view the interests and welfare of the public factor as significant in this case. The short-term cost differences are small. In the long term, even if the City's analysis of the Association's sick leave conversion cost estimates is reasonable, it is not clear that there will be much larger annual expenditures necessary in order to keep the fund in balance. Certainly the costs will be slight in relationship to the annual wage and benefits budget.

Factor (d) requires the arbitrator to consider comparisons of wages, hours and conditions of employment with "other employees performing similar service and with other employees generally: (1) in public employment in comparable communities; (2) in private employment in comparable communities."

The parties differ with respect to what communities should be used for purposes of these external comparisons. The Association argues that the comparisons should be ". . . the significant emergency departments within Brown County," which would include DePere police, Green Bay police and firefighters, and Brown County Sheriffs.

The City argues that additional communities are relevant for comparison purposes. While acknowledging that in 1978 cases involving DePere's firefighters and police, arbitrators Bellman and Krinsky used the City of Green Bay as the prime comparable , the City relies heavily on a 1983 arbitration award by arbitrator Zeidler involving DePere firefighters. Zeidler concluded that ". . . the DePere wage scale should be somewhere between the average of nearby comparable communities and the scales of Green Bay." He also stated his opinion that comparisons with other firefighters were entitled to greater weight than comparisons to police. He stated also that "there is validity to comparing DePere with Menasha, Two Rivers and Kaukauna, all being parts of a complex of municipalities . . ." The City argues that other relevant comparisons are neighboring Allouez, which has a fire department which was created subsequent to the Zeidler award, and Neenah because of its proximity to and comparability with Menasha.

Since the parties have not agreed upon a different set of appropriate comparables subsequent to the Zeidler award, this arbitrator believes that it is appropriate to consider the comparables cited in the Zeidler award plus Allouez, which borders DePere and now has a fire department.

With respect to the sick leave conversion issue, Green Bay is the only jurisdiction which is paying what the Association is asking for in its final offer, although Green Bay's benefit is somewhat greater because the 100% conversion is up to a maximum of 95 days and it is also possible for accumulated vacation days to be converted.

In the two of the City's comparisons which are closest geographically to DePere, Allouez does not provide for conversion of sick leave for payment of health insurance premiums. Kaukauna does not provide for conversion, either, but there the city pays 75% of the health insurance premium to age 65. The Association argues in its brief that the benefit in Kaukauna is comparable to what it is asking in its final offer:

> The Association's offer, based upon today's wages and insurance premiums would result in approximately 90 months of coverage . . . which is approximately three-fourths of the coverage necessary between the age of 55 and 65.

Two Rivers pays 95% of health insurance premiums to age 65. The Association argues that this is a more generous payment than what it is seeking, and it uses the same logic as it did in comparing the Kaukauna benefit, above.

In Menasha, firefighters can convert half of their sick leave accumulation above 90 days to pay for health insurance premiums. The Association points out that this is a potentially much more generous benefit than what it is asking in its final offer.

Precise benefit comparisons are difficult to make, especially when the value of some of them is tied to the cost of health insurance, and the mix of benefits in the comparable communities is not identical. It appears to the arbitrator that there is somewhat more support for the Association's position on sick leave conversion for health insurance premiums than there is for the Association's position, based on the external comparables.

With respect to the issue of sick leave conversion payment for day vis-a-vis line personnel, neither side has presented data showing what the comparison jurisdictions do with regard to such payment. Presumably this information is available. The arbitrator does not have the information. Since the Association is the party that wants to change this benefit, it needs to justify the change to the arbitrator. It has not provided such justification, other than to argue that it bases its position on "fairness." On this issue, the arbitrator favors maintaining the status quo based on the information presented to him, and thus favors the City's position based on external comparables.

With respect to duty disability pay, the Association argues that its proposal is in line with all of the comparables of both parties with the exception of Two Rivers, which pays in the same manner as the City. As the Association argues, all of the others "provide the benefit in one form or another." The City, in its brief, concedes that its benefit payment is lower than most of the comparables.

The arbitrator agrees with the Association that the external comparables appear to support its position with respect to duty disability pay.

Neither party offered any evidence with respect to comparisons with private employment.

In conclusion, it is the arbitrator's opinion that there is greater support for the Association's final offer than the City's when external comparisons are considered.

With respect to factor (d)(1), it is appropriate to look at other of the City's employees, the internal comparables. The only internal comparison made by the parties is with the DePere police. With respect to sick leave conversion, the City argues that under its offer which raises sick leave conversion from 40% to 66.67%, the dollar value of that increase is $6,235, whereas the Association's proposed increase to 100% is equivalent to a dollar increase of $13,673.

The police were allowed a 100% conversion beginning in 1987. The increase in value of the police benefit from 1987-1989 is $11,676, which the police obtained in exchange for giving up 2% of base salary. The City argues that the Association's one-year increase of $13,673 is in exchange for only 1% in base salary. Thus, under the Association's final offer the firefighters would get more than twice the dollar value that the police got in exchange for a 1% offset of base salary.

The Association argues that the police have a 100% conversion rate, and it should be able to have it also. It argues that when the police got the benefit they gave up a 25% payout of sick leave at retirement, but the firefighters will give up a 40% sick leave payout at retirement to get the conversion benefit.

It is difficult for the arbitrator to judge the merits of the parties' arguments because the results are very different depending on how the benefit is viewed. In percentage terms, there is reason to support the Association's position, bringing it to the same 100% conversion rate that the police have. However, in terms of the dollar value of the converted benefit, there appears to be greater support for the City's position.

With respect to the second issue, neither party provided internal comparison data for the Association's proposal to pay day personnel and line personnel in the same amounts for purposes of sick leave conversion. The arbitrator does not know if there are comparisons with the DePere police that can be made on this issue.

With respect to the duty disability issue, the City argues that the 180 day payment sought by the Association is twice what is given to the police, since the police get the benefit only until they are eligible for disability insurance, which is 90 days, according to the City. There was no rebuttal to the testimony of City Administrator Smits that what is proposed by the Association is more generous to the employee than the benefit received by the police.

The Association argues as follows:

In short, the police department receives the benefit requested by the firefighters. The only difference is that the firefighters request has a limitation in time, whereas the police department contract does not. Thus, the internal comparable is favorable to the Association's proposal.

The City appears to be correct that the Association is asking for it to pay the difference between salary and workers compensation for 180 days maximum, while the police now have it for 90 days maximum. The Association argues in its reply brief that disability benefits do not always begin automatically after 90 days, but it offered no evidence at the hearing to support that assertion. Even if the Association is correct that there are instances in which the disability payments do not begin automatically after 90 days, there is no persuasive reason given by the Association to justify it receiving much better treatment in this regard than is given to the police in the typical case in which disability benefits begin after 90 days. On this issue the arbitrator favors the City's final offer.

In conclusion, although the Association claims to be asking only for what the police already have, in fact the Association is asking for something of greater value than the police have, with respect to duty disability pay, and perhaps sick leave conversion as well. The arbitrator favors the City's final offer based on internal comparisons.

Factor (e) is the increase in the cost of living. Data presented by the City show that for the one-year period between 1988 and 1989, the period prior to the effective date of what is being arbitrated, the cost of wages and benefits for the bargaining unit (including: base salary, longevity, squad pay, holidays, retirement contributions, insurance and clothing) increased 4.1%. Because of the difficulty in estimating their cost, this figure doesn't include the increase in value of sick leave, vacation, overtime and call-in pay. During approximately the same period, December 1987 to December 1988, the increase in the Consumer Price Index for All Urban Wage Consumers was 4.4%. Thus, the City argues, even though the Association agreed to give up 1% of base pay in order to increase the amount of sick leave conversion, the increase in wages and benefits was only (.03%) less than the cost of living.

The Association doesn't disagree with the City's figures. It states in its brief: "The cost of living is not a significant factor in this arbitration."

The arbitrator is of the opinion that the City's offer is quite close to the increase in cost of living. The Association's final offer would cost somewhat more, but no calculation has been

made by either party of how much the percentage of wages and benefit increases would be if the Association's final offer were implemented. Thus, the City's final offer is a fair one in relationship to the change in cost of living, but the Association's may be also. The arbitrator does not view this factor as significant in this case.

Factor (f) which the arbitrator must consider is the overall compensation received by the employees. The City presented an exhibit in which it calculated the value of wages and benefits (longevity, holiday pay, squad pay, retirement, medical and dental insurance, disability and life insurance, clothing allowance) for the average DePere firefighter and compared it with what that average firefighter would receive in Allouez, DePere, Green Bay, Kaukauna, Menasha, Neenah and Two Rivers. The result shows that DePere is second to Green Bay, and some $3,500 above the median of those comparables.

The Union argues that the "overall compensation" factor is insignificant in this proceeding because of the slight difference between the cost of the parties' final offers. It argues also that the parties have achieved the level of compensation over a long period of bargaining and are comfortable with it, and overall compensation was not an issue in the bargaining which led to this arbitration.

It is true, apparently, that the parties did not focus on overall compensation _per se_ in their bargaining. Nonetheless, the arbitrator is required to weigh that statutory factor. The data presented show that the affected employees enjoy more compensation than all of the comparables other than Green Bay. However, Green Bay has been adjudged to be the primary comparable in two arbitrations, and clearly the parties view Green Bay's conditions as an important ingredient in their bargaining. The DePere firefighters' overall compensation is some $850 behind Green Bay firefighters' compensation.

Because the cost differences between the parties' final offers is relatively very small, the arbitrator does not view the overall compensation factor as particularly significant in this case. The data demonstrate, using Arbitrator Zeidler's standard, that DePere is "somewhere between the average of nearby comparable communities and the scales of Green Bay." On this factor, the arbitrator does not have a preference for either final offer.

The last factor to be considered is (h), other factors normally or traditionally taken into consideration in arbitration. The City raises several arguments in support of its position in relationship to this factor.

The City notes, correctly, that the parties reached a tentative agreement. That agreement was rejected by the Association's membership. The City notes, also, that at the time of the rejection, the only issue in dispute was the duration of the Agreement, the City proposing two years, while the Association was seeking a three-year term. The City notes that its final offer reflects the tentative agreement reached on all of the issues which are now in dispute, while the Association has added two issues and modified a third subsequent to the rejection. The City also questions the logic of the Association's position in which the items offered by the City would have been acceptable to it as part of a three-year agreement, but are not acceptable as part of a two-year agreement. The City notes that the tentative agreement was reached after thirteen negotiation sessions. It states that, ". . . the fact that the Association was willing to agree to less benefits for three years than it demands in its final offer for two years smacks of unreasonableness."

The City argues, also, that the arbitrator should not award in favor of the Association because the proposal to equalize the sick leave conversion of day and line personnel was not made by the Association until it was contained in the mailed final offer which was certified by the WERC following mediation. In mediation final offers were exchanged which did not contain that item. The City argues that this item was never bargained. Similarly, with respect to the duty disability provision sought by the Association, the City contends that there was brief mention of it in bargaining but it was not contained in the stipulations and was not even on the table again until it was put into a final offer in the presence of the mediator. The City contends that both of these items, offered for the first time in the final offer process, were offered without any quid pro quo and were not bargained.

The City argues also that in part because of the way these items were introduced, there is ambiguity in the Association's final offer. It argues with regard to the duty disability proposal that the Association's proposed 180 day benefit conflicts with language in the unamended portion of the existing Agreement which provides for a 90 day benefit. A second ambiguity it cites is in the language of the day-line personnel offer in which it is not at all clear how the sick leave conversion is to be calculated. The City argues that it should be offered the opportunity to negotiate on these items rather than have them imposed on it through arbitration without prior negotiations.

In its reply brief, the City makes it clear that it is not challenging the right of the Association to change its offers as it did. Rather, the City raises this history ". . . to demonstrate the reasonableness of the City's final offer and the inconsistency and unreasonableness of the Association's offer."

The Association argues that its changes in final offer were all done within the statutory framework and were done in continuing efforts to reach agreement with the City. The Association notes that the City could have, at any time during and after mediation, bargained about the duty disability provision and could have requested further bargaining about the day-line personnel proposal after receipt of the mailed final offer and prior to its certification by the WERC, but the City did not do so. It argues that almost a year has passed since the mediation session, and the City has not sought further bargaining over these proposals in attempt to reach a settlement.

The Association argues further that both the duty disability provision and the day-line equalization concept were discussed during negotiations, although not extensively. Union President Annen testified that the day-line concept was discussed, but he offered no documentation to support that claim. With respect to the duty disability provision, Annen testified that he believed it was discussed after mediation. He acknowledges that it was not contained in the tentative agreement which was rejected by the membership prior to mediation.

The Association argues that there is logic to its course of action in bargaining. The Association wanted badly to have 100% sick leave conversion and a three-year agreement. It conceded to 66.6% conversion in order to achieve a three-year agreement. When its offer for a three-year agreement was not accepted by the City, it reverted to asking for 100% conversion and maintained that position, even though the parties have now agreed to have a two-year agreement.

The arbitrator believes that if possible an Award should be avoided that produces conflicting and/or ambiguous language. He is persuaded that the relationship between the existing duty disability language and the 180 day provision proposed by the Association is not clear and produces ambiguity. Also, he is persuaded by the City's brief and response brief that there are questions about the meaning and implementation of the Association's offer on day and line personnel. That provision was not bargained, and thus the parties have not attempted to reach a mutual understanding of how it would be implemented.

With respect to the other aspects of bargaining history, the City acknowledges that there was nothing illegal about the Association's method of bargaining. However, the arbitrator agrees with the City that arbitrators should not encourage strategies which result in items being raised for the first time when they are placed in final offers. The duty disability offer was made late in the game, during mediation, but there was an opportunity for it to be discussed and bargained in the presence of the mediator. The day-line equalization proposal was not

introduced until subsequent final offers were mailed to the WERC for certification, and there was no face to face discussion of it by the parties with or without the presence of the mediator. While the Association is correct that the City could have requested further bargaining on these items, the arbitrator is more impressed by the fact that the Association placed ambiguous and/or conflicting proposals into the bargaining at very late stages, than by the City's failure to ask for additional bargaining sessions to clarify the proposals. For these reasons the arbitrator feels that the "other factors" favor the City's position.

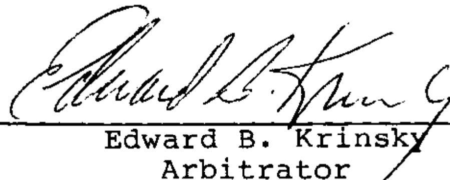
Under the statute the arbitrator is required to make an Award in favor of one final offer or the other in its entirety. Such a decision is difficult in this case where the differences between the parties' offers are small and the calculation of the costs and benefits of the proposals and their interpretation are difficult to make and to understand. In the arbitrator's opinion the data and arguments of the parties in relationship to the statutory factors weigh somewhat more in favor of the City's final offer than the Association's.

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

AWARD

The City's final offer is selected.

Dated at Madison, Wisconsin, this 24th day of April, 1990.



Edward B. Krinsky
Arbitrator