STATE OF WISCONSIN
BEFORE THE IMPARTIAL ARBITRATOR

In the Matter of the Petition of MILWAUKEE POLICE ASSOCIATION, LOCAL NO. 21, IUPA, AFL-CIO For Final and Binding Arbitration Involving Law Enforcement Personnel in the Employ of CITY OF MILWAUKEE	Case 403 No. 49683 MIA-1824 Decision No. 27905-B

APPEARANCES: KENNETH J. MURRAY and LAURIE A. EGGERT OF ADELMAN, ADELMAN & MURRAY, S.C., Attorneys at Law, appearing on behalf of the Association.

GRANT F. LANGLEY, City Attorney, by THOMAS E. HAYES, Special Deputy City Attorney, and THOMAS C. GOELDNER, Assistant City Attorney, appearing on behalf of the Employer.

The Milwaukee Police Association, Local No. 21, IUPA, AFL-CIO, hereinafter referred to as the MPA, and the City of Milwaukee, hereinafter referred to as the City, were parties to a collective bargaining agreement, effective through December 31, 1992, covering non supervisory law enforcement personnel. The parties were unsuccessful in their efforts to negotiate the terms to be included in a successor collective bargaining agreement, to be effective from January 1, 1993 through December 31, 1994, and the Association filed a petition with the Wisconsin Employment Relations Commission (WERC), on August 25, 1993, requesting the WERC to initiate compulsory final and binding arbitration pursuant to Section 111.70(4)(jm) of the Municipal Employment Relations Act (MERA). An investigation was conducted by Commissioner Herman Torosian and

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Daniel J. Nielson, a member of the Commission's staff, on September 2, 1993 and April 20, 1994. On May 5, 1994, Commissioner Torosian issued a Notice of Close of Investigation and Advice to Commission, advising that an impasse within the meaning of Section 111.70(4)(jm) existed with regard to the issues in dispute as outlined in the final offers attached. On May 6, 1994, the Commission issued its Finding of Fact, Conclusions of Law, Certification of Results of Investigation and Order requiring arbitration. Thereafter, the parties selected the undersigned from a panel of arbitrators provided by the WERC and the undersigned was appointed arbitrator, by order dated June 8, 1994.

On June 22, 1994, the undersigned held a prehearing conference with the parties and their representatives for the purpose of scheduling hearings and establishing certain procedures to be followed. An Order for Hearing, setting forth such matters, was issued by the undersigned on June 23, 1994. Thereafter, evidentiary hearings were held on the following dates:

August 15, 16,* 18, and 19, 1994
September 12, 13, 15, and 16, 1994
October 10, 11, 13, and 14, 1994
October 17,18, 19, 20, and 21, 1994
November 2, 3, and 4, 1994
November 7, 8, 10, and 11, 1994
November 14, 15, 16, 17, and 18, 1994
November 29 and 30,* 1994, and December 1 and 2, 1994
December 6, 8, and 9, 1994
December 15 and 16, 1994
December 19 and 21, 1994
*Hearing adjourned shortly after convening.

Verbatim transcripts of the hearings were prepared and the parties filed post-hearing briefs and reply briefs. The initial

briefs were received by March 2, 1995 and the reply briefs were received on March 20, 1995. Full consideration has been given to the evidence and arguments presented in rendering this decision.

PRELIMINARY COMMENTS

Testimony and documentary evidence was presented on 38 of the 40 days listed above. This resulted in 6,365 pages of transcript and even more pages of exhibits. Based upon this mammoth record, the parties prepared comprehensive written arguments and reply arguments totaling some 779 pages.

As to the issues in dispute, the undersigned is confronted with numerous proposals or "demands" as the Union customarily refers to them. Neither party attempted to present a detailed history of the negotiations and the arbitrator has not undertaken an effort to determine why the negotiations failed to produce anything other than numerous "housekeeping" changes and a few agreements on some of the less difficult issues raised. That is not the purpose of this proceeding. Rather, its purpose is to determine "those terms of the agreement on which there is no mutual agreement and on which the parties have negotiated to impasse, as determined by the Commission."

While the parties have agreed to an extension of the time period contemplated by the statute, for the completion of that task, it is simply not possible to discuss all of the evidence and arguments presented in relation to the numerous issues in dispute without unduly delaying the decision-making phase of this

proceeding. In most cases, the arbitrator will focus on the evidence and arguments deemed most persuasive, in making the required determinations. Matters found less persuasive or rendered less persuasive or irrelevant by this process may not be mentioned, but have not been ignored.

During the course of the hearing, it became clear that many of the proposals are "unrefined," in the sense that they have not been subjected to the give and take of bargaining, which usually results in many items being dropped and/or modified and subjected to counterproposals. For this same reason, many of the proposals lack any apparent *quid pro quo* or accommodation.

The arbitrator recognizes that, under the statute, he has the authority to "refine" the parties' proposals in the course of determining the terms of the agreement. However, the arguments of the parties disclose the risks inherent in attempting to do so, based upon a formal record, such as that presented here, as opposed to the insights gained through mediation or other forms of actual participation in the negotiating process. For this reason, such authority has been exercised with great restraint.

With these considerations in mind, the undersigned turns to the task at hand. Initially, the base salary article and pension benefit article will be discussed. Then the other articles will be discussed in numerical order, except where a new article has been proposed or (in one case) where proposals for two articles are interrelated.

ARTICLE 10 - BASE SALARY

In it "final offer",[1] the MPA proposes to modify all of the 1992 base salary figures set forth in Article 10 by implementing across the board increases of 4 1/2%, to be effective pay period 1, 1993 and pay period 1, 1994. The City's proposal is to the same effect, but would implement increases of 3 1/2% in each year.

MPA's Position

In general, the MPA relies upon evidence concerning external comparisons and expert testimony and other evidence concerning the heavy demands placed upon police officers in the performance of their duties in Milwaukee. According to the MPA, it is an accepted premise that police officers in the City of Milwaukee deserve to receive the highest pay, in terms of salary and total compensation, in relation to other police officers in neighboring communities or elsewhere in the State. It argues that the additional 1% increases included in its final offer will help make up the ground lost, since 1982, when City police officers were the highest paid, and cause them to be ranked closer to the middle in the national comparisons relied upon by the parties. In its view, police

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[1]Pursuant to the terms of the Order for Hearing issued by the undersigned on June 23, 1994, embodying the agreements reached at the prehearing conference, both parties filed final offers on July 22, 1994, with the understanding that neither party could thereafter change its position on any issue in dispute (other than by dropping its proposal) without the consent of the other party. The parties did subsequently agree to a few substantive changes and corrections in the wording of their final offers, all of which are well documented in the record.

officers in Milwaukee deserve to be paid more than fire fighters, due to the greater intellectual demands and risks placed on police officers; the suburban comparisons, which should be more persuasive because of the job market and similarities in economic conditions, require a larger increase than that proposed by the City; and the MPA's national comparisons should be found more persuasive because of similarities due to their geographic proximity.

In support of this position, the MPA makes the following points:

1. While a Milwaukee police officer's job is much more demanding than that of a police officer in one of the 28 suburban communities or the county sheriff's department, Milwaukee police officers have not ranked number one in maximum base salary since 1982. In 1983, they dropped to third place and continued on a downward trend until 1985, when they reached an all time low of seventeenth place. The 1987-1988 Kerkman award and the 1989-1990 Vernon award resulted in moves to ninth, sixth, fifth, and sixth place and the voluntary settlement for 1991-1992 returned them to fourth place. Under the City's offer, Milwaukee police officers would revert to fifth and tenth place under the two years of the agreement. The Union's offer would still leave them in second place (by $369.00) after Glendale.

2. The award of Arbitrator Weisberger, covering Milwaukee fire fighters for the two years in dispute, likewise recognized the appropriateness of first place ranking for Milwaukee fire fighters

in relation to suburban fire fighters. She rejected the City's offer of 2.5% for each year of the agreement as too low, because it would result in fourth place ranking for those employees.

3. When consideration is given to total direct compensation, the difference between the two offers worsens, placing the City in the lower half in the suburban comparisons. Even if the City were correct in its claim that its calculation of total direct compensation is more accurate than that of the Union for suburban and State comparisons, City police officers will still rank low, with nearby West Allis paying nearly $3,000 more.

4. Statewide averages for wage increases for police officers in 1993 and 1994 (at 4.38% and 3.97%, respectively) favor the Union's proposal.

5. The expert testimony of Dr. Larry Hoover of Justex Systems, Inc., supports the appropriateness of comparisons of Chicago, Cincinnati, Cleveland, Columbus, Detroit, Indianapolis, Kansas City, (Missouri), Minneapolis, Omaha, St. Louis, and Toledo to Milwaukee, as being more appropriate than the "Vernon 18" (9 larger and 9 smaller cities nationally). By focusing on large midwestern cities, which are similar to Milwaukee, the results become more persuasive. His comparisons of direct compensation and total direct compensation reflect that City police officers will rank in the lower half among these comparables under either final offer, but that the MPA demand would place them near the middle of the range.

6. Comparisons to the Vernon 18 cities relied upon by the City (Baltimore, Boston, Cleveland, Columbus, Dallas, Denver, El Paso, Indianapolis, Jacksonville, Memphis, Nashville, New Orleans, Phoenix, San Antonio, San Francisco, San Jose, Seattle, and Washington D.C.) produce similar results for both wages and total direct compensation. Also, the average increases for the two years in question among these comparables (4.31% and 3.83%), also support the Union's position.

7. Comparisons to the 15 largest cities in the State, which are also relied upon by the City, (Appleton, Eau Claire, Fond du Lac, Green Bay, Janesville, Kenosha, LaCrosse, Madison, Oshkosh, Racine, Sheboygan, Waukesha, Wausau, Wauwautosa, and West Allis) likewise favor the MPA demand. It is significant that Milwaukee police officers would not only rank third, but $89.00 below the rate paid to nearby police officers in Wauwautosa.

8. The City's parity argument lacks historical support and is not logically supportable. There was no parity between 1965 and 1977, during which time there was an illegal strike by fire fighters. In 1978, fire fighters achieved parity at the top step, after the police arbitration award, when the City granted them an increase pursuant to an agreement reached in 1975. During the period between 1979 and 1982, police officers earned more at all steps. After trying unsuccessfully to reopen its agreement, the Union representing the fire fighters engaged in another illegal strike and obtained parity at the top three steps between 1983 and

1986. During the period between 1987 and 1992, fire fighters have maintained parity at the top step, but it takes longer (5 years and 4 months in 7 steps) for fire fighters to get to the top step than in the case of police officers (4 years in 5 steps). Police officers are paid nearly $5,000 more at the first step and police officers will earn approximately $30,000 more than fire fighters during their first six years of employment under either the City or MPA offer.

9. This history reflects that the City recognizes that police officers deserve to be paid more than fire fighters, at least during their first years of employment, and no doubt reflects the requirement that police officers now must obtain two years of college education during their first five years of employment.

10. The concept of parity lacks logical support. Arbitrator Kerkman indicated that it made sense because Milwaukee fire fighters had no legal way of enforcing their salary demands, but the legislature has since given Milwaukee fire fighters access to interest arbitration. The concept holds back the MPA in its efforts to achieve first ranking; rewards past misconduct by the fire fighters; ignores important differences between the two jobs, as testified to at length by Prof. George Kelling; ignores legislative recognition of the need for education, intellectually demanding aspects of the job, the relative lack of promotional opportunities, the greater risk of injury and death, the large block of inactive time included in fire fighters schedules, and the

greater stress suffered by police officers, as testified to at length by Dr. Lawrence Blum; the lack of support among State or national comparables; and the lack of support by comparisons to the supervisory bargaining unit (which is not settled) and management employees who received 2.5% across the board and merit increases equal to 5.73% and 5.74%, respectively.

11. While the City attempted to portray itself as lacking the ability to pay the higher salary demand made by the MPA, through the testimony of its economist, the City's AA+ bond rating and the favorable matters identified in the *Forbes* article and local newspaper column belie that claim. On the other hand, the testimony and evidence on this point emphasizes the importance of controlling crime, in relation to improving the City's economic condition and the best way to accomplish that is through a highly trained, professional and well compensated police force. The pay should be sufficient to discourage police officers from taking less demanding, but better paying, jobs in the suburbs.

12. While the City claims that the recent increases in the cost of living, as measured by the Consumer Price Index referred to in the statute, supports its position, Arbitrator Weisberger recognized that such changes are only one factor to be considered and were offset by the external comparisons. Increases must exceed the rate of inflation if the pay for police officers is ever to catch up to the pay enjoyed by suburban officers. Further, consideration should be given to the standard of living

contemplated for police officers by the statute, even though the measure referred to no longer exists.

13. In costing the proposals, the City ignores the cost savings available under the MPA's 25 and out pension proposal. In addition, its costing methodology is flawed in numerous other ways.

In reply to City arguments, the MPA argues that all of the non police, internal comparisons relied upon by the City are irrelevant; that the City's national ranking data is flawed by its omission of Boston and San Jose and use of inaccurate figures in the case of San Antonio; that its figures for total direct compensation and longevity calculations suffer from the same problems; that the City admits it would be in third place, statewide, for total direct compensation for ten year officers, yet tries to "minimize" the difference as being only 1% (the amount the Union seeks) and utilizes incorrect figures for Racine; that the fact that the suburban departments are much smaller actually supports the MPA's position and if 1.6% is *de minimus* for them, 1% should be viewed in the same light; that the percentage of detectives in the department is no greater than in most departments and their relative pay status is not meaningful, absent more information, or relevant as to what police officers should receive; and that the City's costing figures should be rejected because of their failure to parallel the costing presented to the city council for the fire fighter settlement and because of the numerous errors and theoretical costs included. According to the MPA, the only

appropriate use of CPI data is for wage comparison purposes, not total percentage cost or lift analysis. In conclusion, it argues that, contrary to the City's contention, police officers should earn more than fire fighters at all steps of the salary schedule, for the reasons previously given, and because there has never been "lock step parity" between their respective salary schedules.

City's Position

In general, the City relies upon internal comparisons, especially that involving fire fighters; other state and national comparisons; its costing analysis; comparisons to increases in the Consumer Price Index; and the concept of parity. In support of this position, the City makes the following points:

1. Internal comparisons strongly support the City's proposal and should be deemed controlling in this case. The City negotiates with 18 other bargaining units. Two of those bargaining units (covering the electrical group and the building trades group) are tied to private sector prevailing wages. Only one other unit, the police supervisors represented by the Milwaukee police supervisor's organization (MPSO), remains unsettled. Thirteen of the 14 remaining bargaining units agreed to across the board increases of 2.5% in 1993 and 1994. The remaining bargaining unit, represented by the fire fighters union, was awarded 3.5% increases in the two years in question as a result of an arbitration award. The voluntary settlements cover 3,513 general City employees and the award covers 1,006 fire fighters.

2. For purposes of making national comparisons, it is appropriate to utilize the Vernon 18 cities, since they are the only group that have been approved for such purposes in an interest arbitration proceeding. Boston and San Jose did not respond to the City's request for information. Excluding those cities for purposes of analysis, the City would rank 8 of 17 in 1993 and 10 of 16 in 1994 in comparisons of maximum base salary. The City's rank would only be 1.5% away from fifth place ranking in 1993 and less than 1% away from sixth place ranking in 1994. When compared for total direct compensation, at 10 and 15 years of service, the City still compares favorably. It would rank eighth of 17 in 1993 and ninth in 17 in 1994, for officers with 10 years of service, and ninth of 17 in 1993 and ninth of 17 in 1994, for officers with 15 years of service.

3. The City also compares favorably with the 15 most populous cities in the State. The City would rank first in base salary in 1993 and third in 1994. However, in 1994, Wauwautosa would only top the City's proposal by $89.00 and West Allis would only do so by $5.00. Such differences are essentially meaningless. When compared for purposes of total direct compensation, an officer with 10 years of service would be third in both 1993 and 1994. West Allis would only be ahead of the City by one-half a percent in 1993 and 1% in 1994.

4. The small size of the police departments in the suburban comparables greatly diminishes their value as comparisons. Only 2

of the 29 departments (Wauwatosa and West Allis) are also included in the statewide comparison and their departments employ only 62 and 48 police officers, respectively. Taken together, the 8 highest ranking suburban departments plus Wauwatosa and West Allis only have an aggregate number of front line law enforcement officers equal to the Milwaukee County sheriff's department. All of the departments taken together, plus the sheriff's department, only employ 906 front line officers or 63% of the City's total 1,436 police officers. The City's proposal would cause it to rank fifth out of 30 municipal departments in 1993 and less than 1% out of second place ranking. The City would rank tenth out of 28 departments with settlements for 1994 and be one-half of 1% out of fifth place ranking. On the other hand, the Union's proposal would not top the rate earned by the 29 Glendale police officers in 1993 or 1994. In terms of total direct compensation, at 10 and 15 years of service, the dollar and percentage differentials become rather small. A 10 year officer in Glendale would be $398 (or 1%) ahead in 1993 and $622 (1.6%) in 1994. The figures for a 15 year officer would be even lower at $208 (or one-half of 1%) and $432 (or 1.1%). The numbers and percentages would be even lower (and negative in 1993 for a 15 year officer) for second place West Allis. These *de minimus* annual differences in base salary and total direct compensation support the conclusion that the City's base salary proposal is reasonable.

5. A comparison of salary rates for City detectives mandates

an award of the City's base salary proposal. The City employs 230 detectives who represent 13.2% of the bargaining unit of 1,746 employees. Numerically, they exceed the number of police officers in any of the State or suburban comparables. Only the county deputies are more numerous (260). In 1993, the City proposes that detectives receive $42,207 at the top step or 11.7% more than police officers. In 1994, the City proposes that detectives receive $43,684, which is also 11.7% more than police officers. Eight of the 11 cities utilized by MPA witness Hoover, had no detective classification and Kansas City paid its detectives the same as their patrol officers at the top step. Even Chicago and Detroit only paid their detectives 5% more and 10% more, respectively. The City's proposal would cause it to rank first among State comparisons and second only to the three detectives in Glendale.

6. Retiree health insurance costs will rise substantially under the terms of the new agreement, because it will result in a reduced average retirement age.

7. The total package cost of the MPA proposals is prohibitive. Each 1% pay increase in the first year alone translates into $614,712 or $775,856, with rollups. In order to calculate the total cost of the two-year agreement, it is necessary to consider the 1993 repeat costs. When all of the costs associated with the MPA proposals are calculated, it is possible to calculate the total percentage lift. The MPA's proposal for

increases in base salary alone would result in a 9.56% lift over the two years of the agreement, with rollups included. When the cost of all of the other proposals is included, the total percentage lift of cost to the City under the MPA proposal would be an astronomical 23.96% pay.

8. The City's proposal is extremely generous. Its proposal would result in a total percentage lift of 7.4% with rollups. This is the same wage increase received by the fire fighters. The total package lift under the City's proposal would be an extremely generous 12.89%. No other Wisconsin city has presented its police officers with a proposal which includes both an excellent base salary increase of 3.5% per year in addition to a significant pension enhancement.

9. The statute requires the arbitrator to consider increases in the cost of living as measured by the average annual increases in the consumer price index since the last adjustment in compensation. The last adjustment occurred in pay period 1, 1992. Utilizing the same CPI-U index which is used for purposes of computing the proposed pension escalator, the CPI change in 1992 was 2.9% and the CPI change in 1993 was 2.8%. The cumulative change over the two-year period was 5.7%. The 3.5% increases proposed by the City would result in a cumulative base salary increase or lift of 7.12%. This is well in excess of the change in the CPI. Even if the CPI data for 1993 and 1994 were used, because of the timing of the award in this proceeding, the CPI data would

provide even stronger support, since the cumulative increase would drop to 5.5%. The City's proposed total percentage lift of 12.89% outdistances the CPI change by 135%, a truly staggering amount. On the other hand, the MPA's proposals, which would result in a percentage lift of 23.96%, is almost 4 1/2 times the change in the CPI.

10. Numerous arbitrators have recognized that internal comparisons of base salary (and pension benefits and total package), carry the greatest weight in interest arbitration proceedings. Arbitrator Vernon recognized the importance of settlement patterns and, in municipalities that have a number of different bargaining units internal patterns. A union must present strong justification to break such an internal pattern and the MPA has failed to do so in the case. Adherence to the strong internal pattern, especially that involving the fire fighters, will not result in wage rates which are substantially out of line with external comparisons and should be followed in this case.

11. Parity between the police and fire department personnel in the City of Milwaukee is vital to labor peace and to the protection of the community. If the MPA were to prevail in this case, irreparable harm would be done to the collective bargaining process in the City. A divergent outcome from that achieved by the fire fighters would necessarily discourage bargaining and set the City back years into a scene of labor turmoil. While both parties have adduced evidence concerning comparables, the fire fighter

comparison no doubt carries the greatest weight in this proceeding. If the City is to maintain labor peace with its protective service unions, both wage and benefit parity must be maintained. To do otherwise would result in a continuous struggle of one upmanship, as shown by the City history of past labor relations chaos. The longstanding, lock step parity going back to 1981, must be preserved if the City is to maintain labor peace. If the parity pattern is broken, the City will find it increasingly difficult to negotiate with its protective service unions and the collective bargaining process may be reduced to a series of interest arbitration proceedings with different arbitrators issuing contradictory awards.

12. The evidence concerning the City's relative ability to pay strongly supports the City's position. The City's economist and statistician, William Anderson, testified at length concerning the City's economic conditions, based upon population trends, employment trends, projected increases in gross City product and economic growth across industry groups, the relationship between declining personal income and poverty, recent decreases in household income and increases in the level of poverty and evidence concerning the stagnation in the tax base and decreases in the tax levy (while the rate remained above others in the metropolitan area). He testified that the City is home to an economy "that is struggling to adjust to structural changes from a strong and vibrant manufacturing based economy to one that is driven by

service related activities and that it is demonstrating a "sluggish response." He predicted that the changes described were bound to continue in the years ahead, with little growth and poverty likely to increase while the tax base remains stagnant. He also testified that the City remained vulnerable to other unpredictable developments, such as the decision by a major employer to close its operations or move its operations. When appropriate consideration is given to this economic and social data, the City's offer should be awarded.

In reply to Union arguments, the City maintains its position that the Vernon 18 comparables are more appropriate than those proposed by the MPA; that the Union should not be heard to argue about police officers taking suburban jobs while "spearheading" a drive to eliminate the City's residency requirement through legislation; that the City's ranking in relation to suburban departments has fluctuated over the years; that if total compensation *received* is considered, the City would move up on the Union's proposed comparisons because other police departments require their employees to pick up a larger portion of their pension costs; that the Union's rebuttal exhibits were shown to be unreliable, as illustrated by the existence of six different annual salary figures for San Antonio for 1993 and 1994, none of which is consistent with the documentary evidence that San Antonio has not settled for either year; that the MPA's education argument is overblown because it only applies to police officers hired after

February 1, 1993; that Dr. Kelling's testimony should be disregarded because he admitted that his experience with the work performed by fire fighters is "extremely limited;" that the testimony of Dr. Blum on the issue of parity should likewise be disregarded because he was unfamiliar with the dollar differences in dispute; that the MPA's comparison to police management employees was misplaced because management employees receive merit and not step increases; that the City is less able to pay the increases in dispute than the suburban communities relied upon by the MPA; that the City's good bond rating and other positive press is the result of a conservative approach to spending; and that changes in the CPI-U index are not only applicable for purposes of evaluating salary, but also costs and they strongly support the City's position. The MPA claim that the actual cost of its entire final offer is a mere 7.68% of pay, in spite of the fact that its wage demand alone costs 9.2% of pay, is obviously bogus and its "actual cost flow" method amounts to a "slight of hand."

Discussion and Award

Most persuasive, in support of the MPA's position are the evidence and arguments based upon suburban comparisons. There are several problems with the external comparisons relied upon by both parties, especially the national comparisons. Those problems include questions concerning the accuracy of the data presented and questions of relevance, due to differences in size, geographic location, and political, economic and social conditions. Also,

unlike the suburban comparisons, there is no sound basis for concluding that the base pay for police officers in Milwaukee should maintain any particular rank within the national comparables on the base salary question.

As Arbitrators Kerkman and Vernon have both recognized, there is a sound basis for concluding that police officers in Milwaukee ought to receive a top base pay rate that is at or near the top rate among the suburban comparisons. However, as the City points out, that is a goal that has not often been met in the past. There are 28 suburban communities, many of which have a sound and growing tax base. It is obviously much easier for such communities to pay a higher base rate to the relatively small number of police officers they employ.

Most persuasive in support of the City's position, is the evidence concerning the internal pattern of settlement and especially, the terms of the award granted to the fire fighters by Arbitrator Weisberger; the cost of the Union's proposal, especially in light of the significant improvement that will be made in the pension plan under either final offer; the costs associated with some of the other MPA demands that have been agreed to or may be granted in this proceeding; and the relevant increases in the cost of living. The economic and social data presented by the City's economist, while persuasive, is off set to a large extent by the expert testimony and other evidence presented by the MPA concerning the tremendous demands placed upon police officers in the City of

Milwaukee.

Like others before him, the undersigned cannot accept the proposition that the concept of parity precludes the MPA from ever justifying an increase greater than that agreed to or awarded to fire fighters which results in a breaking of the parity relationship that exists in base salary.[2] However, like others before him, the undersigned is also very reluctant to do so, in the absence of compelling evidence requiring such a result, because of the consequences that may follow such an award. An award which disregards a well established internal pattern of settlements or a parity relationship can be very disruptive to the bargaining process. The MPA offer would do both.

The bargaining history between the parties here includes a period, following the 1979-1980 Malinowski award, where some of the worst possible consequences of such an award came to pass. Even though the fire fighters now have access to interest arbitration, the undersigned is satisfied that an award which goes beyond both the internal pattern of settlements and disregards the parity relationship that has been shown to exist has not been sufficiently justified as necessary in this round of negotiations.

In reaching this conclusion, the undersigned has had to balance the set back that will occur in the MPA's effort to close

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[2]That relationship would appear to have evolved, over the years, to the point where parity can be said to exist, where fire fighters and police officers receive the same biweekly salary at the top step.

the gap with certain suburban departments against the anticipated disruption in bargaining relationships that will follow if its proposal were granted. The other matters identified as persuasive, in support of the City's position, have helped to tip that balance.

AWARD: The agreement shall include a base salary increase of 3 1/2% applied to 1992 rates of pay effective pay period 1, 1993 and a base salary increase of 3 1/2% applied to 1993 rates of pay effective pay period 1, 1994.

ARTICLE 19 - PENSION BENEFITS

A. NEW PENSION ESCALATOR

Prior to January 1, 1990, the parties' agreement on pension benefits did not include a pension "escalator" or cost of living adjustment for retirees. In the arbitration proceeding before Arbitrator Vernon, covering the years 1989 and 1990, Arbitrator Vernon selected the City's final offer, to establish a pension escalator which currently provides for an escalator of $50 per month increases after the fourth, seventh, and tenth year after retirement, in the case of employees who retire on a service retirement. The escalator is also applicable to duty disability retirees who convert to a service retirement.

In the interest arbitration proceeding before Arbitrator Weisberger, the City proposed to improve the escalator provision by providing that the $50 increments would be added after the third, sixth, and ninth years of retirement and by adding a 2% annual increase for service retirees after they complete 11 years of retirement. In that proceeding, Arbitrator Weisberger selected the

fire fighter union's final offer, calling for an annual COLA escalator, based upon changes in the CPI-U, with a cap of 3%.

In its final offer in this proceeding, the City has made a pension benefit proposal including the new COLA escalator and other features that mirror the new agreement with the fire fighters. In its final offer, the MPA includes a COLA escalator proposal which has a number of features that differ from those proposed by the City and fails to include the *quid pro quo* referred to in the City's proposal. In addition, the MPA has a number of other proposals to improve pension benefits and to modify certain other provisions, along with an offer of a different *quid pro quo*, if all of its proposals are accepted.

B. CITY'S PROPOSAL

In its written argument, the City describes its proposal for changes in the pension benefits article, as follows:

> a. Employees who are or who become eligible to retire during the term of this contract shall on March 1 of the calendar year following the first full calendar year of retirement and each succeeding March 1 receive a CPI-based escalator with a 3% maximum in lieu of the current $50 per month escalator on the 4th, 7th and 10th annual anniversary after retirement.
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> b. The above-mention escalator is applicable to the surviving spouse's survivor allowance.
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> c. The above-mentioned escalator is not applicable to a deferred retirement allowance or a survivor not the employee's spouse.
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> d. An employee who elects a duty disability retirement benefit shall after the optional

conversion date be paid an amount equal to the amount the employee would receive if as of the date of such election he or she had elected an ordinary retirement benefit but not more than 75% nor less than 57% of current annual imputed salary.

e. Effective Pay Period 1, 1993, each MPA employee shall contribute an amount equal to 1% of his/her earnable compensation or duty disability retirement benefit toward the cost of the pension benefit deducted from the bi-weekly paycheck of such employee. Effective Pay Period 1, 1994, the contribution shall increase to 2%.

f. Any members of the MPA who elected a protective survivorship option prior to the execution date of this agreement or individuals who retired on a service retirement allowance between January 1, 1993 and the execution date of this agreement may reselect an option available under this agreement during the time period beginning one (1) month following execution and ending 180 days thereafter.

C. MPA'S PROPOSALS

At the hearing, and in its written arguments, the City raised a number of questions as to whether the MPA proposals, as drafted, had the meaning attributed to them in testimony at the hearing and in written arguments. The following represents the arbitrator's understanding of the stated intent of MPA proposals, as reflected in their arguments:

1. New COLA Escalator. Include the new COLA escalator in the agreement, as proposed by the City, with the following differences:

A. Employees who become eligible to take a deferred retirement allowance during the term of the agreement shall be

entitled to have COLA adjustments made in their retirement benefits.

B. Surviving beneficiaries who are not spouses would be entitled to receive COLA adjustments.

C. The minimum benefit to be received by a DDR retiree who elects to remain on DDR would be equal to 60% (not 57%) of current annual imputed salary.

D. The surviving beneficiary of a police officer who selected a protective survivorship option (PSO) other than option 3 (95/50% unreduced benefits) would also be entitled to receive the COLA adjustments.

E. Police officers who retire under the MPA 25 and out proposal and police officers who leave employment with a regular service retirement at age 57, but with fewer than 25 years of creditable service, would be eligible to receive the COLA adjustments.

F. The surviving spouse or other beneficiary of a duty disability retirement (DDR) police officer would be entitled to receive the COLA adjustments.

G. The first COLA adjustment would be made on the first anniversary of the employee's retirement and every 12 months thereafter.

H. The "window" for reselecting a PSO would be up to 90 days (not 180 days) following the execution of the agreement.

I. Police officers would not be required to contribute

1% of pay for 1993 and 2% of pay for 1994.

2. 25 and Out. Under the current agreement, a police officer with 25 years of creditable service is entitled to retire with an unreduced pension upon reaching age 52. Police officers who have 25 years of creditable service, but are not yet 52 years of age, can leave their employment and begin receiving a service retirement benefit at age 52. Under the MPA proposal, police officers with 25 years of creditable service would be eligible for an immediate, unreduced service retirement benefit, regardless of their age.

3. Recruits. Police officer recruits would be eligible to receive DDR benefits if injured during training.

4. Automatic Revocation of PSO Option. The MPA would include a new "pop-up" provision, providing that any PSO a retiree selected would be automatically revoked (prospectively) if their spouse or other beneficiary predeceased them.

5. Automatic 100% PSO After 25 Years. The MPA would include a new provision for police officers with 25 years of creditable service, giving their spouse or other beneficiary the right to receive option 2 retirement benefits (100%), in the event they die before actually retiring.

6. 30-Day Waiting Period. Under the rules of the employees' retirement system (ERS) an employee who files an application for retirement must wait a minimum of 30 days before retiring. The MPA proposes to "eliminate" the 30-day waiting period for employees who die during the waiting period.

7. *Quid Pro Quo* Offered. The MPA offers to "relinquish any and all rights and claims it or its current and former members may have" to the surplus that exists in the Firemens' and Policemens' Survivorship Fund (FPSF), actuarially estimated to total 28.5 million dollars. The offer would require the City to agree to a hold harmless agreement providing that, in the event of litigation against the Association, the City would co-defend, indemnify and hold harmless the Association, and its agents or employees for any monetary award and all costs, including attorney's fees.

D. ARGUMENTS AND DISCUSSION

MPA's Position

The MPA's position on the above-described proposals, may be summarized as follows:

1. As to differences in its proposals for inclusion in the new COLA escalator:

A. The City proposal would deny COLA escalator benefits to deferred retirees, who were found by the courts to be eligible for the 50/50/50 escalator benefits provided for in Arbitrator Vernon's award. To do so would be inequitable and deprive the widows of deferred retirees of access to COLA adjustments.

B. While the current 50/50/50 escalator is not available to *non spouse* beneficiaries, the new COLA escalator should be available to them. By denying COLA adjustments to non spouse beneficiaries, the City is taking an unjustifiably narrow view of the function of pensions; depriving employees of the ability to

give their non spouse companions, mothers, and children, a benefit that is protected from inflation; and ignoring the fact that the initial benefit is actuarially reduced in the case of younger, non spousal beneficiaries.

C. The floor for retirees who elect to stay on DDR at conversion age should be 60% rather than 57%, because the City unilaterally established that floor when it modified the DDR program after the passage of the Older Worker's Benefit Protection Act (OWBPA). At that time, the City concluded that it was appropriate to maintain a three percentage point differential between the floor for fire fighters and the floor for police officers and the MPA proposal is consistent with that conclusion.

D. The COLA escalator should be available to the survivors of employees who select PSO options other than option 3. Under option 4, an employee may pick a survivor's benefit expressed either as a percentage or a dollar amount, but the City objects because the employee could pick a dollar amount under option 4. There is no basis for this distinction and if such a distinction were drawn, employees could determine the dollar amount they wish to leave their survivors and express it as a percentage. Option 4 is intended to give employees flexibility in choosing PSO's and the need for a COLA adjustment under such a PSO is no less compelling.

E. Employees who are entitled to receive an immediate retirement allowance, either because they have 25 years of creditable service (under the MPA proposal) or because they have

attained age 57, should be eligible to receive COLA escalator adjustments. The MPA would agree that employees who retire before age 57 with fewer than 25 years of service, would not be eligible for such adjustments.

F. The surviving spouse of an officer who had been receiving 90% DDR benefits needs the benefit of a COLA escalator no less than the surviving spouse of an officer who had been receiving 75% of such benefits. The fact that the surviving spouse of a 90% DDR police officer receives a larger pension than the surviving spouse of a 75% DDR police officer, is irrelevant. It is expected that service retirees may get another job to supplement their retirement, while DDR retirees are already at an economic disadvantage in that regard. The MPA proposal recognizes that the spouse of a DDR retiree has already suffered both emotionally and financially as a result of the police officer's service to the City and is more consistent with the purpose of the DDR plan itself.

G. Under the City proposal, retirees do not receive their first COLA adjustment until the March 1 following their first calendar year of retirement. This could be as many as 26 months after the employee's actual date of retirement. In order to avoid this result, employees will tend to pick the same retirement date in order to reduce the delay in receiving their first COLA adjustment to 15 months. This will be unnecessarily burdensome to the system and diminishes the value of the COLA adjustments. A number of other national jurisdictions provide for a shorter

waiting period than that provided under either proposal, while only Chicago and Omaha have a longer waiting period. The City admits that under its proposal, an employee would receive approximately 2% less in COLA adjustments, even though it claims to be offering a 3% COLA adjustment.

H. The MPA wants the reselection of a PSO option to be completed within 90 days of the agreement to insure that officers will make their reselection "as soon as possible." The City's proposal allows officers to procrastinate and possibly cause harm to their survivors. There is nothing in the record to establish that the shorter time period called for under the MPA proposal would create any difficulty for the ERS.

I. The MPA does not propose to contribute 1% in 1993 and 2% in 1994 because there is no valid reason to establish parity with the contributions being required of fire fighters; MPA members have already contributed 1% more of their wages to the ERS during the period between 1969 and 1989, amounting to 8.1 million dollars or approximately 21.7 million dollars with interest; the City plan would require police offices to contribute more to the cost of the COLA escalator because they earn approximately $30,000 more during their first six years of employment; police officers will receive the same pension benefits as fire fighters when they retire, even though they have contributed more toward the cost of producing those benefits than fire fighters; and, the evidence establishes that the City contributes less to the pension system than other

cities in Wisconsin, while providing a COLA adjustment that is inferior.

2. The Union's 25 and out demand is justified by the expert testimony and other evidence relating to the cumulative effect of injuries suffered by police officers in the normal performance of their duties and the effects of stress being suffered by police officers in the department. The evidence shows that rank and file officers are concerned about their ability to perform effectively; the emotional detachment they develop to protect themselves harms the City and themselves; the cumulative effect of injuries and stress are a function of years of service rather than age; many large municipalities have 25 and out provisions, or better provisions, for police officers; and the chief of police has stated that he likes the idea. By rejecting the proposal, the City fails to take these operational concerns seriously; overestimates the impact of the proposal on actual retirements; and makes other arguments that are insubstantial. Its cost estimates are overstated and its estimates of training costs and other costs are overstated. The City's objection to allowing police officers who began as police aides to retire after 25 years of creditable service, could be avoided by a modification in the proposal, but would create an unnecessary distinction between the two types of service which has not previously existed.

3. The City should provide DDR benefits to recruits because of the likelihood that they may be injured while performing duties

on the street. The evidence establishes that, in recent years, recruits have been increasingly called upon to perform such duties as conducting neighborhood surveys, assisting police officers during abortion clinic protests and crowd control during the annual circus parade.

4. The MPA proposal to provide for automatic revocation of a PSO option, prospectively, where the spouse or other beneficiary dies before the retiree, allows an employee to select an option without having to gamble about how long his spouse or other beneficiary is going to live. The fact that it would result in subsidizing the 100% option is no reason to oppose it, since the 95/50% option is currently subsidized. Because of age differences and gender differences between spouses and typical retirees, it is unlikely that very many retirees will actually benefit substantially from this provision. Under the Wisconsin Retirement System (WRS) plan, retirees are permitted to cancel their PSO selections within their first five years of retirement and its actuaries have assumed that there will be no additional cost associated with that right.

5. The proposal to allow police officers to select a PSO option within the six months prior to reaching 25 years of service is to protect spouses in the event a police officer should die before actually retiring. By making the selection of the 100% option automatic, the problem of a neglectful spouse is avoided and the administrative burden on the system is minimized. Without the

provision, if the police officer were to die before retiring, his or her spouse would not receive any pension or COLA benefits. Instead, the spouse would receive the employee's contribution and the ordinary death benefit.

6. The MPA's proposal to eliminate the 30-day waiting period between the application for retirement and retirement is intended to parallel the existing ERS provisions which eliminate the 30-day waiting period for both duty and ordinary disability retirees, in the event of the applicant's death during the 30-day period. In this way, the ERS can proceed to process the deceased employee's application for retirement as if he had continued to live and prevent hardship. It is not the purpose of the proposal to allow the surviving spouse to "double dip." The retirement benefits (not duty death benefits) would be payable on the established retirement date, no less than 30 days after the application. The City's contention that an employee might make a "death bed election that would disadvantage the system" is jaundiced and unlikely to occur, while the cost of the benefit would be minimal.

7. The FPSF is substantially overfunded. The present value of future benefits is 4.5 million dollars, while the actuarial value of the fund is 33.1 million dollars. The MPA proposes to make approximately 19 million dollars of that surplus available to the City to subsidize the cost of the pension changes sought by the MPA, if the City agrees to hold the MPA harmless.

In addition to these specific arguments in support of its

various proposals, the MPA argues that the City has overstated the cost of its proposals and makes the following points:

1. The City improperly used the entry age normal method in calculating the cost of the pension changes.

2. The City did not consider the effect of the lower DDR conversion age.

3. The City has overstated the cost of the COLA and 25 and out proposals.

4. The interrelationship between the cost of the MPA demands reflected in the calculations made by the City's actuary is already accounted for by the assumption that the average retirement age will decrease and does not justify the additional costs reflected in that calculation.

5. The City costing exhibit improperly includes the cost of continuing the COLA escalator beyond the term of the agreement, even though the benefit is limited to those who become eligible during the term of the agreement.

6. The MPA has assigned no cost to the pension proposals it makes because the pension fund is "overfunded" and the City will not need to contribute any money to the system over and above the 7% contributed on behalf of employees. It argues that the calculations made by the City's actuary are based upon an average retirement age that is too low (52) and suffers from the above described flaws. Even so, it argues, the City's own evidence shows that the proposals will only cost the City 1.18% of pay (over and above the 7%), after the value of the *quid pro quo* offered by the Union is deducted.

In reply to City arguments, the MPA insists that its pension demands are clear; that it has offered a substantial *quid pro quo* for its pension demands, including a lowering of the pension cap

that will result from the 25 and out proposal; that 25 years with the department does amount to a career for a police officer, regardless of his age; that unlike the situation with the fire fighters, there is no empirical data to support the City's DDR conversion range; that both the Employer and employees are entitled to the benefits of the fully funded status of the ERS; that the City overlooks the fact that the 90% cap is reached by few employees; that the City overstates the impact of the 25 and out proposal on department efficiency; and that the cost of extending the COLA in future contracts, if it is in fact extended, should be excluded from present cost calculations.

City's Position

In general, it is the City's position that its proposals on pension benefits should be accepted for inclusion in the agreement and that all of the MPA proposals should be rejected. While the City advances numerous arguments in support of this position, including arguments that go to specific proposals, they can be summarized as follows:

1. The MPA's pension proposals are extremely ambiguous. For example, under the language as written, it is not clear whether the new COLA escalator replaces the old escalator in the case of deferred retirees with 25 years of service or why the surviving spouse of a DDR retiree would be entitled to receive the 70% survivor allowance plus the COLA escalator. Also, even though the MPA contends that under its language, the COLA escalator is limited

to those members with 25 or more years of service by the end of the contract on December 31, 1994, its proposal does not contain any such limitation.

2. Prudence dictates caution when addressing pension enhancements. The pension plan is a defined benefit plan and any change in benefits results in an increase in the present value of future benefits, without changing the value of the assets available to fund it. In fact, it is the MPA's position that the provisions of Section 36-13-2-e of the pension law (Chapter 36 of the Milwaukee City Charter) precludes any future reduction in benefits.

3. When the MPA proposed a 100/200/300 pension escalator in the arbitration proceeding before Kerkman, the City opposed that proposal based upon its conclusion that any such improvement should be negotiated, with an eye toward reducing the pension cap as a *quid pro quo*. In the subsequent proceeding before Arbitrator Vernon, the parties agreed to reduce the cap, but the MPA "upped the ante" by asking for a 2% pension escalator. Arbitrator Vernon accepted the City's 50/100/150 proposal, because it was consistent with the agreement reached with the fire fighters and the MPSO; because it still carried a significant cost; and because it gave the MPA a "foot in the door" and allowed the parties to spread the cost of future improvements over time. Here, the MPA does not seek to use the new COLA escalator as a "foot in the door," but as a "springboard into the stratosphere." While Arbitrator Weisberger abandoned the incremental approach in the fire fighter arbitration

proceeding, she did so in part because of a perceived lack of evidence concerning financial difficulties being experienced by the City. Here, the City has presented such evidence, but has nevertheless offered to implement the expensive fire fighter pension package in order to honor the longstanding parity relationship that has existed between police and fire fighters and in the interest of labor peace.

4. The MPA still offers no *quid pro quo* for its rich pension enhancement demands. Even though both Arbitrator Kerkman and Arbitrator Vernon recognized the need for a *quid pro quo* for such improvements, the MPA does not offer to pay the 1% and 2% contributions required under the award obtained by the fire fighters.

5. The MPA has provided no support for extending escalator eligibility beyond normal service retirees and their spouses. Both the City and the MPA proposed to provide the escalator to the surviving spouse who is receiving a proportionate share under the subsidized (95/50%) option 3. Under that option, the surviving spouse receives 50% of the retiree's allowance in exchange for a 5% reduction of the retiree's benefit. The MPA would make it available to any police officer who has 25 or more years of service at the end of the contract and make it available to any survivor, regardless of the retirement option selected, including non spousal beneficiaries. It is unreasonable in two respects. First, it is in conflict with the general proposition that the loss of ability

to perform the duties of one's job is related to age rather than years of service. That is the basis of the current age 52 requirement for police officers and a similar requirement is found in all Wisconsin comparables. Secondly, the City's responsibility does not extend beyond retirees and their spouses. PSO options were developed to protect spouses from the normal situation where the obligation to pay retirement benefits ceases upon the death of the retiree. The 95/50% option has not been actuarially reduced and is intended to assist City retirees and their surviving spouses, not their grandchildren or others. Finally, to extend the escalator to employees who may retire at an age as young as 42, is contrary to its design intent.

6. The MPA's 25 and out pension proposal is diametrically opposed to its position on reappointment benefits, which undermines both proposals. Under the MPA's reappointment benefit proposal (discussed under Article 67 below), an MPA member could retire with full benefits after 25 years of service, as early as age 42, begin receiving a service retirement allowance and obtain reappointment as a police officer. This would allow the officer to "double dip" until age 57 and then retire with a second pension check.

7. The MPA's pension proposal is internally inconsistent and therefore unreasonable. The City proposal is tied to current eligibility requirements, which do not include a 25 and out feature. Under the MPA proposal, at the end of the agreement, officers who were less than 52 years of age but had achieved 25

years of creditable service, would be entitled to COLA adjustments, but not eligible for retirement.

8. The City's proposed duty disability conversion range of 57% to 75% is supported by an empirical study. The MPA's consulting actuary, Robert Bolton, also testified in the fire fighter's interest arbitration proceeding. In that proceeding, he introduced an empirical study he conducted in order to address the issue of the legality of the 57% to 75% range proposed by the fire fighters in that proceeding. The City's proposal is consistent with that study and the award in that proceeding, while the MPA has offered no such support for its proposed 60% to 75% range. Again, the MPA just wants more than the fire fighters received.

9. The MPA's pop-up proposal is inappropriate and unsupported by the evidence in the record. The only evidence in the record concerning such a provision was provided by MPA witness Blair Testin, director of retirement research for the Wisconsin Retirement Research Committee. As he described, in 1991, a pop-up provision was enacted for two of the joint and survivor options under the WRS. In both cases the *spouse* must die within the first five years of pay out status. However, the WRS does not have a subsidized 95/50% option. All survivorship options under the WRS are actuarially reduced. Consequently, the WRS retiree pays for the survivorship benefit by accepting reduced benefits which pop-up at the time of death. The MPA proposal is not limited in time and is applicable to all ERS survivorship options, including those

having non spousal beneficiaries.

10. Recruit officers assigned to the police academy do not merit duty disability coverage. The MPA has the burden of proving the need to make such a change and it has failed to do so in this proceeding. Police recruits are eligible for worker's compensation benefits, which are paid for by the City, but not duty disability retirement benefits. While the record shows that the City has used recruits for crowd control at the great circus parade and protests at abortion clinics, the record is void of any evidence of a recruit receiving a disabling injury or any injury for that matter.

11. The MPA has established no basis for eliminating the 30-day waiting period. An employee who dies prior to the effective date of retirement not in the line of duty, does not leave beneficiaries or an estate without benefits. Such an employee is entitled to life insurance benefits and an ordinary death benefit under the provisions of the pension law. The latter benefit includes the payment of accumulated contributions plus interest plus one-half of the final average salary of the deceased member.

12. The MPA proposal to relinquish its right or the right of its members or former members to the surplus funding in the survivorship fund is bogus. First, it should be noted that the MPA does not and cannot represent former employees in negotiations. All police officers and fire fighters who contributed to the fund have a claim on the surplus assets which are held in trust. Even the MPA's actuary recognized this limitation. The fact that the

MPA proposes that the City agree to indemnify the MPA is indicative of the MPA's belief that it cannot do what it has offered to do. Further, the MPA has conditioned this hollow proposal on an award granting all of its pension demands, i.e., nothing in return for everything.

13. External comparables support the City's position to continue linking full service retirement benefits to an employee's age. The City and County pension plans are the only two public employee pension plans in Wisconsin which have not merged into the WRS. When the City's pension plan is compared to the Milwaukee County plan, it becomes clear that City pension provisions significantly exceed Milwaukee County provisions in final average salary (FAS) maximum FAS, vesting, COLA, and multiplier. There is a negligible difference between the two systems with regard to normal retirement age, with the County providing for retirement at age 55 with 15 years of service and the rule of 75. When the City pension provisions are compared to the WRS provisions in those same categories, the same result occurs. While the WRS retirees received high COLA adjustments during the stock market boom of the 1980's, those benefits are subject to reduction in times of adverse investment experience. The WRS permits retirement at age 54 (or 53 with 25 years of service), but does not permit anyone to retire on the basis of years of service alone. The minimum age for retirement by protectives under the WRS is 50, with a substantial actuarial reduction. Other cities relied upon by the MPA for

comparisons generally have much lower salary caps (in the range of 60 to 75%) and require substantial employee contributions. Only a few permit retirement based upon minimum years of service alone.

14. The City's pension proposals match the strong internal comparison provided by the terms of the award and agreement with the fire fighters. The MPA's consulting actuary helped design the proposal and testified in favor of it before Arbitrator Weisberger. The differences between that proposal and the MPA proposal here are substantial, as described above.

15. The March 1 implementation date for the escalator increments is consistent with the agreement with the fire fighters and lends itself to administrative efficiency. The purpose of an escalator is to provide for increases after the employee has been retired for a period of time and the delay provided by the provision is not unreasonable. It would be inappropriate to break parity on this aspect of the COLA adjustment provisions.

16. The MPA's 25 and out proposal would have a severe negative impact on the department. The MPA proposal refers to service as a "policeman" in reference to the requirement of 25 years of creditable service. That would include service as a police aide. Under the MPA proposal, 376 of its members would be eligible to retire during the "window." Because the MPA is a pattern setting union, the MPSO would seek the same benefit on behalf of the 485 sworn members of that bargaining unit who would be eligible. Together, these employees represent 23.31% of the

total sworn strength of the department. The department is capable of running four recruit classes (of 60 members each) per year and is currently conducting two to three recruit classes each year. The department already anticipates having four classes in 1995. As City witnesses testified, the potential loss of such a large number of senior officers, when combined with the continuing requirement that officers be assigned to the day shift by seniority, could have a severe adverse impact upon the experience level of officers on the street at critical times. There would also be a reduction in the number of available field training officers. The already generous service requirement provisions, which permit retirement as early as age 52, ought not be changed.

17. The cost of the MPA's pension proposal is prohibitive. While expert witnesses called by the City recognized that the City charter requires the use of the aggregate cost method for purposes of funding the ERS, Blair Testin testified that the great majority of public pension systems use the entry age normal method for costing purposes because it serves the purpose of leveling the contributions from year to year and from generation of taxpayers to generation of taxpayers. The City's actuary also testified that the entry age normal method was the preferred method because it produces a good representation of long term costs and for other reasons as well. In computing the cost of the MPA proposals, he utilized figures provided by the neutral actuary, using the entry age normal cost method, and justified assumptions concerning

current retirement age and projected decreases in the retirement age due to the proposed improvements in benefits. He made calculations based upon the normal retirement age suggested by the MPA actuary as well. All of the percentage costs computed were prohibitive. Even using an average retirement age of 54, the City proposed COLA costs 11.93%, 18.04% or 3.48%, depending upon eligibility, the length of time it is funded and the funding method utilized. The total proposed cost, utilizing the same variables, is 11.41%, 18.14% or 4.52% of pay.

18. Adding to these cost concerns is the testimony of Blair Testin regarding the spread that now exists between the actuarial assumptions relating to earnings on invested assets and projected salary increases. The WRS assumes 8% for earnings and 5.6% for salary, creating a 2.4% spread. Milwaukee County assumes 8.5% for earnings and 6% for salary, for a spread of 2.5%. The average spread for major public retirement systems across the country is currently 2.8%. New earnings and salary assumptions adopted by the City's pension board, effective January 1, 1993, raised the earnings assumption from 8% to 8.5% and lowered the salary assumption from 7% to 5.5%, for a 3.0% spread. As Testin stated, a jump from 1% to 3% in the assumed spread was a "big jump to do all at once." In this regard he noted that it may be more difficult for the City to meet the earnings assumption in the future.

19. In its arguments concerning total package costs, the City

makes a number of points that bear on the pension proposals. It notes that the anticipated reduction in the average retirement age will be very costly to the City in terms of increased retiree health insurance costs. It argues that the total package costs of the MPA proposals are prohibitive and that its proposal is extremely generous. According to the City, the total package lift of its proposal, including salary and pension enhancements is 12.89%.

20. The City also relies upon other general arguments, dealing with increases in the CPI, internal comparisons, parity, and the City's relative ability to pay, in support of its pension proposals.

In specific reply to MPA arguments, the City makes numerous arguments concerning alleged inaccuracies in the MPA's description of current contract provisions and practices, its own proposals and City proposals and challenges other assertions as well. With regard to the MPA's objections to the City's proposed *quid pro quo* of 1% and 2% contributions, the City cites language in the award of Arbitrator Arvid Anderson, dealing with the 1981-1982 agreement, describing the origin of the 1% contributions referred to by the MPA in its arguments. According to that description, the 1% contributions had their origin in the 1971 negotiations, during which the City agreed to pay the employee's share of pension contributions for all other employee groups, but agreed to create a gun allowance in exchange for a 1% contribution in this

bargaining unit. After the FPC suspended the rule requiring police officers to carry their guns off duty, the gun allowance was ended and replaced with an unanticipated duty allowance (UDA). Now, the contract provides for a $550 annual UDA, even though the 1% contribution requirement was effectively eliminated by the agreement, effective January 1, 1990, when it was reduced to $1.00. The City also notes that, due to recent hires, more than 700 members of the MPA have never made a pension contribution of more than $1.00 per year.

Discussion and Award

Nearly all of the numerous proposals for changes in pension benefits made by the MPA are appealing, in the sense that they would appear to be desirable improvements. Viewed in isolation, certain aspects of the proposals have particular appeal. For example, it would seem that the surviving spouse of a DDR retiree has no less a need for COLA adjustments (in order to maintain his or her retirement standard of living) than does the surviving spouse of a service retiree. However, all of these proposals must be viewed in the context of a two-year collective bargaining agreement, giving appropriate consideration to a number of factors emphasized by the City in its arguments.

The COLA adjustment proposed by the City is significantly more generous than that provided for general City employees and equal to that provided for fire fighters, the most compelling internal comparison. While the City's proposal is not unusual in relation

to public sector pension programs, it represents a major improvement in the terms of the existing pension plan. This improvement will have been accomplished during the term of two collective bargaining agreements, rather than over a period of years as anticipated by Arbitrators Kerkman and Vernon.

While the pension plan is currently fully funded and will probably remain that way for a number of years in the future, even with the new COLA adjustments provided, there are a number of reasons for proceeding cautiously in granting additional proposals that will serve to tax that fund further. The new COLA adjustments are subject to renegotiation. However, as a practical matter, they are already permanent for those employees who qualify for them under the terms of the agreement and they will no doubt be continued without diminution in the future, through the negotiating process. In fact, the MPA argues that there may be legal impediments making it difficult to do otherwise.

The pension board recently approved modifications in certain critical actuarial assumptions, for purposes of calculating required contributions under the legally mandated, aggregate method. The newly established 3% spread between anticipated earnings and anticipated wage increases could result in a more rapid depletion of assets if these assumptions are proved to be unjustified. Past market advances and recent inflationary trends support the assumptions, but there are no guarantees in such matters. Also, as the record in this proceeding clearly

demonstrates, no one knows for certain what impact the new COLA adjustments will have on the average retirement age in the long run.

The undersigned recognizes that the aggregate method is the method required by law for purposes of calculating current, required contributions. However, the expert testimony convinces the undersigned that the entry age normal method is probably a more useful method for purposes of evaluating the potential future impact of such changes in benefits on the assets of the fund over time.

The MPA's 25 and out proposal alone would have a very significant impact on the availability of funds and the need to make additional contributions in the future. However, it would also have a dramatic impact on the department. Even if the proposal is viewed as a one time "window" proposal, this would be true. In fact, it is reasonable to assume that even more eligible employees would take advantage of the proposal, if it were so viewed. This impact would no doubt spread to include supervisory personnel, who would understandably insist on the establishment of a similar window period for themselves.

Importantly, there is no apparent *quid pro quo* for this significant proposal by the MPA. In collective bargaining, it is not uncommon for an employer to agree to such a breakthrough proposal (or a "window period"), when faced with a lack of sufficient funds to provide a respectable wage increase and/or a

need to reduce staffing or payroll costs or generate short term turnover for other reasons. None of those factors are present here.

For these reasons and others, the undersigned has concluded that the proposals for changes in Article 19 - Pension Benefits, set forth in the City's final offer should be included in the new agreement with up to four modifications, two significant and one or two minor in nature. The most significant change has to do with the amount of the *quid pro quo* required in exchange for implementing the new COLA escalator provisions.

Under Subsections 7a and b of the City's proposal, each employee and certain DDR retirees would be required to contribute 1% of earnable compensation or DDR retirement benefits, effective pay period 1, 1993 and 2% effective pay period 1, 1994. The undersigned has carefully reviewed the available evidence and arguments concerning this proposal and concludes that the agreement ought not include Subsection 7b, requiring the additional 1% contribution, in the second year of the agreement.

The most persuasive objections made by the City in support of this aspect of its proposal, relate to cost and considerations of equity and parity. In reply to MPA arguments, it contends that the 1% contribution that was paid by employees in this bargaining unit for many years in the past, was a trade off for the old gun allowance and the current unanticipated duty allowance (UDA).

For several reasons, the undersigned believes that these

arguments ought not be viewed as controlling, at least for the term of this agreement. Many of the MPA proposals that are yet to be discussed herein that have significant costs associated with them have been rejected for that reason, in part, and for other reasons also found persuasive. The principle of equity does have considerable persuasive force in relation to this issue, but it cuts both ways.

For many years in the past, members of this bargaining unit contributed 1% toward the cost of pension benefits, while members of the fire fighters bargaining unit and other general City employees did not. While this difference may have originated at the time the parties agreed to establish the gun allowance (now UDA), the two provisions are not logically connected and must ultimately stand or fall on their own merit. The fact remains that the current "overfunded" status of the pension fund includes those contributions. In addition, due to significant differences in the pay schedules for fire fighters and police officers, police officers contribute substantially more to the fund during the early years of their employment, than do fire fighters. This is true, even though the defined retirement benefits are based upon the same percentages of final annual salary. As a result of the parity relationship that has evolved over the years, employees who retire as a top step fire fighter or top step police officer after the same period of employment, receive the same pension benefits.

Both parties are obviously free to revisit this issue in their

future negotiations. However, in the meantime, the undersigned finds that it is equitable that the employees covered by the terms of this agreement, should be allowed to effectively "recoup" some of these past contributions to the fund, along with the significant new pension benefit provided, the 3.5% wage increases offered by the City and the other changes awarded herein that result in additional costs. While not controlling on this issue, the undersigned believes that this combination of proposals more closely approximates an outcome the parties might have been expected to reach through bilateral negotiations, had they been able to do so.

The other significant change has to do with the "range" established by Section 3c of the City's proposal, for service retirement benefits made available to employees who elect to convert from a DDR to an ordinary service retirement. The *status quo* range established for police officers by the City is currently not more than 75%, nor less than 60% of "current annual imputed salary." The City's proposal would establish a new floor of 57%.

The City's proposal to change the floor of the range from 60% to 57% is consistent with the award of Arbitrator Weisberger. The floor established in that case, was based upon an actuarial study. As the MPA points out, no such study has been conducted for this bargaining unit, to justify either the 57% or the 60% or some other percentage. Under these circumstances, the undersigned concludes that the floor should remain at 60%. Like the question of the

appropriate (equitable) contribution to be required, this is an issue that can be revisited by the parties in their future negotiations.

The first of the other two changes has to do with the length of the "window period" provided for in Section 8 for the reselection of PSO options. Based upon the most recent version of the City's final offer on pension benefits, dated December 6, 1994, there is reason to question whether this is still a matter of dispute. That version would only allow a window period of 30 to 90 days in the case of active employees, but still allows for a longer (30 days to 180 days) window period for individuals who retired during the two-year period covered by the agreement. There would appear to be no sound reason to reject the MPA's proposal on this issue, to the extent that it is still an issue.

The last change has to do with the MPA's proposal to "eliminate" the minimum 30-day waiting period between an application for retirement and the effective date of the retirement. The City is understandably concerned about the wording of the MPA's proposal and the possibility that it might produce a result other than that referred to in the MPA's arguments. The undersigned has therefore directed the City to draft appropriate language, to be included in the agreement, consistent with the MPA's stated purpose, i.e., to provide that when an employee dies during the minimum 30-day waiting period after having applied for retirement benefits, the retirement benefits applied for (but not

death related benefits that might otherwise be payable) should be implemented as if the employee had died immediately after retiring on the date previously established. The language drafted by the City shall be subject to the approval of the MPA, or the undersigned if the parties cannot agree.

Award: The City's final offer on Article 19 - Pension Benefits shall be included in the agreement with the following modifications:

A. Subsection 7b shall be deleted and subsection 7c shall be reworded to reflect the deletion of subsection 7b.

B. The reference to 57% in the last sentence of subsection 3c shall be changed to 60%.

C. Unless the parties agree otherwise, the reference to 180 days in subsection 8b shall be changed to 90 days.

D. The City shall draft language, for inclusion in the agreement, dealing with the situation where an employee dies during the minimum 30-day waiting period after having applied for retirement benefits, consistent with the above discussion and subject to the conditions mentioned therein.

ARTICLE 6 - PROBATIONARY EMPLOYEES

On December 4, 1986, the MPA filed a complaint with the WERC alleging that the City had committed prohibited practices by extending the probationary period of employees and refusing to bargain with the MPA concerning the matter. According to City records, the City sent the Union a letter dated December 21, 1988,

referring to a conversation with the MPA's attorney and setting forth the terms of a proposed settlement, wherein the City would agree to send copies of the chief's letter to the FPC, requesting an extension of a police officer's probationary period, to the officer and the MPA and providing that the officer would be given an opportunity to be heard by the FPC. On May 25, 1989, the WERC dismissed the complaint, indicating that the MPA had advised the WERC in writing, on May 19, 1989, that the matter had been resolved. The MPA indicates that its records do not include a copy of the letter from the City dated December 21, 1988, or a copy of the writing sent to the WERC referred to in its Order of Dismissal. In response to a request from the MPA, the WERC advised the MPA that it was unable to provide the MPA with a copy of the May 1989 letter referred to in the Order of Dismissal, because the file in which it was kept had since been destroyed.

In the meantime, the parties agreed to include a provision calling for a 16-month probationary period in their 1987-1989 agreement. The two subsequent agreements contained the same provision. In addition, all three agreements provided that a probationary employee is not covered by the grievance and arbitration procedure "in differences involving matters of discipline or discharge" while at the police training academy and prior to the start of field training. After the start of field training, probationary employees are not covered by the grievance and arbitration procedure "in differences involving matters of

discharge."

A study conducted by the City discloses that, since August of 1989, 22 police officers (or 2.8% of 795 hired) have had their probationary periods extended upon recommendation of the chief and approval by the FPC. Sixteen of the 22 successfully completed their extended probationary period and 4 were terminated. (One resigned and one was still on probation at the time of the study.) The reasons given for the extensions sought were of two basic types: time missed due to injury (8), sickness (1), or maternity leave (2), and problems with work performance (8), misconduct (2), or absenteeism (1).

The evidence concerning the City's practice, since the 1988 agreement to extend the probationary period to 16 months and the 1989 dismissal of the MPA complaint is essentially undisputed. If the chief recommends an extension to the FPC, a copy of the letter is sent to the officer and the MPA and the officer and the MPA are both allowed to appear and address the FPC before it acts on the chief's recommendation. On only one occasion during the five-year period covered by the City's study, did the FPC decline to extend the probationary period.

In March of 1993, the department created a probationary evaluation board (PEB) to assist the chief in making decisions relative to probationary employees. If there is a concern that a particular probationary employee does not meet the standards for graduation from recruit training, the PEB can recommend a number of

actions other than termination, including "recycling" the officer through the recruit training program "with an accompaniment of a probationary period extension." Probationary employees have been permitted to appear before the PEB, along with an MPA representative if they so desire. However, the procedure followed by the PEB is not adversarial. Probationary employees are permitted to consult with their MPA representative, outside the presence of the PEB, to advise them on their presentation.

MPA's Proposal

The MPA proposes to modify Article 6 of the agreement by adding language that would prohibit the chief from recommending an extension of a police officer's probationary period unless the police officer had "a break in service," in which case any extension recommended and approved could not exceed the "duration of the break in service." It would also require the City to send the employee and the MPA a notice of the request for the extension. Finally, it would require the City to send the MPA a letter, giving it notice of the successful completion of the probationary period by all police officers who did so, along with their completion date.

City's Proposal

The City also proposes to modify Article 6. However, its proposed modifications are only intended to codify two of the existing practices, i.e., those referred to in its letter dated December 21, 1988. Specifically, its proposals would require that

a copy of the chief's letter to the FPC be sent to the officer and the MPA and that the officer be given an opportunity to be heard at the meeting of the FPC wherein the recommendation is discussed.

MPA's Position

The MPA makes the following points in support of its proposal:

1. The MPA recognizes the need for a substantial probationary period by agreeing to a 16-month probationary period, four months longer than that which is typical in Wisconsin. Only two of the national comparables have a longer period.

2. By extending a probationary period, the employee is deprived of the right to contest the reasonableness of any subsequent decision to discharge him.

3. While probationary police officers may be placed on light duty status, such action is through no fault of theirs. The current practice of placing pregnant officers on light duty and then extending their probation amounts to unlawful discrimination.

4. The City already has sufficient time to evaluate probationary officers, even if they are placed on light duty for a portion of the time they are on probation. It is highly unlikely that any officers would ever be placed on light duty for the duration of their probation and if they were, it is likely that the injury would be permanent.

5. The MPA's proposal balances the needs of the City to evaluate probationary employees and the needs of probationary employees for job security.

6. The City's proposal would permit unlimited extensions.

7. The City's proposal is not supported by the comparables. Half in the metropolitan area do not allow it and only three of the national comparables do.

8. By extending the probationary period, the City also extends the period during which it can use random drug testing.

9. While the City argues that an MPA representative can represent the employee as a matter of practice, its proposal does not include that alleged practice in the agreement.

10. The City offers no reason for refusing to include a requirement that the MPA be notified when employees pass their probation.

In reply to City arguments, the MPA contends that the primary problem with the City's position is that it would place no limit on the extensions that can be granted; the fact that the WERC dismissed the MPA complaint is irrelevant; even if some of the comparisons relied upon by the MPA were inaccurate, the other comparisons support the MPA's position; in fact, none of the comparisons drawn are inaccurate since the contracts in question do not contain language permitting extensions; the City does not explain why it is unreasonable to give notice to the MPA; and if the MPA has the right to represent the employee at the FPC meeting, that constitutes the *status quo* and it should be included in the agreement.

City's Position

In support of its proposal, the City makes the following points:

1. The current practice is the result of an agreement to settle the unfair labor practice complaint, as reflected in the letter sent to the MPA on December 21, 1988. Further evidence of that agreement can be found in the WERC dismissal, which refers to a written request from the MPA, received on May 19, 1989. While the MPA would have the arbitrator believe that such a communication was never sent, it offers no explanation as to why the WERC would indicate that it was or dismiss the complaint. Nor does the MPA explain why the department would modify its practices, if it did not believe that it would resolve the complaint or why the MPA did not insist upon a hearing on the complaint and waited the length of two additional contracts before making its proposal.

2. No problem has been shown to exist with the current practices. Only two probationary officers have had their probationary periods extended for misconduct and 73% of those police officers who have had their probationary period extended have ultimately passed their probation.

3. The MPA's claim that the City is discriminating against pregnant females is wrong. The two police officers had their probationary periods extended due to lack of sufficient experience on the street. In the case of one, she went off duty due to an injury, four months before completing her probationary period.

After six weeks, she returned to work and was put on light duty when she informed the department that she was pregnant. She subsequently passed her probationary period.

4. The MPA's proposal is in conflict with the purpose of a probationary period because it only allows for extensions when an employee is "off the payroll." Under that proposal, if a probationary officer were injured on the job after four months and remained off work for 12 months, no evaluation would be possible.

5. The probationary period is an extension of the selection process which occurs in an actual patrol setting and it would be a grave disservice to the department, the employee and the public to deprive the chief of the right to request extensions. The department could be unnecessarily deprived of the benefits of its investment in training the officer; the officer could be unnecessarily deprived of employment; and the public could be unnecessarily exposed to the actions of an unqualified police officer.

6. The comparative data relied upon by the MPA is unreliable, because it equates contractual silence with a prohibition on extensions. A review of contracts discloses that at least five of the metropolitan comparisons relied upon by the MPA as prohibiting extensions are actually silent on the question.

7. The current practice provides an employee with Union representation. Not once since the settlement of the unfair labor practice complaint, has the MPA been denied the right to appear

before the FPC on such questions.

8. Probationary periods are taken very seriously by the department and the department has demonstrated its desire to be fair to all concerned through the creation of the PEB. The testimony discloses that an MPA representative may accompany the probationary employee in dealings with the board, which merely serves to make recommendations. The final decision is made by the FPC and both the employee and the MPA have the right to appear before the FPC before the decision is made.

9. The MPA's proposal would actually cause harm to probationary employees. In the case of uncertainty as to whether an employee has successfully completed the probationary period, the only choice would be to terminate the employee, rather than risk the possibility of retaining an employee who may not be capable of performing the duties of a police officer.

In reply to MPA arguments, the City repeats and emphasizes some of the points made above. In addition, it notes that the MPA's explanation as to the meaning of its exhibit on metropolitan comparables establishes that it has failed to demonstrate that its proposal is supported by a preponderance of the comparables.

Discussion and Award

Included in the 1987-1988 agreement was the agreement to extend the probationary period to 16 months. That agreement was not finalized until after Arbitrator Kerkman issued his award on November 3, 1988. The City's letter, offering to settle the

complaint before the WERC, is dated December 21, 1988. Several months later, on May 25, 1989, the WERC dismissed the complaint. The practice thereafter was consistent with the City's letter dated December 21, 1988, in the sense that the two practices referred to therein were followed.

The obvious inference that arises out of these facts is that the parties agreed, implicitly if not explicitly, to put this issue aside under the new conditions established by the new collective bargaining agreement and the changes referred to in the December 21, 1988 letter. However, taken together, they do not establish the entirety of the *status quo*. The *status quo* also included the practice of allowing MPA representatives to appear before the FPC.

In the view of the undersigned, the MPA has failed to justify its proposal to prohibit all extensions of probationary periods, except in those few cases where a probationary officer has a "break in service." On the other hand, the data presented by the City establishes that, while extensions are not often sought, the requests are supported by reasons which are reasonable on their face and in most cases the employee successfully completes the extended probationary period. In particular, this data serves to refute the MPA's contention that a limitation needs to be placed on the length or number of extensions that can be granted. None of the employees had their probationary period extended more than once and the length of the extensions appears to have been related to the reason given for the request.

Similarly, there is no evidence in the record to support the proposed requirement that the department notify the MPA by letter of the successful completion of each member's probationary period. While the MPA is correct in its contention that the City offers no reason for declining to do so, the burden is on the MPA to establish the need for such an additional contractual requirement.

For these reasons, the undersigned makes the following award on this issue:

> Award: The City's final offer on Article 6 - Probationary Employees - shall be included in the agreement, but a sentence shall be added to Subsection 3b which states: A representative of the Association may also appear and be heard on behalf of the employee, if the employee so requests, and/or on behalf of the Association.

ARTICLE 7 - GRIEVANCE AND ARBITRATION PROCEDURE

The existing grievance procedure requires aggrieved members to reduce their grievances to writing and present them to their steward. After discussing the matter with the steward, the grievant and the steward (if the grievant so desires and the steward so determines) must present the written grievance to the grievant's commanding officer within 15 days of the occurrence of the incident leading to the grievance. If the grievance cannot be resolved at that step, the MPA grievance committee chair or designee has 15 calendar days after the receipt of the step 1 decision to appeal the decision to the chief of police. If the grievance cannot be resolved at that step, the MPA has the right to proceed to final and binding arbitration. There are special

provisions for grievances over discipline and grievances involving health and life insurance benefits.

From time to time, the parties have agreed to consolidate the grievances of individual members, arising out of the same incident or otherwise deemed to be sufficiently similar to warrant their consolidation for purposes of presenting them to the parties' umpire. For example, 45 grievances were filed in 1993 protesting a change of off days and an additional 19 grievances were filed in 1994 protesting another change of off days. The parties have agreed to consolidate those 64 grievances for purposes of arbitration before the umpire.

The MPA proposes to add a sentence to the fourth paragraph of part A of the grievance procedure which would read as follows:

> The MPA grievance committee may file a grievance on behalf of members similarly situated.

The City proposes no changes in the grievance and arbitration procedure other than one agreed to by the parties, identifying the current umpire and the effective date of his appointment. The City would continue the current practice of negotiating *ad hoc* agreements to consolidate grievances for purposes of hearing, described above.

MPA's Position

The MPA makes the following points in support of its proposal:

1. The change is reasonable and should be adopted. It will benefit both parties by reducing paperwork and the time spent

processing grievances.

2. Under the current arrangement, a group or class of employees who are similarly situated and affected in the same manner by a particular rule, order or memo that they deem to be a violation of the agreement, must file individual grievances which must be answered by their commanders and appealed to the chief and answered by the chief. This requires meetings with the various commanders throughout the department and multiple answers, appeals and answers at the second step.

3. The City's only objection to the proposed procedure is that it might have difficulty identifying who is affected by the grievance. That is a problem which could be readily dealt with by directing captains to keep track of such matters.

4. The City should welcome the proposed change because it will result in a cost savings.

5. Twelve of the 15 state comparables permit the filing of group grievances and nearly all of the national comparables relied upon by the City do so as well.

In reply to City arguments, the MPA contends that the practice of consolidating individual grievances for hearing, while desirable, is no substitute for a group grievance procedure because there has already been unnecessary time and paperwork involved in processing such grievances; the City is in a better position to know how many people are affected by a group grievance for purposes of settlement discussions; and the City is wrong when it contends

that the MPA proposal would eliminate the 15-day time limit for filing group grievances.

City's Position

The City makes the following points in support of its position:

1. In defining the MPA's proposal, president Bradley DeBraska stated that the MPA would have difficulty in naming all of the aggrieved employees in a single grievance within the 15-day time limit for filing grievances. Thus, the proposal would appear to be intended to eliminate or bypass the 15-day time limit for filing grievances.

2. The proposal would also disrupt the orderly processing of grievances. Under the current procedure, all grievances are reviewed individually and the department is able to determine if they involve the same subject matter and circumstances and to assess the potential cost and/or operational impact of an adverse decision, before deciding whether to settle them or consolidate them for arbitration.

3. Because it is the intent of the MPA's proposal to modify the time limit for filing grievances, even though it does not so state, it should be rejected for that reason alone. Also, by removing the time limit for group grievances, employees will be able to "sign up" at any point in time during the grievances and arbitration process and the department would not be able to determine whether the subject matter and circumstances surrounding

each grievance are the same.

4. The department has the right to know the universe of aggrieved employees at the time a grievance is filed. In that way, both parties are equally able to weigh the risks associated with proceeding to arbitration. The MPA's proposal would place all of the risk on the City and accept none for itself.

5. While the MPA claims that its request is a "matter of convenience," like the practice of agreeing to consolidate grievances for arbitration, the latter practice is quite different than a group grievance, because each grievant and all of the circumstances are identified.

6. The City would agree that the parties should continue the practice of consolidating grievances for their mutual convenience. They have done so on many occasions, involving hundreds of grievances.

7. Continuation of the existing practice would help insure that the goal of avoiding arbitration until all possibility of settlement has been exhausted, is met.

In reply to MPA arguments, the City notes that the problem of identifying grievants is not the only objection the City has to the proposal; the City also contends that it is unreasonable to deny it the opportunity to determine the identity of grievants and facts and circumstances surrounding each grievance; the suggestion that the City can keep records of events giving rise to potential grievances is without merit, since it would require the department

to anticipate what might be a potential grievance and maintain a record of every management action taken with respect to every employee; while the proposal may make the filing of grievances less time consuming and expensive for the MPA, it will have the opposite effect upon the department; the MPA's reliance upon comparables is misleading because there are numerous variations in what constitutes a group grievance procedure; and contrary to the MPA's argument, its proposal is not in the best interests of the City's taxpayers, because it will increase the City's cost of grievance processing.

Discussion and Award

The MPA has identified legitimate concerns it has with the present practice and the City has identified legitimate concerns it has with the MPA's proposal. Under the current practice, there is considerable duplication of effort on those occasions where a particular action is taken by the chief or department, which results in the filing and processing of multiple grievances that are essentially identical in nature. In addition to being inefficient, the current practice also has a potential for producing inconsistent results.

On the other hand, the fact that a number of grievances allege violation of the same provision of the agreement does not mean that they are essentially identical in nature. There could be a number of differences, other than the identity of the grievant. The alleged violations could have occurred on different dates, either

more than 15 calendar days prior to the filing of the group grievance or even after the filing of the group grievance. In addition, the facts and circumstances in particular cases might be sufficiently different to justify or require separate handling and disposition. The current practice of negotiating *ad hoc* agreements to consolidate grievances for hearing provides an effective mechanism for dealing with grievances of this type.

The undersigned is of the opinion that the MPA's proposal can be reworded in a way that captures the efficiencies that can be gained by a procedure that allows for the filing of group grievances, while accommodating the legitimate concerns expressed by the City. Such a group grievance procedure would not eliminate the need to continue the practice of negotiating *ad hoc* agreements to consolidate grievances for hearing, but it could substantially reduce the number of individual grievances filed in cases where a particular action, alleged to be in violation of the agreement, impacts upon a number of members under circumstances that are essentially identical.

Because the introduction of such a procedure would be new to the parties' relationship and may pose unanticipated problems, the provision should include an expiration date, allowing the parties to negotiate over its inclusion in future agreements. Because it involves new language, the procedure is not intended to be applied retroactively and will immediately become "dead letter" language. Even so, it will provide the parties with a basis for future

negotiations over this issue.

Award: Part I A of Article 7 shall be amended to include a new paragraph 5, to read as follows:

> In the event the chief or department takes a particular action which, in the Association's view, results in a violation of the agreement and such action adversely affects a number of members under circumstances that are essentially identical, the MPA grievance committee may file a group grievance on their behalf at the second step, within 15 calendar days of the occurrence of the incident leading to such grievance. The group grievance shall identify by name, all members alleged to have been adversely affected by such action. If the MPA grievance committee is unable to identify all members of the group, by name, within the time limit allowed for the filing of grievances, it shall specify those facts which cause the adversely affected members to be identically situated in its view. Before responding to the grievance, the department shall provide the Association with information or access to information reasonably necessary for the Association to identify the members covered by the group grievance. The Association must identify all members covered by the group grievance before appealing it to arbitration. Alleged violations occurring after the occurrence of the incident giving rise to the group grievance shall not be considered to be covered by the group grievance, even if the facts are alleged to be essentially identical. In such a case, separate grievances or group grievances must be timely filed in order to be considered. Nothing herein is intended to preclude the parties from agreeing to consolidate grievances and group grievances for purposes of arbitration. This provision shall expire on December 31, 1994.

ARTICLE 12 - SPECIAL DUTY PAY
NEW ARTICLE - ASSIGNMENT PAY

For some years, the parties' agreement has included a

provision calling for "special duty pay" for time spent by employees in the police officer job classification "underfilling" the position of desk sergeant at the direction of the commanding officer. The special duty pay is the difference between the base salary hourly rate at the minimum pay step for desk sergeants and the officer's base salary hourly rate. No deduction for pension benefits is made from the payments received by the officer and the payments are not included in the determination of pension benefits or other fringe benefits.

Parties' Proposals

In its final offer, the MPA proposes to eliminate this provision and replace it with new language which would require the following:

1. All employees covered by the agreement would receive special duty pay for "underfilling or performing work for a rank, position or classification that is compensated at a higher rate." The payments due would be based upon the difference between the base salary hourly rate of the employee and the next highest pay step of the rank, position or classification in question.

2. If the position being underfilled is "an authorized exempt rank, position or classification" members cannot be required to underfill the position for more than two pay periods in a one-year period. After two pay periods, such position would need to be filled "by the appointment of an eligible member of the Association through the appropriate procedures set out by statute, ordinance and applicable administrative procedures" if the City desired to continue to have the work performed.

3. If a vacancy exists beyond two pay periods in a non exempt rank, position or classification, the chief would be required to nominate the next qualified member at the next regular meeting of the FPC if the City desired to continue to have the work performed.

4. Special duty payments made pursuant to the new provision would continue to be excluded from pension deduction requirements and the determination of pension benefits or other fringe benefits.

In its final offer, the City proposes to create a new article providing for "assignment pay" for employees in the police officer classification assigned to perform dispatch duties in the communication operations division and employees in the police officer classification assigned to perform court coordinator duties in one of the two positions calling for the performance of those duties in the court administration section. Assignment pay is described as a flat dollar amount equal to the difference between the maximum biweekly pay rate for pay range 801 and the maximum biweekly pay rate for pay range 804. In both cases, the officers would not be eligible to receive the assignment pay until they completed one year of active service in the assignment. The assignment pay provided would not become effective until the first pay period following the execution of the agreement, but officers currently performing the duties would be entitled to count prior service in the assignment for purposes of meeting the one year experience requirement. The assignment pay, like special duty pay, would not be subject to deductions for pension contributions and

would not be counted as part of base pay for purposes of computing pension benefits and fringe benefits.

While the MPA seeks to justify its proposal in relation to the underfilling of any rank position or classification, it presented evidence primarily relating to the department's current practices in relation to the assignment of police officers to positions requiring that they perform the duties of police alarm operators (PAO'S) or dispatchers, court liaison officers (those two functioning as court coordinators) and positions in the open records division. In response, the City presented evidence concerning assignments to a number of other positions in the department which the MPA might claim to be covered by its proposal, even though such a claim would not be unjustified in the City's view.

Of all of the assignments for which evidence was presented, the assignment of police officers to function as dispatchers has the longest and most complicated history. However, it would appear that the controversy that continues to surround those assignments (and to a lesser extent the court coordinator assignments) provided the real impetus for the MPA's proposal to expand special duty pay to cover all positions, limit its payment to two pay periods and establish a mandatory promotion requirement. It also serves to explain the City's counterproposal.

Dispatcher Assignments

POA positions, like court liaison officer positions,[3] are covered by the recognition clause of the agreement. They are currently treated as exempt positions, to which an officer can be promoted from within the department by the chief, without going through the FPC. The agreement provides that POA positions (and court liaison officer positions) should be placed in pay range 804, which has three steps, the last two of which are slightly higher than the top step of the pay range for police officers (801).

POA positions, along with a number of other exempt promotional positions were covered by the terms of a settlement of a federal lawsuit brought by the League of Martin (LOM), an organization which seeks to represent the interests of African American officers. The final court order setting forth the terms of the settlement, dated February 13, 1986, gave recognition to the fact that the City might take action to eliminate the practice of making exempt promotions to the POA and other positions covered by that lawsuit. Under the terms of the settlement, a number of positions were reserved for agreed to promotions pursuant to the court order, but it was recognized that the City had no obligation to reserve any additional positions and that the MPA (which intervened) did

[3]The parties have a practice of referring to the officers who actually appear in court, under the direction of the two court coordinators, as court liaison officers. Unless otherwise indicated herein, the undersigned will use that term to refer to the two court coordinators only

not have "any right, claim or expectancy to exempt promotions to police alarm operator" apart from those mentioned in the settlement.

Also pursuant to the terms of the settlement, the FPC arranged to have a study conducted to ascertain whether the various positions covered by the terms of the settlement, including the POA positions, should continue to remain exempt. With regard to the POA positions, the consultant recommended as follows:

> "It is recommended that the Police Alarm Operator class be placed in a non-exempt classification. It is also recommended that a Police Alarm Operator Trainee class be established. Competitive examination should be administered for the trainee class which consists, at a minimum, of aptitude tests for the type of work performed by Police Alarm Operators. After completion of a one year training program, successful candidates could be ranked and be eligible for selection to positions of Police Alarm Operator. It is further recommended that consideration be given to gradually working some civilians into Police Alarm Operator position."

After the settlement of the LOM lawsuit, the department filled the PAO positions which were required to be filled under its terms. However, since that time, the chiefs have declined to make further appointments of police officers to positions as PAO's and a stalemate has developed, within City government, concerning what action to take with regard to the possibility of civilianizing the PAO positions. As the parties note in their arguments, there have been inconsistent or conflicting recommendations and proposals within the department and at the FPC and common council level. In the meantime, approximately 28 police officers continue to be

assigned to positions performing dispatch functions, alongside the PAO's.

The essence of the current stalemate is reflected in the following excerpt from the minutes of the March 4, 1993 meeting of the FPC:

> "b) The Director returned to the Board a letter dated January 12, 1993, from Attorney Barbara Zack-Quindel, representing both the League of Martin (LOM) and the Milwaukee Police Supervisors' Organization, concerning the underfilling of Police Alarm Operator (PAO) positions by police officers in the Communications Division. The Chair had laid the matter over at the January 21, 1993, meeting to allow the Chief and Board an opportunity to review Attorney Quindel's letter with legal counsel. He clarified that if the Commission recommended promoting 12 Police Officers to currently vacant PAO positions, no further request for promoting underfilling officers to PAO would be made. Attorney Quindel agreed with that statement. Chief Arreola took issue with several statements in Attorney Quindel's letter. He stated that promoting 12 Police Officers to PAO will not free 12 Police Officers for street duty, and there are only two persons who have been underfilling since 1984/85-the remainder have only been there since 1989. The department supports giving additional pay and benefits to Police Officers underfilling PAO. The Chief is concerned about other officers in the department possibly grieving the promotions and asked for a City Attorney's Opinion relative to the language in the League of Martin court order pertaining to PAO promotions. He also proposed asking the Department of Employee Relations to study the entire classification of PAO with a view toward civilianization. He suggested that if promotions to PAO are going to be made, perhaps a competitive examination should be developed which could be open to the entire department. Attorney Quindel stated that language in the League of Martin order was constructed based on a belief that these positions would not be available in the future because the department was going to civilianize the dispatch function, which has not yet happened. These positions have been studied several times in the past, and she believes it is now time to act. The Chair acknowledge previous civilianization studies, and stated that action has been deferred for several years due to

> the restructuring of the department. Commissioner Ziolkowski noted that the Commission cannot promote these officers but can only recommend to the Chief that he do so. He suggested that this matter be put to rest and put into motion the idea of studying the classification. He moved the Board recommend to the Chief that he promote the existing personnel into those 12 vacant PAO positions, and that other PAO positions be underfilled by Police Officers who will receive whatever extra compensation can be given to them through the negotiation process. This will give the department the flexibility to visit the issue of civilianization in the future. Commissioner Williams seconded the motion. On the call of the question, the motion carried on a vote of 2-1, with Commissioners Ziolkowski and Williams voting aye, Commissioner Harris voting nay, Commissioner Harrell-Patterson abstaining, and the Chair not voting. Chief Arreola stated he is not inclined to recommend the promotions as the issue is too complex."

Court Coordinator Assignments

The report of the consultant retained by the FPC pursuant to the LOM settlement covered two positions then identified as "municipal court liaison officer" and "traffic court coordinating officer," which are the predecessors to the two court coordinator positions currently in existence. In the case of both positions, the consultant recommended that they also be reclassified to non exempt status and filled by competitive examination.

To date, that recommendation has not been implemented. The two court coordinator positions are currently filled by police officers Fred Bohlmann and Timothy Wysocki. Their supervisor, Lt. Jerome Starke, testified that he preferred the City's proposed assignment pay provision over the MPA's proposal which would provide limited underfilling pay for two pay periods and require promotion thereafter.

Open Records Assignments

In the MPA's view, its proposal would also have application in the open records section. Currently there are six police officers assigned to the open records section. Two of those officers, Milton Reich and Charles Alioto, handle the requests that are complex or require the exercise of significant discretion. They are expected to consult with their superiors and detectives involved in the various matters that might be affected by a request and often do so.

The MPA introduced into evidence, a letter from then chief Harold Breier to the common council, dated December 10, 1982, making reference to a revision in the open records law and requesting authorization to hire six detectives and a detective lieutenant to staff a separate division to handle open records requests. The MPA notes that, in a subsequently adopted ordinance (No. 169, dated November 17, 1983) the common council authorized one lieutenant of detectives position and three detective positions for assignment to the open records bureau. Finally, MPA points to an order (No. 8753, dated January 3, 1984) signed by Chief Breier, transferring a lieutenant of detectives and three detectives to a new open records bureau. References to those positions and funding can also be found in the City's 1984 budget. Based upon these documents and the work actually being performed by at least two of the six police officers assigned to open records, the MPA contends that its provision would be applicable and require underfilling pay

and promotions to detective after two pay periods.

Other Possible Applications

At the hearing, the City produced evidence concerning other assignments which might be the subject of a claim by MPA that the police officers in question would be entitled to underfilling pay and the City would be required to make promotions. Even though the police officers assigned to the criminal investigation bureau (CIB) do not perform the work performed by detectives, according to the City, it is possible that the MPA will argue that its proposal would require the City to promote police officers to fill those positions, if its proposal is granted. To lend support to its concern, the City notes that the MPA did not specifically make that claim at the hearing, but did introduce evidence concerning a past dispute over the City's failure to fill acting detective positions, that then existed.

The City contends that the MPA proposal would also pose a potential problem in the identification bureau, where police officers are assigned to work with identification technicians. While it is possible for police officers to be selected and assigned to technician positions, they must complete a number of courses and 8 to 18 months of training before qualifying as an identification technician who can function as such and give testimony as an expert.

MPA's Position

The MPA makes the following points in support of its proposal:

1. By the wording of its proposal, the City seeks to establish a distinction between a rank being underfilled and a job classification being underfilled, for no apparent reason. The MPA proposal focuses on the differences in duties and responsibilities and pay levels in all underfilling situations in one article.

2. Under the City's proposal, members assigned to perform the duties and responsibilities of a higher paying classification have no rights and can be moved at will. Further, they can be deprived of any right to underfilling pay by being reassigned after one year. Under the MPA proposal, employees asked to assume the increased duties and responsibilities of a higher position are entitled to immediate compensation and the City is required to fill the position permanently and provide the employee selected with full pay and benefits.

3. The record establishes that if the City is afforded any discretion in the handling of such matters it will abuse that discretion to its own advantage. A review of the City's handling of past disputes involving acting detectives, PAO's and court liaison officers confirms that this is the case. Unless the chief is required to fill positions, he will be free to continue to ignore the fact that such positions have been authorized and that employees are performing the work, but not receiving the pay.

4. The testimony of Captain Anthony Bacich, who has served as

the commanding officer in communications, strongly supported the need for underfilling pay and promotions into the PAO positions and yet he tried in vain to justify the City's proposal.

5. In 1991, the former communication's commander recommended that promotions be resumed and the FPC's policy review committee has recommended that the PAO position continue to be staffed by sworn officers. Thereafter, the FPC supported the need for promotions and in December of 1992 the common council did so as well. When the matter came before the FPC again on March 4, 1993, Commissioner Ziolkowski noted the commission's dilemma noting that the commission cannot promote the officers in question, but can only recommend that the chief do so.

6. Court liaison officers are also referred to in the department's budget and the City's use of the title "court coordinator" cannot serve to avoid the fact that court liaison officers are entitled to receive pay in pay range 804, under the agreement. The City cannot avoid its obligations by a title change, with no showing that the duties of the job have changed as well. The testimony given by Lt. Jerome Starke, in support of the City's position, i.e. promotions might cause the incumbents to become "slack in the harness," constituted a desperate bid to rationalize the manifest inequity of the City's position.

7. The open records section continues to function in the same manner as when it was initially established and staffed by Chief Breier. The City has failed to produce any documentation to

explain how and why the positions of detective were "eliminated." The work performed is complex and requires the exercise of important discretion.

8. The City's own national comparables support the MPA's demand. None requires a year of underfilling before an officer is eligible for increased pay. The average length of time required is 22.7 days. The average length of time of underfilling is 38 days.

9. The MPA's demand is consistent with City service rules and FPC rules. Under City service rules, temporary appointments are limited to 14 days. Under FPC rules, officers cannot serve in an acting capacity for certain selected positions for more than 30 days.

10. The recent agreement with the fire fighters provides that a vacancy existing for longer than two pay periods is to be filled and the higher pay is effective on the date the individual began filling the position on a temporary basis.

11. The City's claim that it needs a 12-month period to train PAO's and court liaison officers, before it should be required to pay underfilling pay is a sham and pretext for its real purpose, which is to "save a buck."

In reply to City arguments, the MPA contends that its proposal is not ambiguous, because the concept of underfilling is clearly understood between the parties; this is an issue appropriately raised in interest arbitration, because the MPA has tried for years, without success, to resolve this issue through various

mechanisms, including bargaining; the proposal is intended to apply to all higher paid positions, consistent with the agreement and the MPA's rights to bargain, and should not be limited as suggested by the City; much of the evidence dealing with the history of the PAO dispute cited by the City is irrelevant, since the MPA is not attempting to resolve the question of whether the PAO's should be civilianized in this proceeding; the City's argument that its proposal is more generous, because the pay provided is higher under its proposal, amounts to "smoke and mirrors" since it can effectively prevent anyone from qualifying to receive such payments and employees promoted under the MPA proposal would retroactively receive significant improvements in pension benefits as well as the increased pay for two pay periods; the fact that the consultant recommended that the court liaison classification be made non exempt is likewise irrelevant since that question is not here in dispute; the burden was on the City to prove that the detective positions in open records have been eliminated; the City shows a "white flag" on the open records officers by suggesting that a study be conducted; the MPA does not currently contend that the police officers in CIB would be affected by the proposal; unlike the situation with acting detectives, the positions that would be affected have been authorized; and the MPA's proposal would not disturb the chief's authority to determine qualifications and methods of selection for exempt positions.

City's Position

The City makes the following points in support of its proposal:

1. The compensation payable under its proposal would be equal to the difference between the bi-weekly rate for a police officer (pay range 801) and PAO's and court liaison officers (pay range 804). While the City's proposal is prospective from the execution date of the agreement and requires employees to have one year of experience before qualifying for the pay, service prior to the execution date of the agreement would count towards the one-year requirement.

2. A significant flaw in the MPA proposal is the lack of a clear delineation of when it would apply. It is not sufficient to say that the department should know, because it makes the assignments, since the MPA would be free to disagree, leading to numerous grievances and arbitration to clarify the true intent of the proposal.

3. The MPA's proposal should be limited to the three underfilling situations which the MPA addressed in its presentation.

4. In the case of the dispatcher assignments, the MPA proposal would require the department to fill PAO positions, but it is unclear how that obligation would be interpreted. The testimony of MPA witness Barbara Zack-Quindel was presumably intended to show how the City was expected to comply with the promotion requirement

in the LOM settlement, but the specifics of that settlement suggest that the MPA proposal for mandatory, exempt promotions would be in conflict with the intent of the settlement.

5. The reports on the issue of civilianization introduced into evidence by the MPA do not support a finding that a decision has been made not to civilianize the positions. The MPA proposal for mandatory exempt promotions would foreclose the department from implementing the program envisioned by the most recent commanding officer to study the matter, Captain Bacich. His survey disclosed that the use of civilians is the predominant pattern nationally.

6. The civilianization of the dispatch function would not unduly restrict the number of available limited duty assignments and would not unduly limit promotional opportunities. Captain Bacich testified concerning a number of police officers serving as dispatchers who have been promoted.

7. On the other hand, a logical career ladder would exist if the PAO positions were civilianized. Telecommunicators could seek promotion to PAO positions and PAO's could seek promotion to a new civilian position of lead police telecommunicator.

8. While the position of PAO involves stress, the FPC consultant noted that the stress involved needs to be compared to the stress experienced by a police officer on the street.

9. The City does not deny that the PAO position is complex and requires considerable experience to master. In fact, the evidence introduced by the MPA on that point actually supports the

City's proposal. Even so, the average number of years of departmental experience for POA's is relatively low, undermining the MPA's claim that vast experience as a street officer is necessary to perform the job.

10. The complete minutes of the March 4, 1993 meeting of the FPC dealing with the PAO controversy reflect a number of important points. The FPC recommendation to the chief was to make a limited number of promotions (12); the method of promotion was left unaddressed; the vote was 2 to 1 with one abstention and the chair not voting -- hardly a landslide; the chief's support for assignment pay is reflected in the minutes, along with his concern over the method of promotions, the appropriate classification level and the civilianization issue; and the chief's reason for declining to recommend promotions related to the complexity of the issue, not money as suggested by the MPA.

11. The question of whether exempt promotions, such as those involving PAO's, should be mandated is not an appropriate subject for a binding interest arbitration proceeding. The MPA proposal has too much potential for grievance arbitration and litigation, including litigation over the rights of individuals who transferred out of PAO positions in 1993 and 1994 or even before.

12. The underfilling portion of the MPA proposal is fundamentally flawed in two respects. First, it makes no allowance for training and orientation. Secondly, it provides a far smaller differential than that provided by the City's proposal.

13. The City's proposal preserves managerial flexibility to look at the alternatives to improve the delivery of police service to the public and provides "breathing room" in which to do so. The MPA proposal requiring mandatory promotions would foreclose such a policy evaluation.

14. The MPA proposal, as it would apply to court coordinators, involves similar problems. It required considerable effort to get the MPA to clarify at the hearing that the proposal is only intended to apply to the two coordinator positions. While those two positions were not recommended for possible civilianization, by the FPC consultant, it was recommended that they be converted to non exempt positions requiring competitive examinations. Lt. Starke, the commander of the court administration section, favored the City's proposal, because it provided greater flexibility.

15. In the open records section, only two officers perform complex tasks requiring discretion that might justify some additional pay. Relying on an outdated budget document, the MPA apparently contends that three of the six police officers assigned to that section should be promoted to detective. However, it gives no indication of which three of the six are entitled to the mandatory promotions. Further, any attempt to promote three officers would be an open invitation to litigation on behalf of police officers on the current FPC promotional eligibility list.

16. The MPA proposal on open records assignments would create

promotional positions where none exist in the budget. For this reason alone, it must be rejected. Further, the testimony establishes that the police officers working in the open records section are not currently performing duties that would justify promotion to the detective rank.

17. The vagueness of the MPA proposal, as written, would permit a reach into other areas of assignment.

18. The City service commission rules cited by the MPA are irrelevant, since they are not applicable to members of the police department.

19. The provision in the fire fighter contract cited by the MPA does not mandate the filling of vacancies, but provides that, in the absence of an active eligible list, a vacancy can be filled on a temporary basis by naming the employee highest on the expired eligible list (with no promotional seniority credit accruing) until the vacancy can be filled through promotion from a new eligible list. This is quite different than the mandatory filling of vacancies required under the MPA proposal.

20. The comparative data relied upon by the MPA are not germane. The practice of underfilling in suburban departments is a necessary function of their size. In the case of PAO's any underfilling provisions would be inapplicable, because of the predominance of the practice of using civilians in those positions. Also, few jurisdictions have a detective rank, to support the MPA proposal for underfilling that position.

21. The requirement that promotions be automatically filled will have a serious impact on the budget of the department and the City and conflict with the statutory budget making authority vested in the mayor and common council. In a budget emergency, the only alternative would be layoffs. This problem is exacerbated by the wording of the MPA's proposal, because it is not possible to determine its true budgetary impact.

In reply to MPA arguments, the City explains that it proposed the creation of a new article because of the specialized nature of the assignments covered by the proposal, but indicated it had no objection to including the assignment pay proposal in the special duty pay article; argues that there is no basis for the MPA claim that the City has violated the contract in the past, as evidenced by the arbitration award over the PAO issue; denies that the City's concern is one of cost only and notes its other arguments; disputes the MPA contention that Captain Bacich's testimony supports its position, since he explained that the high turnover of civilian dispatchers has been determined to be due to the low pay initially given many civilian dispatchers; challenges the MPA's characterization of Captain Bacich's testimony; argues that the MPA proposal would be contrary to the public interest because its mandated exempt promotions would return the department to the problems that arose before the LOM litigation; denies that the use of the term court coordinator serves any purpose other than clarity; disputes the claim that the officers in open records are

performing detective work; notes that only 6 of the 19 jurisdictions cited by the MPA in its arguments require promotions and all six mention the need for civil service eligible lists; notes that the FPC rule relied upon by the MPA deals with the temporary filling of high ranking positions in the department, not rank and file or specialist positions; contends that portions of the MPA's argument are filled with "bluster" rather than justification for its proposal; and concludes by emphasizing the all encompassing nature of the language employed in the MPA's proposal and urging the arbitrator to reject it for that reason, in favor of the City's "clearly defined and purposeful assignment pay proposal."

Discussion and Award

The undersigned can certainly appreciate the MPA's frustration with the continuing inequity that exists in the case of PAO's assigned to work in the communication operations division and the two police officers assigned to work as court coordinators in the court administration section. In both cases, the employees are performing work in a promotable classification for which there is a higher, negotiated rate. In the case of the police officers assigned to work as dispatchers, they are required to work alongside PAO's who are earning the negotiated rate because they were promoted to the positions after the settlement of the LOM litigation and before the current state of decisional gridlock developed. The two police officers who function as court

coordinators are indisputably performing the work associated with that job title, but do not receive the contractually agreed to rate, again because of a continuing inability on the part of the responsible City officials to resolve their internal differences over the appropriate answers to the questions that were raised at the time of the issuance of the consultant's report.

On the other hand, the undersigned must agree with the City, that the solution to these problems proposed by the MPA is unworkable and overbroad. In addition to being very costly, the MPA proposal would impose an unworkable timetable, effectively precluding any opportunity for the making of a reasoned decision and implementing it. The City would be precluded from giving serious consideration to the pros and cons of the civilianization option or taking the time necessary to develop and implement appropriate testing procedures to be utilized by the chief or the FPC. Even if not retroactive, any implementation of the MPA proposal would no doubt lead to renewed and/or new litigation and grievances, including grievances over the possible application of the provision to ambiguous situations, such as that which exists in the open records section and other areas.

The undersigned concludes that, in order to avoid the above described problems and provide the responsible City officials with an opportunity to resolve their differences internally, the City's approach should be adopted. It provides a temporary solution to this dilemma, as it affects the police officers assigned to

function as dispatchers and court coordinators. Provisions should also be made for a study of the situation involving the police officers assigned to work in the open records section.

While the undesigned has adopted the City's approach, its proposal that police officers who are assigned to work as dispatchers or court coordinators should have to wait a year before receiving the assignment pay provided is clearly unreasonable. If the police officers were promoted to such positions they would be entitled to earn the higher rate from their first day on the job, even though it might take them as long as year to become fully proficient. Both jobs require special skills. While the current assignment practice does not include testing or other objective measures for screening, it also leaves the chief free to reassign a police officer who lacks the necessary skills or the ability to develop the necessary skills.

The evidence concerning the police officers assigned to the open records section presents a different picture. Before that section was established by Chief Breier in the early 1980's, he predicted that it would be necessary to staff a bureau with 6 detectives and a lieutenant of detectives in order to carry out the legislative mandate. At that time, the common council only authorized three detective positions. Based upon the evidence concerning the current situation, it would appear that, even though there are six police officers assigned to open records, only two perform duties which are deemed to be complex or require the

exercise of significant discretion. The City suggests that a study of the job duties of the police officers assigned to open records might be appropriate and that would appear to be a reasonable proposal.

Award: (A) Article 12 shall be retitled Special Duty and Temporary Assignment Pay. Paragraph 2 shall be renumbered Paragraph 3 and a new Paragraph 2 shall be added, to read as follows:

> 2. Effective at the start of the first pay period following the execution of this agreement, employees in the police officer classification who are assigned or continue to be assigned by the chief to the communication operations division to perform dispatch duties and the two police officers who are assigned or continue to be assigned to the court administration section to perform work as court coordinators shall be entitled to receive temporary assignment pay for all active service in such assignments. For purposes of this paragraph only, temporary assignment pay is defined as a flat dollar amount equal to the difference between the maximum bi-weekly pay rate for pay range 801 and the maximum bi-weekly pay rate for pay range 804.

(B) The department of employee relations shall conduct a study of the work currently being performed by the police officers assigned to the open records section for the purpose of determining whether any of those positions should be reclassified to a higher pay level with a different title. The results of such study shall be made available to the MPA prior to the conclusion of negotiations over the terms to be included in the next succeeding agreement.

ARTICLE 14 - HOURS OF WORK
ARTICLE 55 - DUTY ASSIGNMENT

The MPA makes several proposals for changes in the existing contract provisions governing hours of work and duty assignment.

Several of the MPA proposals for changes in the duty assignment article relate back to the proposed changes in the hours of work article. In those cases, it is not possible to separate the analysis of the proposed changes in the two articles. The City does not propose any changes in the existing hours of work and duty assignment provisions, but would add a new provision to the duty assignment article, allowing the chief to assign certain "rookie" police officers to day shift duty, without regard to the seniority requirement set forth in the duty assignment article.

A. EXISTING CONTRACT PROVISIONS

"ARTICLE 14
HOURS OF WORK

1. The normal hours of work for employees covered by this Agreement shall consist of work shifts of eight (8) consecutive hours which in the aggregate results in an average normal work week of forty (40) hours.

2. Within the normal hours of work, any shift assignment of eight consecutive hours, which is of 10 consecutive eight-hour work shifts in duration or longer, with each eight-hour work shift starting at the same time or in the case of special assignments such as vice-squad with possible differing starting times for each eight-hour work shift shall be deemed to be a regularly scheduled eight-hour shift assignment; except that within the normal hours of work Christmas Store detail or Summerfest detail shall also constitute a regularly scheduled eight-hour shift assignment.

3. The regularly scheduled eight-hour shift shall be established by the Chief of Police in accordance with the requirements set forth

above.

ARTICLE 55
DUTY ASSIGNMENT

An employee shall, upon appointment and after taking and subscribing his oath of office, be assigned to night duty in a police district designated by the Chief of Police. Employees shall be assigned to day duty according to seniority in their respective ranks and positions. Temporary exceptions to such shift assignments may be made in accordance with existing Departmental practices."

B. MPA'S PROPOSALS

The MPA proposes to delete paragraphs 2 and 3 of Article 14 and replace them with the following two paragraphs:

2. *Within the normal hours of work, any shift assignment of eight consecutive hours, which is of 30 consecutive eight hour work shifts in duration or longer with starting times other than those work shifts identified in Article 55 Duty Assignment, with each eight hour work shift starting at the same time or in the case of special assignments such as Vice Control Division with possible different starting times for each eight hour work shift shall be deemed to be a regularly scheduled eight hour work shift assignment subject to compensation as set forth below; except that within the normal hours of work, Christmas Store Detail or Summerfest Detail shall constitute a regularly scheduled eight hour shift assignment.*

3. *Each member shall be formally assigned to a "regularly scheduled shift" as determined by the Chief and consistent with Article 55, DUTY ASSIGNMENT, hereof. When a member is scheduled to an assignment which falls outside the member's regularly scheduled shift, the time scheduled outside (before) the regularly scheduled shift shall be compensated at out of shift premium rates (1 1/2 x regular rate) and time worked beyond eight (8) hours on such assignment shall be compensated at overtime*

rates (1 1/2 x regular rate). If an hour(s) worked is eligible for both out of shift premium and overtime rate compensation, the resulting payment shall not be treated as pyramiding of overtime under paragraph 5 of Article 15, hereof. Further, if a member is required to work on a regular scheduled off day or if an off day is rescheduled, all time worked on the regularly scheduled off day shall be compensated at overtime rates (1 1/2 x regular rate).

The MPA also proposes to eliminate the existing language dealing with duty assignments set forth in Article 55 and replace it with the following six new paragraphs:

1. *An employee shall, upon appointment and after taking and subscribing his/her oath of office, be assigned to night duty in a police district designated by the Chief of Police.*

2. *The Regularly Scheduled Shifts shall be defined as:*

DAY SHIFT -	*Starting time between 7:30 a.m. and 8:00 a.m. excluding roll call, (First Shift).*
EARLY SHIFT	*Starting time between 3:30 p.m. and 4:00 p.m. excluding roll call, (Second Shift).*
POWER SHIFT	*Starting time between 12:00 Noon and 1:00 p.m. or 7:00 p.m. and 8:00 p.m. excluding roll call.*
LATE SHIFT	*Starting time*

between 11:30 p.m. and 12:00 midnight excluding roll call, (Third Shift).

3. *Members shall be assigned to day shift according to seniority in their respective ranks and positions, except, reasonable accommodations will be made for members on the day shift (on a case by case basis) for medical conditions that require assignment to day shift irrespective of seniority rights. When an opening exists on the day shift, eligible personnel shall be transferred to such shift unless the employee waives such transfer to such opening. If an employee waives his right to transfer to the day shift, upon a subsequent request the member shall be eligible for the next day shift opening. Seniority shall be defined as set forth in ARTICLE 9, of this Agreement for all ranks, positions or classifications.*

4. *When a vacancy occurs within a special assignment, position, rank or classification or a newly created special assignment, position, rank or classification the Chief of Police shall cause a memorandum to be published and posted at all work locations. The memorandum shall indicate the minimum eligibility criteria that are reasonably required for said position, affording all eligible personnel expressing interest the same opportunity for selection. All results shall be posted.*

5. *The parties recognize members, as a matter of past practice, have regularly scheduled shifts, e.g. TEU 11:00 a.m. to 7:00 p.m., which are other than those identified in section 2. of this ARTICLE and those deviations may continue. However, any further deviation in shifts beyond those in place as of the commencement of bargaining the terms of this agreement shall be negotiated pursuant to the normal collective bargaining process between the parties except, for temporary*

changes for thirty (30) days or less or in the event of a declared emergency. Nothing herein shall preclude the City from meeting service level needs with overtime assignments pursuant to Article 14 - Hours of Work.

6. *A member who waives, or has waived his or her contractual right to Day Shift shall be paid an amount of compensation equivalent to five percent (5%) of the annual Base Salary of said employee for time spent on a shift other than Day Shift, subsequent to the signed waiver. The seniority differential pay shall be paid on a biweekly basis. After a member waives his/her Day Shift assignment, the member shall not be transferred to Day Shift unless requested by the member. Any payment made under the provisions of this Article shall not have any sum deducted for pension benefits nor shall such payments be included in any computation establishing pension benefits or payments.*

C. CITY'S PROPOSAL

The City proposes to modify the duty assignment article, effective upon the execution date of the 1993-1994 City/MPA agreement, by identifying the existing language as paragraph 1, preceded by a clause "subject to the provisions of paragraph 2, below," and adding the following two new paragraphs:

2. *The Chief of Police shall have the unrestricted right to assign an employee of Police Officer rank with less than 12 months of active service beyond probation in that rank to day shift duty at a District Station assignment without regard to seniority. If such an employee is assigned to day shift duty, he/she shall be reassigned to night duty before attaining 12 months' active service beyond probation as a Police Officer. Nothing herein shall be construed as a limitation on the Chief's existing right to determine at any time the total number of Association bargaining unit employees assigned to day*

shift duty.

3. *Prior to the execution date of the 1993-1994 City/MPA Labor Agreement, the Duty Assignment provisions from the 1991-1992 City/MPA Agreement shall apply.*

D. IMPACT OF THE PROPOSALS

Under existing departmental practices, most police officers and detectives are assigned to one of five shifts, commonly referred to as the day shift, early power shift, early shift, late power shift, and late shift. The starting and ending times are generally consistent with those that would be specified in the agreement under the MPA's proposals. The two power shifts are relatively new, having been established by the department in recent years in an effort to make more patrol officers available during certain hours of the day in certain areas of the city, based upon calls for service. As the language indicates, there are a few unique shifts and the department frequently makes temporary assignments of police officers and detectives to work shift hours different than those of the five basic shifts, for a variety of reasons.

Under the duty assignment article, the chief is required to assign all new police officers to night duty in a police district and to assign all police officers and detectives "to day duty according to seniority in their respective ranks and positions." Unlike many departments, there is no rotation between shifts. However, the chief does have the right to reassign police officers

and detectives to other districts and positions, on any shift, provided that any assignment to day duty must be according to seniority.

The proposals made by the MPA would have a significant impact on these practices and would establish a number of new requirements. In general, those changes and new requirements can be described as follows:

1. In order to qualify as a "regularly scheduled shift," to which a member could be assigned, the shift in question would need to be one of those specified in new paragraph 2 of Article 55 or one of those permitted by the language of paragraph 5. In addition, any such shift would need to be of 30 consecutive eight-hour work shifts in duration or longer.

2. Each member would be "formally assigned" to one of the regularly scheduled shifts described in paragraph 2 of Article 55 or permitted under paragraph 5 of Article 55.

3. Members who are scheduled to work hours falling outside the regular scheduled shift to which they have been formally assigned would be entitled to be paid at an "out of shift" premium rate of one and one-half times their regular rate for all such hours. (Currently members are entitled to premium pay of one and one-half times their regular rate for all hours worked outside of one of the shifts permitted by the existing language of Article 14.)

4. Members who are entitled to receive out of shift premium

pay for working hours falling outside the regular scheduled shift to which they have been formally assigned, would also be entitled to receive overtime premium pay if they work more than eight hours. Such payments would no longer be considered to constitute prohibited "pyramiding" of "overtime" pay. Thus, members who are assigned to work a shift beginning two hours prior to the start of the regularly scheduled shift to which they have been formally assigned and work their full normal shift, would be entitled to time and one-half for the first two hours and time and one-half for the last two hours of the ten hours worked.

5. Members who are required to work on one of the regular scheduled off days reflected in the regularly scheduled shift to which they have been formally assigned would be entitled to receive premium pay at the rate of one and one-half times their regular rate, even if the off day is rescheduled. (Currently, if the off day is rescheduled within the same pay period, overtime/premium pay would not be required.)

6. The requirement that new police officers be initially assigned to night duty in a police district would be dropped, but the chief would be required to assign all members to the day shift defined in paragraph 2 of Article 55, according to seniority in their respective ranks and positions. The sentence permitting "temporary exceptions to such shift assignments may be made in accordance with existing departmental practices," would be dropped.

7. A specific exception would be created, permitting the

chief to assign a member to the day shift without regard to seniority, where the member's medical condition requires such an assignment.

8. "Eligible personnel" would be entitled to transfer to the day shift whenever "an opening exists," unless they have waived their right to transfer to such opening. Members who waive their right to transfer to the day shift would be considered eligible for the next day shift opening, upon request.

9. For purposes of determining eligibility for assignment to an opening on the day shift, the definition of seniority set out in Article 9 would apply. Under Article 9, length of service is based upon time in active service and active service excludes time spent on leave without pay.

10. The department would not be permitted to create any new shifts, beyond the five regularly scheduled shifts defined in paragraph 2 and those other regularly scheduled shifts that existed as a matter of "past practice" at the time negotiations commenced (circa July 1, 1992), except through the "normal collective bargaining process." An exception would be made for temporary changes of 30 days or less or in the event of a declared emergency. The proposal does not specifically state whether the City would be obligated to pay out of shift premium pay in those two circumstances, but that is the intent. Also, the proposal specifically acknowledges the department's right to schedule employees to work out of shift, provided it pays them the premiums

called for in the MPA proposal on hours of work.

11. Members who waive their right to be assigned to the day shift would be entitled to receive a premium payment equal to 5% of their base salary for all time spent on a shift other than the day shift, subsequent to signing the waiver. The payments would not be included in computations of pension benefits or payments.

12. Members who signed waivers could not be assigned to the day shift, unless they requested such an assignment.

13. The chief would be required to post all vacancies in a "special assignment, position, rank or classification or a newly created special assignment, position, rank or classification," by posting a memorandum at all work locations setting forth the "minimum eligibility criteria that are reasonably required" and affording all eligible personnel expressing an interest an opportunity for selection. The results of the selection process are also required to be posted.

Under the City's final offer, there would be no change in the hours of work or duty assignment provisions other than that reflected in its proposal to make an exception to the existing requirement that all employees be assigned to day duty according to seniority. There is an existing departmental practice permitting the assignment of probationary police officers to the day shift for six weeks of their field training. Such assignments, to work with a field training officer (FTO) do not serve to reduce the number of potential day shift assignments. While the City's proposal is

somewhat ambiguous on its face, the stated intent of the proposal is to allow the chief to assign "rookie" police officers, i.e. police officers with less than 12 months of active service beyond probation, to day shift duty at a district station without regard to seniority. In the case of a police officer who progresses through probation without an extension, this would theoretically allow the chief to assign such an officer to the day shift for any portion of his or her first 28 months of active service. If the police officer's probation were extended, the period for potential assignment to the day shift would be increased accordingly. Any period during which the police officer was out of active service after probation and before 12 months had elapsed, would not be counted for purposes of computing the 12 month limitation.

E. MPA's POSITION

The MPA's position with regard to the above described proposals can be summarized as follows:

1. Prior to the mid 1980's there were three basic shifts, beginning at 8:00 a.m., 4:00 p.m. and 12:00 midnight. In the mid 1980's, the late power shift, beginning at 8:00 p.m., was added. In January of 1994, the early power shift, beginning at noon, was added. As a matter of practice, any of the five shifts might be scheduled to begin 30 minutes earlier. In addition, the agreement recognized that there were certain special assignments, such as vice squad, which had differing starting times, and that Christmas Store detail and Summerfest detail, during normal hours of work,

would be considered regularly scheduled eight-hour shifts.

2. Under these practices, each police officer, in effect, had a "regularly scheduled shift" and any assignment to a different shift triggered "overtime" premium payments, which were identified in common parlance as "out of shift" premium payments.

3. The practice of assigning a police officer to a "regularly scheduled shift" carried with it an assignment to an "off day group." This would tell the officer what days off he or she would have during the year, so long as the assignment continued. Officers required to work on a portion or all of an off day, would be entitled to receive premium pay. However, in recent years, the department has engaged in some "highly questionable practices" of changing off days in order to avoid such premium payments. Numerous grievances have been filed protesting such practices.

4. The MPA's proposals on hours of work and duty assignment seek to "lock down" the department's right to make changes in a member's work schedule and the member's right to premium payments when the department does so under certain circumstances. The record is replete with testimony concerning the need for police officers to have as much stability in their lives as the unique nature of their employment permits.

5. The proposal to contractually define what constitutes a regularly scheduled shift (RSS) merely incorporates the existing practice in the agreement. Similarly, the requirement that changes be bargained, merely incorporates that existing requirement. A

majority of the suburban, state and national comparables have agreements which define shifts.

6. Prior to 1979, the City was not required to pay a premium for changes made in a member's hours of work or off days, provided it gave seven days' notice. The seven-day notice requirement was deleted by Arbitrator Malinowski in the 1979-1980 agreement. Arbitrator Anderson included a new provision in the 1981-1982 agreement, that permitted the chief to change an officer's shift from one of the three RSS' then in existence, so long as the change lasted for at least ten days. The department subsequently construed this language to mean that the department could create totally new shifts. By that means, the department was able to avoid the payment of premium pay and the strictures of the "day shift by seniority" provision. The department took this action without bargaining and numerous grievances have been filed.

7. The MPA demands would end these abusive practices by laying out the parties' respective rights and obligations in the contract and requiring that a shift assignment last for 30 days, before it can be considered permanent.

8. The department's effort to make a distinction between a change of off days and a cancellation of off days amounts to a distinction without a difference. Nevertheless, the department has used that difference to justify its refusal to pay a premium for doing so.

9. The department's use of the 10-day shift assignment

language amounts to a bastardization of its original intent, which was to permit the chief to move an officer from one permanent RSS to another. All other shift changes were intended to be treated as temporary.

10. A member's right to premium pay is triggered whenever there is a change in shift hours or off days, that is not requested by the member. When a member arranges for a "body for body trade" of off days which is approved by the desk sergeant or volunteers to work a unique shift which has been negotiated with the MPA, the department will not be required to pay out of shift premium pay. The practice of requiring individual members to "volunteer" to accept different shift assignments in order to participate in special assignments would be ended.

11. While the City argues that the department needs to be able to direct its manpower resources where they are needed, the MPA proposals do not challenge that right. Instead, they serve to prevent the arbitrary exercise of that right, without recompense.

12. The MPA proposal to require premium pay for rescheduling an off day is supported by the evidence of the practice in comparable jurisdictions. Eleven of the 29 suburban departments require compensation where an officer's off day is rescheduled and 10 require that the off day be cancelled, so that the officer receives premium pay. Others, including the Milwaukee County Sheriff's Department, require advance notice to avoid premium payments. Similar provisions exist in the state and national

comparables.

13. The proposal that members be entitled to receive both an out of shift premium and an overtime premium would reverse the award of Arbitrator Arlan Christensen dated June 9, 1978, which concluded that, under the wording of the agreement, such payments amounted to prohibited pyramiding of overtime pay. That result, while logical under the language of the agreement, was unfair because it failed to recognize the right of the officer to be compensated for both the disruption in his or her schedule, as well as for performing extra work.

14. The proposal to pay a 5% premium to members who waive their right to go to the day shift by seniority is akin to a shift differential, but is less costly. It would, nevertheless, provide an incentive for senior members to stay on other shifts. A majority of the City's state and national comparables pay a shift differential and a majority of the MPA's midwest comparables do so as well. This limited shift differential payment would provide a better solution to the City's stated need to have younger officers working alongside older officers and it would do so in a way that rewards the older officers rather than punishes them, as would the City's proposal to begin assigning rookie officers to the day shift.

15. The posting provision would serve to eliminate a longstanding problem, which led to the LOM lawsuit and consent order, i.e. the lack of a negotiated posting and bidding procedure

designed to assure evenhandedness in the handling of promotions and assignments. The testimony of the attorney for the LOM, Barbara Zack Quindel, describing the importance of such procedures to insure fairness and promote morale is equally applicable to all employees in the department and justifies the inclusion of the proposal in the agreement. While the City claims that the procedure would be cumbersome and time consuming, it is already complying with some aspects of the proposal and the department could use the expedient of temporary assignments for up to 30 days, to achieve any needed flexibility.

In response to the City's proposal to make an exception for rookie officers, to the existing requirement that assignments to the day shift be by seniority, the MPA makes the following points:

1. This proposal would substantially affect the "only contract provision" utilizing seniority as a premise for the establishment of rights under the agreement.

2. It would reduce the value of that precious right, which can take anywhere from 12 to 20 years to earn.

3. A majority of suburban, state and national comparables utilize seniority for purposes of shift assignments.

4. The City attempts to justify its proposal by asserting the need to allow newer officers to work with senior officers. However, the MPA has already accommodated that need by allowing recruits to receive up to six weeks of field training on the day shift. Further, the record establishes that the stated

justification is a sham. The department has never attempted to pair newer officers on the early power shift with senior officers working the second half of their day shift. Further, the discussions which occurred during the negotiations conducted by one of the City's negotiators (Blackman) made clear that the City's real purpose for making this proposal is political, i.e. to have women, minorities and all age groups evenly represented on all shifts. This otherwise laudable objective could be accomplished by granting other MPA demands. The City could agree to pay the 5% premium to senior officers who waive the right to go days; agree to the 25 and out proposal; and agree to grant reappointment benefits to retirees, which would exclude seniority rights for day shift assignment purposes.

5. In fact, there are already more than enough experienced officers on the other shifts to mentor the new recruits. An officer with three years of service is deemed eligible to serve as an FTO and an officer with four years of service is deemed eligible to be promoted to sergeant.

6. If the City's real purpose were to provide recruits with intensive field experience, that purpose would best be accomplished by assigning them to the other shifts, where the incidence of serious crime is the greatest.

7. The City could easily extend the 28 month period set forth in its proposal by the simple expedient of extending the probationary period.

8. If the City's proposal is granted, the chief is almost certain to displace day shift officers to make room for the newer officers. This will have the affect of causing some senior officers to lose the coveted right to a day shift assignment.

9. By assigning more senior officers to the other shifts, the likelihood of injuries will increase. The expert testimony establishes that older police officers are more likely to suffer injuries on the job and more injuries occur on shifts other than the day shift. Also, older workers are more likely to sustain more serious injuries from the same incident and take a longer time to recover.

In reply to City arguments, the MPA disputes the City's contention that it has properly interpreted and applied the existing definition of a "regularly scheduled eight-hour shift;" argues that the City is attempting to achieve flexibility in scheduling entirely at the expense of police officers without fair recompense; disputes the City's claim that the MPA is opposed to community oriented policing; disputes the City's claim that the MPA would exercise a "veto power" over changes in schedules; characterizes as a "red herring" the City's arguments concerning the lack of rotating shifts; disputes the City's characterization of the accuracy of the MPA's arguments on pyramiding, including its analysis of comparable data; asserts that the evidence does establish that officers have an established off day schedule; asserts that the City failed to establish that advance notice was

in fact given of changes in off duty schedules; notes that temporary exceptions to the day shift assignments are allowed under the MPA proposal; acknowledges that it is the chief who determines whether an "opening exists;" explains that the intent of its "medical condition" exception was merely intended to meet ADA requirements; characterizes the City's "seniority" argument as "another diversion intended to obfuscate the intent of the demand" and argues that fixed starting times are necessary to put an end to past abuses; takes issue with the City's criticism of the posting language and identifies those assignments which it believes would be subject to posting; and argues that the City seeks to distort the MPA's proposal for a shift differential in order to discredit a perfectly reasonable proposal.

F. City's Position

The City makes the following points in support of its opposition to the MPA's proposals for changes in the hours of work and duty assignment articles:

1. The hours of work issues need to be viewed in the context of police service. Police service must be provided around the clock and it is necessary to "go where the work is," i.e. by staffing in relation to "calls for service."

2. The City offered extensive testimony and documentary evidence concerning the variations that exist in calls for service, based upon time of day, day of week, and time of year and the changes that occur over time.

3. The testimony of various City witnesses demonstrated the need to balance the needs of the community against the legitimate desire of police officers for stability in their assignments and the reality that often requires that the needs of the community come first.

4. The City also offered extensive testimony describing the department's community oriented policing program that began with the Metcalf Park Project, expanded to the Avenues West Project and will eventually be extended communitywide. The success of that program and the continued availability of state and federal funds to support it, requires flexibility in scheduling that would be effectively eliminated under the MPA proposals.

5. While the MPA proposal on hours of work would appear, on its face, to permit the establishment of shifts with starting times other than those identified in paragraph 2 of its proposal on Article 55, provided the changes lasted for 30 consecutive shifts, it became clear through testimony that such is not the case. Any such proposal would require the consent of the MPA and any change without its consent would result in the filing of a prohibited practice complaint and grievances claiming a right to out of shift premium payments.

6. Because the MPA would maintain virtual veto power over any proposed change in work schedules, it would effectively bar the City from pursuing its community oriented policing policy or otherwise responding to special community needs.

7. While the MPA may argue that the "past practice" language of paragraph 5 would permit "deviations" from the five shifts authorized under paragraph 2, there will inevitably be grievances over what constitutes a "past practice" and the department will be effectively foreclosed from establishing new shifts, should circumstances warrant.

8. Throughout the hearing, the MPA sought to justify its proposals on hours of work by making reference to the disruption in an officer's life caused by "rotating shifts." However, the record clearly establishes that, unlike many large urban departments, the MPD does not utilize rotating shifts.

9. By proposing that there be a "formal" assignment to one of the shifts allowed by its proposal, without specifying what constitutes formal assignment, the language employed by the MPA would invite grievances by officers reassigned to another shift. The term "formally assigned shift" connotes a permanent assignment, a concept rejected by both Arbitrator Wagner in 1973 and Arbitrator Anderson in 1981. Such a concept would have disastrous results on the operations of the department and its service to the public, because the department would have no effective way of balancing shift experience and allocation, except at prohibitive cost. Further, the department should not be forced to wade through countless grievances and extended arbitrations to learn the real meaning of the proposal.

10. Prior arbitration awards bolster the City's position. In

1973, Arbitrator Wagner established a seven-day advance notice requirement as a condition by which the department could avoid the payment of out of shift premium payments. In his award, Arbitrator Wagner specifically rejected the MPA's proposal that regular shift hours be guaranteed. That rejected proposal is the direct ancestor of the current MPA hours of work proposal that would require the department to "formally" assign a member to a regularly scheduled shift. In 1979, Arbitrator Malinowski eliminated the seven-day advance notice provision established by Arbitrator Wagner which led to a grievance arbitration award by Arbitrator Christensen, which held that the agreement established by Arbitrator Malinowski required out of shift premium pay for hours worked outside of the employee's shift, as specified in the "district personnel assignment book." That result was similar to the result the MPA seeks in this proceeding, i.e. to "formally assign" an employee to a regularly scheduled shift. In 1981, Arbitrator Anderson adopted the City's proposal which established 10 work shifts, with all shifts having the same starting time, as the standard for defining what constitutes a "regularly scheduled eight-hour work shift." Arbitrator Anderson rejected the MPA's proposal to define such a shift as constituting the officer's permanent assignment noted in the "permanent roster sheet" in each district or bureau. Again, that rejected proposal was very similar to the proposal made by the MPA in this proceeding. The contract language awarded by Arbitrator Anderson has persisted unchanged to this day, through

five, two-year agreements.

11. In his award, Arbitrator Anderson noted that Arbitrator Malinowski's cancellation of the seven-day notice requirement established by Arbitrator Wagner resulted in confusion as to when a permanent shift change had occurred. To adopt the MPA's position on hours of work in this proceeding would throw the parties back into the state of confusion that existed from 1979 to 1981, after Arbitrator Malinowski cancelled Arbitrator's Wagner's seven-day notice requirement.

12. The MPA's proposal to allow pyramiding of out of shift premium payments and overtime premium payments would not only be contrary to existing contract language which treats all authorized time worked outside of an employee's regularly scheduled eight-hour work shift as overtime, it amounts to a proposal for double premium payments for the same hours worked and is hard to justify in rational terms. Arbitrator Christensen found that claims for such payments were contrary to the contract provision against pyramiding of overtime. As MPA evidence discloses, there are numerous grievances pending on this same question and there is every reason to believe that those grievances will be denied by the permanent umpire, based upon the award of Arbitrator Christensen. The MPA proposal to allow pyramiding would not only have an economic impact, it could cause further grievances because of its lack of clarity as to the circumstances under which it would apply. However, rewording the proposal would only beg the question of why

it would be appropriate to make an exception to the general bar against double payments of overtime premium for the same hours worked.

13. The MPA evidence concerning the 15 state comparables relied upon by the City, actually supports the City's position on this issue. Nine of the 15 jurisdictions either pay at a rate of straight time for the two-hour period within the officer's regularly scheduled shift or at a rate of straight time for the two-hour period outside the regular shift. Although some establish "guaranteed hours," the vast majority of the national jurisdictions surveyed by the MPA on this issue do the same.

14. In addition to deleting the current reference to the establishment of the regularly scheduled eight-hour work shift by the chief, the MPA proposes to add a provision making reference to an employee's "regularly scheduled off day." Inclusion of this language may have the undesirable effect of locking the City into "off day schedules" that cannot be varied without the consent of the MPA. Under the current agreement, the regularly scheduled work shift must comport with the average 40-hour per week requirement and the 10 work-shift minimum, with each shift having the same starting time. The MPA's language may result in grievances alleging that an officer who is "formally assigned" to a shift then has "regular off days," which could never be changed, even if such a change was necessary in order to move the officer from a squad to a beat or a different shift. While the MPA may argue that such is

not the intent of the proposal, those assurances will give way the first time the department acts to split up two squad partners and requires one to change to a different off day group. Again, by overbroad wording, the proposal would hamstring the department even when there is a compelling need to change in order to balance experience, avoid interpersonal conflict, equalize work load, etc.

15. If the MPA proposals on hours of work are adopted, they will create built-in inefficiencies and inflexibilities and doom the City's community oriented policing program to failure.

16. By proposing that an officer be eligible to receive out of shift premium pay any time an off day is changed, even if it is changed within the same two-week work cycle, the MPA would further hobble the department in its efforts to deliver police service to the public. There are times when such changes are required due to the variability of calls for service and there are predictable events, such as the Great Circus Parade and Fourth of July fireworks presentation which require additional numbers of officers to provide service. The testimony of managerial witnesses establishes that officers were given significant advance notice of the possibility that their off days would be changed in connection with these predictable events. A memo was sent to all district captains, months in advance, and notices were posted by district commanders at least 30 days in advance. As the events drew closer, the affected officers were identified and given individual notice. Rather than taking such a reasonable approach, by requiring prior

notice, the MPA proposal would require the City to incur additional costs for such changes, regardless of the notice provided.

17. Throughout this proceeding, the MPA has suggested that the department's concerns about its operational proposals and its hours of work proposals in particular were misplaced, because the department could meet its needs through the simple expedient of a premium payment. On the contrary, the hours of work proposals present insurmountable operational problems through the establishment of MPA veto power and by making the exercise of the remaining discretion fiscally impossible.

18. The proposal to delete current language permitting temporary exceptions to the day shift assignment by seniority requirement is troublesome. It could lead to grievances any time a police officer is assigned temporarily to the day shift, no matter how compelling the reason. While the MPA may argue that such problems could be worked out on an individual basis, they are bound to represent their members who file grievances and there is every reason to believe that they will do so aggressively. The MPA may also argue that the 30-day shift change language would give the City needed flexibility to make such assignments. However, if the day shift hours to which the officer was temporarily assigned were consistent with those specified in paragraph 2 of Article 55, under the MPA proposal, such an assignment would not qualify as an exception. Finally, the MPA may argue that the assignment could be carried out at overtime rates, but the cost of doing so would be

prohibitive. The MPA presented no evidence to support its proposal to eliminate this provision and it should be rejected for that reason alone.

19. By stating that eligible personnel have the right to be transferred to the day shift "when an opening exists on the day shift," the MPA proposal creates an ambiguity as to when the right would arise. The current language avoids this problem by being conditional and stating that officers assigned to day duty must be assigned by seniority. The MPA language could be interpreted as creating a minimum staffing requirement for the day shift, which would seriously impair the department's flexibility to make assignments where they are needed. While the MPA may deny such intent, the unnecessary change in language could give some future grievance arbitrator a basis for concluding otherwise.

20. The proposal to permit day shift assignments for medical reasons, without regard to seniority, expresses a sentiment with which the City agrees. However, under the Americans with Disabilities Act (ADA), the City's obligations may be broader than the wording of the MPA proposal and would, by law, prevail. By placing the proposed language in the agreement, with numerous modifiers, the City could be faced with a potential conflict between its obligations under the law and its obligations under the contractual grievance and arbitration procedure. The City might be compelled to maintain additional day shift assignments to accommodate both requirements.

21. While the MPA claims that its definition of seniority represents "current practice" it is inconsistent with the definition of seniority used for layoff purposes. In the case of layoffs, it is the date of hire or appointment date (or position on the eligible list in the case of members who have the same date of appointment) that controls. The MPA proposal to use a different definition of seniority will require a significant recalculation of seniority and individuals currently assigned to the day shift may need to be returned to night duty. The proposal would also require constant recalculation any time an employee was placed on an unpaid leave of absence or disciplinary suspension.

22. By prescribing shift starting times and proscribing any deviations from those starting times, except in the case of existing practices (like the tactical enforcement unit), the MPA would preclude initiatives such as the creation of the early power shift. The City could not respond to perceived changes in the need to provide service without negotiating and submitting the issue to interest arbitration if necessary. This is but one example of how the MPA proposal would put existing shift practices in concrete and interfere with the department's efforts to introduce community oriented policing and meet its legislative mandates.

23. The reference to "past practice" would invite grievances and arbitration proceedings any time the department deviated from the five prescribed shifts and starting times, including claims for out of shift premium pay.

24. The scope of the posting proposal, as explained by the MPA at the hearing, would have a profound effect on the department. The proposal not only covers specialized assignments such as the tactical enforcement unit and the robbery task force, but also all assignments within the districts, such as tavern detail. The department currently posts all specialized assignments for police officers in accordance with the requirements of the LOM consent order, even though that order expired in 1989. The MPA proposal would not only expand the posting requirement to all assignments for police officers, it would also do so for detectives. It would impose procedural requirements that would result in intolerable delays, especially on the district level. For example, it would arguably include directed patrol missions, which by definition require the speedy deployment of personnel. It would be unworkable in many areas, such as the criminal investigation bureau, where the skills and abilities of personnel are well known to management and taken into account in the making of assignments. It would also prevent management from giving new employees a variety of assignments before they are allowed to gravitate toward specific assignments for which they express a special interest or aptitude. Currently, personnel are free to express their interest in all such assignments by submitting "matter ofs" requesting them.

25. The conditions which led to the League of Martin litigation no longer exist in the department and the existing practices with regard to making special assignments not covered by

that expired consent order, gives appropriate consideration to fairness and affirmative action policies.

26. The MPA proposal goes far beyond the requirements of the consent order and seeks to open the door to challenges to the selection criteria utilized by management by creating a requirement that the criteria meet a reasonability standard. This would also have the effect of submerging the department's affirmative action concerns in the grievance arbitration process, even though umpire Yaffe has already ruled that the intent of the LOM settlement was to leave such matters for court enforcement.

27. While the MPA claims that its proposal is not intended to create a posting requirement for routine assignments, that assurance is not enforceable under the vague language employed.

28. There is an existing system for posting police officer special assignments that are districtwide in nature and the MPA introduced no compelling evidence that that system needs to be revised.

29. The shift differential premium proposal is unwarranted and would be ineffective. Read literally, any officer who was not already assigned to the day shift could sign such a waiver at any time and claim entitlement to the shift differential payments. While the MPA may deny such intent, the vague language used is subject to such an interpretation.

30. The proposal is significant because it constitutes recognition on the part of the MPA that the City and department

have legitimate concerns about disparities in experience levels between shifts.

31. Even if the problems with the wording of the proposal were eliminated, it has three major flaws. First, it would create morale problems, when two officers who might be squad partners end up receiving different wage rates for performing the same work. Secondly, it would not provide an effective cure for the problem, since there would be little difference, in terms of experience level, between those officers who signed waivers and those who elected to go on the day shift. Finally, the morale problems described would inevitably create collective bargaining pressure to expand the scope of the proposal to cover all night shift officers.

32. While the MPA proposal would "permit" the City to meet its staffing needs through the payment of premium pay, it also imposes numerous restrictions on the department, preventing it from operating efficiently and effectively. In effect, the combination or proposals would hamstring the department and prevent it from pursuing its community oriented policing initiatives and otherwise meeting its obligations to the public.

The City makes the following arguments, in support of its proposal to create a new exception to the existing contractual requirement that employees be assigned to day duty according to seniority in their respective ranks and positions:

1. While the wording of the City's proposal might initially lead the reader to believe that it only applies to non probationary

officers during their first 12 months of active service beyond probation, a careful reading of the provision in relation to the existing practices establishes that such is not the intent of the proposal. The probation period for police officers is currently 16 months. Therefore, a probationary police officer with 11 months of active service clearly has not attained 12 months of active service beyond the completion of his or her probationary period. To read the provision as excluding the period of probation would remove the most crucial time period from the proposals coverage.

2. While training is important, there is no substitute for experience in police work. There is a need to give new police officers the best possible opportunities for on the job training. Because a majority of the more experienced police officers work on the day shift, new officers are deprived of the opportunity to work with them and learn from them.

3. This problem has become far more serious in recent years. Nearly 800 new police officers have been appointed since August 21, 1989. It is anticipated that there will be four recruit classes in 1995, each including 60 employees. It is essential that something be done to address the worsening experiential imbalance. A number of management witnesses testified to this effect. As the City's evidence shows, nearly 46% of the department's police officers and over 53% of the police officers assigned to districts have four or less years of service. The median length of service on the day shift is nearly 25 years or more than eight times the median

service for all of the night shifts other than the early power shift (where the factor is six times). For the last three years, the trend has continued downward and the problem would be greatly exacerbated if the MPA's 25 and out proposal were awarded.

4. The MPA's reliance upon the minimum number of years of service required to qualify as an FTO or be considered for promotion to sergeant, is misplaced. It is the actual level of police officers on the various shifts that matters and the figures introduced into evidence by the MPA at the hearing were not reliable.

5. The MPA claim that the department could utilize the slightly more experienced officers on the early power shift to work with the new officers is impractical and misinterprets the proposal. To pair the new officers in squads during the four hour overlap would defeat the purpose of creating the early power shift, i.e. putting more officers on the street when needed. It would also require the new officers to return to the district in mid shift, for deployment on their own. The idea of the proposal is to allow the new officers to work independently, but on the same shift with more experienced officers than those available on the other shifts.

6. The MPA suggestion that the City's real reason for proposing the assignment of newer officers to the day shift is to increase gender and racial diversity on the day shift rather than addressing the experiential disparity is "insulting" to all

concerned. While it is a fact that women and minorities have only recently been appointed to the department in significant numbers, and they are therefore better represented on the night shifts, the record clearly establishes that the City's purpose is to address the experiential disparity described, rather than this relative lack of diversity which will disappear over time.

7. While the MPA complains that the City's proposal will decrease the number of available day shift assignments, that would only be true if all of the newer officers were assigned to the day shift rather than rationally allocated among the various shifts. In fact, the proposal is unlikely to significantly increase the current amount of seniority required to go days.

8. While it is true that probationary police officers are assigned to the day shift for a six-week field training period, that exposure to the day shift is far too short to be of any consequence and the new officers are paired with an FTO during that phase of their training. What the new officers need is the benefit of the advice and assistance of senior officers when responding to calls for service on their own.

9. The Wisconsin Advisory Committee to the United States Commission on Civil Rights strongly recommended that the City seek relief from the requirement that all assignments to the day shift be by seniority in their report, *Police Protection of the African American Community in Milwaukee*, dated November 1994.

In reply to MPA arguments, the City contends that the MPA

misrepresents the current contract provisions regarding hours of work by alleging that departmental practices under those provisions are a matter of agreement and accusing the department of engaging in "highly questionable" practices; contends that the proper interpretation of the provisions in question are reflected in the recent decision of WERC hearing examiner Amedo Greco, who traced the history of the changes in the hours of work provision back to the interest arbitration award of Arbitrator Wagner; disputes the MPA claim that the City's motivation for exercising its rights has been the avoidance of premium payments rather than responding to community needs for police service; disputes the MPA claim that the department's actions have resulted in "rotating shifts" or instability in officer's lives; disputes the relevance of MPA comparisons, because of their failure to make a distinction between jurisdictions that use rotating shifts; notes that Arbitrator Anderson merely stated that he was adopting the City's counterproposal to include the 10-day requirement for purposes of defining what constitutes a regularly scheduled eight-hour shift assignment and made no reference to the existence of an officer's right to a "regularly scheduled shift" or "permanent changes" in a regularly scheduled shift; points to the potential adverse consequences of granting the MPA "veto power" over shifts; disputes the MPA claim that police officers have been improperly "coerced" into accepting shift changes in connection with the community oriented policing projects, but argues that this contention helps

expose the MPA's "real agenda;" notes that those jurisdictions which allow changes in off days generally contain some form of advance notice requirement, and do not state that premium pay would be payable if notice is given; disputes the MPA claim that the City has "obliterated" the distinction between overtime and out of shift premiums for administrative convenience and that this was misinterpreted by the arbitrator; questions the relevance of MPA comparable data based upon suburban districts; reiterates it arguments about the alleged inappropriateness and ineffectiveness of the MPA's proposed shift differential payments; alleges that the MPA mischaracterizes the relationship between the LOM consent order and its own proposal; and seeks to "debunk" MPA arguments against the City's 28-month out of seniority "window."

G. DISCUSSION AND AWARD

As the above analysis reveals, there are numerous aspects to the MPA proposals for changes in the hours of work and duty assignment articles. Most of those proposed changes are directed at "locking down" shifts and starting times and, in effect, establishing a system of permanent assignments to shifts and off day groups, combined with a strict out of shift premium pay requirement that would permit pyramiding of premium payments. However, some aspects of the proposals can be separated from the the balance of proposals, and will be initially considered separately.

Pyramiding of Premium Payments

The MPA arguments in support of this proposal which focus on the claim that out of shift premium payments are mischaracterized as "overtime" payments under the agreement are not viewed as particularly persuasive. The important question is the reasonableness of the proposal that the City be required to pay both kinds of premium payments under the circumstances described. While not universal, it is very common for collective bargaining agreements to prohibit the pyramiding of premium payments, regardless of whether they are for overtime assignments or assignments to shifts or hours that are deemed undesirable. Simply put, the argument against such payments is that it is not reasonable to count the same hours more than once for purposes of computing eligibility to premium payments.

Day Shift Exception for Medical Conditions

While this proposal, on its face, would appear to introduce an element of flexibility in the "lock down" approach taken by the MPA in its overall proposal, the undersigned must agree with the City that it would not be a good idea to put such language in the agreement. Doing so would create a second forum for litigating the propriety of such actions and create a potential for inconsistent results. This is especially true since the language utilized does not refer to the City's statutory obligations or utilize general, statutory language to describe the exception.

5% Premium for Waivers

The City's arguments which focus on the wording of the MPA's proposal, may or may not have merit, but could be overcome by rewording the proposal. While the undersigned noted in the above analysis that the MPA proposal would prohibit the chief from assigning members who sign waivers to the day shift, the City has not focused on that aspect of the proposal or argued that it would present a particular problem. Presumably if it did, it could be the subject of future negotiations.

The City advances three basic arguments against the premium payment proposal, which the undersigned does find persuasive, when the proposal is viewed separately. Because the department does not employ rotating shifts, there is a high likelihood that those members who are assigned to shifts other than the day shift will come to resent the fact that some of their colleagues receive such payments and pressure will build for shift differential payments that are available to all, in spite of the fact that members would continue to have the valuable right to go days by seniority. Further, as the City argues, it is unlikely that the payments would substantially reduce the experiential disparity which is a matter of serious concern to the City.

Redefining Seniority

Based upon the arguments presented, it would appear that the MPA proposal to utilize a different definition of seniority than that which has been employed in the past for purposes of determining who is eligible to go days may have been inadvertent.

In either case, the MPA has offered no evidence and arguments that would support the change and it ought not be included in the agreement, even if the MPA's overall proposal for change in these articles is included in the agreement.

Posting All Vacancies

In general, there is obvious merit to a proposal that would require an employer to post declared vacancies, setting forth an accurate description of the position and the minimum requirements for selection and giving notice to the applicants of the results of the selection process. However, such procedures create an administrative burden and delay which must be weighed in the balance along with other considerations. Some of the other considerations present in this case are the existence of statutory procedures for filling certain vacancies; the continuing application of the procedures established as part of the LOM consent order; legitimate distinctions that can be drawn between work assignments and permanent assignments or promotions; and the special needs of a police department in making work assignments and temporary assignments. Viewed in this context, it is clear that the MPA proposal is overbroad and would require substantial modification, if it were to be included in the agreement. In the view of the undersigned, such refinements should be left to the give and take of the bargaining process, especially in view of the fact that there are existing statutory procedures and departmental procedures, including some that are based upon the LOM consent

order, that already deal with the most compelling situations.

City's Proposal

Like so many of the MPA proposals, the City's proposal to give the chief the unrestricted right to assign police officers with less than 12 months of active service beyond probation to the day shift would appear to be unrefined by exposure to the give and take of collective bargaining. This is especially true, if it is interpreted in the way the City contends it was intended to be interpreted. The undersigned must agree with the MPA that the City proposal, as currently worded and intended, has the potential to significantly affect the value of the existing provision requiring that members be assigned to day duty according to seniority in their respective ranks and positions. The City objects to all of the MPA proposals for changes in the two articles, even though it is reasonable to assume that the MPA would expect some *quid pro quo* for any significant relaxation in that requirement.

Hours of Work

The balance of the MPA proposal for changes in these two articles goes to "locking down" shifts and starting times; creating a system of permanent assignments, including regular off day groups; and enforcing same through a strict out of shift premium payment requirement that permits pyramiding. The undersigned must agree with the City in its contention that the MPA proposal overall is not reasonable when appropriate consideration is given to the needs of the department. It would severely impact upon the City's

ability to respond to problem situations requiring short term special duty assignments; its ability to deal with changes in the pattern for demand for service; and its ability to implement the community oriented policing policy. It will not do to state that the City can obviate these problems by paying premium rates, since the cost would no doubt deter the City from doing so in all but the most urgent situations.

As noted above, the City's proposal to relax the rule that requires the assignment of all members to day duty according to seniority represents a potential tradeoff that could be exchanged for some of the proposals made by the MPA. However, as noted, there is a vast difference between the positions of the parties on these matters and, as a consequence, it cannot be said that any appropriate middle ground clearly emerges which might be viewed by the parties as preferable to the arrangements which currently exist under the agreement.

There would appear to be one exception to this latter observation. Based upon their arguments, both parties appear to be in agreement that any change in off days (as opposed to a cancellation of an off day) ought to be preceded by reasonable notice. By definition, a change in off days must occur within the same pay period. Otherwise, it would amount to a cancellation of an off day, for which premium pay would be due.

The City presented evidence indicating that it gave substantial advance notice of its intent to change off days in

connection with certain special events. The MPA called a series of witnesses who disputed the accuracy of that testimony. However, even if such notice was communicated substantially in advance of the events in question, there is no claim that it identified the officers who would be affected. They were notified shortly before the events.

The undersigned is satisfied that, under the existing arrangements, the City ought not be precluded from changing off days within a pay period, provided such a change is preceded by reasonable notice to the officers affected by the change. Seven days, or one full week prior to the start of the pay period in question would appear to constitute reasonable notice.

AWARD: Article 14 - Hours of Work shall be amended by adding a new paragraph 4 to read as follows:

> 4. Except on those occasions when an emergency situation exists, if the department desires to change the off days falling within a single pay period for a member who otherwise continues to be assigned to the same schedule and off day group, the member must be given personal notice of such change, at least seven days prior to the start of the pay period in question. If the department fails to give such notice, all hours worked on either of the off days in question shall be treated as falling outside the regularly scheduled eight-hour shift, as provided in Article 15.

ARTICLE 20 - LIFE INSURANCE

The City maintains a life insurance program for all of its employees. Under current contract language, members of the MPA bargaining unit may elect coverage up to one and one-half times

their annual salary (rounded up to the next higher thousand dollars). The City contributes 43 cents per month for each $1,000 of coverage in excess of $30,000 and the employee pays 21 cents per month for such excess coverage. If a member continues employment to age 65, the amount of coverage to which the member is entitled is reduced to 100% of the employee's base salary (rounded to the next higher $1,000). The same contribution requirement applies to such employees. If a member retires before reaching age 65, he or she is required to pay 50 cents per $1,000 of coverage until age 65, unless the coverage is dropped. At age 65, retirees are not required to contribute toward the cost of their remaining life insurance coverage, which drops an additional 16 2/3% on their 70th birthday and an additional 16 2/3% on their 75th birthday.

MPA's Proposals

The MPA proposes changes in the language of Article 20 which would have the following effect:

1. The amount of coverage provided at no cost to members still in active service would be increased from $30,000 to $35,000.

2. Members who remained in active service beyond their 65th birthday would continue to be eligible for life insurance coverage equal to one and one-half times their base salary.

3. A retiree less than 65 years old would only be required to contribute 21 cents per $1,000 of coverage until age 65.

4. Provisions spelling out the rights and obligations of retired employees would be included in the collective bargaining

agreement, rather than just being included in the master contract between the City and its insurance carrier.

5. The City would retain the right to change insurance carriers (or self insure), but would be contractually obligated to give the MPA 60 days advance notice if it decided to change carriers.

MPA's Position

The MPA advances the following arguments in support of its proposals on life insurance:

1. The amount of life insurance fully paid by the City has remained the same since the 1987-1988 agreement, when the parties agreed to increase the amount from $25,000 to $30,000. In 1988, the top pay for a police officer was $30,858. Under either wage proposal in this proceeding, the top pay for a police officer will be in excess of $39,000 in 1994. If the amount of fully paid insurance coverage is increased to $35,000, it will help close the gap between fully paid life insurance and one year's wages.

2. The City should provide this increased benefit to police officers, even if it does not choose to do so for fire fighters, since police face a substantially higher rate of on duty death than fire fighters.

3. Active employees should be eligible to receive the same life insurance benefits, regardless of their age. One of the purposes of life insurance is to make up for the economic loss suffered by the decedent's family after death. That loss is greater

in the case of an employee, than in the case of a retiree.

4. The contribution rate for retirees who are younger than 65 should be the same as the contribution rate for active employees, since the retiree has less money available to spend. Further, the actual cost of providing such coverage should be less, since a retired employee is less likely to die, because he does not bear the risk of a duty related death.

5. The benefits available to retirees should be spelled out in the agreement, to assist current employees in making retirement decisions. Doing so carries no cost to the City.

6. The City should be contractually required to provide notice of a change of carrier, since earlier side agreements requiring such notice have not been honored and requiring such notice helps the MPA in its role of advising members and their families and monitoring the solvency and experience of the insurance carrier selected.

City's Position

The City proposes no changes in the life insurance article. In support of its position, it makes the following points:

1. The life insurance coverage currently provided is generous. While the MPA sponsored Justex report misread the contractual agreement on life insurance (to provide one and one-half times annual salary at no cost), it was nevertheless correct when it stated that the amount is "relatively generous." Only one or two of the jurisdictions studied provided more than $30,000 of

coverage at no cost to the employee. Many provided substantially less (between $15,000 and $20,000).

2. The only aspect of the MPA proposals which the City costed was the proposed increase in free coverage to $30,000. It would have an annual cost of $22,000.

3. The MPA presented no support for its other life insurance demands for active employees or retirees. Its position of "we want more" should be rejected.

In reply to MPA arguments, the City notes that the MPA ignored its own comparables in its arguments; argues that there is no support in the record for several assertions made by the MPA, i.e. that only one member is still on the job past 65 years of age and that the City "voluntarily agreed" to increase the paid life insurance benefit in the past to keep pace with wage increases; takes issue with the MPA assertion that a working member is disadvantaged by a reduction in life insurance coverage after age 65, since there is no obligation to take the maximum coverage allowed and there is no indication that the one member who is more than 65 years of age did so before turning age 65; disputes the MPA claim of greater economic loss, by pointing out that the surviving spouse of an employee in active service is entitled to the subsidized 95%/50% PSO and will now be protected by the COLA escalator; and argues that there is no need to include additional provisions from the life insurance master contract in the agreement and thereby expand its massive length, since members are fully

aware of their life insurance benefits.

Discussion and Award

Under the new agreement, a "top cop," i.e., a police officer at the top step for that rank, will be eligible for $60,000 of life insurance coverage at a cost of $75.60 per year. The MPA proposal would reduce that cost by $12.60, to $63.00. It would not increase the total amount of coverage available, which automatically increases, along with wages, under the existing language. Viewed from this perspective, certain of the MPA arguments have less persuasive force.

All of the available evidence supports the conclusion that the current benefit is not only generous in relation to outside comparisons, but that it will continue to be better than other, internal comparisons. Internal comparisons are deemed to be particularly significant for benefits such as life insurance.

The City is correct when it argues that there is no compelling evidence to support the MPA argument that the families of officers who continue to work past age 65 suffer greater economic harm when the officer dies than the families of officers who retire before age 65. There are too many factors that might affect that comparison to draw such a conclusion. More importantly, this aspect of the MPA proposal would constitute a precedent setting change, for the benefit of one member, while the City will have to live with the consequences in other bargaining units where the number of affected employees would be far greater.

Members who retire prior to age 65 not only receive pension benefits, they are free to seek other employment and, according to the evidence, generally do so. That being the case, it would not appear to be reasonable to require the City to increase the subsidy it currently pays toward the cost of their life insurance coverage.

Since the MPA proposals to improve the benefits available to retired employees are not to be included in the agreement, it would be unnecessary and inadvisable to attempt to modify the MPA language to include a description of their current benefits in the agreement.

Finally, with regard to the proposal to include a notice requirement in the agreement, the MPA correctly points out that such a requirement would serve a useful purpose, at no increased cost. The City has not argued that the length of the notice requirement is unreasonable, and it has therefore been included as proposed.

AWARD: Paragraph 6 of Article 20 shall be amended to include the words "subject to a sixty (60) day advance notice to the MPA" immediately following the word carrier(s) in the first sentence.

ARTICLE 21 - HEALTH INSURANCE

The parties have agreed to a number of minor, editorial changes and one or two substantive changes in the health insurance article. There remain, two significant substantive issues. The first and most significant substantive issue, is raised by the MPA in its final offer. The MPA would, in effect, require the City to

provide the same contribution toward the cost of the basic plan or HMO plans for deferred retirees and retirees with 25 years of service under its 25 and out proposal, as are currently provided for service retirees. The other substantive proposal is included in the City's final offer. It would place an age 65 limit on the City's obligation to contribute towards the cost of the basic plan and the HMO plans on behalf of those DDR retirees (75%) who will now have the option of remaining on DDR retirement after they become eligible for a regular service retirement.

MPA's Position

In support of its proposal, the MPA makes the following points:

1. The MPA proposal should be awarded if the arbitrator awards the MPA's 25 and out proposal. If the 25 and out proposal is awarded, the current provisions dealing with deferred retirement should be modified since employees with 25 years of service will be deemed to be service retirees, regardless of age. The change would be necessary to provide them with the same health insurance benefits which are provided to other service retirees.

2. If the 25 and out proposal is not awarded, it still makes sense to change the language of the health insurance article. Deferred retirees should not receive lesser health insurance benefits than service retirees. At age 52, they are treated the same, but only receive the 65% contribution (rather than the sick leave formula contribution). In fact, retirees who serve only 15

years and retire at age 52 receive the same formula contribution. It is inequitable to require deferred retirees to pay for their own health insurance until they are age 52. In addition, it is cumbersome and can be unnecessarily expensive to purchase insurance for such a short period of time, since many plans have stringent exclusions for preexisting conditions.

3. Deferred retirees are also less able to pay for the cost of their own health insurance until they reach age 52, since they are not receiving any pension income while their retirement is deferred.

4. Deferred retirees, by virtue of having worked 25 years, have earned the right to the City's contribution according to the formula that applies to service retirees. Also, allowing them to get credit for their unused sick leave would be good for the City, since it would encourage them to conserve their sick leave, just as service retirees are now encouraged to do so.

5. The cost of the MPA proposal would be minuscule, since only four deferred retirees would be affected by it during the term of the agreement and there would be no cost to the City for employees who retire under the 25 and out proposal, since the City has already paid the cost of their health insurance for the contract period.

In opposition to the City's proposal, the MPA makes the following points:

1. The City proposal would limit the right of an officer who

leaves employment on a DDR pension during the term of the agreement to receive paid health insurance. While on DDR, the City currently pays the entire cost (except for $15.00 per month) for family coverage on the basic plan or 105% of the least expensive HMO coverage, which is the same as that paid for active employees. The City's proposal would cut off the right to such health insurance coverage at age 65.

2. The City has mischaracterized its proposal by suggesting that an employee can stay on DDR "until age 65." Once a DDR retiree reaches conversion age, he or she must make an irrevocable election to convert to a service retirement or stay on DDR until death. If they elect to stay on DDR, they should continue to receive paid health insurance until death. Police officers who retired on DDR prior to January 1, 1993 and remain on DDR for life, currently receive health insurance for life and those who retired on DDR during the term of the agreement are entitled to no less. In effect, the MPA proposal would maintain the *status quo*.

3. Those employees who retire on DDR are least able to afford to buy their own insurance, having sacrificed their bodies and earning capacity in the service of the City.

In reply to City arguments in opposition to the MPA proposal, the MPA contends that the City has grossly overstated the cost. It notes that the City has, in effect, used the aggregate method to calculate the present value of future costs and attributes the result to the cost of the MPA proposal. This is inappropriate,

according to the MPA, since there is no health insurance fund to which the City must currently contribute the present value of future health insurance benefits. The MPA also notes that the City did not make a similar cost calculation in costing the fire fighter contract. If the affect of the COLA will be to reduce the average retirement age from 56 to 54, as the City 's calculation assumes, then the City will incur a similar "cost" under the fire fighter contract, equivalent to the two million dollar cost attributed to the MPA proposal. Instead, it argues, an actual out of pocket cost method should be utilized, as proposed by the MPA. The City's costing method results in "double billing," because the City has already incurred the cost by agreeing to allow retirees to use their unused sick leave to pay for health insurance. Finally, the MPA contends the calculations made by the City's actuary were seriously flawed by faulty average age assumptions; speculative assumptions about future HMO costs; the use of estimated 1993 retiree health insurance costs when actual costs were available but not used; the use of a 5.5% salary increase assumption; failing to decrease the City's contribution under the sick leave formula based upon an earlier retirement age; and failing to reflect the savings due to the lack of dental insurance for retirees and the lower City contribution to retiree health insurance costs.

In reply to City arguments in support of the City's proposal, the MPA notes that the City found it necessary to clarify its proposal in its brief to indicate that it would not be applicable

to 90% DDR recipients; points out that the City's proposal would not give 75% DDR retirees "several more years of coverage," but would only give them two more years of coverage if they elect to stay on DDR; and argues that the City's proposal "cuts off health insurance benefits for DDR recipients at age 65, whereas currently, DDR recipients get health insurance for the entire time that they are on DDR. The MPA disputes the City's claim that it has "omitted" putting an age 65 limitation on the receipt of such benefits "in order to sneak a benefit enhancement." The MPA notes that it is the City that is attempting to add words to the agreement and argues that it would create an inequitable situation, because some DDR recipients who are eligible to stay on DDR for life (i.e. those who went on DDR prior to 1977), will receive paid health insurance for life, while others will only receive such benefits until age 65.

City's Position

It is the City's position that the costs attributable to the MPA's proposal on health insurance is prohibitive, regardless of whether the 25 and out provision is granted. In support of this position, it makes the following points:

1. The City's consulting actuary, Stephen Brink, has a thorough knowledge of the City's retiree health benefit program for MPA retirees. He analyzed the cost of the changes proposed by the MPA in a report dated November 29, 1994. The costs of future retiree medical coverage for current active MPA employees were

expressed as a level percentage of future payroll, by calculating the net present value of future benefits after deducting retiree contributions and dividing by the present value of future earnings for active employees. This rate was then applied to the annual earnings for MPA employees for 1993 and 1994 to obtain an estimated cost for the two calendar years in question.

2. The inescapable conclusion reached through Brink's calculations is that a reduction in the average retirement age will result in increased retiree health insurance costs to the taxpayers of Milwaukee.

3. If it is assumed that the average retirement age is reduced from 56 years to 54 years (by virtue of the COLA enhancement) the increased cost to the City attributable to 1993 will be in excess of $950,000 and the increased cost to the City attributable to 1994 will be in excess of one million dollars.

4. If the average retirement age drops to age 52, as it would according to the opinion of the City's actuary, Richard Daskais, under the MPA 25 and out proposal, the increased cost to the City attributable to 1993 would be nearly 2.5 million dollars and the increased cost to the City attributable to 1994 would be in excess of 2.6 million dollars.

5. As these numbers demonstrate, the City will incur a substantial increase in costs for retiree health insurance benefits if there is any reduction in the average retirement age and the probable affect of the MPA proposal requires its rejection.

In support of its own proposal, the City makes the following points:

1. Under the City's proposal, as explained at the hearing, the age 65 cap would not be applicable to 90% DDR retirees, i.e. the gravely disabled.

2. Under existing contract arrangements, officers who retire on a 75% duty disability are required to convert to a normal service retirement at age 52 (with 25 years of service) or at age 57. As a result of the mandatory conversion to a normal service retirement, they lose coverage under subsection 2.c. of Article 21, which reads as follows:

"c. Duty Disability

> Employees in active service who commence receiving duty disability retirement allowance between January 1, 1991 and december 31, 1992, as such allowance is defined in Section 36.05(3) of the ERS Act or Section 35.01(50) of the City Charter, shall be entitled to the benefits provided in subsection 1.a. or 1.b., of this Article, above, between January 1, 1991, and December 31, 1992, so long as they continue to receive such duty disability retirement allowance."

3. Under both the MPA and City proposals, an officer with a 75% DDR allowance will no longer be required to convert to a normal service retirement. Instead, conversion will be optional. Therefore, if the above quoted subsection is not modified as proposed in the City's final offer, an officer who elects to remain on DDR instead of converting to a normal service retirement would be entitled to health insurance for life. This would result in a

huge benefit enhancement for such retirees. It is for this reason that the City proposes to add the words "and so long as they are under age 65" to the provision in question.

4. If the City's proposal is adopted, it will provide several more years of coverage under subsection 2.c. for 75% DDR retirees, but it will not extend the benefit to them for life. Only the gravely disabled (90% DDR retirees) would be eligible for such coverage.

5. By omitting the words "and so long as they are under age 65," the MPA is trying to "sneak in a benefit enhancement they don't currently have."

6. The City's proposal is identical to that which the fire fighters won in arbitration.

7. The City's proposal is more reasonable and should be awarded rather than the MPA proposal which yields a windfall, unsupportable by the record.

In reply to MPA arguments in support of the MPA proposal, the City notes that the MPA is asking the arbitrator to believe that there is "no cost to the City" as a result of paying retiree health insurance for up to an additional 10 years for employees who retire at an earlier age if the MPA's proposal for 25 and out is granted. According to the City, it has successfully debunked this type of argument in connection with other MPA demands and it asks the arbitrator to recognize the appropriateness of the 3.36% cost (total percentage lift) attributed to this item by the City.

Discussion and Award

It is true that the City is not required to fund the present cost of future health insurance benefits, but it has been suggested that accounting practices ought be changed to at least require that the current cost of such benefits be reported. There may be some flaws in the analysis by the City's actuary and it is not yet possible to tell for certain what impact the COLA enhancements will have on the average retirement age. However, it would be irresponsible for the arbitrator to ignore this potential cost of the COLA enhancement and the MPA's 25 and out proposal.

Because the MPA's 25 and out proposal has not been awarded, the potential cost of the MPA's proposal under Article 21 is greatly reduced. However, as noted, there is a significant potential cost already associated with the COLA enhancements.

In viewing this proposal, it must be remembered that those referred to as "deferred retirees" are not in fact retirees. They are former employees with at least 25 years of service who will qualify for a service retirement upon reaching age 52.

As the Union notes, there are currently only a few employees holding deferred retirement status. However, it is not unreasonable to assume that their numbers would increase under the Union's proposal, a result that the City has not sought to encourage, as evidenced by its strong opposition to the MPA's 25 and out proposal.

On the other hand, it would be unreasonable to assume that

deferred retirees are without income or access to health insurance coverage through other employment or spousal employment. Once they reach the normal service retirement age of 52, they qualify for City subsidized health insurance coverage.

For these reasons, the MPA's proposal has not been awarded.

The City's proposal to add the words "and so long as they are under age 65" must be considered in connection with the agreement that retirees on 75% DDR will no longer be required to convert to a service retirement once they become eligible to do so. For the first time, those retirees can elect to stay in DDR status and receive the health insurance benefits previously available to the 90% DDR retirees, i.e., paid health insurance for life.

Viewed in this light, the positions of both parties call for an improvement in the *status quo*. The City's proposal includes an improvement in the health insurance benefits available to 75% DDR retirees, but one that is less generous than that which has been available to 90% DDR retirees and will continue to be available to them. On the other hand, the MPA proposal, to leave the wording of subsection 2.c. unchanged, in spite of the agreement to allow 75% DDR retirees to elect to stay in DDR status for life, would greatly improve the health insurance benefits available to such DDR retirees. In addition, it would grant the 75% DDR retirees a benefit that is substantially better than that which was awarded to the fire fighters.

Under these circumstances, the more moderate improvement that would flow from the City's proposal has been awarded.

AWARD: Subsection 2.c. of Article 21 shall be amended by adding the words "an so long as they are under age 65," as proposed by the City.

ARTICLE 22 - SICK LEAVE

Under Section 6 of the existing agreement on sick leave, a member may request sick leave by notifying his or her commanding officer (CO). In practice, such notification is normally done orally, in person or by telephone. The agreement also provides that the CO may require the member to provide "acceptable medical substantiation from a private physician or dentist" if the CO "is informed or believes that the employee is misusing sick leave." The City is not required to pay any fee charged by the physician or dentist to provide the substantiation. In practice, the City does not pay the member for the time spent obtaining the substantiation. The agreement provides that an employee's request for sick leave benefits will be denied if he or she fails to obtain acceptable medical substantiation when required to do so.

MPA's Proposals

The MPA proposes four changes in the existing provisions and practices described, as follows:

1. When requesting sick leave, members would be required to notify their CO "by telephone."

2. A commanding officer could require a member to provide acceptable medical substantiation, only if the absence was "beyond

four (4) days in a calendar quarter (on a non cumulative basis), and if the commanding officer has reasonable belief that the employee is misusing sick leave."

3. Section 6 would be modified to contain the following definition of what would constitute acceptable medical substantiation:

a. *ACCEPTABLE MEDICAL SUBSTANTIATION*

If an employee is believed to be misusing sick time and is required to obtain medical substantiation, sick pay shall not be denied if the employee, after being required to obtain medical substantiation, submits same meeting the following criteria from a private physician.

(1) A brief description of the illness, bodily injury, or exposure to contagious disease.

(2) A brief description of the reason(s) that the employee was unable to work.

(3) The date(s) the employee is/was unable to work.

(4) A projected return(ed) to work date.

(5) The date(s) on which the Doctor examined the employee.

4. An additional subsection (6.b.) would be added requiring that any member required to obtain acceptable medical substantiation for sick leave pay would be compensated for all time spent obtaining such medical substantiation at overtime rates.

City's Proposal

The City does not propose any substantive changes in the sick leave article. However, it does propose a change, in apparent response to the MPA's first proposal, which would add a second sentence to Section 5 (requiring notice of requests to the CO), that would state "such notification may be by telephone."

MPA's Position

In support of its proposals, the MPA makes the following points:

1. The parties are in essential agreement to modify paragraph 5 to reflect that notification shall be made by telephone, as reflected in a stipulation signed shortly before the initial briefs were filed.

2. The proposal to limit the circumstances under which a CO can require acceptable medical substantiation or a "doctor's excuse" is "modeled" after the City's existing practice in all other bargaining units. Although it is modeled after that practice, it is more explicit by specifying the number of absences which must precede any such requirement.

3. The proposal to limit when a CO can require a doctor's excuse is necessary, to insure uniformity of practice within the department. Currently, there is great variation in practice, among CO's. Some require substantiation after three times in six months or four times in six months, while another grants amnesty, another advises and counsels and another "punishes" members by prohibiting

tradeoffs for 90 days.

4. The proposed four day requirement strikes a reasonable balance. If an officer is ill more than four times in a calendar quarter, the proposal acknowledges that a potential sick leave problem may exist and allows the CO to require medical substantiation if the CO has a reasonable belief that the employee is misusing sick leave. It prevents the CO from requiring an officer who is ill for one or two days in a quarter with a cold or the flu from having to make repeated and unnecessary trips to the doctor only to be told that there is nothing that can be done medically to cure the flu.

5. The key to the proposal is the word "reasonable." While the City objects to the use of that word in the absence of a definition, it is not unlike many words in the agreement which are left undefined.

6. The proposal also defines what constitutes acceptable medical substantiation. MPA witness Kresse testified as to how she was required to return to the doctor twice in order to obtain substantiation which was acceptable to her lieutenant, who was not even her CO.

7. A review of the comparables lends support to the MPA proposal to establish a fixed number of days before the CO can require a doctor's excuse. Twelve of the City's state comparables have a contract provision that so provides. Six of the 12 MPA national comparables and 7 of the 19 national comparables relied

upon by the City do so as well.

8. Rather than object, the City should welcome the MPA proposal to define what constitutes an acceptable excuse, because it will provide uniformity throughout the department and give guidance to supervisors. It is based upon a definition written by Inspector Kondracki, the highest ranking officer to draft a definition, and should be acceptable to the City for that reason as well.

9. The requirement that the City pay officers for the time they spend obtaining a required excuse is both reasonable and required by the Fair Labor Standards Act (FLSA). An employee who is required to obtain a medical excuse is spending time in the service of the City and should be paid at the appropriate overtime rate. The City can hold down its expenses in connection with this requirement, by being reasonable in its imposition of the requirement.

In reply to City arguments, the MPA disputes the claim that the wording of the four-day requirement is ambiguous as written and explained at the hearing; disputes the claim that the reasonable belief standard will be difficult to apply or will result in grievances and arbitration proceedings; questions the City's reference to the potential cost of the proposal because it unjustifiably assumes an increase in sick leave usage and that absent officers are replaced; argues that the lack of a specified time frame for securing a doctor's excuse does not constitute a

"flaw," because the proposal is consistent with current language; takes issue with the City's suggestion that it ought not be required to accept a police officer's word for the time it takes to obtain a medical excuse, even though the City accepts the word of an officer in other circumstances, including the reporting of time; argues that the department is attempting to force physicians to change the way they practice while sacrificing the sick leave of officers in the process; argues that the practices in the City's department of public works (DPW) are not relevant because of the existence of a cap on the accrual of sick leave benefits in that department; and argues that the City misconstrues the MPA's purpose for introducing the "home confinement" arbitration award into the record.

City's Position

The City makes the following points in support of its position:

1. The MPA proposals for changes in the administration of the sick leave program will result in an overall increase in the rate of sick leave usage, which will have adverse consequences on the cost, quantity and quality of police services provided to the public.

2. The parties have not agreed to a change the notice requirement for requests for sick leave which would require that they be made "by telephone." While innocuous on its face, such a requirement is unnecessary and could have unfortunate consequences,

if read and applied literally.

3. On its face, the time threshold in the MPA proposal (beyond four days in a calendar quarter), could be interpreted in several ways, including a reading which would permit an unlimited number of absences up to four days in length in a calendar quarter. Even as clarified by testimony, there is a potential for ambiguity and grievances over its meaning.

4. Under the proposal, a CO could not require an officer to provide medical substantiation unless the officer was absent for more than four days in a calendar quarter *and* the CO has a "reasonable belief" that the employee is misusing sick leave. This introduction of a reasonability standard without defining it through objective criteria, means that it will be necessary to proceed to grievance arbitration to determine the definitional parameters.

5. Under the MPA proposal, a member could have 16 occurrences of sick leave, with each occurrence lasting one day, all attached to an off day, and never be subject to the medical substantiation requirement. Even if such an officer went beyond 16 days the commanding officer would have to meet the reasonability standard. This is a prescription for a significant increase in the department's sick leave usage rate. The cost of any such increase could be very great.

6. The biggest flaw in the MPA proposal, is found in the lack of a time frame specified in what would be contractually treated as

an acceptable medical substantiation. In many cases, the lack of such a time frame can render the medical substantiation worthless.

7. The proposal to require the department to pay employees, at overtime rates, for obtaining medical substantiation is inappropriate and an open invitation to abuse. The department would not only have to bear the adverse consequences of a questionable use of sick leave, it would have to utilize its overtime budget to obtain a "dubious" substantiation for the questionable use of sick leave. There would be no way to check on the accuracy of the amount of time claimed.

8. The claim that employees are entitled to receive overtime under the provisions of the FLSA for obtaining medical documentation is without merit. The employees are not being ordered to do so on the City's behalf; they are merely being told they must do so if they want to collect sick leave benefits.

9. The MPA evidence to the effect that a variety of sick leave control practices and policies have been applied over time and in different work areas does not serve to justify its proposals. The agreement provides that the City administers and controls the benefits and provisions of the agreement, including sick leave, and the evidence demonstrates that the use of sick leave varies significantly over time and between divisions and districts. The other evidence establishes that there is a wide variety of sick leave control practices in the various departments of City government.

10. The MPA has failed to establish that the department has abused its contractual prerogative of requiring medical substantiation. The circumstances surrounding the requirements placed on the two officers who were called as witnesses by the MPA establish that they were appropriately required to obtain acceptable medical substantiation. In one case, the officer requested a day off and when it was denied because of staffing requirements, called in sick. That officer had already been identified as a "questionable user" and there were other matters pending which justified the requirement. The medical excuse provided was appropriately questioned, because it appeared that the date had been changed to a date four days later than the date on which the officer had indicated her intent to return to duty. The evidence shows that the other officer was required to provide acceptable medical substantiation because he announced, after learning that he would be assigned to work as a hospital guard, that he was going to call in sick the next day because he did not like the duty assignment and he, in fact, called in sick as predicted. If these are the "best" examples the MPA can cite showing alleged abuse, the MPA position ought to be rejected for that reason alone.

11. Internal comparisons support the City's position. In DPW, the doctor's certification is required for every sick leave occurrence lasting more than three days; for those affecting a planned overtime assignment or a mid week holiday; or when the

employee gets into a disagreement with a supervisor and leaves work claiming to be sick. The requirement is also imposed when an employee requests a day off and has it denied, is identified as a questionable sick leave user or "predicts" an illness.

12. The fact that there is a cap on the number of sick days which may be accumulated in DPW, does not eliminate the incentive to conserve since the employees receive pay at 50% of their base pay in lieu of unused sick leave thereafter.

13. The suggestion that the department can rely upon the disciplinary procedure to control sick leave abuse ignores the City's existing right to rely upon other, less drastic controls to the detriment of all concerned.

14. While the MPA claims that the lower rate of sick leave utilization by supervisors represented by MPSO is attributable to differences in age and work environment, other evidence suggests that high sick leave use can occur in any age group or environment (such as the communications operations division).

15. It is important to note that the MPSO has agreed to the City's sick leave incentive plan (SLIP) to control sick leave, while the MPA rejected that proposal in negotiations. Thus, it should not be heard to complain that the only controls that exist are negative rather than positive.

16. The comparability data relied upon by the MPA does not support its position. City exhibits demonstrate that a majority of jurisdictions require medical substantiation more frequently than

the department does currently. Under Section 17.18 of the Milwaukee County ordinances, the County automatically requires substantiation if the absence extends beyond three days. The data contained in the MPA exhibits concerning medical substantiation requirements of other jurisdictions is too vague and uncertain to be useful.

17. The MPA's introduction of evidence concerning the "house arrest" arbitration proceeding would appear to be irrelevant to any proposal in issue and ought to be viewed as a "smokescreen and red herring."

In reply to MPA arguments, the City contends that the MPA proposals are not in fact modeled on the City's sick leave control guidelines and not more "explicit," since they provide for a warning letter after four sick leave occurrences in a six-month period and a doctor's certificate requirement after four sick leave occurrences in the second six-month period; argues that the MPA's demand is less restrictive rather than more restrictive; characterizes the doctor's certification requirements proposed by the MPA as "loose and flimsy;" argues that the definition of what would constitute acceptable medical substantiation in all cases is "plagued with loopholes;" repeats its argument that the MPA's comparative data does not support its arguments concerning the use of a fixed number of days requirement or the demand that officers be paid overtime for the time required to obtain acceptable medical substantiation; and repeats its arguments as to why the FLSA does

not apply and that overtime ought not be paid for time spent by employees seeking to justify their claims for sick leave.

Discussion and Award

It would appear that the dispute as to whether the agreement should be reworded to "require" or "permit" officers to give notice of their requests for sick leave by phone may be the result of a miscommunication or misunderstanding. However, it is undisputed that such notification is normally given by phone and there would appear to be no reason why the agreement should not be amended to reflect that practice. Even so, it ought not be amended to require that all such notices be given by phone. The agreement will still require that the notice be given "immediately" and it is therefore possible that the notice will, at times, be given in person to help meet that requirement. Therefore, the language change proposed by the City has been awarded.

The MPA is proposing to change the agreement to limit the discretion of CO's by establishing both a four day per quarter threshold requirement and a differently worded standard; to specify what shall constitute acceptable medical substantiation; and to require the City to pay officers at overtime rates for the time it takes them to obtain acceptable medical substantiation. Consequently, the MPA has the burden of establishing that such changes are both necessary and reasonable. In the view of the undersigned, it has not met that burden.

The record fails to establish that CO's have abused their authority to require officers to obtain acceptable medical substantiation. Specifically, the evidence fails to establish that the CO and acting CO who imposed such requirements on the two officers who testified on behalf of the MPA's proposal abused the discretion permitted by the agreement. In both cases, there was an objective basis for their actions. The fact that the requests may have been ultimately approved does not support a finding that the CO's in question acted unreasonably under the circumstances.

The same is true with regard to the proposal to specify what shall constitute acceptable medical substantiation. Further, if the agreement were modified to specify what would constitute acceptable medical substantiation in all cases, it would be appropriate to more strictly define the requirements as to the timing of the office visit and the basis for the medical diagnosis. Thus, a contemporaneous office visit and a diagnosis based on actual examination or observation ought to be deemed conclusive. However, utilizing such a definition would suggest that a less specific form of substantiation should not be deemed acceptable, even though it might be perfectly sufficient in many cases. For example, a statement from an officer's regular physician confirming a diagnosis and treatment by phone of a chronic and recurring condition ought to be deemed sufficient, even if it is provided after the fact.

The evidence showing the diversity of practice in the department does not include any evidence of discriminatory treatment within districts or divisions. Instead, it reflect that different CO's, with differing management styles, faced with differing rates of sick leave utilization, have taken different approaches over time. Further, even if the evidence established the need for a contractual standard, it would be inappropriate to utilize a numerical standard as a minimum threshold rather than a permissive guideline. To do so would preclude a CO from imposing such a requirement on other, objective bases until such a threshold was met. Finally, any numerical standard adopted might prove to be too stringent in the case of some districts or divisions and not sufficiently stringent for others, based upon the evidence concerning the wide variation in the utilization of sick leave.

The proposal to pay officers at overtime rates for the time it takes them to obtain acceptable medical substantiation is likewise not supported as necessary or reasonable. Such leave is an earned benefit that has value to the employee in many ways, but it is not a right without reasonable qualification. It is a nearly universal practice for employers to require employees to provide medical substantiation for questionable uses of sick leave and the record is devoid of any evidence of an employer that has agreed to pay employees at overtime rates for doing so. While the undersigned is of the view that the FLSA does not require such payments, that is a matter that should be left to the agency responsible for

enforcing that law.

AWARD: Paragraph 5 of Article 22 shall be amended by adding the following sentence immediately after the first sentence: "Such notification may be by telephone."

ARTICLE 26 - TERMINAL LEAVE

Under the agreement, an employee with 25 years' service who retires on a regular service retirement or terminates employment as a "deferred retiree" is entitled to receive a lump sum payment equivalent to one eight-hour work day's base salary for each day of unused sick leave up to a maximum of 45 days. In its final offer, the MPA proposes to increase the maximum number of days of terminal leave pay permitted to 83. It also proposes to delete the word "deferred" in paragraph 2 of the terminal leave article, as follows:

> 2. When a terminal leave payment is paid to a ~~deferred~~ retiree with 25 or more years' service, the payment will be made on the ~~deferred~~ retiree's effective date of separation based on his/her pay rate and sick leave accumulation in effect at that time.

MPA's Position

The MPA makes the following points in support of its position:

1. The terminal leave provision creates a disincentive for an employee to abuse sick leave. This benefits both the employer and the employee. For the employer, there is increased productivity, reduced overtime and full staffing. For the employee, unused sick days can be cashed in for money at the time of retirement.

2. The terminal leave benefit was first negotiated in the 1971-1972 agreement and was increased from 30 days to 45 days by Arbitrator Forsythe for the 1974-1976 agreement. It has not been increased since then.

3. Unlike the fire fighters and the police supervisors, represented by MPSO, members of this bargaining unit do not have a SLIP program. Under those programs fire fighters receive $150 for each trimester in which they do not use sick leave, use injury pay or have other unpaid time off the payroll. Police supervisors receive one day of pay. An increase in terminal leave benefits is needed in order to equalize the monetary rewards to MPA members for conserving sick days.

4. The City argues that the MPA cannot resolve this disparity because the MPA was offered a SLIP program but turned it down. However, the MPA turned down the City's SLIP proposal because it unfairly disqualified employees who are injured on duty through no fault of their own. The MPA did not wish to sanction a program which penalized an officer for getting shot or breaking an ankle while protecting the public or encourages an officer to avoid unnecessary risks of injury.

5. The SLIP program is flawed because employees who wish to abuse sick leave can do so during particular trimesters and collect SLIP benefits during other trimesters. Further, once an officer has used a single sick day in a trimester, there is no incentive to minimize further usage until the next trimester.

6. The City agreed in the fire fighter arbitration before Arbitrator Weisberger that there was a potential for abuse in the SLIP program and Arbitrator Weisberger concluded that the SLIP program was flawed in part because of the special risks of fire fighters. Rather than being faulted for turning down the SLIP leave proposal, the MPA should be credited for turning down money under a flawed program and proposing that it be used instead to enhance the terminal leave benefit.

7. The terminal leave benefit program is not flawed because it is cumulative, rewarding only those officers who have a career long history of limited sick leave usage.

8. The comparables demonstrate that Milwaukee lags behind in this benefit. Among the Milwaukee Metro cities that use terminal leave to reward the accumulation of sick leave, the average maximum number of sick days allowed is 77.5 (excluding Mequon, which pays $20 for each day over 180 days). Wisconsin cities that have such benefits pay an average of over 78 days. According to the Justex survey, Milwaukee ranks the lowest among the national comparables who use this benefit to discourage sick leave abuse and impose a limit. The average number of days is 210, for those that have an upper limit and three have no upper limit. Even if the two jurisdictions which do not provide this benefit (Chicago and St. Louis) are included in the computation, the average only falls to 150 days. The national comparables relied upon by the City that pay such a benefit average 149 days.

9. While both parties overstate the cost of this benefit by assuming that all retirees will be eligible for the maximum benefit, the City further overstates the cost by assuming that the number of retirees will accelerate during the last two months of 1994 rather than continue at the pace established through October.

10. The deletion of the word "deferred" in Section 2 of Article 26 is proposed in order to maintain consistency in the wording of the agreement if the arbitrator grants the MPA's demand for 25 and out. However, its deletion would not affect the availability of the benefit if 25 and out is not awarded. To the extent that the City argues otherwise, its concern is unwarranted. The MPA proposal would not otherwise change the language of the agreement, which provides that terminal leave is paid immediately upon separation.

City's Position

The City makes the following points in opposition to the MPA's proposals:

1. While the MPA makes much ado about this unit's lack of a SLIP program, because most other bargaining units have such a program, the MPA is raising a red herring. The MPA acknowledges that it was offered a SLIP program but turned down the offer.

2. It was the MPA that denied its members access to SLIP benefits and it is unconscionable for the MPA to ask the City to pay for its blunder.

3. While the MPA offers an innocent explanation for the

removal of the word "deferred" from the second paragraph of the article, by linking it to its 25 and out proposal, the City has a grave concern that the MPA intends to change the provision so that the terminal leave payment is based upon the rate of pay at the time the deferred retiree receives the first pension check. Currently, terminal leave pay is based upon the pay rate at the time the individual leaves City employment.

4. The MPA proposes an 85% increase in the maximum amount of terminal leave pay allowed, from 45 days to 83 days.

5. Both the suburban and statewide comparables support the City's position. Excluding Milwaukee and Mequon, the average number of terminal leave days allowed by Milwaukee Metropolitan jurisdictions is 49.9 days. The state comparables have an average of 43.7 days.

6. It is important to recall that the agreement also contains another important reward for conserving sick leave. Under the agreement the percentage contribution toward a retiree's health insurance premium paid by the City ranges from 65% to 100%, based upon accumulated sick leave at the time of retirement. Any comparison to other jurisdictions that fails to take into account this added benefit is seriously flawed. The record is void of any such alternative benefits funded by accrued sick leave days in other jurisdictions.

7. The City has calculated that the cost of the MPA terminal leave proposal for 1993 actual retirements and anticipated 1994

retirements will be $982,945, for a percentage lift of 1.27% of pay. The MPA has not offered justification for this incredible increase in cost to the City.

8. While the MPA faults the City's cost calculations, because they were based upon a projection of 129 retirements in 1994, while the MPA estimates that only 80 employees will retire in 1994, the MPA repeatedly used the higher figure when calculating the alleged savings that the City would reap from its 25 and out proposal. For this reason, it should not be heard to argue that the City's calculation of the cost of this proposal is inaccurate.

In reply to the MPA's arguments based upon comparables, the City contends that the MPA has "cooked" the numbers and artificially inflated the results by disregarding those jurisdictions which do not have any terminal leave provision at all. The City also points out that there are a number of national jurisdictions (7) among the MPA comparables where the employer does not contribute toward the cost of a retiree's health insurance premiums and three others that have no terminal leave pay provision at all. In one (Omaha), the redemption rate is only 12.5%. The City also notes that, while the MPA points out that there has been no enhancement of the terminal leave provision since the 1974-1976 agreement, the health insurance contribution formula was established in the 1985-1986 agreement. Thus, according to the City, it has rewarded MPA employees for conserving sick leave during the intervening years, by creating this substantial benefit.

Discussion and Award

Focusing on those comparables with agreements calling for terminal leave pay in the form of cash in exchange for unused sick leave, does lend support to the MPA's proposal to increase the maximum number of days allowed for such purposes. However, as the City notes, many jurisdictions do not provide for this benefit, which can be very costly, as its data reflect.

More importantly, it is appropriate to look at the "whole picture." At the time of retirement, a "top cop" in Milwaukee will not only be entitled to up to $6,750 in terminal leave pay, but an arrangement that will pay between 65% and 100% of the cost of health insurance until age 65, depending on sick leave accumulation. While the Union points out that the maximum number of sick days that can be converted to cash has not increased since 1974, the size of the cash benefit increases along with increases in the base wage rates and the health insurance incentive program has been added within the last ten years.

The most difficult aspect of this issue relates to what consideration, if any, should be given to the fact that the agreement here will not include a SLIP program, a third monetary incentive with special appeal for those employees with a shorter term perspective. It is difficult to understand why the MPA has refused to reinstate a SLIP program. (The record discloses that there was a similar program in effect prior to 1989.) Apparently, the MPA's concern was over the fairness of the requirement that, in

order to qualify for SLIP payments an officer must not have received any injury pay during the trimester in question.

While it is certainly true that an officer who receives injury pay ought not be "penalized," the SLIP program is not intended to penalize employees. An employee who is out on sick leave may have suffered an illness or injury under equally blameless circumstances, but would not qualify for the SLIP payments. Obviously, the SLIP payments cannot prevent such things from occurring. The most they can do is create an economic incentive to reduce claims for disabling illness and injury, by rewarding those who do not incur such costs during the time period in question. It should not be viewed as a "penalty" to those who are unable to do so through no fault of their own.

This question was presented to Arbitrator Weisberger in the fire fighter arbitration, and produced an inclusive result. It would appear that the issue was not well argued, but that Arbitrator Weisberger agreed that the provision was a flaw in the City's SLIP proposal. She favored the fire fighter proposal to substitute a requirement that the fire fighter "did not abuse his/her right to injury pay," but acknowledged that the fire fighter proposal was flawed because it would "difficult to apply."

Perhaps it would be possible to draft language that would not suffer from this difficulty of application, but recognizes the special circumstances affecting public safety employees, who are much more likely to suffer on the job injuries or illness, as a

result of the performance of their normal duties. However, neither party is proposing to include the SLIP program in the agreement, with or without such a modification. Further, the contract term covered by the agreement here in dispute has already expired and the parties will be entering negotiations immediately following its execution. It would be the recommendation of the undersigned, that the parties spend some time during their negotiations attempting to design a SLIP program that is consistent with its purpose and deals with this problem in a way that is fair to all concerned.

Because the MPA's 25 and out proposal has not been awarded, there is no need to delete the word "deferred" from the two places where it is used in paragraph 2. While the MPA would appear to be correct when it argues that such a change would not have a substantive impact on the rights of deferred retirees, it could create possible confusion in the future to change the language for no apparent reason.

AWARD: Article 26 shall be included in the agreement, without change.

ARTICLE 28 - VACATIONS

Both parties propose a number of minor changes in the wording of the vacation article. All of those that involve changes in the calendar years referred to are in both final offers and are therefore agreed changes. The City makes a total of three deletions, all of which appear to involve surplus language. Two would delete references to the "police physician." The MPA's final

offer includes one of those two deletions, but appears to overlook the other. The third City deletion would eliminate the introductory clause "effective January 1, 1991," in relation to the use of segmented vacations. The result would appear to continue the substance of the provision, while deleting the reference to the date on which it became applicable. In the absence of any evidence or argument supporting the exclusion of the additional deletions included in the City's final offer, they have been included in the award on this article.

For many years, the vacation article has provided, in what is currently identified as Section 11, as follows:

> "The assignment and scheduling of vacations with pay shall be controlled by the chief of police."

Over the years, rules and regulations and standard operating procedures (SOP's) have been promulgated and practices have developed, governing the selection and scheduling of vacations. Both parties agree that, in general, those rules, procedures and practices, which give recognition to seniority in selecting and scheduling vacations, work well and need not be changed. However, according to the MPA, at least one significant practice has been changed, through the issuance of an SOP dated January 11, 1991, by Deputy Inspector Thomas Harker, patrol bureau commander. It read as follows:

> "The 1991 vacation selection process shall be conducted pursuant to the guidelines established by the Chief's Committee on Personnel Scheduling/Allocation.

"In scheduling vacations, District Commanders shall ensure that;

1) the attached Standard Operating Procedures are followed;

2) there shall be no moving of a member's regular off days as defined by their off group except for an authorized body-for-body trade that covers the time period affected by the move; [Emphasis added.]

3) there shall be a limit on the number of personnel that may be off at any one time on vacation or compensatory time off. The 1991 goals are:

a) A total of 12% on the day shift.
b) A total of 10% off on the early shift.
c) A total of 10% off on the power shift.
d) A total of 9% off on the late shift."

In addition, the percentages of personnel allowed off on the basic shifts (and the number of basic shifts) reflected in the quoted memo have since changed. On January 10, 1992, Inspector Harker issued a similar memo, applicable to the 1992 vacation picks, that reduced each of the quoted percentages by one percentage point. On December 16, 1993, Inspector Harker issued a memo, applicable to the 1994 vacation picks, that reflected the existence of the new early power shift and established the following percentage goals:

"a) a total of 11% off on the day shift,
b) a total of 8% off on the early power shift,
c) a total of 9% off on the early shift,
d) a total of 8% off on the late power shift,
e) a total of 8% off on the late shift."

MPA's Proposal

The MPA proposes to delete existing Section 11, quoted above, and replace it with seven new, unnumbered paragraphs which would generally describe the existing rules and regulations, SOP's and practices applicable to vacation selections and scheduling, with two significant exceptions. It would include the following two statements, which would be inconsistent with the provisions of the most recent SOP issued by Captain Harker:

> *"...when a member selects his/her non-segmented vacation the trading of off days to start a vacation will be permitted....*
>
> *"The vacation selection process shall be conducted pursuant to the following goals at District Stations in determining the number of personnel off at any one time.*
>
> *a. 12% off on the day shift.*
> *b. 10% off on the early shift*
> *c. 10% off on the power shifts, and*
> *d. 9% off on the late shift."*

The MPA proposal would also include the following language, reflecting the right of the chief to override the right of members to select or take scheduled vacations under certain circumstances:

> *"Anything herein to the contrary notwithstanding, the Association acknowledges the right of the Chief to suspend the rights of its members to select or, having selected, to take a scheduled vacation in the event the Chief is unable to provide essential services by any other means, or in the event of civil disorder, riot, insurrection, or some Act of God requiring the summoning of as many possible officers as possible to an on duty status."*

MPA'S POSITION

The MPA makes the following points in support of its

proposals:

1. The need to provide effective police coverage 24 hours a day, 7 days a week, and meet the other needs of the department, including appearing in court, places great demands on the personal lives of police officers and their families. It also makes it difficult to schedule vacations that are compatible with the school schedules and vacation schedules of their families. Vacations represent a vital opportunity for officers to spend quality time with the other members of their family. Therefore, it is important that the scheduling of vacations correspond with the more predictable schedules of their families to the extent possible.

2. Out of this need, there evolved a fair and equitable system which accommodated the needs of the officer and the department through the mutual efforts of a member of the MPA and a caring, responsible desk sergeant, Dennis Forjan. In selecting weeks of vacation, an officer must select a period that begins with two regular off days, which often may not correspond with the schedule of children and spouses. By permitting officers to "trade" or "change" their own off days it was possible to allow more officers to take weeks of vacation that more closely corresponded to the vacation schedules of children and spouses. With the permission of his CO, Sgt. Forjan would allow such trades, provided it did not conflict with the needs of the department. If it did conflict with the needs of the department, the requesting officer would need to arrange for a "body for body" trade with

another officer.

3. The memo issued by Inspector Harker put an end to this practice. In attempting to explain the need for the memo, Inspector Harker suggested that it was due to the inability on the part of the desk sergeant and other supervisors to say "no" when the trade would result in understaffing the district, bureau or division. It is unfair to invoke such a blanket prohibition due to the department's inability or unwillingness to control its own supervisors. Under the prohibition, the desk sergeant or supervisor cannot allow an officer to trade or change his or her off days in connection with a vacation pick, but can continue to do so in other circumstances, provided it does not result in understaffing.

4. This prohibition is especially inappropriate, in view of the fact that the chief retains the power to cancel such arrangements in an emergency under the current agreement and under the MPA proposal.

5. The proposal to establish percentage goals for the number of officers allowed to be off on vacation at any one time is based upon the percentage figures established by Inspector Harker's original memo. The goals would be established, while simultaneously recognizing the right of the chief to suspend the selection or the taking of vacations under emergency conditions.

6. All 29 metropolitan communities have a contract provision governing the selection of vacations. Twenty-seven of the 29 have

contractual provisions recognizing the principle of seniority in making such selections. Only Menomonee Falls and Mequon give the chief discretion on what methodology is to be utilized. Among the midwest comparables, 9 of the 12 expressly reference seniority and 8 of the 12 set forth the process to be followed in the agreement. Fourteen of the 16 state comparables relied upon by the City have the vacation selection process set forth in their agreements. Thirteen of the 16 reference seniority as the method. Only LaCrosse and Milwaukee do not. Among the City's national comparables, 13 of the 19 have the vacation selection process set forth in the agreement and 10 of the 19 utilize seniority. Only Milwaukee, Dallas and Jacksonville have nothing in their labor agreements.

In reply to City arguments, the MPA takes issue with the City's reliance upon the provisions of Section 62.50(23) of the Wisconsin Statutes, which make the chief responsible for the efficiency of the department. While the statute makes no reference to the morale and general welfare of its members and their families, that is an inherent and essential element of efficiency, according to the MPA. It argues that since the evidence is unrebutted to the effect that the practice described by Sgt. Forjan worked well for many years, there was no need to implement a blanket prohibition. Further, the MPA argues, the last paragraph of its proposal acknowledges the priority of operating needs which can override all other considerations. Finally, the MPA argues

that the City's contention that the proposal should be denied because vacation scheduling for the two years of the agreement and 1995 has already taken place should be rejected as an effort to evade the City's obligation to bargain on this issue, as found by the WERC.

City's Position

The City proposes that there be no changes in the vacation article other than the housekeeping changes described above. In support of this position, the City makes the following points:

1. The changes in the vacation article proposed by the MPA would negatively impact departmental staffing and service to the community.

2. The proposal to delete Section 11 would undermine the chief's responsibilities under Section 62.50(23) of the Wisconsin Statutes. It would directly affect staffing levels, service levels and departmental efficiency in handling calls for service. It would ultimately affect government spending, budgeting and taxation.

3. Section 111.01(1) of the Wisconsin Statutes recognizes three major interests in collective bargaining, i.e., the public, employees and employers. While employees represented by the MPA have an obvious interest in the scheduling of vacations, no employee testified that he or she had been adversely affected by the current departmental practices involving vacation selection. In fact, Sgt. Forjan testified that the current vacation system

"works.

4. Inspector Harker testified that the demands for police service are greatest during the "prime vacation period," from mid June until mid September. The increase in calls for service during this time period were graphically represented in City exhibits and testimony. As assistant chief James W. Koleas testified, the needs of employees to have vacation time with their family cannot be discounted, but must be balanced against the need to allocate resources as necessary to provide police service when it is most needed.

5. The MPA proposal does not recognize the interests of the City or the public, in connection with staffing to meet demands for service and maintaining needed flexibility to respond to changing community needs. The MPA admits that there is a potential for increasing the number of officers that would be off on weekends, even though Sgt. Forjan testified that the night shifts are busier on Friday and Saturday nights. As Captain Howard Lindstedt testified, without requiring body for body switches, such trades result in increases in the number of people that are off on a particular weekend.

6. Vacation selections begin in the third week of January and end in mid March. It is difficult, if not impossible to predict summer staffing needs at that time.

7. Current departmental policy allows body for body trades, which can be accomplished without diminishing staffing or service

to the community. Sgt. Forjan testified that whenever he denied an off day for staffing reasons, he would always suggest the names of people who might be willing to make a body for body switch.

8. The MPA proposes to include the rules and regulations and standard operating procedures and practices in the agreement so that members can "see what their benefit is." There is no need to do so, since those rules have been recently organized and published in the department's rules and procedures book, issued to each member of the department.

9. President DeBraska acknowledged that if the department failed to stay within a "reasonable range" of the "goals" that would be included in the agreement under the MPA's proposal, grievances would be filed, but he was unable to state what would constitute a "reasonable range." Further, the goals in question are not the current goals, but are based on Inspector Harker's 1991 memo. As Chief Koleas testified, "it's not 1991, we have to address the needs for staffing and allocation based on today's needs and today's standards." Because the department may need to adjust vacation goals in the future, the City strongly objects to any contractual language which would limit its ability to do so by forming a basis for future grievances.

10. The modifications proposed by the MPA would have absolutely no affect on vacation selection during the term of the agreement or the first year and perhaps the second year (depending upon negotiations) of its successor. For this reason, and because

the MPA alleges that it is not attempting to change anything as it relates to the vacation selection process, the MPA proposal should be rejected in its entirety.

In reply to MPA arguments, the City argues that the staffing of the department is a vital public interest and that the modifications proposed by the MPA would negatively impact on departmental staffing; notes that, as a result of the award in this proceeding, the department anticipates an increase in retirements which will coincide with the important summer vacation period; underlines the important distinction between the practice of allowing an officer to trade his or her own off days and the practice of allowing body for body switches, which are permitted to accommodate employee vacation needs; again draws the arbitrator's attention to the fact that the goals in the MPA's final offer are outdated; notes that the use of seniority for vacation picks is not in issue; and repeats its argument that the proposed changes will have no effect for the duration of the agreement, but could have a negative impact this summer, due to the anticipated surge in retirements.

Discussion and Award

As indicated at the outset, the three deletions in language proposed by the City are viewed as "housekeeping" proposals and will be awarded for that reason. For a number of reasons, the MPA's overall proposal to eliminate Section 11 and replace it with a comprehensive statement attempting to describe the current rules

and regulations, SOP's and practices has not been awarded. The record does not contain sufficient evidence to justify the need for such a change. It could result in unintentional changes in an arrangement which has existed for many years and "works." In doing so, it would freeze the department's ability to change any of the current practices, unless and until mutual agreement was reached to do so or the changes were included in an interest arbitration award.

The record does contain evidence establishing the need for a change in one of the two substantive areas affected by the MPA proposal.

Prior to the January 11, 1991 memo from Inspector Harker, a practice existed, whereby the desk sergeant or other supervisor charged with the responsibility of implementing the vacation selection process exercised discretion by allowing officers to rearrange their own off days in order to establish a more desirable starting date for their scheduled week(s) of vacation, provided it did not interfere with necessary staffing levels. That same discretion still exists when officers request to do so for other reasons. However, the SOP's issued by Inspector Harker have *prohibited* supervisors from exercising such discretion, at least in the patrol bureau.

The City points out that it is not really possible to predict summer staffing needs at the time the vacation picks are made and that this could pose a special problem in the summer of 1995, due

to a possible surge in retirements. As Inspector Harker testified, desk sergeants and other first line supervisors no doubt have some difficulty in saying "no" to such requests, especially at a time when there is no evidence of an actual problem with projected staffing levels. However, this problem could be overcome by indicating that any such approvals are "tentative," subject to being withdrawn if an actual staffing problem develops. While this would introduce an undesirable element of uncertainty, the officer would be forewarned and free to make alternative vacation arrangements or tentative arrangements for a body for body switch, if needed.

Currently, supervisors are able to agree to allow officers to rearrange their off days on an *ad hoc* basis, shortly before the work day affected by the rearrangement requested. The MPA's proposal is to allow such rearrangements for the purpose of beginning a week of vacation on a more desirable date. Therefore, it would seem workable, if the responsible supervisors are given the discretion to make a final decision in the matter seven days prior to the day in question. Of course, any such decision, like the decision to grant the vacation itself, could be canceled by the chief in the event of an emergency.

Inclusion of the "percentage goals" in the agreement has not been awarded for some of the same reasons that the proposal to include the entire vacation selection procedure in the agreement has not been awarded and for certain additional reasons as well.

The most serious problem identified in the record is the frustration felt by officers who are no longer able to rearrange their off days, with the permission of their desk sergeant or first line supervisor, as before. There is an obvious relationship between the ability of the supervisors to grant such requests and staffing needs. Staffing needs, are, in turn, directly affected by the percentage goals utilized in a given vacation season. As the City points out, staffing levels have a significant impact on the department's ability to meet community needs and this is especially true in the critical summer months. Freezing percentage goals in the agreement could have adverse consequences not only in connection with the ability to rearrange off days, but on the department's budget and its ability to meet community needs.

> AWARD: The changes proposed by the City in the wording of Article 28 shall be included in the agreement. In addition, Section 11 shall be amended by adding the following two sentences: However, in exercising those controls, supervisors charged with the responsibility of scheduling vacations shall not be prohibited from tentatively agreeing to allow members to rearrange their scheduled off days in order to change the starting date of a non-segmented vacation, if projected staffing needs would appear to permit such a rearrangement. If it is necessary to revoke the tentative approval granted due to staffing needs, the member shall be given notice no later than seven days prior to the first day the member is tentatively scheduled to be absent.

ARTICLE 32 - HOLIDAY PREMIUM PAY

The department utilizes a 5-2/4-2 work schedule, which would normally generate 2,080 hours of scheduled work per year. However, under the agreement, officers are entitled to 12 holidays, 8 of

which are built into the 5-2/4-2 schedule. The other four holidays are treated as "floating" days off, to be taken on dates selected by the officer. Under this arrangement, a certain number of officers are required to work on all of those days generally recognized as holidays, including the Fourth of July, Christmas, New Years Day, and Labor Day. Under the terms of the agreement any officer assigned to work on any of those four days is entitled to receive premium pay at the rate of one and one-half times their base salary or compensatory time off in lieu of cash.

MPA's Proposal

The MPA proposes to increase the number of holidays for which premium pay or compensatory time off is earned to six by including Easter and Thanksgiving.

MPA's Position

In support of its position, the MPA makes the following points:

1. While officers are entitled to time off on 12 days during the year for holidays, a large number of police officers are required to work on the days when holidays are normally celebrated. The premium pay payable for the four days currently identified in the agreement is paid in recognition of the fact that they are traditional family holidays and that officers who work on those days deserve extra compensation.

2. The MPA proposal asks that two additional days, recognized as traditional family holidays, be included in the list.

3. The cost of the demand is small, because the premium pay would only be earned by those officers who work on the two holidays in question and that number is within the control of the chief.

4. Even if the number of holidays for which premium pay is earned is increased to six, there still will be a number of family oriented holidays which will not be covered.

5. Thanksgiving is one of the most family oriented holidays there is and should be treated as a premium day for that reason alone. While Easter is not recognized as a legal holiday, presumably because it falls on a Sunday, it is a day on which few employees are required to work.

6. Nineteen of the 29 suburban communities, all of the City's statewide comparables and 14 of the City's 19 national comparables designate Easter, Good Friday, Thanksgiving or the day after Thanksgiving as a holiday.

7. Other jurisdictions pay a higher premium for holidays worked. Hales Corners pays two and one-half times base wages and South Milwaukee and Oak Creek pay double time. Others pay a lump sum at the end of the year, without regard to whether the officer worked the holiday. For example, Wauwatosa pays one and one-half times for holidays, but pays an additional 45 hours at straight time, regardless of the number of holidays worked.

8. Other Wisconsin jurisdictions get specified holidays off, while Milwaukee incorporates eight of them into the officer's regular off schedule. This results in Milwaukee officers having

fewer actual holidays off.

9. The Justex survey shows that all of the MPA's national comparables, except Toledo, provide premium pay for all designated holidays if the officer is scheduled to work on that day. Even Toledo has a better provision, paying a premium of 2.5 times base wages for 10 of 15 designated holidays.

10. The City overestimates the cost of the MPA's proposal by including hours worked on holidays in 1993 which were not compensated at premium rates, because the officers took compensatory time off. The MPA's costing is based on the actual money paid by the City in 1993 for premium pay for the four identified holidays.

In reply to City arguments, the MPA contends that the City is wrong when it states that the existing holiday premium pay benefit is competitive with suburban and state comparables, because even though Milwaukee officers receive 12 days off in lieu of holidays, 8 of those days are integrated into the officer's off day schedule, 4 are floating days off and the officer can only earn holiday pay on a holiday worked if it is one of the four identified; other jurisdictions, which do not integrate their holidays into the off day schedule, require their officers to work fewer total hours, because all of their holidays are in addition to their regular off days and many provide additional time off and/or additional pay for the non integrated holidays; an analysis of scheduled hours less holiday hours demonstrates that only 7 of the 29 suburban

jurisdictions work more hours than Milwaukee officers; only 3 of the 29 suburban jurisdictions integrate days off into their work schedules, while the remaining 26 provide compensation, days off or a combination of the two; a number of suburban jurisdictions pay a higher premium rate and an analysis of the "total value of holidays" of the 29 suburban jurisdictions shows that Milwaukee ranks fifth from the bottom.

City's Position

The City proposes no change in the holiday premium pay article. In support of its position, the City makes the following points:

1. The City has a system whereby it provides MPA members with 12 days off in lieu of holidays, 8 scheduled and 4 floating. No other Milwaukee metropolitan jurisdiction provides its officers with 12 paid days off in lieu of holidays. The vast majority of jurisdictions merely provide a lump sum payment of some dollar amount, not time off. The same is true for state comparables.

2. The City has costed the MPA proposal at $250,000 over the two years of the agreement, for a total percentage lift of .16% of pay.

3. The MPA is wrong when it asserts that other Wisconsin jurisdictions receive their specified holidays in addition to regular off days, while Milwaukee police officers do not. One of the MPA's own witnesses accurately described the current situation whereby an officer who would be normally scheduled to work 10 days

in a 14 day work cycle, receives 5 days off instead of the normal 4, with the fifth day off being treated as a "holiday off" during 8 work cycles.

4. With the addition of four floating days off, Milwaukee police officers are provided with 12 days off plus premium pay on four named holidays, if actually worked.

In reply to the MPA's contention that its costing should be accepted as more accurate, the City notes that the MPA costing only accounts for the actual money paid and does not take into account compensatory time off.

Discussion and Award

In its arguments, the City focuses on the fact that police officers in Milwaukee receive both pay and time off on 12 days during the year, in lieu of holidays, in addition to the premium pay they receive if they actually work one of the four holidays identified in the agreement. As the City correctly notes, most metropolitan and state jurisdictions to which the City might reasonably be compared compensate their police officers for fewer than 12 holidays and most do so through lump sum payments, in some cases at premium rates, rather than through paid time off.

By its arguments, the MPA essentially ignores the dual character of the current benefit provided and focuses instead on the additional compensation paid for holidays under the agreements to which it draws comparisons. Utilizing this approach, it could be argued that West Allis has a more generous arrangement for

holidays. In West Allis (and Shorewood) an officer who works on a holiday receives regular pay for doing so. In addition, in December of each year, the officer receives pay at one and one-half times the straight time rate for all 11 holidays. If it is assumed that the chances of working on a holiday are approximately one in four, this would produce an economic value of 19.25 (2.75 + 11 x 1.5). Using the same method of analysis, the provisions in the agreement at Wauwatosa would generate a value of 19.125. Most of the rest of the metropolitan comparables (including Hales Corners) would produce a value of 13.75 or less.

For a Milwaukee police officer, using this method of analysis, the value of the existing benefit would only be 13.5 (12 + 1.5). However, it must be emphasized, this analysis disregards the time off available under the existing benefit in Milwaukee.

If consideration is given to this dual aspect of the benefit, the more meaningful comparisons are those involving Oak Creek, South Milwaukee, Whitefish Bay and Milwaukee County. Each of those jurisdictions integrate some or all of the holidays provided into their regular work cycles. The City compares favorably to all four jurisdictions.

Oak Creek, which only provides for 10 holidays, but pays double time for holidays worked and pays double time or equal time off for the three that are not integrated into the work schedule, would achieve a value of 14.75, utilizing the above described approach (1.75 x 2 + 5.25 + 3 x 2). However, the Oak Creek police

officer would only be entitled to take a total of 10 days off, rather than the 12 days provided for a Milwaukee police officer.

A similar result would obtain in South Milwaukee where the value would be 13.75 (1.75 x 2 + 5.25 + 5). Again, this would disregard the fact that the South Milwaukee officer could only receive a total of 9 days off (7 integrated into the work schedule and 2 floating days).

The values that would be assigned to Whitefish Bay and Milwaukee County would both be lower than the value assigned to the current arrangement in the City of Milwaukee. In Whitefish Bay, police officers receive 10 days off in lieu of holidays. The Milwaukee County sheriff's department has 9 holidays, all integrated into the work schedule, and provides an equivalent amount of comp time off for each holiday actually worked. Assuming that a deputy worked one out of four holidays, the value assigned would be 11.25. That would compare unfavorably to the value of 13.5, with 12 days off, assigned to the current arrangement in Milwaukee.

In its reply arguments, the MPA has attempted to discount or disregard the paid time off aspect of the existing arrangement with the City, by combining an analysis of the hours generated by the agreed to work schedule with the calculation of the time off or hours paid under the holiday provisions of the agreement. In the view of the undersigned, this analysis must be rejected, because it treats hours paid as time off and because of the differences in the

total hours reflected are in part a function of the work schedules not the holiday pay provisions of the agreements in question.

AWARD: Article 32 shall be included in the new agreement without modification.

ARTICLE 56 - POLITICAL LEAVES OF ABSENCE

Under the existing agreement, if an officer wishes to run for political office, he or she must notify the chief and request a leave of absence. In addition, there are a number of other restrictions on the officer's conduct, intended to prevent the officer from utilizing the position of his or her office to influence subordinates or others for a political purpose.

The provision in question is worded the same as old rule 4, section 23 of the department's rules and regulations, which has been rescinded. In the view of the MPA, its validity has been drawn into question by the enactment of the Law Enforcement Officers' Bill of Rights (L. 1979, c. 351, effective May 22, 1980) found in Chapter 164, Wisconsin Statutes, and (in part) by two opinions of the city attorney.

When originally enacted, the LEOBR consisted of four subsections which were applicable only to law enforcement officers employed by first class cities (Milwaukee) or counties having a population of 500,000 or more. Those provisions have since been extended to law enforcement officers employed by any city, village, town or county. Relevant for present purposes is Section 164.015 which provides as follows:

"154.015. Engaging in political activity

> No law enforcement officer may be prohibited from engaging in political activity when not on duty or not otherwise acting in an official capacity, or be denied the right to refrain from engaging in political activity."

In 1988, the LEOBR was amended, by 1987 Act 350, Section 3, effective May 3, 1988, to provide that law enforcement officers employed by a city, village, town or county other than a first class city (Milwaukee) or a county having a population of 500,000 or more, could not be prohibited from being a candidate for any elective public office if otherwise qualified and could not be required, as a condition of being a candidate, to take a leave of absence during his or her candidacy. By limiting the provisions of Section 164.06, to exclude the city of Milwaukee, the city ordinance (Section 350-35-2 of the Milwaukee Code of Ordinances), which requires employees to take a leave of absence to run for political office in certain circumstances and the provision in the agreement here, were both preserved.

In an opinion written in 1991 (91 OCA 713) the city attorney noted that there was an apparent conflict between the provisions of the city ordinance and rule 4, section 23 of the Rules and Regulations of the Milwaukee Police Department (and, in effect, the collective bargaining agreement) because the ordinance would permit an officer to continue working after announcing his or her candidacy, until such time as nomination papers were filed. As noted above, the rule was subsequently rescinded, but the wording

of the agreement has not been modified since that opinion was issued.

On August 5, 1993, the city attorney issued another opinion (93 OCA _____) in response to the question of whether a police officer elected to a school board position would be required by the ordinance to take a leave of absence from the position of police officer during her elected term of office. The opinion read, in relevant part as follows:

> "Your question relates primarily to the issue of whether a police officer who is elected to a seat on the Milwaukee School Board may continue to serve as a police officer during the term of office. In your letter you point out that the School Board position is part-time and therefore that it may be possible for a police officer to serve in both positions simultaneously. The ordinance as presently written provides that the granting of a leave of absence with reinstatement rights from a position of municipal employment during the term of elected office is dependent upon: (1) the police officer making a request for such leave, and (2) the granting of the leave of absence by the affected department head, in this case the Chief of Police. In our opinion, a police officer who is elected to a seat on the School Board may continue to serve as a police officer after being elected merely by not applying for a leave of absence during the term of office."

MPA's PROPOSAL

The MPA proposes to rewrite Article 56, primarily for the purpose of allowing police officers to run for political office without being required to take a leave of absence in order to do so. The police officer would be required to notify the chief of his or her intention and the chief would be obligated to grant the request, if made. According to the MPA, all of the other

provisions of Article 56 would remain essentially unchanged, albeit with modified wording.

MPA's Position

The MPA makes the following points in support of its proposal:

1. While the provisions of Section 62.50(28) allow the common council of any first class city to enact an ordinance which regulates the political activities of its law enforcement officers, Section 62.50(29), Wisconsin Statutes, provides that, in the case of a conflict between the provisions of the LEOBR and the provisions of Section 62.50, the provisions of the LEOBR supersede the provisions of Section 62.50.

2. While the City may claim that there is no conflict between its exercise of its rights under Section 62.50(28) and the provisions of Section 164.015, the requirement that a police officer take a leave of absence in order to run for political office effectively prohibits the police officer from running for office.

3. The leave of absence requirement is not enforced uniformly. Recently, police officer Linda Reaves was allowed to run for school board without taking a leave of absence and the chief "endorsed" her candidacy through campaign literature which emphasized her police experience and featured a picture of herself with the chief, wearing his official MPD badge.

4. The city attorney rendered an opinion that Reaves could serve on the school board without requesting or taking a leave of

absence. As a result, Reaves was not only permitted to run for office without taking a leave of absence, she was told she would be permitted to serve on the school board without taking a leave of absence. While the MPA does not disagree with that conclusion, it seeks to have the same treatment extended to all of its members.

5. While there would appear to be some uncertainty as to whether rule 4, section 23 of the MPD Rules and Regulations has been rescinded, the MPA agrees that it would be a good idea to do so if it has not, and asks the arbitrator to do so through this proceeding.

6. The contractual leave requirement is much more restrictive than the state requirement, which requires employees to take a leave only if they seek partisan office. (Section 230.40, Wis. Stats.) The federal requirement is to the same effect. If the MPA demand is awarded, the restriction in Milwaukee will be virtually identical to the restriction of the state and federal governments, since all city offices are non partisan.

7. The leave of absence requirement unnecessarily discourages qualified candidates from serving the public. The MPA proposal strikes a balance between protecting against the misuse of police authority, while tapping the experience and wisdom of police officers who have much to offer the public.

8. Police officers should be treated no differently than city aldermen, who are also in a position to misuse their authority during a campaign if they are inclined to do so.

9. Currently, all police officers in the State of Wisconsin are permitted to run for office without taking a leave of absence, except for police officers employed by the city of Milwaukee. They are no less trustworthy than other police officers or Milwaukee County deputies and should not be prohibited from doing so.

In reply to City arguments, the MPA contends that the City misstates the effect of any conflict that may exist between the agreement and the ordinance. The MPA notes that the City cites that provision of the agreement dealing with conflicts between the agreement and the City Charter (Article 4) rather than the provision of the agreement resolving conflicts between the agreement and City ordinances (Article 3). Article 3 states that the contract prevails over any contrary City ordinance. The MPA also argues that the City's expressed concern over an officer's possible unwillingness to accept an overtime assignment is unconvincing. In reality, when a police officer is given an overtime assignment, he or she accepts the assignment even though it may conflict with other important aspects of his or her life. Similarly, the MPA argues that the City's expressed concern over the appearance of conflict of interest is also overblown. It notes that officers are frequently called upon to enforce laws with which they may disagree or under circumstances where they would prefer not to do so. Finally, the MPA notes that reassignment is a powerful tool that can be used by the chief to overcome any such appearance of conflict.

City's Position

The City opposes the proposed change in the political leaves of absence article and makes the following points:

1. While there would appear to be a conflict between the language of the agreement and the City ordinance governing political leaves of absence for all City employees, because the City ordinance requires that the leave of absence commence at the time nomination papers are filed, that conflict is resolved in favor of the ordinance under the provisions of Article 4 of the agreement, which reads as follows:

> "SUBJECT TO CHARTER
>
> In the event that the provisions of this Agreement or application of this Agreement conflicts with the legislative authority which devolves upon the Common Council of the City of Milwaukee as more fully set forth in the provisions of the Milwaukee City Charter, Section 62.50, Wisconsin Statutes, 1977, and amendments thereto, pertaining to the powers, functions, duties and responsibilities of the Chief of Police and the Board of Fire and Police Commissioners or the Municipal Budget Law, Chapter 65, Wisconsin Statutes, 1971, or other applicable laws or statutes, this Agreement shall be subject to such provisions."

2. The MPA proposal goes beyond the limits of the ordinance covering all City employees, and creates a potential for conflict of interest.

3. It would be very difficult for police officers, as agents of the law, to escape the appearance of a conflict of interest where they continue working as police officers while campaigning for political office during their off duty hours. Assistant Chief

Koleas cited an example of an officer who receives help in his or her campaign from persons having business interests in the officer's squad area. He also cited the example of an officer who might be reluctant to accept an overtime assignment because of the demands of the campaign.

4. While the MPA may argue that potential conflicts of interest can be avoided by reassigning the officer, that would not be true in cases where the officer took a position in the campaign which might reflect on the public's perception of the officer's willingness to enforce a law with which the officer has publicly disagreed.

5. It is the stated objective of the City and the department to increase public confidence in the department and its members. The success of efforts such as the department's community oriented policing philosophy depend, in large measure, on cultivating relationships with the public that increase their confidence and the MPA proposal has the potential to diminish that confidence and trust.

6. The MPA's reliance upon Section 164.015 of the Wisconsin Statutes is misplaced. That provision states that no law enforcement officer may be prohibited from engaging in political activity under the circumstances described. A separate provision, Section 164.06, which is not applicable to the city of Milwaukee, deals to the question of running for public office. If Section 164.015 gave Milwaukee police officers the right to run for

political office without taking a leave of absence, the MPA would have been in court a long time ago, demanding enforcement.

7. There is no confusion as to whether Rule 4, Section 23 of the MPD Rules and Regulations has been rescinded. The city attorney opinion introduced into evidence by the MPA clearly states that it has been rescinded. Consequently, the City ordinance, which is applicable to all employees including police officers, requires that police officers take a leave of absence without pay commencing on the date on which he or she files nomination papers.

8. The MPA's claim that the ordinance is not enforced uniformly is based upon the campaign of police officer Linda Reaves. However, as the opinion of the city attorney pointed out, Officer Reaves was running for a part-time position and the legal opinion was premised on that fact.

9. The MPA proposal makes no distinction between full-time and part-time political offices and makes no provision as to the obligations of an officer who is elected to a full-time office. Under its proposal, an officer could run for and be elected to a full-time position of city alderman, creating a textbook example of a conflict of interest. The damage to the public's perception of the department that would occur as a result would be far greater than the examples given above.

10. While the MPA claims that a police officer lacks the resources to take an unpaid leave of absence in order to run for political office, the City ought not be required to subsidize a

police officer's political campaign. More importantly, police officers should be treated no differently than other City employees covered by the ordinance governing political activity.

11. The MPA's comparison of a City alderman and a police officer is without merit. Unlike aldermen, police officers enjoy civil service status and nothing in the record would justify treating them differently than all other City employees.

12. The chief did not require Officer Reaves to take a leave of absence, in compliance with the opinion of the city attorney. While it is unfortunate that Officer Reaves included a picture of herself with the chief in her campaign literature, there is nothing in the record to support the MPA's claim that the chief endorsed her candidacy or consented to her use of the photo. If he had endorsed Officer Reaves, there would certainly be some written documentation available to establish that fact. None was introduced into the record.

Discussion and Award

The MPA proposal can be viewed on two levels. On one level, is the question of the possible need for a change in the agreed to provision and the reasonableness of the MPA's proposal for change. On the other level is the question of whether any change found to be needed and reasonable ought to be granted, in view of the uncertainties concerning its legality. In the view of the undersigned, the evidence establishes the need for a change in the wording of the provision, to more closely reflect its intended

application, but that the MPA proposal goes further than reasonable or necessary to accomplish that purpose.

In reaching this conclusion, the undersigned has given consideration to the stated purposes of the requirement. Those purposes have greater persuasive force in the case of partisan offices and City offices. Consideration has also been given to matters of equity, i.e., the fact that all City employees are subject to the prohibition, and the fact that it can be argued that the requirement is more justified in the case of police officers, due to the nature of their work.

On the other hand, the undersigned has also given consideration to the fact that there has been at least one, recent exception, where a police officer was allowed to run for a part-time, non partisan position on the school board, without requesting a leave of absence. There is no indication in the record that any problem arose in that instance, that was attributable to the officer's failure to take a leave of absence. Consideration has also been given to the fact that the wording found in the collective bargaining agreement has been found to be in conflict with the City ordinance because it is more restrictive than the City ordinance requires. These matters raise concerns as to the reasonableness of the restriction and the evenhandedness of its enforcement.

As written, the MPA proposal would create a direct conflict between the wording of the agreement and the City ordinance, which

would undoubtedly require litigation to resolve. That conflict would not necessarily be resolved by a court determination addressing the relationship between Section 62.50(28) and Section 164.015 of the Wisconsin Statutes. If the ordinance was found to constitute a valid exercise of the City's powers under Section 62.50(28) and not in conflict with Section 164.015 -- a result that would appear to be likely in the view of the undersigned -- a question would still exist as to whether the contract provision is valid or whether the ordinance should be viewed as controlling.

The question of whether Section 3 rather than Section 4 of the collective bargaining agreement is applicable for purposes of resolving that conflict is an issue that could initially be decided by the parties' umpire. However, such a determination would not put an end to the dispute. Ultimately, the courts would have to decide whether such a provision, established under the procedures of Section 111.70, could supersede the preexisting ordinance, enacted pursuant to the City's powers under its charter ordinance and/or Section 62.50(28).

Giving consideration to all of the above concerns, the undersigned has concluded that the MPA has established the need for a change in the wording of the provision, but that the proposed changes should be limited to bringing the provision into conformity with the wording and application of the ordinance. The undersigned recognizes that the city attorney's opinion was limited to the question of whether Officer Reaves would be required to apply for

a leave of absence if elected. He did not answer the question of whether she should have been required to take a leave in order to run. However, if the City continues to interpret and apply the ordinance as was done in the case of Officer Reaves, that should not prove to be a problem.

AWARD: The existing provisions of Article 56 shall be identified as Section 1 and existing paragraphs 1, 2, 3, and 4 shall be identified as a., b., c., and d. The wording of the introduction to Section 1. and Section 1.a. shall be modified and a new Section 2 shall be added, so that the provision will read as follows:

ARTICLE 56

POLITICAL LEAVES OF ABSENCE

1. If and when an employee chooses to run for political office, he or she shall notify the Chief of Police of his or her intention and, if there is a contest, file for a leave of absence.

   a. Any such request for a leave of absence shall be granted and shall take effect no later than the date on which nomination papers are filed for the political office in question.

   b. While engaged in political activity, the person, i.e., candidate, shall not communicate with any person who is serving in the Milwaukee Police Department who is subordinate to that person for any political purpose whatsoever.

   c. It shall be improper for such persons to require or request the political service or political support of any subordinate.

d. Such person shall not use the influence of his/her office for political purposes.

2. The requirement that an employee file for a leave of absence after deciding to run for political office shall not apply if the political office is a non-partisan, part-time position.

ARTICLE 65 - INTERPRETER/TRANSLATOR PAY

Currently, the parties' agreement on interpreter/translator pay is found in Article 64 A. The parties have agreed to renumber the article to the next number in sequence, Article 65.

Under the existing provision, officers who are authorized to perform interpretation and/or translation of a language other than English and do so at a "level of competence deemed acceptable to the department" are entitled to receive interpreter/translator pay, in the amount of 80 cents per hour, provided the language is one of those recognized by the department. Authorization to perform such duties can occur in one of two ways, i.e., at the direction of the employee's commanding officer or in response to a request for an interpreter/translator broadcast over the MPD radio network. The agreement states that the department recognizes eight non English languages (American Sign, German, Greek, Italian, Kurdish, Polish, Russian, and Spanish), but any employee possessing ability in another non English language can file a written request to add that language to the list. A November 16, 1994 list includes 21 non English language spoken by law enforcement officers of all ranks.

In order to receive the premium payment in question, the officer must file a form requesting such payment, similar to the form utilized to request overtime pay. Payments are to be requested for each hour or nearest 0.1 of an hour spent actually performing such authorized duties. The payments are made quarterly and are not considered part of the base wage for overtime or the computation of fringe benefits or pension deductions or benefits.

The department has apparently called upon of the non English language capabilities of all members of the department for a number of years. Following the settlement of a lawsuit dealing with the authority of the department to require officers to utilize non English language capabilities, the chief distributed a questionnaire, dated January 11, 1993, designed to elicit information concerning officers' non English language capabilities and willingness to serve as interpreter/translators. The stated purpose of the questionnaire was to establish a list on or before February 8, 1993, identifying those officers claiming to have non English language capabilities described as fluent or passable, who were willing to serve as interpreter/translators. Thirty-six officers indicated that they were fluent in a non English language and an additional 52 officers indicated that they were passable.

MPA's Proposal

The MPA proposes to rewrite the first five paragraphs of the existing provision in a way which would have the following affect:

1. Employees would be entitled to receive interpreter/

translator pay in the amount of $240.00 per year if they were capable of translating/interpreting at a level of competence deemed acceptable to the department in languages other than English or they were directed to perform such duties consistent with their capabilities and the needs of the department by direction of their commanding officer or in response to a request for an interpreter/ translator broadcast over the MPD radio network.

2. Paragraph 1, which currently states that the chief of police retains the right to "direct employees to perform interpreter/translator duties consistent with employees' capabilities for such duties and the needs of the police service," would be replaced with a statement that the chief retains the "authority to direct employees deemed competent to perform interpreter/translator duties."

3. The existing list of non English languages recognized by the department would be deleted from the agreement, but the agreement would continue to state that "an employee possessing interpreter/translator ability in a non English language may at any time file a written request with the department to add that language to the list."

4. A new provision would be added, similar to provisions found in Articles 38 and 39 dealing with bomb squad pay and underwater investigation unit pay, establishing a method for prorating the payments on a monthly basis for months during which employees are "deemed competent" for at least 14 days.

City's Proposal

The City proposes to maintain the existing contract language, and increase the hourly premium to $1.00 per hour, effective on the execution date of the agreement.

MPA's Position

The MPA makes the following points in support of its proposal:

1. The current method of paying officers for translating is not fair. An officer is not entitled to compensation unless he is directed by his commanding officer to translate or if he responds to a request broadcast over the radio. If more than one officer with translating abilities arrives at the scene, only those employees actually needed to perform translating duties are entitled to receive the premium. If the officer encounters a citizen who needs assistance, he is not entitled to receive the compensation unless he makes the citizen wait while he attempts to obtain prior approval. Further, the paperwork involved is cumbersome. Frequently, translation duties only take a few minutes to perform, in which case the officer would be required to file an additional time card in order to qualify for a few cents' compensation.

2. The MPA proposal encourages police officers to learn to speak another language, thereby furthering the goals of community oriented policing.

3. The amount of premium pay proposed is the same as the premium currently paid to other officers with specialized, valued

knowledge. Members of the bomb squad and the underwater investigation unit receive $240.00 annually, regardless of the amount of time spent performing those duties.

4. While the City contends that it is unreasonable to pay $240.00 per year to an employee who speaks German, when there may be no need for such skills during a particular year, the City pays bomb squad members that amount, even if there are no bomb threat runs during the year. The additional pay rewards officers for the skills that they have developed and need to maintain, as distinguished from those that are used everyday.

5. The MPA proposal gives the department the authority to determine what minimum qualifications are needed to be placed on the list.

6. Milwaukee ranks the lowest among the national cities which pay for such skills. Phoenix pays $6.00 per hour and the other three cities which make such payments do so on a monthly or yearly basis. Dallas pays $75.00 per month; San Francisco pays $70.00 per month; and San Jose pays $546.00 per year.

7. Translators in the private sector receive up to $90.00 per hour for translating.

8. The City's offer of $1.00 per hour is too low. The City expects the translating officers to be available even when they are off duty and places substantial responsibilities on them.

9. The City estimate of the cost of the MPA proposal is overstated, because it assumes that all 88 officers who reported

that they were fluent or passable would be eligible to receive the payments. The MPA's cost calculation assumes that only the 36 officers who have been determined by the department to be fluent would qualify.

In reply to City arguments, the MPA disputes the City's claim that its proposal deletes the current language concerning the chief's authority; disputes the City's attempted distinction between interpreter/translators and bomb squad and underwater investigation unit officers, noting that interpreter/translators currently perform such duties whenever their skills are needed regardless of whether they have been directed to do so; contents that its proposal preserves the chief's right to determine who will be on the list and argues that the City's concern over the possible need for testing is a "red herring;" and disputes the City's contention that Racine does not currently provide for interpreter/ translator compensation on an annual basis, since they receive points which are reviewed on an annual basis that help qualify them for higher compensation.

City's Position

The City makes the following points, in support of its proposal and in opposition to the MPA's proposal:

1. The MPA proposal specifies no effective date, but President DeBraska testified that it would be retroactive to "February 1, 1993."

2. The key difference between the proposals is that under the City's proposal it would continue to pay employees for actually performing the duties while the MPA would pay everybody the same amount, regardless of actual performance.

3. As part of its stated rationale, the MPA alleges that an officer might be required to perform the duties of an interpreter/ translator once the department became aware of his/her ability. This is not so. The record is clear to the effect that only volunteers were placed on the roster established through the January 11, 1993 questionnaire.

4. The MPA's analogy to bomb squad and underwater investigation unit pay is unpersuasive because the MPA is inconsistent on the question of how often interpreters are called upon to perform those duties; the underwater investigation unit has 15 members and the bomb squad has even fewer members; the bomb squad is often called out on standby duty; and common sense indicates that members of both groups must undergo training and preparation to perform such work.

5. Fairness does not dictate that all interpreter/ translators receive the same amount of compensation. A fluent Spanish speaking officer might perform such duties numerous times during the course of a year in exchange for the annual compensation of $240.00, while an equally fluent German-speaking officer might not be called upon to perform such duties all year.

6. The City does not have the financial wherewithal to compensate individuals for a skill they have, but never use in the course of their employment. To do so would be difficult to reconcile with legislative mandates.

7. There is a serious problem with the scope of the MPA proposal. The City anticipates that the MPA will claim compensation on behalf of all persons listed on the roster established, going back to February 1, 1993, most of whom did not claim to be fluent.

8. Actual experience in 1993 and 1994 indicates that 26 officers performed translating duties in 1993 and 19 officers performed translating duties in 1994. All were deemed fluent and in all cases but one in each year, the language involved was Spanish.

9. The City relies upon self-declarations to determine language skills. If the MPA's proposal were adopted, the department would be required to expend considerable resources to test for actual fluency levels for individuals who would probably never be called upon to perform interpreter/translator duties. Undoubtedly, grievances will be filed if the department seeks to determine skill levels retroactively or prospectively for this purpose and the officer disagrees with the result.

10. The MPA claim that its proposal is necessary because the current provision is burdensome and discourages officers from applying for compensation is without merit. The officers need only

complete a timecard, similar to but simpler than an overtime card, to receive such payments.

11. A review of the comparable data fails to support the MPA's proposal. None of the MPA's national comparisons offer such payments and only 1 of the 15 state jurisdictions does so, in an unspecified amount. Only 4 of the Vernon 18 jurisdictions provide compensation and, it is interesting to note, 2 with sizable hispanic populations (San Antonio and El Paso) offer no such compensation. Contrary to the MPA's exhibits, there is no evidence that Racine offers compensation on an annual basis.

In reply to MPA arguments, the City repeats its arguments on the fairness and administrative burden issues; challenges the MPA's contention that its proposal would promote the department's community oriented policing policy, because it would equally reward officers who speak German or Kurdish; notes that the MPA offered no evidence concerning the activities of bomb squad and underwater unit officers to support its claims or the claim that bilingual officers need to take steps to maintain their linguistic skills; alleges that the MPA is inconsistent when it argues that the department has the authority to determine minimum qualifications, contrary to the testimony at the hearing; and repeats its arguments concerning the lack of support among comparables for the MPA's proposal.

Discussion and Award

For a number of reasons, the MPA's proposal must be rejected. First of all, actual experience demonstrates that currently the department has little need for the assistance of interpreter/ translators, except for those who are fluent in Spanish. Under the MPA's proposal, as written, the City would be obligated to pay $240.00 per year to all officers who have made themselves available to perform such duties, retroactively to January 1, 1993. Even if the wording of the MPA proposal was modified to limit its application to those who claimed to be fluent in a non English language in the January 1993 survey and to clearly establish the right of the department to determine competency retroactively and in the future, it would still pose a serious problem in terms of its cost in relation to the department's actual needs.

Further, as the City argues, officers claiming to have non English language skills would have a strong financial incentive to apply for listing. This would be true, even if the department had no foreseeable need for the particular language skills or no need for additional volunteers with those language skills. Unlike the situation involving the bomb squad and underwater unit, the City would have no ability to limit its liability to a fixed number of openings consistent with its actual needs. The payments would be due, regardless of whether the officer spent any time in training or preparation during the year and without regard to the fact that there are significant risks associated with service on the bomb squad or with the underwater unit.

On the other hand, the MPA has identified a significant problem with the current system of compensation. The City does not dispute the testimony of police officer Alex Ramirez to the effect that he frequently uses his language skills under circumstances where he does not technically qualify for interpreter/translator pay. The evidence concerning actual practice suggests that a similar problem may exist in the case of other police officers who are fluent in Spanish. Further, when an officer like Officer Ramirez does qualify for such pay, the amount of time spent performing actual translation duties is often not great. The 25 police officers who performed such duties during 1993 were paid for a total of 349.3 hours or less than 14 hours each. The 18 police officers who performed such duties through mid November 1994 claimed a total of 356.2 hours or a little less than 20 hours each. In order to accumulate those hours, they were no doubt required to complete and file numerous timecards.

For these reasons, the undersigned believes that the agreement should be modified to include the City's proposed increase in the hourly rate, but that it should also be modified to provide that an officer who qualifies to receive interpreter/translator pay should be entitled to a minimum payment of $1.00 for each occasion, with a maximum of 60 such minimum payments per quarter.

AWARD: Paragraph 2 of Article 65 dealing with interpreter/translator pay, shall be amended by adding the following two sentences:

Effective the first pay period following the execution date of the 1993-1994 City-Union labor agreement the premium pay amount for interpreter/translator pay shall be increased to $1.00 per hour. Thereafter, an employee who is authorized to perform interpreter/translator duties shall receive $1.00 per hour for each actual hour or nearest 0.1 of an hour spent performing such interpreter/translator duties, with a minimum payment of $1.00 for each separate occasion he or she is so authorized, up to a maximum of 60 such minimum payments in a calendar quarter.

ARTICLE 67 - REAPPOINTMENT BENEFITS

Fire and Police Commission Rule No. XXII deals with eligibility requirements for reappointment when an officer resigns and seeks reappointment. It reads as follows:

ELIGIBILITY REQUIREMENTS FOR REAPPOINTMENT

Section 1. Any former, regular member of either department who resigned in good standing without any departmental charges pending may within six months apply for re-entry into the department in which the member previously served through a written request to the respective Chief. The Chief shall forward the request together with a recommendation to the Board. If the Board acts favorably on the request, it shall recommend to the respective Chief that reappointment be made immediately provided that a vacancy exists and that there is no pending eligible list for the same or similar position and that no examination is in progress. If there is a pending eligible list or if an examination is in progress, the name of said former member shall be placed at the bottom of the pending eligible lists or at the bottom of the new lists when adopted.

Section 2. If an eligible list expires before reappointment of the former member can be

made, the former member shall have to qualify again by competitive examination.

Section 3. Former members of either department must submit to a medical examination before being reappointed. *A reappointed member shall in all respects be treated as a new employee.* [Emphasis added]

Section 4. Any former member of either department who was discharged or resigned while departmental charges were pending must qualify for reappointment through competitive examination.

From time to time, officers who have resigned from the department have requested reappointment pursuant to this rule and most requests have been granted. A chart prepared by the city discloses that 17 police officers who resigned between July 6, 1989 and April 9, 1994 requested reappointment. Five requests were denied, ten were approved and two withdrew their applications. One of those officers whose request was approved failed to return to the department. Three of those who returned again left the department again in less than a year. One of those three requested reappointment a second time, but that request was denied.

A variety of reasons were given for the six denials, including the results of a background investigation (two), excessive sick leave usage (two), and poor work performance (one). One request was denied because it was not filed within six months as required by the rule.

Another (18th) request involved Ronald Pasholk, who retired. His request was denied because he was receiving and would continue

to receive a service pension which he took at age 53 after 28 years of service.

Until now, the agreement, like the rule, has not made any benefits available to officers who are reappointed. Both parties have made proposals along that line. However, the MPA proposal would further modify the above-quoted rule by requiring that reappointments be granted under certain conditions.

City's Proposal

The City's proposal would be applicable to employees who have voluntarily resigned and have been reappointed, based upon the recommendation of the Chief and approval by the FPC. Eligibility for the reappointment benefits would be contingent upon the employee's not having filed an application with the ERS for return of accumulated contributions; successful completion of recruit training and graduation from the training academy as of the date of separation; not having previously been reappointed to the department; and filing the application for reappointment within 60 calendar days after separation.

An officer whose reappointment meets these conditions (hereinafter referred to as a 60-day reappointment) would have his or her anniversary date adjusted so that the amount of time the employee was separated would be excluded from active service time. Such an employee would be entitled to the following benefits:

4. *Benefits to which an employee is entitled upon reappointment:*

a. *Pay Step Advancement*

The reappointed employee's active service in the MPA classification he/she occupied at the time of separation from the Department shall count as active service for the purpose of computing his/her current and prospective pay step advancement.

b. *Seniority*

A reappointed employee's prior service in the MPA Bargaining Unit shall count as active service for purposes of computing his/her current and prospective contractual seniority benefits or those seniority benefits in effect by custom and practice at the time the employee is reappointed to the Department. The reappointed employee shall not be entitled to exercise seniority rights for purposes of picking vacation schedules until the calendar year following the calendar year in which the employee is reappointed.

c. *Vacation Benefits*

A reappointed employee shall have his/her prior active service in the Department counted as active service for purposes of computing his/her current and prospective vacation benefits.

d. *Sick Leave Benefits*

A reappointed employee shall be entitled to reinstatement of his/her earned and unused sick leave credit at the time of his/her separation from the Department.

e. *Promotional Exams*

The period of separation shall not be deemed a break in continuous service for purposes of eligibility to take promotional examinations if, and only if the reappointed employee applied for reappointment with the Department within thirty (30) calendar days from the effective date of his/her resignation from the Department.

If an officer applies for reappointment more than 60 calendar days after separation, but before the time limit for applying for reappointment established by the FPC expires and is reappointed, the officer would be treated as a "new employee" and not entitled to the above-quoted benefits. Eligibility for pension, health/dental insurance and life insurance benefits would be as provided in the pension law, contracts between the City and health care providers and the contract between the City and its life insurance carrier.

The City's proposal also provides that, except as provided in the reappointment benefits article, all other benefits would be as provided by the agreement and/or city ordinances; the Chief and the FPC would retain their respective rights regarding reappointments; and the provisions would take effect after execution of the agreement.

MPA's Proposal

Under the MPA proposal any officer "who left in good standing" would be entitled to apply for reappointment within one year, by giving a written notice to the Chief. If the officer did leave "in good standing," both the Chief and the FPC would need to have "cause" for any denial of reappointment and any failure to reappoint would need to be supported by "just cause" or the absence of a vacancy.

All current employees would be entitled to reappointment under the conditions described. In addition, they would be entitled to

the following benefits, as they are reflected in the MPA's final offer, as drafted:

> a. *A current employee shall maintain the right to reappointment for a period of one (1) calendar year from the time of separation and upon reappointment shall be granted "full rights-benefits". For purposes of full rights-benefits interpretation an employee reinstated shall have restored the same base salary level, sick leave balance, seniority, classification or rank, promotional opportunity, vacation(s) and selection and all other benefits afforded by this agreement. No time-driven rights or benefits shall accrue during the period of separation.*
>
> b. *Eligibility for pension, health/dental insurance and life insurance benefits shall be as provided for respectively by the provisions of the contract in effect between the City and the MPA, the ERS Act (Pension Law), contracts between the city and its health/dental insurance providers (Basic plan as well as HMO's) and the contract between the City and its Life Insurance Carrier.*
>
> c. *A current employee that detaches from active service and applies for reappointment may be requested to submit to a medical examination prior to reappointment.*
>
> d. *A current employee that detaches from active service and applies for reappointment may request, on an annual basis, from the Fire and Police Commission, extensions of separation not to exceed one (1) year increments and such extension if granted being subject to the terms as set forth in subsections 1.a., 1.b. and 1.c.*

The MPA proposal also states that the reappointment benefits article is not to be construed as affecting any available rights and benefits in connection with leaves of absence.

MPA's Position

The MPA makes the following points in support of its proposal and in opposition to the City's proposal:

1. The City proposal provides that employees are eligible for the reappointment benefits described only if they have been separated from active service for 60 days or less. If they have been separated for more than 60 days, but less than the time limit established by the FPC (currently six months), they are not entitled to the reappointment benefits described and would be returned as new employees. The City's proposal would not affect the right of the Chief to recommend against reappointment and the right of the FPC to deny reappointment in either case.

2. The MPA proposal would give any employee who left the department in good standing the right to apply for reappointment and be reappointed within one year of separation. Such an employee would be required to take a medical examination and drug test, upon request, and could be denied reappointment for just cause or if a vacancy does not exist. An employee could request extensions of the 1-year separation limitation, in additional 1-year increments.

3. The contractual benefits provided to an employee under the MPA proposal [as the MPA would re-word it, if permitted] would grant such employees restoration of salary level and all benefits other than seniority, but the employee would not accrue any additional time-driven benefits during the break in service.

4. The wording of the MPA proposal would allow a retired officer to apply for reappointment and to continue to collect pension benefits while working. While the City objects to this aspect of the MPA proposal, it is no different than the situation that exists when an officer takes a leave of absence to accept another position (such as United States Marshal) and returns to work for the department, while drawing a pension from the job held while on a leave of absence. Nor is it different from the situation exemplified by the Chief, who continues to draw a pension from the City of Detroit while receiving a paycheck from the City of Milwaukee. The fact that an employee has earned the right to a pension check does not diminish the right to be compensated for current work. While the City claims to be opposed to "double dipping," there is no real distinction in these situations.

5. The City and the FPC have established a new program which allows officers to retire and then be re-hired as police services specialists (PSS). As such, they will earn a paycheck while receiving their police pensions. This too will constitute "double dipping," to which the City apparently does not object.

6. By objecting to the MPA proposal to include retirees, the City is distinguishing between the rights of employees to reinstatement on the basis of age.

7. The City will derive three benefits from the MPA proposal. Retirees who seek reappointment will not be eligible for the day shift and the department will have a group of experienced

officers available for assignment to any shift, consistent with the goal reflected in its duty assignment proposal. The MPA proposal will decrease any administrative problems which might arise as a result of the 25-and-out proposal. And, the reappointment provision will provide a pool of knowledgeable and experienced officers to serve as FTO's.

8. Other city workers have a right to reinstatement with full rights within one year of resigning. The MPA proposal is modeled on the City document spelling out those benefits.

9. State employees have more liberal reinstatement privileges. They are allowed to return to employment within three years.

10. Police officers elsewhere in the state who are dismissed for just cause are left on an eligible reemployment list for a period of two years after their date of dismissal (unless the dismissal was for disciplinary reasons), under the provisions of Section 62.13(5m)(c) of the Wisconsin Statutes.

11. The MPA proposal would not limit the Chief's discretion to recommend against reappointment. Nor would it disturb his right to do background checks, medical evaluations and a drug test.

12. On the other hand, the City's proposal would unduly discourage good employees from returning to the job, by making them start over as new employees if they have separated from service for more than 60 days. While the department wishes to retain the right to extend the probationary period of unproven or borderline

recruits, it is willing to lose highly experienced officers with proven skills and abilities, because they have been off the job for more than 60 days.

In reply to City arguments, the MPA notes that its demand clearly excludes leaves of absence; asserts that an officer who leaves on AWOL status has not left in good standing and would therefore be ineligible for reappointment, contrary to the City's contention; argues that the 1-year extension proposal makes sense, because the FPC would retain the right to grant or not grant such extensions; and disputes the City's claim that the MPA has brought this issue to the arbitrator because it was unable to win the Pasholk litigation. The MPA notes that it was not a party to the Pasholk litigation, but acknowledges that it did make this demand to protect current employees from such results in the future. Finally, the MPA argues that its proposal is consistent with the WERC declaratory ruling, because it deals with the rights of current employees, not former employees such as Pasholk.

City's Position

The City makes the following points in support of its proposal and in opposition to the MPA proposal:

1. By referring to employees "who left" and employees "who detach from active service" the MPA proposal creates uncertainty as to who is covered. It was not until the hearing that the MPA clarified its position that the proposal is intended to cover people who retire from the department and that it does not cover

employees on a leave of absence. In fact, under the language employed, it would not preclude an employee who left on AWOL status from being reappointed.

2. The paragraph that states that an employee who detaches from active service and applies for reinstatement may request "extensions of separation" in one-year increments, makes no sense. Such an employee is either applying for reappointment or asking to remain separated for an additional year. It is not possible to do both.

3. The City's proposal is much clearer. There is no ambiguity in terms of which benefits are affected by reappointment or how they will be calculated and administered. Under the MPA's proposal, reappointed employees would be entitled to "full rights-benefits," which is then defined to include a number of items, followed by "all other benefits afforded by this agreement." This catch-all phrase will leave the department unnecessarily vulnerable to grievances. The failure to state how the benefits will be administered could also result in needless disputes.

4. The benefits proposed by the City for reappointees are almost identical to those benefits received by members of the ALEASP bargaining unit, which includes non sworn department personnel. Use of that agreement as an internal comparable supports the City's proposal, especially in view of the fact that the MPA did not provide any evidence that any other City bargaining unit had a provision similar to the one it proposes.

5. The MPA's reliance upon Section 62.13(5m)(c) is misplaced, since it clearly states that it does not apply to dismissals for disciplinary reasons and, contrary to the MPA claim, applies to both probationary and non probationary employees on its face.

6. By utilizing a just cause standard, the MPA proposal insures that there will be disputes whenever a reappointment is denied and the MPA will seek to represent such former employees and bring the issue before a grievance arbitrator.

7. Under the language of the MPA proposal, as explained at the hearing, an employee could leave the department in good standing with no departmental charges pending or active investigations pending and be entitled to reappointment, regardless of any nefarious activity the former employee may have been involved in after leaving the department. Also, a retired employee would be entitled to reappointment even if it was determined that the employee had been a sick leave abuser or had a history of relatively poor work performance.

8. The just cause standard proposed is unnecessary. Of the 18 employees who requested reappointment, only 6 had their request denied. The FPC holds public hearings regarding such requests and the MPA can and has availed itself of the opportunity to speak on behalf of the former member. The MPA has failed to show that a need exists to modify the present practice wherein the chief and the FPC maintain some discretion in reappointing former employees.

9. Based upon the testimony and exhibits presented by the MPA, it would appear that the MPA is confusing the granting of a general leave of absence with the termination of one's employment. In the absence of a rule delineating the terms and conditions governing leaves of absence, the FPC has followed City Service Commission rules, as it does in a number of other specialized personnel transactions. City service rule X makes it clear that general leaves of absence may be granted and extended for periods of one year for employees who accept positions which are exempt from civil service. When an employee requests a leave to accept a non exempt position, the employee must sever the employment relationship with the City by resigning. Data concerning requests for leaves of absence between July 1992 and June 1994 show that only one member of the MPA requested a general leave of absence and that request was granted.

10. It would appear that the MPA is attempting to merge the leave of absence rules and reappointment rules by giving employees the right to reappointment within a year unless the department can establish that there was just cause to deny the request. This would allow an employee to resign or retire to take another job that would not qualify for a general leave of absence, and retain the right to return to City employment.

11. The City is adamantly opposed to allowing employees to engage in "double dipping." Under the MPA proposal such a practice would become commonplace, especially if its 25 and out pension

demand were granted. In fact, there would be nothing to prevent an employee with 25 years of service from "triple dipping" if so inclined.

12. While the MPA claims to have based its proposal on the benefits a person would have after reinstatement pursuant to City Service Commission rules, a closer look at the memorandum relied upon by the MPA discloses that it sets forth a proposed policy. There is no evidence that it was ever adopted by the City Service Commission.

13. While President DeBraska testified that this proposal is intended to be retroactive to one year prior to the date of the award, that intent, should have been made clear in the final offer. In the absence of language indicating an effective date, it must be assumed that economic items are retroactive in nature while non economic items are prospective in nature.

14. The MPA is seeking to achieve what it could not achieve through the Pasholk litigation, i.e., establish a contractual, property right to reinstatement. In doing so, it would remove discretion from the chief and the FPC in determining who will and who will not work for the department. It would also overrule the court's finding that the chief and the FPC were entitled to rely upon "budgetary considerations" arising out of public perceptions of the "double dipping" concern.

15. In effect, the MPA is seeking to exercise a measure of control over new hires, which is beyond its rights, as found by the

WERC in its declaratory ruling. It is also seeking, in effect, to have the arbitrator adopt the deferred retirement option program (DROP) which the MPA initially proposed but failed to include in its final offer.

In its reply to MPA arguments, the City contends that the MPA is seeking to modify its proposal (to eliminate seniority from the benefits provided reappointed employees) in violation of the order for hearing issued by the arbitrator in this proceeding. By that attempted change, the inclusion of retirees and the attempted resurrection of its DROP proposal, the MPA has completely changed the meaning of its proposal, according to the City. Even so, the City argues that the MPA proposal as changed does not merit adoption because it would not have a significant impact on the number of senior officers on shifts other than the day shift, such assignments would be inconsistent with the MPA's other proposals and there is no guarantee returning officers would be willing and able to serve as FTO's; the proposal is based upon a "model document" that was never adopted and is not consistent with that document; the two examples relied upon by the MPA both involve leaves of absence; the MPA ignores the testimony of Chief Koleas to the effect that the department seeks to hire the best possible employees; and, contrary to the MPA's contention, the MPA proposal would severely limit the discretion of the chief and the FPC.

Discussion and Award

While the MPA's proposal clearly states that it is not intended to have any effect on the right of employees to take leaves of absence, it establishes rights for employees who quit or retire that would be equal to those enjoyed by such employees, for all practical purposes. It would do so by placing significant and unusual limitations on the (re)hiring discretion of the chief and the FPC, while granting benefits that are equal[4] to those enjoyed by employees who have been granted a leave of absence.

The record does not provide support for this aspect of the MPA proposal. A decision to quit one's employment or retire is quite different than a decision as to whether or not to take a leave of absence, if available. It is not a decision to be taken lightly. Requests for reappointment are not acted upon until the requesting officer has been afforded a public hearing, where the officer and the MPA are permitted to appear and be heard and most requests are granted. In all but one of the cases where the requests have not been granted, the reason given is one which directly relates to the department's efforts to hire (or rehire) the best employees available. That one case was, by definition, an unusual one, since it involved an employee with an excellent record who had decided to retire, Pasholk.

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[4]The undersigned has notes reflecting the changes which the MPA would make in its proposal to eliminate seniority rights, but finds no record that the City ever agreed to those changes. While the undersigned has the authority to modify the MPA proposal, such modifications would not change the opinion expressed herein.

In his lawsuit, Pasholk attempted to convince the court that the FPC's stated concern about a possible public perception that the commission would be sanctioning "double dipping" was unsupportable. The court acknowledged the logic of Pasholk's argument (which is the same as the MPA's argument here), but went on to note "budgetary matters are a sensitive political issue and the fire and police commission was within its rights to consider public perceptions if reinstatement was permitted under these circumstances." (SLIP op. p. 6.)

The chief, who had previously indicated his willingness to recommend Pasholk's reappointment, but for that same concern, recommended that the parties attempt to negotiate a change in the pension law which would have permitted Pasholk to return to work and accrue further retirement credits while temporarily waiving his rights to pension payments, as it apparently permitted for police officers who take a service retirement at age 57. That approach to the problem would have been a more reasonable one than the proposal presented here. It would have allowed the chief to recommend Pasholk's reappointment, as he obviously would have preferred to do, and avoided a situation where he would be receiving the salary of a police officer and 70% of his prior salary as a police officer for the City of Milwaukee.

This round of bargaining will produce the parties' first agreement granting benefits to reappointed officers. While the City's proposal is quite modest, when compared to the MPA proposal,

it is consistent with the provisions negotiated on behalf of the employees in the ALEASP bargaining unit. It constitutes a reasonable beginning and takes into account the administrative problems that will arise when the new provision is implemented. Employees who quit their employment are entitled to withdraw their accumulated contributions and earnings from the pension fund. Undoing such withdrawals would no doubt be complicated. The record does not establish if it is even possible to do so. If the right to restored benefits is to be extended beyond 60 days (say to 6 months), it will be necessary for the parties to address that problem in future negotiations.

AWARD: The City's final offer on Article 67 - Reappointment Benefits shall be included in the agreement.

ARTICLE 68 - FITNESS FOR DUTY

The MPA proposes to include a number of new provisions in the agreement under the heading Article 68 - Fitness for Duty. Most of those provisions would establish procedures to be followed when an officer is ordered to submit to a medical examination, to determine the officer's "fitness for duty." One additional provision would establish a contractual right for up to 10 days' administrative leave for an officer in "immediate contact" and/or "directly involved" in a "lethal incident." It will be discussed separately.

A. FITNESS FOR DUTY

Rule 4, Section 100 of departmental rules reads as follows:

"SECTION 100. Any member of the Department may be ordered to submit to a medical examination, at any time, to determine whether or not any such member is fit, physically and mentally, for the proper performance of duties."

MPA's Proposal

Those portions of the MPA proposal which deal with the procedure to be followed when an officer is ordered to submit to a medical examination read as follows:

ARTICLE 68

FITNESS FOR DUTY

1. *The Chief of Police may order a member of the Association to submit to a medical examination by a physician or psychiatrist who shall be licensed in the State of Wisconsin.*

2. *An order to submit to a medical examination must be premised on reasonable suspicion founded on specific, objective and articulable facts either directly observed by at least two (2) direct line supervisors or learned from a reliable source corroborated by facts and circumstances from which a reasonable inference may be drawn that the member is unfit for duty. Reasonable suspicion based solely on an officer's physical appearance, conduct and psychological demeanor must be premised on factors that are generally accepted within the scientific community. The Department shall make a record of the basis for its determination prior to a medical examination and this record shall be dated and signed by the supervisor ordering such examination.*

3. *When the Chief of Police orders a member to submit to a medical examination the Chief's physician shall be a member of a panel of three (3) physicians. The second physician to be designated by the Association and the third physician to be selected by agreement of the first and second physicians, if needed.*

Decisions by the panel shall be solely limited to whether the member is fit or unfit for duty and shall be final and binding upon all parties.

4. *All records reviewed by a physician of the panel shall be treated as being confidential pursuant to a doctor/patient relationship. The physicians shall only report to the Chief of Police whether the member is fit or unfit for duty.*

5. *If a panel physician determines a member is unfit for duty, the member shall be carried on Administrative Leave with full pay and benefits continuing until the member is medically released for duty by two physicians of the tripartite panel. All time spent by a member outside the regularly scheduled shift for medical examinations shall be deemed overtime pursuant to Article 15 of this agreement."*

MPA's Position

The MPA makes the following points in support of its proposals:

1. The licensing requirement guarantees that the state has evaluated the credentials of the physician or psychiatrist and that he or she is qualified to practice in the state. All fitness evaluations should be performed by a medical doctor, since virtually all fitness evaluations involve medical components and not just psychological components. The MPA has no objection to the medical doctor using the services of a licensed psychologist to assist in evaluating the psychological components of an officer's condition; however, such work should be performed under the direction of the physician to guarantee a holistic approach and

preserve the statutory physician/patient privilege, which does not apply to psychologists. This requirement is consistent with the charter ordinance dealing with psychological evaluations for purposes of determining eligibility for a duty disability and the drug testing procedure, which requires that all testing be performed by a licensed physician.

2. The requirement that there be reasonable suspicion documented and verifiable as provided is necessary to place a limitation on the chief's existing power to force an employee to submit to a medical or psychological exam. Such examinations are at least as intrusive as a drug test and the chief cannot order random drug testing, but must meet a similar reasonable suspicion test. Under the proposed procedure, supervisors will be on notice as to what is required and the record keeping requirement will help insure that the requirements are met.

3. The three-doctor panel is modeled after the three-doctor panel currently used in making determinations of whether an officer is eligible for duty disability retirement. There is no reason to believe that it will not work as well in fitness for duty evaluations. By limiting the doctors' report to a finding of fitness or unfitness, confidentiality is preserved. This would not preclude the doctor from reporting any limitation on fitness or indicating that unfitness is likely to be temporary.

4. The proposal guarantees that records reviewed by the panel will remain within the physician/patient privilege and treated as

confidential. While the department has a legitimate interest in learning whether an officer is fit for duty, it has no interest in knowing the details of what led to the doctor's conclusion. This is particularly true in the case of psychological examinations. The fitness exam of the officer whose case was discussed at the hearing (X), demonstrates the need for this demand. That officer was ordered to be examined by a psychologist, who inquired and reported to the department about very sensitive matters. The department did not have any business knowing such details. The same confidentiality issues exist in the case of a physical exam. An administrative law judge found that conduct directed against another officer (Y) was "sleazy and unconscionable." That conduct included a supervisor placing the report recommending that Y be returned to full duty where co-employees had access to it. The proposal strikes a balance between the employer's right to know whether an employee is fit against the employee's right to be free from unnecessary intrusion into his medical and psychological history and treatment and the inappropriate disclosures which occurred in the case of both X and Y.

5. It is fair and reasonable that an officer be placed on paid administrative leave when required to submit to a medical examination. The officer may be ready, willing and able to work and the department is prohibiting him from doing so. The requirement that the department pay overtime for time spent being examined if it is outside the officer's regularly scheduled shift

compensates the officer for the disruption caused by being required to do so at a time that would normally be the officer's off time. This disruption occurs whether the officer is on administrative leave or assigned to regular duty.

In reply to City arguments, the MPA contends that its proposal does not require the City to keep an unfit officer in on duty status, since the officer would be placed on administrative leave; the MPA demand does not prohibit the department from using psychologists and allows the doctor to indicate that limited duty or other restrictions are appropriate, as President DeBraska explained at the hearing; there will be no problem with delay, because the procedure includes the same impasse procedure utilized by the ERS; officers will not be in a position to abuse the administrative leave requirement, since it is the chief, not the officer, who determines if a fitness for duty evaluation is needed; officers like officer X ought not be required to utilize, much less exhaust their sick leave before being placed on administrative leave for this same reason; the MPA is not guilty of "forum shopping" by pursuing this matter in interest arbitration, since the court proceeding involving officer X determined that there was no existing contractual protection to prevent the department from placing X on unpaid status; and it is not improper to utilize the panel for making medical determinations of this type, since the chief is not properly trained to make medical determinations.

City's Position

The City makes the following points in opposition to the MPA proposals:

1. The consequences of failing to place an unfit officer in off duty status are so profound that the City must maintain its right to conduct fitness for duty examinations in the current fashion, to meet its obligation to protect the safety and welfare of the public. The MPA proposals would impose unnecessary economic and operational burdens on the department and invite countless grievances and/or litigation in other forums.

2. The proposal unnecessarily prohibits the department from utilizing psychologists to perform fitness for duty evaluations. The MPA's own expert witness described the difference between a psychiatrist and a psychologist and generally gave testimony supporting the need for the use of a psychologist for purposes such as psychological debriefing and crisis intervention.

3. The MPA proposal would limit the report of the examining physician to the question of whether the member is fit or unfit for duty. As the City's occupational medicine expert, Dr. Theodore Bonner, testified, the purpose of a fitness for duty examination is to determine whether a person is able to perform the job functions with or without an accommodation and also whether they are able to safely perform the job functions with regard to risk to themselves or others. Under the MPA proposal, a physician might be required to find that an officer with a back condition was "unfit," even though the officer could be assigned to perform inside, light duty

tasks, and the department would be required to carry such an employee on full pay and benefits.

4. The MPA proposal would be much too time consuming. If there was a dispute over the findings of the department's physician a second physician would be designated by the MPA and, if there was still a dispute, those two doctors would choose a third doctor to break the tie. All of this would take a considerable amount of time, while the employee would continue to draw full pay and benefits.

5. While the MPA argues that its proposal is similar to that used for making DDR determinations, that does not make it any the less expensive or time consuming. In one case arising under that procedure, an officer (X) was required to wait two years because the two doctors selected could not agree on a third doctor. While the MPA claims that such a stalemate need not continue indefinitely, the only suggestion the MPA made for breaking the stalemate was that it would allow the *employer* to replace its physician.

6. Under the MPA proposal, an officer who did not wish to utilize sick leave or meet the requirements for doing so, could claim to be unfit for duty due to stress or a football injury and remain on the payroll "forever" while the tripartite panel attempts to reach its consensus. Nothing in the MPA proposal would require the employee to use injury pay, sick leave, disability benefits, etc., before becoming entitled to administrative leave benefits.

7. The MPA only offered one rationale in support of its proposal, i.e., to afford officers due process and fair hearing rights. Based upon the facts in the officer X case, the MPA appears to be under the misguided notion that going off the payroll as a result of running out of injury pay and sick leave amounts to a discharge with no hearing. This is simply not true. In fact, officer X was on injury leave for 207 working days in 1986, 83 working days in 1987, 138 working days in 1988 and 72 working days in 1989. Because he had also exhausted his sick leave days, he was taken off the payroll but not discharged, as the court found. In effect, the MPA is asking the arbitrator to grant what the court refused to grant in that case.

8. Police officers are armed, have the power to arrest without warrants and the ability to exercise deadly force. Under these circumstances, the City is obligated to take action when it believes that an officer has a physical or mental problem which endangers the safety of the public or the officer or fellow employees. It is critical that such determination be made by the employer and not some third party, because it is the employer and the chief who will be held accountable.

9. The MPA claim that it is only seeking to afford its members protection from the department's misuse or abuse of fitness for duty examinations is a red herring.

In reply to MPA arguments, the City notes that the second paragraph of the MPA's proposals was declared a permissive subject

of bargaining by the WERC and the MPA agreed at the hearing that it had been dropped. For this reason, the City asks that the arbitrator disregard that proposal and the arguments advanced in support of it. According to the City, the MPA has attempted to modify its first proposal in its arguments by indicating that it would permit the department to utilize a licensed psychologist. It notes that this change of position is inconsistent with the position the MPA took in the court proceeding involving officer X and throughout the negotiations and argues that it should not be permitted, as a violation of the arbitrator's order. The City also disputes the MPA's claim that the panel of physicians has served the parties well in DDR determinations, noting that there is no evidence in the record to support that claim and there is evidence that it did not work in the one example given; notes that the MPA has also changed its position and its proposal with regard to the content of the report by referring to an exception which is nowhere to be found in the language used; and argues that the "balance" that the MPA would strike would cause concerns over the privacy rights of officers to outweigh the department's need to protect the officer, co-workers and the public.

Discussion and Award

Under the rule, the chief has the unfettered discretion to require officers to submit to a "medical examination" to determine whether or not the officer is fit, physically and mentally, for the proper performance of duties. The MPA is proposing to curtail that

discretion in a number of ways. A central proposal, that found in the second paragraph, is not properly before the arbitrator and will not be considered further in this proceeding. This leaves the proposed requirements that the examination be conducted by "a physician or psychiatrist who shall be licensed in the state of Wisconsin;" that all such examinations be made by a tripartite panel of three physicians, as described; that all records be treated as confidential pursuant to a doctor/patient relationship and that the report to the chief be limited to the question of whether the member is fit or unfit for duty; that an officer who is found unfit by one of the three physicians be carried on administrative leave with full pay and benefits until released by two physicians of the tripartite panel; and that all time spent by a member for medical examinations which falls outside the member's regularly scheduled shift be compensated at overtime rates.

The first proposal is unnecessary in that the current rule only permits the chief to require a member to submit to a medical examination. The rule covers determinations of both physical and mental fitness and would therefore include the right of a physician or psychiatrist to rely upon information provided by psychologists and psycomotrists (among others). This is a procedure which is not objected to by the MPA, at this stage of the proceeding.

This first proposal apparently had its origin in the circumstances surrounding the fitness determination made in the case of officer X. In that case, the department relied upon the

evaluation of a psychologist for purposes of determining that officer X was not fit for duty.[5] On that point, the court held as follows:

> "But in my judgment as qualified as a psychologist may be the rule relates solely to medical evaluation, and Dr. Ovide is not a medical doctor.
>
> "And because of that I'm going to issue an injunction restoring him to the department, but there's nothing to prevent the department from using a medical evaluation in time to determine his fitness to act as an officer."

The requirement that all fitness for duty evaluations be conducted by a tripartite panel is not supported by the evidence in this proceeding. As the City points out, such a procedure would be time consuming and very costly, especially when combined with the other MPA proposals for administrative leave and premium payments.

The apparent impetus for these contractual proposals came from the department's handling of the officer X and officer Y cases. However, the case of officer X was quickly and effectively dealt with by the court. The case of officer Y was not handled as expeditiously, but was effectively dealt with under the worker's compensation laws. As the decision in that case reflects, the agreement contains a provision (Article 25) setting forth injury pay provisions which officer X had not exhausted and received, along with payment for medical bills under the normal worker's compensation procedures.

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[5]The MPA had a number of other concerns with the procedure followed, one of which was redressed by the court and all of which would have been addressed by MPA's proposal in paragraph 2.

If an officer is found unfit for duty due to an injury or illness arising out of employment, it seems reasonable that the officer should be required to use injury duty pay and worker's compensation benefits to cover such absences. If, on the other hand, an officer is found unfit for duty due to an injury or illness unconnected with employment, it seems reasonable that the officer should be required to use sick leave for that purpose. Such usage is consistent with the purposes of such programs. To require the City to pay an officer overtime for time spent for medical evaluation outside the officer's normal duty hours (which could be evening or night hours), when the officer is already receiving such payments (in all but the most unusual cases) would not be reasonable.

This leaves the proposals dealing with confidentiality and the content of the report to the chief. The proposal to use a standard based upon the normal doctor/patient relationship would appear to be inappropriate. The purpose of such an examination is to make necessary disclosures of the results to the employer.[6] Finally, the proposal limiting disclosure to the chief and the question of whether the officer is fit or unfit for duty is too restrictive, as the MPA's own arguments demonstrate.

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[6]Of course, this does not mean that the department is free to share the results of such disclosures with persons not involved in the decision-making process. There are laws providing redress for such behavior.

AWARD: The first five paragraphs of Article 68 proposed by the MPA shall not be included in the agreement.

B. ADMINISTRATIVE LEAVE

In 1986, the department established a police officer support team (POST) to provide assistance, in a variety of forms, to both sworn and civilian personnel, including retired personnel and personnel on disability and their immediate families or survivors. Members of the team, all volunteers, provide assistance in areas including alcohol/drug abuse, marital problems, financial problems, suicide, stress situations, officer related shootings, and job difficulties. The program was established with the assistance and approval of the chief, based upon the recommendations of a steering committee, that included sworn personnel from a variety of ranks, including Captain (now Deputy Inspector) William Gielow.

The POST team was established by order number 9444, dated November 10, 1986, and included a separate policy and procedure for dealing with "traumatic incidents." Under the policy, a POST member was to be dispatched to the scene of all police related traumatic incidents involving serious injury or death, including but not limited to, the use of deadly force or in the operation of motor vehicles. The procedure described in some detail how the POST member would function at the scene and thereafter, in the hospital or during the investigation that would normally follow such incidents. In general, it is the purpose of the POST member to provide moral support to the officer or officers involved and

investigative and administrative personnel were prohibited from soliciting any information from the POST member, learned as the result of conversations with the officer or officers involved in the traumatic incident. The order contained the following provision implementing support procedures, including the granting of administrative leave:

"D. IMPLEMENTATION OF TRAUMATIC INCIDENTS SUPPORT PROCEDURES

The implementation of a traumatic incident support procedure involving members must be generated by the Chief of Police. The following procedures will apply:

1. Debriefing

The involved member(s) are required to attend a confidential debriefing with a Department-approved mental health professional within 48 hours following the incident. Arrangements for the debriefing and any subsequent sessions with a mental professional shall be made through the Office of the Chief of Police.

2. Administrative Leave

A three day administrative leave of absence with pay is mandatory for any officer directly involved in the death or serious injury of another person. This three day leave of absence will commence with the officer's next tour of duty. Consideration should also be given toward an administrative leave of absence, with pay, being granted to member(s) involved in any other

traumatic incident, at the discretion of the Chief of Police."

The record discloses that at least six grievances were filed protesting the application of the administrative leave portion of the above quoted support procedures, before the order was rescinded and modified in 1993. The first five grievances were all filed on July 16, 1990 and protested the decision of the chief to deny administrative leave to five officers who used deadly force by discharging their service revolver on Friday, July 13, 1990. The sixth grievance involves an officer (Moises Gomez), who was involved in a shooting incident that occurred on January 11, 1991. In that case, it was determined that Gomez should be placed on administrative leave. However, because January 12 and 13, 1991 were regular days off for Gomez, he was only granted one day of paid leave, for January 14, 1991.

According to Inspector Gielow, the application of the administrative leave support procedure in the case of Officer Gomez was consistent with the intent of the above quoted administrative leave provision. Inspector Gielow states that the steering committee was divided on the question of whether the three days of administrative leave should be in addition to any scheduled time off or whether the scheduled time off should be counted for purposes of insuring that the officer would be off work for at least three days. While acknowledging that the language used could be interpreted otherwise, Inspector Gielow states that the language

was intended to reflect the majority view that the three days "should not be awarded on the end of an already scheduled vacation or off day period."

In order to resolve a federal lawsuit over the applicability of the FLSA to time spent by POST members, order number 9444 was rescinded and replaced by two separate orders, on March 24, 1993. The first order (No. 10704) describes in some detail the relationship between the POST members' activities and the operations of the department and are apparently designed to insure that the volunteer work performed by the POST members outside normal duty hours are not covered by the FLSA. The second order, which had to be modified slightly because of an omission involving the definition of what constitutes a "traumatic incident," replaced the above quoted provisions dealing with the implementation of the traumatic incidents support procedures. The corrected version, dated July 16, 1993, is found in order number 10757, which reads as follows:

> "Whenever a Police-related incident involving serious injury or death of another person, including but not limited to, the use of deadly force or in the operation of motor vehicles, occurs and the Chief of Police has determined that such incident constitutes a 'traumatic incident,' the following procedures shall apply to those Department members the Chief has determined were directly involved in such traumatic incident:
>
> 1. <u>DEBRIEFING</u>
>
> Such involved member(s) are required to attend a confidential debriefing with a Department-approved mental health professional within 72 hours following the traumatic incident.

Arrangements for the debriefing and any subsequent sessions with a mental health professional shall be made only through the office of the Chief of Police. All time spent at such debriefing session(s) outside the member's regularly scheduled period of duty shall constitute overtime, unless such session(s) occur on a day of administrative leave covering a day the member would have otherwise been on duty, as provided below.

2. ADMINISTRATIVE LEAVE

a. When a Commanding Officer determined that a member under his/her command was directly involved in a traumatic incident within the scope of Rule 5, Section 11 (first and fourth paragraphs), the Commander may, at his/her discretion, grant administrative leave of not more than 3 consecutive calendar days duration (including any administrative leave granted pursuant to paragraph 2.c. and 2.d., hereof), or station house police duty, as determined by such Commander. Upon granting a member under his/her command either administrative leave, or station house police duty, the Commanding Officer shall immediately file a report with the Chief explaining his/her decision.

b. Only the Chief may extend an instance of administrative leave granted pursuant to paragraph 2.a., hereof beyond 3 consecutive calendar days. The Chief may grant administrative leave or station house police duty whenever he deems it appropriate.

c. If such member's mandatory confidential debriefing, provided for in paragraph 1, hereof, occurs on a day the member is regularly scheduled for duty, the member shall

be deemed to be on administrative leave, with all pay and benefits continuing, for the period of time the debriefing, with its associated reasonable travel time, is coincident to the member's regularly scheduled period of duty that day. For the balance of such member's regularly scheduled period of duty that day, such member's commanding officer at his/her discretion, may either grant such member administrative leave, or assign the member to station house police duty, as provided for in paragraph 2.a., hereof.

d. If such member's mandatory confidential debriefing, provided for in paragraph 1, hereof, occurs on a day the member is not regularly scheduled for duty, at the member's request, such day may be deemed to be a day on which the member is regularly scheduled for duty, the provisions of paragraph 2.c., hereof, applying, and the member granted a rescheduled day off, to be determined and scheduled by the Department.

e. For purposes of construction and interpretation, a period of administrative leave granted hereunder shall include whatever work days, regular offs, or paid off days (e.g., vacation, holidays, etc.) that, but for the period of administrative leave granted, would have been part of such member's work/off schedule during this period."

MPA's PROPOSAL

The MPA proposes that the proposed fitness for duty article include the following provision dealing with the granting of administrative leave:

"*6. TRAUMATIC INCIDENTS*

A minimum three (3) day administrative leave of absence with pay and benefits shall be mandatory for any officer in immediate contact with a lethal incident while in the course of duties. This three (3) days administrative leave of absence shall commence with the next calendar day after the traumatic incident. In the event a member has scheduled regular off day, vacation, holiday time or compensatory time, within three (3) consecutive days following the incident that gave rise to the administrative leave of absence, such scheduled time shall be rescheduled immediately after the administrative leave, at the request of the employee. In addition, an officer directly involved will be afforded an additional seven (7) floating administrative leave days to be used at his/her discretion. Consideration shall also be given toward an administrative leave of absence, with pay and benefits continuing, being granted to member(s) involved in traumatic incident at the discretion of the Chief of Police.

a. At all times a member while on an administrative leave of absence shall advise his/her commanding officer of a phone number where he/she can be contacted for follow-up investigation."

MPA'S POSITION

The MPA makes the following points in support of its proposal on administrative leave:

1. The expert testimony concerning the effects of stress on police officers, offered in support of the MPA's 25 and out proposal, included testimony about the effects of traumatic incidents. Such incidents can lead to post traumatic stress reaction (PTSR) when they involve unanticipated or uncontrollable elements, pierce the calluses that officers have developed to psychologically distance themselves from such events, and produce effects that remain with the officer beyond the immediate impact of the stressful event. The symptoms of PTSR have an intrusive quality causing the incident to be reexperienced; an avoidance quality, causing the officer to avoid things that remind the officer of the trauma as well as normal activities; and an arousal quality, causing an inability to sleep, irritability or outbursts of anger and difficulty in concentrating. At the hearing, officer A provided testimony in graphic detail concerning the traumatic incident he experienced and the PTSR symptoms he experienced thereafter and continues to experience.

2. The survey conducted by Dr. Blum shows that Milwaukee police officers have high and significant levels of PTSR problems.

3. According to Dr. Blum, the department's definition of trauma is exceedingly narrow, because it does not include many traumatic incidents, such as an officer's feelings of helplessness when an innocent victim suffers and there is nothing the officer can do to prevent it. In his view, an officer should automatically be given 72 hours of paid administrative leave whenever the officer

has had immediate contact with incidents where potentially lethal force was used or immediate contact with death or grievous harm to innocent persons. He would include witnesses to such incidents as well, while the department would not grant such individuals administrative leave, but might assign them to other jobs.

4. The department's policy limits the CO to making recommendations on administrative leave, leaving the chief free to overrule the recommendation, no matter how much the officer may be suffering.

5. Dr. Blum strongly recommended that such administrative leave be made mandatory, even if the officer shows no immediate signs of PTSR. The first 72 hours are the most critical, for purposes of determining the symptoms that an officer may later suffer. Officers should be forced to take administrative leave, to protect those who would choose to suffer in silence, fearing that any showing of weakness could affect their career or the perception of their peers.

6. By making administrative leave mandatory, it is possible to avoid the current "guessing game" about which officers need it. POST records showing 73 contacts with officers following traumatic incidents in the period between April 1993 and September 1994 demonstrate that Milwaukee police officers are suffering PTSR problems more frequently than the department is prepared to acknowledge or able to recognize.

7. While Inspector Gielow testified that a majority of the original drafters did not intend for the three administrative leave days to be in addition to scheduled off or vacation days, the wording used, i.e., "next tour of duty," does not reflect that intent.

8. Dr. Blum's testimony supported the MPA's demand that the administrative leave be in addition to previously scheduled vacation or off days. The purpose of administrative leave is to give the officer a chance to get away from everything that reminds the officer of the incident and the officer's responsibilities. Inspector Gielow agreed that the officer should be able to spend time with family and get away from the media. Even so, the officer may be required to give statements and travel to the hospital for the mandatory debriefing, which could be scheduled on an off day. Further, if an officer has family obligations on the off days, they do not provide the break that administrative leave is intended to grant.

9. The City's concern that the public might misconstrue the administrative leave as a "reward for killing someone" ignores the City's obligation to do the right thing for its officers and educate the public about the appropriateness of doing so.

10. Dr. Blum also provided testimony to support the MPA demand that such officers be provided seven additional days of administrative leave with pay to be used when the officers feel the need. The additional floating days off would allow the officers to

take time away from those things which force them to relive the incident, such as the anniversary or other elements which trigger the memory. They also make it easier for the officers to acknowledge and deal with the stress they feel. The City contention that they should use accumulated sick leave if suffering from such problems is inappropriate and heartless. Sick leave is to be used in connection with illness that is not duty connected. The City has intensified its scrutiny of sick leave use and such use might cause the officer to be mislabeled an abuser. The officer should not be forced to use sick leave, which should be available for other purposes or saved for use in connection with retirement benefits. Injury pay is not readily available, because it is governed by the rules that apply to worker's compensation claims and the Supreme Court has held that an employee may not recover for stress related injuries, in the absence of physical injuries, unless they were caused by a stressful situation of greater dimension than the day to day emotional strain and tension that all employees experience without serious mental injury. Police officers would have difficulty meeting this burden of proof and would be required to engage in protracted and expensive litigation, if the City were to deny a claim.

11. Contrary to the City's claim, the proposal would not disrupt department operations. If an officer has killed someone, the officer is entitled to legal representation and cannot be required to give a statement. Thus, the decision to submit to such

an interview will turn on the officer's willingness to waive constitutional rights, not the availability or lack of availability of administrative leave. If the officer chooses to give a statement, the MPA has no objection to the officer remaining on duty until that task is concluded, before beginning the 72 hours of administrative leave. The requirement that the administrative leave begin on the next calendar day is similar to the original provision that the leave begin on the "next tour of duty" and was not intended to preclude the officer from being interviewed before the leave begins.

12. The three-day leave proposal is not retroactive and therefore would have no cost attributable to the agreement.

In reply to City arguments, the MPA notes that the fact that the orders dealing with POST and administrative leave apply to all department personnel, does not remove those matters affecting wages, hours and conditions of employment from the bargaining obligation and states, that if the City's concern is cost, most such incidents involve bargaining unit members and the costs to other units ought not be attributable to this bargaining unit. The MPA also disputes the City's claim that the present system is "working." In the MPA's view, the evidence demonstrated that it did not work in the case of officer A, who said he felt as if administrative leave was "welfare;" the female officer who was given administrative leave and told that it was because "of her inability to cope in a professional manner;" and officer B, who

requested additional administrative leave in order to recover from the trauma of having had to take a life and had his request denied. According to the MPA, making administrative leave available on the recommendation of the CO and the approval of the chief results in a situation where officers silently endure feelings of despair because they do not wish to be perceived as unprofessional or weak.

City's Position

The City makes the following points in opposition to the MPA proposal:

1. The testimony of Inspector Gielow provides important background information concerning the POST program and the intent of the administrative leave provision. After discussing various alternatives, the administrative leave provision was drafted with the intent that the 72 hours off not be in additional to scheduled time off. One of the concerns of the committee was the possibility that there might be a public perception that the three additional days off were a "reward for shooting and killing someone."

2. Inspector Gielow was the district commander for officer A, who was involved in a shooting incident. After speaking to officer A, Gielow advised him that he was going to be off work for a few days and then had the sergeant check his work schedule. After learning that officer A was scheduled to be off work for the next two days, he was granted administrative leave on the first work day following the two regular off days. Inspector Gielow's decision and grievance disposition in that case are consistent with his

testimony as to the intent of the provision and that grievance (along with the others cited by the MPA) is currently pending before the umpire.

3. The changes in the original POST order were necessitated by the settlement of the FLSA lawsuit brought by the MPA. While the language of the administrative leave provision was clarified, it was clarified in a way that was consistent with Inspector Gielow's testimony as to its original intent.

4. In viewing the MPA proposal, it is important to recall that the original POST order and the modified POST and traumatic incident orders were not the result of collective bargaining and apply to all department personnel. No prohibited practice charge was filed with the WERC with respect to them. In effect, the MPA is attempting to rewrite history by characterizing the administrative leave issue as a partisan labor relations dispute, even though it was developed as part of a departmentwide effort to provide support for all members of the department.

5. The MPA proposal makes administrative leave mandatory for an officer "in immediate contact with a lethal incident." According to the MPA, the use of the word "lethal" was a typographical error, because the word "traumatic" was intended. If allowed, this amendment would expand the scope of the provision to cover non lethal traumatic incidents. The use of the words "in immediate contact" remains problematic.

6. Inspector Gielow noted this problem and acknowledged that the words "directly involved," used in the order, were a little broad as well. However, he indicated that it was the intent that each and every situation would be evaluated on a case by case basis. That approach was based upon the recommendation of the FBI, which has had a lengthy experience with the use of a support organization for its employees. While a tactical officer who fires the gun that kills a man in order to save a hostage's life is obviously "directly involved," so is a partner who gives the tactical officer the green light. However, under the MPA proposal all tactical officers at the scene and perhaps those in radio contact, including dispatchers, could be deemed "in immediate contact." It will be necessary to resolve grievances through arbitration to answer those questions.

7. Under the MPA proposal, those officers who are "directly involved" are entitled to an additional seven days of administrative leave, to be scheduled by the officer. It may be necessary to arbitrate additional grievances to determine if there is a difference between those officers "in immediate contact" and those "directly involved." It is conceivable that all officers granted administrative leave will be found to be entitled to a total of 10 days off with pay. Thus, it is possible that all tactical officers on the scene, and perhaps others, would be entitled to such time off. This is not an insubstantial amount of time off and it could involve the temporary loss of an entire

specialized service unit and have other serious consequences in terms of the delivery of police service to the public.

8. The requirement that the administrative leave commence the first calendar day following the date of the incident could seriously interfere with the investigation, for example, if the incident occurred at 11:00 p.m. Further, the proposal would create a very negative public perception if the officer became unavailable for three days, before the investigative process was complete. The provision requiring the officer to provide the commanding officer with a phone number is a poor substitute for actual availability to cooperate in the investigation. It is extremely important that the officer give an account of the incident when the facts are fresh in the officer's mind and this is true in the case of the mandatory debriefing as well. The purpose of the debriefing is to assist the officer in dealing with the stress, provided the officer is willing to discuss the matter with a counselor.

9. By its questioning of Inspector Gielow, it would appear that the MPA is attempting to merge its administrative leave proposal with the fitness for duty procedures in an effort to subject the debriefing process to the procedures that it proposes for that purpose. Such a result would have terrible consequences for the department, its members and the community.

10. The City is also concerned that, by including the MPA's proposal dealing with traumatic incidents in the agreement, the traumatic incident procedure will be undermined. This would be

particularly unfortunate, because the testimony shows the present system is working. Commanding officers now have the discretion to grant administrative leave in all traumatic incidents and have done so, with positive feedback. In making the decisions, they receive assistance from the POST coordinator, police officer Kenneth Felsecker, who works out of the chief's office.

11. The MPA's vague and multifaceted proposal creates an overbroad mandate that would override circumstances crying out for a case by case review.

12. Contrary to the impression left by the MPA at the hearing, officer C was granted administrative leave, consistent with Inspector Gielow's testimony that he would have done so.

In reply to MPA arguments, the City points to the broad definition of a traumatic incident found in the testimony of Dr. Blum, including any officer who remained upset with a call after it has been cleared, witnesses and persons in "psychological proximity to the event," as a basis for its concern about the overbroad nature of the MPA proposal. It notes that he gave no basis for his opinion that the department's definition of a traumatic incident was exceedingly narrow and suggests that any definition would appear exceedingly narrow, compared to Dr. Blum's. According to the City, the evidence establishes that its policy is not limited to situations where an officer has taken a life. The City also notes that Dr. Blum's testimony indicates that the seven additional days should be automatic for officers who are granted the first

three days, even though his data suggests that a smaller percentage of officers have the anniversary reactions he described. According to the City, the MPA has misrepresented the department's administrative leave practices as precluding leave for those not directly involved and cites testimony indicating that a witness might be entitled to administrative leave under certain circumstances. Also, the City notes, there is no evidence that the chief has ever overturned the decision of a CO. According to the City, there is no evidence that the current procedure involves a "guessing game" or that the department is unwilling to acknowledge or recognize PTSR problems, since the data cited was prepared by POST coordinator Felsecker, who works out of the chief's office. In reply to other MPA arguments, concerning the intent of the provision and its impact, the City repeats and elaborates upon its original arguments. According to the City, the "educational" burden it would have, attempting to convince the public that the MPA's proposal is justified would be insurmountable. In the City's view, it would allow officers to self declare their need for ten days off and not only make officers directly involved, but witnesses, unavailable to cooperate in investigations. The City notes that Dr. Blum admitted that most administrative leave provisions are established by the chief and are not part of the labor agreement and the MPA has produced no evidence of any contractual provisions or policies that are as expansive as that which it seeks to establish. Finally, the City alleges that the

MPA's argument that its proposal will not cost anything is "nonsense" and expresses concern that the MPA's failure to mention the cost of the seven days of administrative leave may portend a claim that that aspect of the proposal is retroactive.

Discussion and Award

For purposes of analysis, the undersigned has put aside certain problems with the wording of the MPA's proposal. This includes the requirement that the administrative leave commence on the next calendar day and the inconsistent use of language, confusing the terms "traumatic incident" and "lethal incident" and the requirements that the officer either be in "immediate contact" or "directly involved."

The purpose of the proposal is to require that all officers covered by its terms will be granted ten days of administrative leave, three to be taken immediately after the incident, exclusive of any scheduled time off, and seven to be taken at the discretion of the officer at some later point in time. The leave would be "mandatory" not only in the sense that the officer would be required to take the leave, but that the department would have no discretion as to whether the officer should do so.

The undersigned concludes that the administrative leave in question should be mandatory in the sense that an officer can be placed on administrative leave with pay by the department in appropriate circumstances and that no stigma should attach. However, the MPA proposal that the leave should be mandatory in the

sense that it must be taken in all cases, raises numerous problems, identified by the City in its arguments, and should not be granted.

As the City notes, the wide variety of situations covered by the administrative leave policy call out for a case by case approach. That approach should, and does, include the POST coordinator in the process of making the discretionary judgment calls required. To require that all those involved or in physical or psychological proximity to the incident be automatically granted administrative leave would be very disruptive and lead to great expense, potential abuse and an insurmountable problem with public perceptions.

All of these problems exist in the case of the initial three days of administrative leave, but would be greatly exacerbated in the case of the seven additional days of administrative leave, to be taken at the discretion of the officer. There can be no doubt that some police officers (such as officer A) will require additional time off after a traumatic incident. However, it is unreasonable to assume that all those officers who might qualify for the initial three days off would also qualify for the additional seven days off. This would render the proposal extremely costly and disruptive of certain operations and impair the City's ability to provide police services.

The question of whether the four officers who discharged their weapons on July 13, 1990 and Officer Gomez should be granted additional paid time off will apparently be resolved by the umpire.

However, the policy has been substantially amended in a way which makes sense, in the view of the undersigned. The procedures set out in order number 10757 give the commanding officer significant discretion and structures the administrative leave in a way that accommodates all interests in a reasonable fashion.

Because the undersigned is convinced that it is important for the affected officers and the public to understand that such leaves are mandatory in the sense that the officer is required to take the time off and that no stigma should attach, consideration has been given to putting some language in the agreement to that effect. However, neither party has made such a proposal and any language drafted by the arbitrator might lead to unanticipated problems with interpretation and application. Therefore, the arbitrator has left it to the parties to decide whether they wish to do so, in their future negotiations.

AWARD: The sixth paragraph of Article 68 proposed by the MPA shall not be included in the agreement.

ARTICLE 69 - EMPLOYMENT CONNECTED DISEASES

As noted above, the agreement includes a provision (Article 25) which makes officers eligible for "injury pay" instead of worker's compensation benefits for any period of time that they may be temporarily disabled due to an "injury" for which they are entitled to receive worker's compensation benefits. Under Section 102.01(c) of the Wisconsin Statutes, an injury includes any mental or physical harm caused by an accident or disease. The agreement

provides for a maximum of 365 days of injury pay (at 80% salary) for any compensable injury or recurrence. Thereafter, the employee is entitled to take sick leave or receive benefits under the worker's compensation act. If an officer is unable to return to work due to a duty incurred injury, he or she is entitled to receive duty disability retirement benefits, pursuant to the provisions of Article 19 and the pension law.

MPA's Proposal

The MPA proposes to include a new provision in the agreement, identified as Article 69, which would create a presumption that when an officer contracts a contagious disease or heart disease under certain circumstances, the disease was caused by his or her employment. This would automatically qualify the officer for injury pay and possibly worker's compensation benefits, if the presumption was honored by the worker's compensation authorities. In addition, the presumption would apply for purposes of determining eligibility for duty disability retirement. The MPA's proposal reads as follows:

> *"ARTICLE 69*
>
> *EMPLOYMENT CONNECTED DISEASES*
>
> *1. A member requesting Injury Pay (80% of base salary) where a medical examination performed by a licensed physician was given prior to his/her becoming a member of the Milwaukee Police Department which examination showed no evidence of disease and where the member has contracted a disease by the performance of his official police duties and has properly notified his/her Commanding Officer of the*

exposure to a contagious disease or heart disease, shall be presumptive evidence that such disease was caused by his/her employment.

2. *Such injury pay shall not exceed 365 calendar days for any one compensable injury or recurrence thereof. Thereafter such disease shall be presumptive evidence in determining eligibility for duty disability retirement."*

MPA's Position

The MPA makes the following points in support of its proposal:

1. If an officer is free from a particular contagious disease before being exposed to it in the performance of duties and later contracts that contagious disease, after having reported the exposure to his/her commanding officer, there ought to be a presumption that the officer's illness was caused by his employment for the purpose of determining eligibility for injury pay and/or duty disability pay, provided the officer can demonstrate that he or she was disease free prior to the exposure. A medical exam conducted at the time of his or her employment, a medical exam conducted prior to the exposure or a medical exam conducted immediately after the exposure would be sufficient to demonstrate that the officer was disease free at the time of the exposure.

2. Dr. Blum's survey and analysis served to demonstrate that concern about being exposed to infectious diseases and spreading that disease to their families is a major cause of stress for Milwaukee police officers. The testimony of officer H, who contracted hepatitis B after being bitten by an infected suspect he arrested, served to graphically demonstrate the risk of such

occurrences and the stress and uncertainty that follows such occurrences.

3. Police officers have a statutory obligation to provide first aid to any person in custody and are prohibited from discriminating against people who are HIV positive. During a five-month period in 1990, there were 30 reported incidents of exposure to infectious diseases. The Brandel report shows that there were over 2,000 reports of exposure to infectious diseases in 1992-1993. The most common exposures were to HIV, tuberculous and hepatitis, all of which are at least potentially life threatening.

4. The MPA has indicated its willingness to modify its demand to limit its application to HIV, tuberculous, and the various forms of hepatitis.

5. The presumption created by the provision would allow the officer to use injury pay to cover the time required for evaluation, treatment, and/or recovery from the illness.

6. Since it takes some period of time after exposure before developing one of the enumerated contagious diseases, it would be possible for the officer to take an exam immediately after the exposure to establish that he or she was disease free prior to the exposure. If the officer was unaware of the exposure at the time it occurred, disease free status could be established through evidence of disease free status at the time of hire or thereafter.

7. The provision would also establish a similar presumption if an officer develops heart disease.

8. Under the current procedure, an officer who is exposed to a contagious disease must be tested and treated on the officer's own time, which is unreasonable. No officer should be required to put up with the "run around" experienced by officer H, to whom it was suggested that he could get a second mortgage while attempting to get the City to pay for some of the treatment he received.

9. In the recent past, the department required officers to seek medical attention after a contact which "could be considered a source of transmission of a communicable disease (especially in the case of meningitis)." However, the department rescinded that SOP on January 9, 1991, and change it to say that it is "generally advisable (but not required) that medical attention be sought." This change [which occurred after four grievances had been filed requesting overtime pay] was apparently made to avoid the obligation to pay officers for the time they spend seeking diagnosis and treatment. Even so, on October 4, 1993, the chief issued an order (No. 10785), requiring officers who experience an exposure incident to obtain appropriate medical treatment as soon as practicable. Then, in August of 1994, the health and safety director informed a police officer that he may have been occupationally exposed to tuberculous and recommended that he get a TB skin test, but the officer was reminded that he would not be paid overtime for doing so. [He was also told that he could do so during his regular tour of duty, with proper supervisory approval]. The MPA proposal would "return" to the October 1993 procedure,

requiring the exposed officer to obtain appropriate medical treatment as soon as practicable.

10. The MPA demand is patterned after the "heart-lung bill" applicable to fire fighters. (Section 891.45, Wis. Stats.) That law presumes that any fire fighter with more than five years on the job who contracts heart or lung disease, contracted the disease as a result of a work-related injury, if there was no evidence of such disease in a pre-employment medical examination. While the City's expert, Dr. Bonner, was critical of that statutory presumption, the fact remains that the legislature saw fit to adopt it to protect fire fighters and similar protections should be afforded to police officers, who are more likely than fire fighters to suffer from stress and increased risk of heart disease.

11. Police officers are also more likely than any other group to be exposed to infectious disease. They are required to provide first aid and must do so without the precautionary measures that are available to emergency medical personnel.

12. While Dr. Bonner sought to downplay the risk of exposure for police officers, that opinion was based on an inaccurate view of what police officers are exposed to in their day to day work. Police officers arrest people in homes, where they may come into contact with stool (the source of transmission of hepatitis A); wrestle with people have used knives covered with blood; give CPR to a person who may have tuberculous; reach through broken glass of a car window to help a bloody accident victim; or search

intravenous drug users, who may have a contaminated needle on their person.

13. While Dr. Bonner noted that the employer cannot force an employee to take a pre-employment test for HIV or hepatitis, he acknowledged that a disease free base line could be established after an employee is first exposed. Apparently Dr. Bonner did not realize that, under the MPA proposal, the burden would be on the officer to demonstrate pre-employment disease free status, if the officer contracts the disease without having established a disease free base line prior to or at the time of the exposure.

14. The City's reliance upon the opinions of Dr. Bonner is misplaced, since he is not an expert in the transmission of infectious diseases. His specialty is occupational medicine and his opinions were based upon the opinion of other doctors, whose names he could not recall.

City's Position

The City makes the following points in opposition to the MPA proposal:

1. The current contract language provides sufficient assurance that MPA members who contract a disease as a result of their employment will be covered by the injury pay provision of the agreement.

2. The MPA proposal is excessively broad and ambiguous. In his testimony, President DeBraska sought to modify the proposal by stating that it was the MPA's intent to cover "AIDS, which is at

the top of the column, all of the hepatitis A, B and non A and B infectious diseases, communicable diseases and tuberculous on the bottom." When asked if there were others, he responded "not at this time." While ambiguous, the provision contains no language which would so limit its application and the testimony leaves uncertainty as to the future intent of the MPA, which will have to be resolved through grievances and arbitration proceedings.

3. The MPA's attempt to modify its proposal through testimony should be rejected as a violation of the arbitrator's order for hearing in this case.

4. While the presumption created by the proposal would protect the rights of officers, it would disregard the rights of the City and the public who must ultimately finance its cost, which has the potential to be astronomical.

5. Current contract language and worker's compensation legislation adequately protects the rights of employees. Acceptance of the MPA proposal, as worded, would invite dubious claims of eligibility, including eligibility for duty disability retirement benefits.

6. Dr. Bonner, a specialist in occupational medicine, testified that there is a difference between "exposure" and "significant exposure," where it would be likely that an average healthy person would have a significant chance of contracting the disease in question. He gave the example of an ambulance crew exposed for a short period of time to a patient with active

tuberculous, which would not be considered to be a significant exposure.

7. The proposal also constitutes an attempt by the MPA to obtain a presumptive evidence of heart disease benefit, similar to that awarded municipal fire fighters by the state legislature. Regardless of the merits of that legislation, which Dr. Bonner questioned, there is no evidence in this record to support a finding that a law enforcement career causes heart disease. As Dr. Bonner testified, there is a genetic component to heart disease and the risk factors for heart disease include many behavioral lifestyle decisions. Also, the MPA proposal does not include a five-year waiting period to qualify for the benefit. The MPA proposal relies upon the pre-employment physical examination to prove that a member did not have the disease as of the date of hire. However, as Dr. Bonner testified, pre-employment examinations and related laboratory tests are minimal and do not normally include such tests (which are not infallible) except for those over age 35. The tests given would not necessarily disclose the presence of HIV or other diseases not suspected to be present.

8. The MPA's reliance upon the case of officer H is misplaced. In his testimony, officer H acknowledged that he was told to stay off of work until it was determined that he was not contagious and that all of his bills were paid, including those for psychological treatment. He acknowledged that the department now

offers, on a voluntary basis, vaccinations for hepatitis B, and that he now believes that his problems have gone away.

In reply to MPA arguments, the City disputes the claim that it has misread the MPA proposal; notes that there is no language placing a burden on the employee under any circumstances and no reference to "significant exposure;" argues that there is no basis for MPA claims that department procedures were modified to avoid payment for time spent seeking diagnosis and treatment, that police officers are likely to come into contact with stool, or that police officers are more likely than all others to be exposed to infectious diseases; repeats its arguments concerning the lack of need for the proposal or evidentiary support for the presumption as to heart disease, which could cost the department a million dollars, in the case of an employee who is diagnosed with heart disease shortly after beginning employment; and notes that Dr. Blum described exposure to infectious disease as an element in officer stress reactions and emphasized that behavioral life styling ingredients clearly affected officer stress reactions as well.

Discussion and Award

The undersigned is inclined to agree with the City that the existing contract provisions and the procedures referred to therein, should be utilized for purposes of determining whether and under what circumstances presumptions should be employed. The establishment of such presumptions, by rule or case law, should

give appropriate consideration to the nature of the communicable disease in question, i.e., its method of transmission, incubation period, period of communicability, modes of transmission, etc., as well as the facts surrounding the exposure.

This is especially true in the case of heart disease. The MPA relies upon evidence that police work in the City of Milwaukee is stressful. There can be little doubt that it is stressful. But, there are numerous other factors that need to be considered before creating such a presumption. The nature of the heart disease, the reliability of any tests previously administered, genetic predisposition and the influence of life style choices should be considered before creating any presumption, even if deemed rebuttable.

Even if the proposal were rewritten to limit its application to the five communicable diseases referred to by the MPA in its arguments, it would be necessary to consider all of these matters before establishing a presumption. Further, any such presumption could be rendered of questionable validity by subsequent advances in medical knowledge. Finally, there is no guarantee that any such assumption would be acceptable to the worker's compensation authorities, even if they were deemed binding on the tripartite medical board called upon to make DDR determinations.

AWARD: Article 69 - Employment Connected Diseases, as proposed by the MPA, shall not be included in the agreement.

NEW ARTICLE - FIELD TRAINING OFFICER PREMIUM PAY

After graduation from the police academy, recruits receive initial on-the-job training under the tutelage of field training officers (FTO's). Police officers are selected for training to serve as FTO's, by their commanding officers, based upon the recommendation of their shift supervisors. In most cases they are volunteers.

The department considers the role of FTO's to be extremely important, for purposes of providing appropriate guidance and training to recruits, before they are allowed to patrol on their own. The duties are quasi supervisory in nature and the department looks for police officers who have the potential to be promoted to supervisory ranks.

Currently, the agreement does not call for any additional compensation for work as an FTO. The MPA contends that FTO's receive one-half hour of overtime pay for each shift during which they serve as an FTO. The record does not establish what is, in fact, the department's practice in that regard. However, it would appear that FTO's may be called upon to work overtime, in order to complete all of their training, administrative and paperwork responsibilities. There is no evidence which would support a finding that they receive overtime pay for hours not worked.

City's Proposal

The City proposes to include the following new article in the agreement, providing premium pay for FTO's:

"FIELD TRAINING OFFICER PREMIUM PAY

1. *The Chief of Police retains the exclusive right to make assignments of Field Training Officers (FTO's) from the ranks of employees in the Police Officer classification. Such assignments shall be made in accordance with procedures established for this purpose from time to time by the Chief.*

2. *The duties and responsibilities for the FTO assignment shall be as determined from time to time by the Chief. Effective as of the beginning of the first biweekly pay period next following the execution date of the 1993-1994 City/Union Labor Agreement, an employee in the police Officer classification assigned by the Chief as a Field Training Officer shall be entitled to receive premium pay equal to $1.00 per hour in addition to his/her base salary for each hour spent on duty while so assigned, provided however, that such an employee shall not be entitled to this premium pay for time spent at FTO training programs. Such premium pay shall be termed 'FTO Premium Pay.' FTO Premium Pay shall be subject to the terms and conditions provided in paragraphs 3 through 7, inclusive below.*

3. *FTO Premium Pay shall only be granted when an employee assigned by the Chief as an FTO is actually performing FTO duties and shall not be granted when such an employee is temporarily reassigned to other duties.*

4. *FTO Premium Pay payments to employees entitled to receive them shall be made quarterly during the calendar year on such dates after the effective date referenced in paragraph 2, hereof, as the Department shall prescribe.*

5. *Payments made under the provisions of this Article shall not be construed as being part of employees' base pay and shall not be included in the computation of any fringe benefits enumerated in this Agreement.*

6. *Any payment made under the provisions of this Article shall not have any sum deducted for pension benefits nor shall such payments be*

included in the determination of pension benefits or other fringe benefits.

7. The provisions of this Article shall become effective the first pay period following the execution date of the 1993-1994 City/MPA Labor Agreement."

City's Position

The City makes the following points in support of its proposal:

1. As Assistant Chief Koleas testified, the FTO program is an essential element of an officer's passage from civilian to police officer. Because of the important role the FTO plays, the department is very selective in choosing officers to be trained and utilized as FTO's. It is therefore critical that the chief retain the exclusive right to select FTO's, consistent with his statutory responsibilities.

2. The arbitrator should adopt the City's proposal for additional compensation as an incentive for qualified officers to volunteer and as an equitable economic reward in exchange for performing these important duties.

3. In its final offer, the MPA included no proposal calling for additional compensation for FTO's. When the MPA sought to incorporate "suggested language" to cover this issue, in its rebuttal evidence, it was ruled out of order as a belated effort to amend its final offer. Therefore, the arbitrator should select the City's final offer on this issue. However, if the City's final offer is not selected, no proposal should be awarded.

4. At the hearing, President DeBraska testified that FTO's currently receive one-half hour of overtime pay per day for serving in that capacity. However, there is no reference to such additional compensation in the agreement or any of the departmental orders and memos introduced into the record by the MPA. Nor was there any record or testimony regarding the actual experience of any FTO's.

In reply to MPA arguments, the City notes that the MPA's arguments on this issue are internally inconsistent. At one point, it argues that the City's proposal should be rejected and at another point it argues that the arbitrator should include one-half hour of overtime pay as well as the City's offer in the award. In the City's view, the request to include one-half hour of overtime pay constitutes another attempt by the MPA to modify its final offer, without the City's consent, which should be rejected for that reason. The City also contends that the MPA's arguments as to the comparables are misleading. It notes that the MPA fails to mention that 5 of the 11 MPA national comparisons, 25 of the 29 metropolitan comparisons and 11 of the 15 state comparisons provide for no compensation, or that some of those that do pay 49 cents per hour (Cincinnati), 50 cents per hour (Brookfield), and 45 cents per hour (Fond du Lac). In the City's view, the MPA is attempting to secure guaranteed, mandatory overtime, a concept rejected by Arbitrator Wagner as early as 1973. Its claim that FTO's currently receive compensation in the amount of $2,579.00 is premised on that

assumption, and the unsubstantiated and inaccurate assumption that an FTO is called upon to train six recruits per year for six weeks each. According to the City, the MPA's belated attempt to argue strenuously in favor of guaranteed, mandatory overtime and premium pay for FTO's amounts to bad faith bargaining and should be rejected in favor of the City's proposal. If the City's proposal is rejected, it argues that no proposal should be awarded.

MPA's Position

The MPA makes the following points in support of its position on this issue:

1. Of the Justex cities which pay a premium for FTO duties, only one pays an hourly rate. All the rest pay a flat dollar amount, with the average being $87.00 per month or approximately $1,000.00 per year.

2. Of the metropolitan cities which pay a premium for FTO duties, the average is $702.00 per year, with the benefit in Wauwatosa being worth 85 cents per hour (35 cents plus .3 hours of overtime).

3. Among the state comparables with FTO pay, the average is $889.00 per year, with only one hourly rate, at 45 cents per hour in LaCrosse. Madison FTO's receive an additional day off with pay for each training cycle.

4. The City's national comparisons provide stronger support for the MPA position. Among those cities which provide FTO pay,

the average is $1,628.00 per year. Almost half have an FTO premium.

5. The City currently provides a premium as an incentive to recruit and retain FTO's, consisting of one-half hour of overtime pay for each shift worked as an FTO. Assuming three recruit classes, an FTO could expect to handle six recruits per year for six weeks each. This would generate overtime premium pay that is worth $2,579.00 per year, utilizing the base pay for 1994 that would be established under the MPA's final offer.

6. Utilizing these same assumptions, the City's offer is worth only $1,440.00 per year, if it eliminates the one-half hour overtime pay practice. An FTO would have to work with a recruit for 71.6 hours per week in order to equal the premium pay currently being paid.

7. FTO's have substantial responsibilities. They train and evaluate recruits and have significant authority to determine whether the recruit will pass probation. Unlike sergeants, their relationship is an intensive one on one relationship, which gives the recruit practical training on how to use what the recruit has been taught at the academy. An FTO is like a mentor who shares knowledge and experience and provides emotional support to help build self confidence. The FTO can either underscore or undermine all the recruit has been taught, including the theory of community oriented policing.

8. The FTO's are also responsible for the safety of the recruit. They cannot assume that their "partner" will be there to protect them and they must take care to protect the public from any mistakes the recruit might make. In some ways, the work is more dangerous than work in a one officer squad. In fact, a recent memo prohibited the practice of assigning recruits to two officer squads.

9. The City proposal should be rejected because it would not count the $1.00 premium towards the base salary for calculating overtime. The premium is supposed to reflect the fact that the FTO is performing a more difficult job than that of other police officers and that remains true if the FTO is working with the recruit on overtime or in court.

10. The MPA does not object to the City proposal, as long as it is in addition to the one-half hour of overtime pay that the City currently pays FTO's. However, standing alone, it is actually a reduction in current FTO pay and $1.00 per hour is not enough. As Inspector Harker testified, it is "a start" and "probably should be greater."

Discussion and Award

The undersigned is faced with two choices in connection with the parties' positions on this last issue in dispute. Those choices are to either accept or reject the City's final offer.

The MPA is arguing, in effect, that the *status quo*, which would be unaffected by the City's proposal as such, includes one-half hour of overtime pay for each shift that an FTO works while performing FTO duties. The City disputes that claim and the record does not establish the extent to which FTO's have received overtime payments or the circumstances under which they were earned. Thus, the undersigned must accept or reject the City's proposal, without knowing for certain what constitutes the *status quo* or whether there is any real risk that the City will seek to change the *status quo*, as the MPA apparently fears.

In deciding this issue, the undersigned has assumed that the City does not intend to take away any existing, extra contractual "benefit." If FTO's are required to work hours outside their normal shift hours in order to perform their duties, they are obviously entitled to premium (overtime) pay under the agreement. That will continue to be the case if the City's final offer is awarded. Any suggestion that FTO's are currently receiving premium pay for time not actually worked is not supported by the evidence. Further, it would be extremely short sighted of the department to change the hours of work of FTO's (assuming they would be opposed to such a change), by reducing available overtime. Such action would undermine the very purpose of its proposal.

When the City's offer is compared to the provisions found in agreements with those jurisdictions who offer similar payments, it compares quite favorably. This is true, even though it is

impossible to determine, from the available evidence, how many FTO's are covered by the provisions in those jurisdictions that pay a lump sum amount, or (more importantly) how many hours of FTO duties they must perform in order to qualify for such payments.

If the MPA is correct in its assumptions concerning the number of shifts an FTO might be called upon to work, the City's proposal is worth $1,440.00 per year for straight time hours worked. Only San Jose, San Antonio, and Chicago (and possibly Cleveland) would provide FTO's with a larger annual sum. Significantly, 49 of the 73 jurisdictions reviewed have no provision within agreements calling for FTO payments. Finally, the City will compare quite favorably in both metropolitan and statewide comparisons.

AWARD: The new article covering field training officer premium pay proposed by the City shall be appropriately numbered and included in the agreement.

Dated at Madison, Wisconsin this 15th day of May, 1995.

George R. Fleischli
Arbitrator