BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION (WERC):

ARBITRATION IN THE MATTER	)	
	)	
Between	)	**Case 325**
	)	**No. 46762 MIA-1679**
APPLETON PROFESSIONAL FIRE	)	Decision No. 27489-A
FIGHTERS UNION, LOCAL 257,	)	**Marvin Hill, Jr.**
PFFW, IAFF, AFL-CIO	)	**Arbitrator**
	)	
-and-	)	
	)	
CITY OF APPLETON	)	
	)	

Preliminary Statement

A hearing was held on the above case on March 1, 1993, at the Paper Valley Hotel and Conference Center, 333 West College Avenue, Appleton, Wisconsin. The parties appeared through their representatives and offered exhibits and testimony. Post-hearing briefs and reply briefs were submitted on April 28, 1993, and the record was closed on that date.

Appearances

For the Union: Timothy E. Hawks, Esq., and John B. Kiel, Esq., of Shneidman, Myers, Dowling & Blumenfield, P.O. Box 442, Milwaukee, Wisconsin, 53201-0442.

For the City: David F. Bill, Director of Personnel for the City of Appleton, 200 N. Appleton Street, Appleton, Wisconsin, 54911.

I. BACKGROUND & FACTS

The Appleton Professional Fire Fighters Union, Local 257, PFFW, IAFF, AFL-CIO ("Union") is the collective bargaining agent for a bargaining unit comprised of all employees of the City of Appleton ("City") Fire Department up to, and including, the fire

department captain. The parties have negotiated a series of collective bargaining agreements, the most recent one covering the period from January 1, 1990, to December 31, 1991.

In the Fall of 1991 the parties began negotiations on a successor agreement but were unable to reach an accord. Accordingly, on January 2, 1992, the Union petitioned the Wisconsin Employment Relations Commission ("WERC") to initiate compulsory final and binding arbitration pursuant to Section 111.77(3), Wis. Stats. Final offers were submitted by the parties on October 8, 1992, and on October 21, 1992, the WERC certified that the parties were at impasse, and issued an order requiring compulsory final and binding interest arbitration.

The disputed elements of the final offers as follows:

A. Wages

1. Union Proposal:

* 2.9% effective the first pay period of 1992;
* 1.5% effective the fourteenth pay period of 1992;
* 3% effective the first pay period of 1993;
* 2% effective the thirteenth pay period of 1993.

2. City Proposal:

* 2.9% effective January 1, 1992;
* 1% effective July 1, 1992;
* 3% effective January 1, 1993;
* 1% effective July 1, 1993.

B. Part-time Fire Fighters

1. Union Proposal:

* Fire department employment opportunities shall be offered first to full-time professional Appleton fire fighters.
* Part-time employees shall be defined as those employees who work less than 2912 hours annually.

2. City Proposal:

* Inclusion of a new contractual provision which would allow the City to schedule and utilize part-time employees as fire fighters.

* Part-time employees shall be those employees who work less than 1456 hours per year.

C. Medical Exam

1. Union Proposal:

* The City shall bear costs of medical examinations it requires.
* The City shall pay the transportation costs associated with medical examinations.
* The City shall conduct medical examinations at a site reasonably near the employee.
* Sick or injured employees who are too ill to travel will not be required to submit to non-residential medical examinations.
* Sick or injured employees who suffer from an impaired ability to drive will not be compelled to drive.

2. City Proposal:

* City will pay for the examination.

D. Normal Work Hours

1. Union Proposal:

* Contract language which embodies the normal duty day past practice between the parties and which, where the employer chooses to assign routine duties on Saturday afternoon, Sundays and holidays, provides for additional employee compensation.

2. City Proposal:

* City has no proposal with regard to this issue and essentially seeks to terminate the normal duty day past practice.

E. Call Back

1. Union Proposal:

* Union has no proposal with regard to this issue and seeks to preserve the call back status quo.

2. City Proposal:

* Elimination of the contract provision requiring classification based recall and overtime assignment of personnel.

II. POSITION OF THE UNION

It is the position of the Union that the two major items in dispute in this case are wages and the City's plan to use part-time employees in the fire service. The Union asserts that its final offer is the more reasonable of the two based upon intra-industry comparisons, to a limited extent upon intra-employer comparisons, and upon certain additional factors taken into consideration in the resolution of interest disputes.

A. Wage Issue

The final offers of the parties differ in the actual take home pay they propose by about $78 per top step fire fighter in 1992, and by about $321 per top step fire fighter in 1993. However, because the increases occur at six month intervals under both proposals the annualized salary difference between the monthly salaries of two final offers as of December 31, 1993 is $481.

The Union's final offer is supported by the "Mueller" set of core comparables. The Union compares the wages of its top step fire fighters to those in comparable communities emphasizing a core comparable group comprised of the fire fighters employed by Green Bay, Oshkosh, Neenah and Menasha.

Neenah, Menasha and Appleton have a combined 1991 population of approximately 104,000. Oshkosh has a population of more than 53,000 and is only 20 miles from downtown Appleton. The center of Green Bay, population of 96,000, is 31 miles from Appleton's center, and its limits are perhaps 20 miles from those of Appleton. The Union's emphasis upon this core group of comparables is rooted in the interest arbitration decision of Arbitrator Mueller between these parties dated August 24, 1988.

In absolute dollar terms, the Union's proposal is closer to its comparables than the City's offer. Among the core comparables the mean year-end monthly salary in 1992 was $2,729. The Union's final offer for year-end 1992 is $2,650 and is $79 less the mean, whereas, the City's offer is $2,637 or $92 less the mean.

The Union's offer merely maintains the negative difference between its salaries and the salaries of the comparables while the City's offer widens the shortfall between them. The Union's final

offer proposes a percentage increase for 1992 which is well within the that paid to its comparables, whereas the City's offer again falls behind the mean. The Union's proposed increase of 4.4% for 1992, is both less than and closer to the mean than the City's proposed 3.9% increase. The Union's final offer does not improve its relative rank compared to its comparables.

The analysis of the parties' wage offers for 1993 yields identical conclusions. The Union's final offer produces a monthly salary at the end of the year which is $75 less per month than the mean of the comparison group. The Union's offer does not improve the relative rank of Appleton compared to the others. The only difference between the 1992 and 1993 analyses is that the Union's total proposed increase for 1993 is 5%, which is higher than two of the three settlements of the comparables and of the average of the comparables. Green Bay and Oshkosh settled for 4% increases but such increases were both effective on 1/1/93. Appleton's final offer proposes a 3% increase for the first half year. Split increases may serve the purpose of allowing catch-up at a lesser immediate cost, or when ability to pay is an issue, keep-up, at a lesser cost. The City's final offer serves neither purpose here.

For the first six months of 1993, the City proposes a monthly salary of $2,716, compared with Green Bay's $2,938, Oshkosh's $2,861 and Menasha's $2,734. The Union's proposal more nearly preserves the actual dollar differential which has historically existed between Appleton fire fighters and fire fighters in the core comparison set. The City's proposal would have the effect of increasing the difference between the wages of an Appleton fire fighter and fire fighters in comparable communities in each and every case. The Union's proposal, on the other hand, would more nearly preserve an Appleton fire fighter's wage position in relation to fire fighters in comparable communities.

Union Exhibit 301(c) demonstrates that the cost of both the Union and the City's wage proposals for the period running from 1992 to 1993 and from 1991 to 1993. The exhibit illustrates that Appleton's costs are below the mean cost of those in Appleton's core comparable group. Thus, this exhibit illustrates that the Union's proposal is more reasonable than the proposal of the City.

The City's proposal would further contribute to the wage ranking erosion of Appleton fire fighters wage position in relation to external comparables. The Union's proposal would restore some of the historical wage ground lost by Appleton fire fighters. Moreover, the Union's higher percentage increase in 1993 is placed in perspective when contrasted with the combined 1992-93 percentage increases of the comparable units. For example, voluntary agreements in Menasha, Green Bay and Oshkosh produced increases of 9.42%, 9.67% and 8.13% respectively.

While the Union proposes a slightly higher percentage increase than the comparables it does not improve its relative rank in absolute dollars, and therefore the Union's offer is just a "keep-up" and not a "catch-up" proposal. Inclusion of the salaries paid to the top-step fire fighters employed by Sheboygan, Manitowoc and Fond du Lac does not vary the above analysis in any significant regard.

From 1986 to 1991 Appleton's fire fighters were paid between $26 and $44 per month more than the comprehensive mean. In 1992 the City's final offer would reduce that difference to $14 over the mean, well below the historic average of about $35 over the mean for the period of 86-91, whereas the Union's proposal would maintain the difference slightly below that mark -- $27 per month. In 1993 the Union's final offer would increase the difference to $61 ($51 if Neenah is presumed to have a 4% increase in 1993) and the City's final offer would hold the difference down to $20 above the average ($10 given as similar presumption regarding Neenah.) The Union's final offer maintains a closer relationship to the historic difference between the salary paid its fire fighters and that the mean of the more comprehensive set of comparables.

Moreover, the internal comparables do not support the City's final offer. The cost of the City's wage-only agreements in terms of the percentage increase resulting from the average of salary adjustments during 1992 may be summarized as follows: Police Supervisors -- 4%; Teamsters -- 4%; AFSCME Waste Water -- 4%; and Compensation Policy -- 3.5%. In addition the wage-only cost of the City's final offer to the Police Association is 3.5%. Yet the cost of the City's wage final offer regarding to the fire fighters is only 3.4%, less than any other settlement. The Union's final offer cost of 3.65% more closely approximates the internal pattern, to the extent there is one.

The percentage lift for 1992, for wages only, also varies substantially. The lift for the Police Supervisors and Teamsters units was 4%. However, the percentage lift for the AFSCME bargaining unit was 5%. The Union's proposed lift of 4.4% falls between the range's extremes, while the City's final offer lift of 3.9% for wages only is less than any settlement and it is also less than City's final to the Police Association. Again, the Union's final offer more closely approximates the internal pattern, to the extent there is one.

The listed salary increases adding "benefit changes" only further weakens the City's claim of a pattern during 1992. As the City acknowledged at the hearing, it treated the increase in the police clothing allowance as a cost of living adjustment without factoring it into the cost increases, yet calculated the cost as .1% increase toward the fire fighters package. Treating all

economic costs as listed by the employer the pattern, such as it is, is an increase of between 4% and 5%.

In sum, the Union asserts that its proposal on the wage issue is more reasonable that the City's proposal.

B. Part-Time Fire Fighter Issue

The City announced its plans to hire part-time fire fighters for the purpose of reducing its overtime costs, and to further supplement the force. This is a significant change to the status quo, because prior to this case, whenever the need for service exceeded the regularly scheduled complement of employees to provide it, other full-time fire fighters were called to work overtime. In addition, the use of less well-trained, and less experienced personnel raises substantial concern about the safety of the employees and the public they serve.

However, the City fails to meet the arbitral standard imposed upon a party seeking to change the status quo. First, the City offered no proof of need to support its plan to hire part-time fire fighters to replace full-time fire fighters. Union Exhibit 705 reveals that the City's overtime expenditures have fallen precipitously from $204,859 in 1988 to an estimated actual of $60,000 in 1991, thus the City cannot cite high overtime costs in support of its plan. Further, the budget for overtime in 1992 was $81,575 and for 1993 it was $83,166. Second, because the change sought by the City will have an adverse economic impact on the members of the bargaining unit, the City has the burden of establishing that it has offered some reasonable exchange of value for the change it seeks. The City has not done this. Since the employer offered no evidence in support of its need for this change, it necessarily fails to meet the higher standard cited by Arbitrator Malamud.

Additionally, while witnesses for the Union from comparable communities testified that fire services in their communities are provided solely by full-time fire fighters, the City failed to demonstrate any comparable support for its plan. At the hearing, the Union brought forth witnesses from Green Bay, Oshkosh, Neenah, Menasha, Manitowoc, Fond du Lac and Sheboygan. All testified that fire services in their communities are provided solely by full-time, professional fire fighters. The Union also established that the safety concerns associated with the use of part-time employees as fire fighters exist.

However, the City sought to refute the testimony offered by the Union establishing the risks of use of part-time fire fighters by merely implying that Appleton Fire Department Administrative Policy would provide reasonable assurance that part-time employees

would be equipped to safely undertake the duties of a fire fighter. According to the Union, the evidence introduced at the hearing establishes that the City's proposal is unusual, novel and unprecedented. By way of its part-time employee proposal, the City seeks to plow new ground which enjoys no past practice or contractual support in Appleton. Nor does the practice proposed by the City enjoy support in any of Appleton's comparable communities.

In sum, the Union asserts that its position with regard to part-time fire fighters is more reasonable.

C. Medical Examination Issue

The Union contends the City has begun to establish a practice designed to deter legitimate sick leave use by using the contract provision regarding medical examinations to harass and intimidate employees and, in doing so, subjects sick or injured employees to the risk of injury or illness aggravation, interferes with recovery of sick or injured employees and unduly burdens sick or injured employees. Accordingly, the Union proposes narrowly-crafted language limiting the burdens and health risks placed on sick or injured employees, yet which continues to allow the City to order employees to submit to independent medical examinations.

The Union contends that its proposal regarding medical examinations is more reasonable than that of the City. The Union offered testimony that revealed that the City frequently ordered sick or injured employees to submit to non-residential medical examinations when employees sought to use sick leave. The combined witness testimony also revealed that the City's implementation of the medical examination provision was not only burdensome on sick or injured employees, but also interfered with the course of treatment on which sick or injured employees were embarked. Their testimony also demonstrated that the City's practice unreasonably subjected them to aggravation of their illness or injuries.

The testimony offered the Union's witnesses revealed that the practice of the City is to order sick or injured employees to submit to non-residential medical examinations even where it is obvious that an employee is sick or injured. The Union also established that it is the practice of the City to order sick or injured employees to submit to non-residential medical examinations regardless of their medical condition and to order sick or injured employees to submit to non-residential medical examinations even where it is obvious that an employee is under the care of his or her personal physician. Further, the practice of the City is to order sick or injured employees to submit to non-residential medical examinations even where compliance with the order interferes with the employee's course of illness or injury treatment. Also, the practice of the City is to order sick or

injured employees to submit to non-residential medical examinations regardless of their ability to operate motor vehicles. The Union further established that it is the practice of the City is to send sick or injured employees to a facility which is unable or unwilling to examine these employees in a timely fashion and to remain unresponsive to the problems sick or injured employees have experienced in examination delays.
Clearly, the Union has demonstrated that there is a compelling need to modify the non-residential medical examination provision of the contract.

Further, the recent practice of the City has been to rely on the medical exam provisions of the contract as a means to deter sick leave use rather than as a means to control individualized sick leave abuse, as is evidenced by a May 4, 1990 memorandum concerning vacation days written by Mr. Davis and which is directed to "All Chief Officers."

However, the Union's proposal is narrowly drawn and carefully crafted to address the compelling need for change. Moreover, thee

Union's proposal would not prevent the City from compelling employees to submit to medical examinations as a condition preceding the receipt of sick leave compensation; instead it simply says that under certain circumstances employees may not be ordered to submit to non-residential medical examinations, that such examinations must be conducted reasonably near the employee, that the City may not compel impaired individuals to drive to the examination site and the City must pay for transportation costs associated with the medical examinations. As such, the Union's proposal is narrowly drawn so as to preserve the provisions of the contract while responding to the compelling need for change. Finally, even with the Union's proposal, the City retains sick leave monitoring and control which are unmatched by the monitoring and control rights of any external comparable. As a consequence, the City cannot point to external comparables to argue that the Union's proposal on this point is unreasonable. The Union however can, and does, point to the external comparables to argue that the City enjoys an unprecedented power to regulate sick leave use and points to the testimony of its witnesses to argue that the City has abused this unprecedented power.

D. Normal Duty Day

The work day of Appleton fire fighters is twenty-four (24) hours. In the past the twenty-four hour tour was divided into a normal duty day period, in which a fire fighter would engage in routine fire fighting duties, and a stand-by period, in which a fire fighter would engage in eating, sleeping, and recreating. Just prior to the expiration of the 1990-1991 contract the City began

scheduling a number of routine duties outside of the traditional normal duty day hours, which prompted the Union to file a number of grievances. On the final day of the contract period, the City responded to the Union's grievances by advising the Union that it was the City's opinion that no normal duty practice had been established on the Appleton fire department and that, if there was any such practice, it intended to repudiate that practice.

As part of its final offer, the Union has proposed language which defines the normal duty hours. The City seeks the option to assign routine duties and training to fire fighters on any day, at any time. As such, the City seeks to change the past practice which has long been part of the relationship between the parties.

However, the proposal of the Union is consistent with the past practice of the Appleton Fire Department. Based on the testimony of Mr. Springer, the Union's grievance history and the Appleton Fire Department administrative policies, it is clear that there was a normal duty day practice that did exist in the Appleton Fire Department. Because such a practice existed, the City must show a compelling need for change, must demonstrate that its proposal is narrowly drawn to address such need, and must offer a reasonable quid pro quo in exchange for termination of the past practice. It is the position of the Union that the City has failed to meet its burden in this regard.

The proposal of the Union is more reasonable than the "silent proposal" of the City and is consistent with the past practice to which Union witnesses testified. Further, the City has failed to demonstrate a compelling need to deviate from the normal duty day practice and has offered no quid pro quo in exchange for its "silent proposal".

The Union also offered testimony which established that state and district-wide normal duty day practices support the proposal of the Union. The normal duty day schedule proposed by the Union is narrowly tailored to preserve the past practice which existed between the parties and is not intended to interfere with the City's ability to provide essential, and even non-essential, services. The Union's proposal does more than just define a normal duty day; the proposal expressly excludes from the normal duty day constraints, response to emergency and non-emergency calls and activities "necessary for efficient response to alarms" and "vehicle checks."

E. Call Back Issue

Under the 1990-1991 contract language, for example, if a fire department officer creates a vacancy requiring overtime call back, that vacancy is to be filled by another officer working overtime.

Similarly, if a overtime call back vacancy is created by a fire fighter, that vacancy is to be filled by another fire fighter working overtime. This system results in a distribution of overtime call back opportunities across ranks.

The City proposes to eliminate the requirement that overtime call back vacancies be filled at the classification which created the vacancy and seeks to call back employees without considering the classification at which the vacancy causing a need to call back was created. Implementation of the City's proposal would, if a vacancy should occur at an officer's level, allow the City to temporarily assign on duty personnel to the vacant officer position and then call back employees to fill vacancies at the lowest classification level, that of a fire fighter. As a consequence, employees who hold ranking, and higher paid, classifications would not be, or at best would infrequently be, called back to work overtime. The City would save overtime dollars should its proposal be implemented.

The Union's proposal is more reasonable for several reasons. First, the Union seeks to preserve the "status quo" which existed at the expiration of the 1990-1991 contract because there is no compelling need to deviate from the status quo and no quid pro quo has been offered. Second, the temporary call in language contained in the 1990-1991 collective bargaining agreement is consistent with the contractual overtime provisions and practices followed in comparable communities. Finally, implementation of the City's proposal would essentially create a situation in which higher ranking, higher paid employees would infrequently, if ever, be afforded overtime call-in opportunities.

In summary, the final offer of the Union most reasonably reflects the type of agreement the parties would have reached had they reached agreement in bargaining. The Union's final offer contains a wage offer which avoids significant erosion of the Union's economic position in relation to its external comparables, preserves management prerogatives while protecting employee interests and is consistent with the past practices between the parties.

Based on the evidence introduced by the Union and based on the foregoing arguments of the Union, the Union's final offer is more appropriate and should be accepted by the Arbitrator.

III. POSITION OF THE CITY

It is the position of the City that its offer is more reasonable than the Union's and, accordingly, should be awarded by the neutral. The Employer advances the following arguments on each of the issues at impasse:

A. Wages

It is the position of the City that factors b, c, d, e, f, and h of the Statutes (infra) impact the wage issue. As to factor b, the parties have stipulated that the value of the change in uniform allowance is the equivalent of .1% of wages. As a result, both offers should be interpreted to provide for a 3% increase effective January 1, 1992, when comparing them to other settlements.

There are, in reality, two factors included in factor "c". One factor relates to ability to pay while the other relates to the interest and welfare of the public. Since the City has never contended that it does not have the ability to pay, the first portion of this factor does not apply to this case. However, the fact that the City could pay the cost of the Union's proposal certainly does not translate directly into a conclusion that it should.

Moreover, the Union's proposal impacts upon the interests, if not the welfare, of the public. The evidence and exhibits presented by the City confirms that the pattern of virtually all of the voluntary settlements with all City of Appleton units is approximately 4% for 1992. In the instant case the City's proposed wage increase totals 4% while the Union's proposed wage increase totals 4.5% for 1992. In 1993, the City's proposed wage increase is 4% while the Union's proposed increase is 5%. It is not in the public interest to grant the Association through arbitration an increase substantially greater than the pattern that has been established with other City bargaining units through voluntary settlements. To do so would have a negative impact upon the City's credibility with other units and would likely reduce the potential for reaching voluntary agreements with any of those units in the future.

Factor "d" requires a comparison of the wages, hours and conditions of employment of the City of Appleton fire fighters with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally. Here, there is no dispute as to the cities to be used as comparables. The City does, however, challenge the attempts of the Union to place more emphasis on what it terms "core comparables" and asserts that equal weight must be given to each of the comparables as explained by Arbitrator Vernon.

For the most part, the parties have used equivalent numbers for all comparison cities. However, the Union used a monthly rate for Sheboygan based on 27 pay periods in 1992 and the correct

monthly rate based on 26 paydays is $2418 per month. Moreover, the Union used the 10 year longevity step for Sheboygan for 1993. The correct rate based on top fire fighter is $2,515 per month. Further, the Union's use of historical information in Exhibit 301A is interesting, but not pertinent to this case. It is apparently intended to validate their contention that a "catch-up" is warranted. The Union, at the hearing, relied on Arbitrator Mueller's comment that "absent evidence showing some reason Appleton Fire Department employees should be lower than their compatriots, they should be equal." However, when all seven comparables are used, Appleton is above the average of the group for all three classifications in 1991 and remains above the average in 1992 and 1993 under either proposal. Under the City's proposal, Appleton moves closer to the average while under the Union's proposal, the gap over the average is increased.

In reviewing wages under this factor, it is also appropriate to look at wage settlements among the comparables. The exhibits shows that the City's offer is the third highest among the comparables for 1990-1992 and fourth highest for 1990-1993. The Union's offer is second highest for both time periods. The City offer exceeds the average by .8% for 1990-1993 while the Union offer is 2.3% higher than the average. It is the City's position that the Union's proposal is excessive.

Factor "e" requires a consideration of the average consumer prices for goods and services. The City introduced exhibits representing Consumer Price Index (CPI) statistics as prepared by the Bureau of Labor Statistics. In 1992, all of the City of Appleton contract settlements with regard to wage increases were 4% or 4.1% and the CPI when those contracts were negotiated was 4.6%. The CPI at the expiration of the last contract between the City and the Union was 3.1%. Despite this, the City's proposal grants the same overall increase (4%) to the Union as that received by City of Appleton units which negotiated their settlements when the CPI was 4.6%. The Union's 4.5% increase for 1992 and 5.00% increase for 1993 far exceed the CPI for 1991 and even exceed the settlements which were reached when the CPI was 4.6%. Because the City has demonstrated that the CPI has not changed significantly since the expiration of the previous contract, there is absolutely no justification for the Union's proposal based on current economic conditions.

A review of overall compensation, as required by factor "f", including fringe benefits and other compensation among Appleton and the comparables demonstrates that Appleton is lower than the comparables in some areas and higher in others. The differences appear to offset each other to the extent that overall compensation should not be determinative of the wage issue.

Factor "f" requires the arbitrator to consider changes in any circumstances during the pendency of the arbitration proceedings. The City asserts that the reduction in the CPI from 3.1% for 1991 to 2.9% for 1992 is significant and gives further credence to the City's position and makes the Union's proposal for an increase in 1993 that is 2.1% higher than the CPI clearly excessive.

Finally, factor "h" requires that other significant factors be considered. The City asserts that one such factor to be considered is internal comparables. City exhibits show that a consistent internal pattern exists in that approximately three fourths of Appleton bargaining unit employees have settled for about a 4% wage increase for 1992. No justification exists in this case to break from that pattern.

Based on the above considerations, it is the City's position that its proposal on wages is more reasonable than that of the Union.

B. Part-Time Fire Fighters

The Union's proposal on this issue would effectively prohibit the hiring of part-time employees since the proposal requires that any such employees cannot work unless their scheduled hours are first offered to off-duty full-time fire fighters on an overtime basis. The City's proposal, on the other hand, would allow increased staffing levels during peak vacation periods without increasing costs.

The evidence at the hearing revealed that no concerns exist that the employment of part-time fire fighters under the Police and Fire Commission standards will in any way compromise the safety of employees of the Appleton Fire Department or of the public. It is the City's position that the safety concerns the Union alleged are simply a smoke screen. It is inconceivable that the safety of a system that works in volunteer departments staffed almost entirely by part-time fire fighters would be jeopardized by the use of some fully trained part-time employees in a department consisting of mostly full-time fire fighters.

The Union contends that the City offers no quid-pro-quo for allegedly terminating a past practice. However, the decision to utilize part-time employees is a permissive subject of bargaining and the City is not aware of any case which would require a quid-pro-quo for exercising a management right. Similarly, the Union's position is unreasonable in that it would effectively negate the City's right to hire part-time employees. In addition, in the unlikely event that the City could hire part-time employees

under the Union's proposal, the results would be unfair and unreasonable.

The City proposal with respect to part-time fire fighters provides the same daily pay for a part-time fire fighters at the same step. For payroll purposes, the contractual hourly rate is based on 2,080 hours per year, or $14.64 per hour. The Union's position would, therefore, result in payment of $351.36 per day for part-time. This is $101.25 or 40.5% more per day than full-time fire fighter.

Based on all of the above,, it is the City's position that its proposals to use part-time employees are more reasonable than those of the Union.

C. Medical Examinations

Although the Union make several contentions about this issue, it has presented no evidence to support the allegations it has made. In addition, the Union's proposals on this issue do not address any of the concerns raised either by the grievances or by the Union witnesses. Clearly, the Union has presented absolutely no justification for its proposed changes to the status quo.

On the other hand, the City has addressed the Union's valid concern on the length of time employees have to wait at the hospital. In addition, Chief Davis testified that a significant reduction in sick leave has led to a reduction in overtime. The City asserts that this is ample justification for maintaining the status quo.

Moreover, the City's proposal on this issue is consistent with the policies in effect in other bargaining units in the City of Appleton. Assistant Personnel Director Bayer testified that he developed the procedure used by the City of Appleton for medical examinations for employees who call in sick and that procedure has been applied to all City of Appleton unions. He further testified that the contract language on this issue in the Firefighter contract is identical to that of each of the other 16 Appleton bargaining units.

With respect to this issue, the Union has not established that there is a problem or need for change nor has the Union made a proposal for change meets the need or solves the problem. Further, no special burden is placed on the other party or a quo-pro-quo of sufficient value is offered to outweigh the burden.

D. Duty Days

The City has no proposal with respect to this issue. The Union contends that "the proposal of the Union is supported by the work day practices of comparable communities." However, this is not an accurate statement. While the definition of a duty day may be similar to that of other cities, none of those cities provide for any type of financial remuneration for routine work outside the duty day.

The Union asks for 4 hours at time and one-half (6 hours pay) for any amount of routine work performed on Saturdays and 8 hours at double time (16 hours pay) for any amount of routine work performed on Sundays and holidays. This is in addition to the pay the employees are already receiving for working those days. The Union's proposal would prohibit the City from scheduling routine duties on 31% of the employee's regular work days unless it chose to pay the penalties. These are onerous and totally unique penalty payments, and are not supported by any comparable.

The Union's proposal is ambiguous. In response to a question from the City, the Union's attorney stated that the City would have to adopt one or the other option for the term of the agreement. When it was pointed out that the proposal does not say the option must be selected at the start of the term of the agreement or at any other time, the Union asked for a caucus. The Union stated after the caucus that the City can make the change whenever it chooses. It is easy to imagine the confusion and litigation that would result from contract language that is so ambiguous that the drafters of that language needed a caucus to determine what their proposal meant on a particular day.

There is further ambiguity in the proposal. Option 1 provides that the routine duty day for Saturday shall be from 0700 until 1200. Option 2 then provides that employees receive "four hours at time and one-half on Saturdays, for any Saturday in which routine duties are assigned." Since Option 2 simply states "Saturdays," with no reference to time of day, it would appear that the City could be subject to the penalty if it assigned routine duties during the routine duty schedule times on Saturday.

The Union's contention that the City cannot raise the ambiguity issue after final offers are certified is without merit. The Milwaukee County case referred to by the Union related to a challenge to a proposal after certification of final offers on the basis that it was a permissive subject of bargaining. The City is not raising a question of the mandatory/permissive nature of this proposal. The Union drafted this language in order to make its proposal a mandatory subject of bargaining, after the City

challenged the mandatory nature of the Union's original language. The City had absolutely no obligation to edit the Union's language during the exchange of final proposals.

Further, no quid pro quo has been offered by the Union. The alleged past practice, if it existed, was properly repudiated by the City on December 31, 1991. Thus, the status quo to maintain is that there is no past practice relating to duty days. The Union's proposal would place an expensive, confusing burden on the City and no quid pro quo has been offered by the Union. To the contrary, the Union is asking for this significant change to the status quo at the same time it is asking for higher wage increases than any other Appleton unit and the majority of the comparables have received. The Union's proposal on this issue is so unreasonable, onerous, and ambiguous that it should cause the arbitrator to select the City's position, not only on this one issue but on this entire proposal.

E. Overtime Call In

The Union does not have a proposal with respect to this issue. The City acknowledges that its proposal would change the status quo and as a result, the City has an obligation to justify the change. The City has established that a problem or need for change exists. The existing contract language can require the City to call in Captains to work even if qualified on-duty personnel are available, resulting in losses of opportunities for qualified individuals to sharpen their skills by filling in for Captains as well as causing significant extra costs to the City.

The City's proposal for change meets the need or solves the problem by allowing assignments to qualified on-duty personnel before calling in employees to fill the remaining vacancies. This allows qualified employees to sharpen their skills in higher classifications, and expands overtime opportunities for other classifications, and reduces the overall overtime cost to the City. Further, it is the City's position that no special burden is placed on the Union since the City's proposal will not reduce overtime work available to the bargaining unit and will merely redistribute some of that overtime.

In the alternative, if the Captains as a group are considered as "the other party", the City's proposal includes a quid-pro-quo. Any reduction in earnings would be tied to a corresponding reduction in hours worked.

A review of the positions of the parties in relation to the factors specified in Wisconsin State Statutes 111.77 should clearly demonstrate that the offer of the City is the most reasonable and

that it should be adopted by the arbitrator as the final and binding settlement of this matter.

IV. DISCUSSION

Section 111.77(6), Wis. Stats., establishes criteria an arbitrator is to weigh in deciding an interest dispute. These factors include the following:

(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 community to pay.

(d) Comparison of the 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 in similar services and with other employees 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 employees, 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.

* * *

Based on the application of the statutory criteria and the evidence record before me, the Union's final offer is awarded. In support of this award, the following considerations are noted.

A. Wages

I am convinced that the Union's final offer does not improve its relative rank compared to its comparables. The Union proposes a percentage increase which is less than the average increase of the comparables. It preserves the historic difference between the bargaining units and it does not improve its relative rank among the comparables.

Further, and as asserted by the Union, the evidence record indicates that the Union's percentage increase for 1993 is placed in a better perspective when contrasted with the combined 1992-93 percentage increases of the comparable units. Agreements in Menasha, Green Bay and Oshkosh resulted in increases of 9.42%, 9.67%, and 8.13%, respectively. Neenah, with an assumed increase of 4.0% for 1993, will realize a 9.29% increase for 1992-93. The average of the four units is 9.13%. The Union's proposal of 9.73% thus appears more on line with recent settlements than the Employer's offer of 8.12%.

With respect to the Employer's argument that its wage proposal is consistent with internal criteria, the record indicates that some Appleton bargaining units have not yet settled their 1993 contracts. More important, internal comparability is not dispositive of the issue. The statute mandates consideration of numerous factors, not just internal wage patterns. The Union's wage offer is out-of-bounds with internal criteria.

In summary, although the Union proposes a slightly higher percentage increase than the relevant bench-mark comparables, I see the Union's offer as simply preserving the historical wage pattern of Appleton's fire fighters. When split increases are taken into consideration, the actual compensation is within the standard set by voluntary settlements. In short, the Union has advanced the better case with respect to the wage issue.

B. Part-Time Fire Fighter Proposal

There is no question that the City's final offer would give it the right to contract for the delivery of fire protection services with part-time fire fighters. Whether the decision itself is a mandatory subject of bargaining is not dispositive. Since the language the City proposes will, when implemented, result in fewer employment opportunities for full-time fire fighters, the Union's concerns are valid.

Further, not only is the Union's proposal supported by a long-standing past practice at Appleton, the Employer's proposal lacks comparability. I do not agree with the Union's analysis that part-time fire fighters will necessarily be less well-trained and thus cause a safety problem for Appleton residents. Employees must meet the standards set by the State of Wisconsin and, as such, must have at least the same level of training as new hires had in 1989 and 1990. Still, absent clear and convincing evidence of a need to change the present system [1] and absent comparability, [2] the part-time issue must be resolved in favor of the Union. The Union's proposal to provide full-time fire fighters with the first option to work does not prohibit the Employer from offering employment opportunities to part-time fire fighters and, accordingly, the proposal does not interfere with the City's ability to provide services to the community.

C. Medical Examination Issue

The gravamen of the Union's proposal establishes the conditions under which a sick or injured bargaining-unit member may be compelled to submit to an Employer-ordered medical examination. As already noted, the Union's proposal would require the City to pay for the medical examinations it orders and where such examinations are conducted outside of the home of the sick or injured employee, the City is required to conduct such examinations

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[1] The City did argue that it wanted to reduce overtime costs. The evidence record indicates that the City's overtime expenditures have fallen from $204,859 in 1988 to approximately $60,00 in 1991. The budget for overtime in 1992 was $81,575 and for 1993 it was $83,166. As noted by the Union, these amounts are within the range established for the overtime budgets as set out in Union Exhibits #706-710.

[2] The Union produced witnesses from Green Bay, Oshkosh, Neenah, Menasha, Manitowoc, Fond du Lac and Sheboygan. All testified that fire services in their communities are provided solely by full-time fire fighters. References to voluntary fire departments are simply inapposite.

at a location reasonably near the employee's residence. The Employer would also be required to pay for the employee's transportation to an from the examination site.

I see nothing unreasonable in conditioning City-ordered medical examinations on the employee's ability to travel. Moreover, there is nothing unreasonable in preventing an employer from compelling an employee to drive to an examination site where illness, injury or medication impairs that employee's ability to drive. If the City wants to order an examination it should not be mandatory that an impaired employee drive himself to the examination site. The evidence record demonstrates that on some occasions the City has ordered an examination when the medical condition of the employee arguably resulted in impairment. The testimony of witnesses demonstrate a need for a change as the present practice subjects sick or injured employees to further medical risks. While there are some problems with the Union's proposal, management's apparent unresponsiveness to the problem is in part addressed by the Union's language. The Union's proposal on this issue is more reasonable than that of the City.

D. Normal Duty Day

As part of its final offer the unit has proposed to include language that defines the normal duty hours. The City, through a December 31, 1991, letter (Union Exhibit #509), and through its silence at the bargaining table, seeks the option to assign routine duties and training to fire fighters on any day and at any time.

The Union's primary objective on this issue is to prevent assignment of duties outside of the normal duty day hours. Where normal duty practice is not observed, the Union, similar to its comparables, seeks assurance that such assignments will not regularly be made. In the Union's eyes, the issue of compensation is second to the definition of the duty day.

The parties are not in agreement with respect to the past practice on this issue. The Union asserts that Springer testified that it had been the practice of the Appleton Fire Department to follow a normal work day schedule, which is consistent with the proposal of the Union. Management says that the evidence record indicates that no city among the comparables, or in the State of Wisconsin, or in any region, has a practice consistent with the Union's proposal. The Employer points out that pursuant to case law in Wisconsin, the City repudiated the alleged past practice by its December 31st letter. The Union did not challenge this action. The fact that the Union is making proposals on this issue indicates that they agree that the practice was terminated.

I hold that the Employer makes the better case on this issue. In selected cases employees on their twenty-four (24) hour tour of duty (employees "on the clock") can be assigned non-emergency work by management.

E. Call Back Issue

Under the current language, Article 17, Section A allows the Employer to temporarily assign the most senior, on-duty qualified person to fill vacant positions where a shift is sufficiently staffed to allow filling of a vacant position without resort to overtime call back. Where a shift does not have sufficient staff to fill a vacant position, the language mandates that the City must call back for overtime an off-duty employee of the same classification as the vacancy which caused a staffing shortage. As noted, the Employer proposes to eliminate the requirement that overtime call back vacancies be filled at the classification which created the vacancy and seeks to call back employees without considering the classification at which the vacancy causing a need to call back was created. In other words, the City is proposing that on-duty personnel be assigned to work they are qualified to perform before employees are called in to fill vacancies in their respective classifications. Implementation of the Employer's proposal would allow management to temporarily assign on-duty personnel to the vacant officer position and then call back employees to fill vacancies at the lowest classification level, that of fire fighter.

I hold that the Union's proposal is more reasonable. The Union's proposal seeks to preserve the "status quo" which existed at the expiration of the 1990-1991 contract. Further, the temporary call in language contained in the 1990-1991 collective bargaining agreement is arguably consistent with the contractual overtime provisions and practices followed in comparable communities, although, as pointed out by management, exceptions can be found. Finally, implementation of the City's proposal would essentially create a situation in which higher ranking, higher paid employees would infrequently, if ever, be afforded overtime call-in opportunities. For these reasons, I hold that the Union makes the better case.

* * *

For the above reasons, the following award is issued:

V. AWARD

The Union's final offer is awarded.

Dated this ____ day of June, 1993,
DeKalb, Illinois.

Marvin Hill, Jr.

(See Statement of Arbitrator
indicates Award dated
6-7-93.
WERC
mb)