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In the Matter of Petition of

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION

and

For Final and Binding Arbitration Involving Law Enforcement Personnel in the Employ of

VILLAGE OF WEST SALEM (POLICE DEPARTMENT)

Case 9
No. 52105 MIA-1964
Decision No. 28624-A

Gil Vernon, Arbitrator

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APPEARANCES:

On Behalf of the Employer: Jerome J. Klos, Attorney - Klos, Flynn & Papenfuss

On Behalf of the Union: Richard Thal, Attorney - Cullen, Weston, Pines & Bach

I. BACKGROUND

On January 11, 1995, the Union filed a petition with the Wisconsin Relations Commission requesting the Commission to initiate final and binding arbitration pursuant to Sec. 111.773(3) of the Municipal Employment relations Act, with regard to an impasse existing between the Parties with respect to wages, hours, and conditions of employment of law enforcement personnel. An informal investigation was conducted on March 6, 1995, by a member of the Commission's staff, and that investigator advised the Commission on December 26, 1995, that the Parties were at impasse on the existing issues as outlined in their final offers and closed the investigation on that basis.

On January 2, 1996, the Commission ordered the Parties to select an arbitrator to resolve the dispute. The undersigned was selected by the Parties and appointed by the Commission on February 13, 1996. A hearing was

conducted on August 16, 1996, and post-hearing briefs were received September 10, 1996.

II. FINAL OFFERS AND ISSUES

There are four items from the final offers at issue. They are: duration, wages, holiday pay, and retirement benefits. Regarding duration, the Union proposes a three-year agreement to succeed the 1993-94 agreement and the Employer proposes a two-year agreement covering 1995 and 1996. Regarding holidays, the Parties agree to change the manner in which holidays are taken, but the Union is proposing to delete one holiday (the personal-choice holiday).

Regarding wages, the Association proposes the following schedule of rate increases:

Effective January 1, 1995 - 2 percent
Effective July 1, 1995 - 1 percent
Effective July 1, 1996 - 2 percent
Effective July 1, 1997 - 2 percent

The Employer proposes 3 percent effective January 1, 1995, and again January 1, 1996.

Regarding retirement benefits, the Employer proposes to retain the status quo language. Currently Article XVIII reads as follows:

ARTICLE XVIII
RETIREMENT FUND

18.01 The Village does not participate in the Wisconsin Retirement Fund and in lieu thereof provides a pension plan currently with La Crosse Trust Company wherein the Village contributes 13% of the employee's gross pay annually to the plan in the name of the employee with vesting rights as follows:

Less than 3 years	0%
3 years	20%
4 years	40%
5 years	60%
6 years	80%
7 years	100%

The Village retains the right to change carriers and trustees of said pension plan.

The Association proposes that Article XVIII and the local retirement trust be terminated effective January 1, 1997. In lieu thereof they propose the

Employer ". . . become a participant in and pay for the entire cost of both the employee's and employer's share of the Wisconsin Retirement Fund for all employees."

III. RELEVANT STATUTORY CRITERIA

111.77(6) In reaching a decision the arbitrator shall give weight to the following factors:

(a) The lawful authority of the Employer.

(b) Stipulations of the Parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.

(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

1. In public employment in comparable communities.

2. In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the Parties, in the public service or in private employment.

111.77(7)	Proceedings, except as specifically provided in this section, shall be governed by Chapter 788.
111.77(8)	This section shall not apply to cities having a population of 500,000 or more nor to cities, Villages or towns having a population of less than 2,500.

IV. ARGUMENTS OF THE PARTIES (SUMMARY)

A. The Union

Addressing first the principal issue of retirement benefits, the Union contends it has sustained its burden to change the status quo. They contend they have demonstrated a need for the change, reasonably addressed the need, found overwhelming support in the comparables, and offered an adequate quid pro quo. In terms of need they note that WRS provides duty disability benefits under 40.65 Wis. Stats. More specifically, this provides lifetime benefits in the form of a guaranteed income if they sustain on-the-job injuries that prevent them from continuing to work productively as a law enforcement official. The officers employed by the Village aren't entitled to 40.65 benefits because the Employer doesn't participate in WRS as does all the comparable departments. It is also submitted that WRS coverage is also needed so that Village officers may take advantage of WRS early retirement options and because the normal retirement age is 53. Early retirement is available under WRS at age 50. In contrast, normal retirement under the local plan is age 65. Early retirement is available at age 55. Disability payments last only five years. Moreover, WRS provides participants with generous post-retirement increases in annuity benefits. The North Central defined contribution plan, of course, provides no similar post-retirement benefit adjustments.

Given the demonstrated need for a change to WRS, the Association also contends their WRS proposal reasonably addresses the officers' retirement benefit needs. In this regard they respond to the Employer's argument that, because all 12 of the Village's other employees would have to participate in WRS, the Association's proposal "violates the constitution as taking property without due process." The Union contends that, in fact, there is no basis for the Employer's contentions that the WRS proposal is unconstitutional or that it is likely to adversely effect Village employees. First, this argument is contrary to a WERC declaratory ruling. Nor is there any support in Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549,552 (1966). There has been no confiscation of funds. Nor is the possibility that employees will make poor financial decisions with the local plan distribution a reasonable justification

for rejection of a WRS proposal that provides retirement benefits that are better than those offered under the current North Central plan.

The Union also addresses the possibility that a Village employee could be adversely effected by a change to WRS because Employer contributions to the Wisconsin Retirement Fund are not vested until an employee completes five years as a fund participant. While this is true, they note that if a WRS participant terminates his or her employment prior to five years of WRS coverage, this employee would not lose the 5 percent refundable employee contribution. Under the local plan an employee loses all contributions if he or she terminates before becoming partially vested. They don't become fully vested for seven years, and at five years are only 60 percent vested. Thus, they conclude that since the oldest, non-police Village employee is 55 and since only one-half of all Village employees are not fully vested under the seven-year North Central vesting schedule, Village employees may fare better under the WRS vesting schedule than under the North Central plan. They recognize, too, that in an interest arbitration case the Arbitrator may consider the effect that adopting a final offer will have on the legitimate needs of non-bargaining unit employees. However, they submit it is the Village itself who place the Village in the situation where the employees are not receiving the same WRS retirement benefits received by employees at comparable municipalities. Moreover, they argue the Village has presented no factual evidence in support of its assertion that Village employees will be adversely effected by a change to WRS, or any support for its position that its final offer should be selected because of the effect that WRS participation will have non-bargaining unit employees.

The Union's next major arguments relate to the comparables and the idea of a quid pro quo. Regarding the comparables, they note all employees of the comparables enjoy WRS retirement benefits. Thus, they submit it is grossly unfair that the West Salem police officers have not yet received WRS coverage. Regarding quid pro quo, the Association argues they have made sufficient concessions to "buy" the WRS coverage. This is true in two respects. First, they are proposing a wage package that gives bargaining unit employees only a 6.16 percent wage increase (in in-pocket money) over the life of a three-year contract (i.e., from 1995 through 1997). In contrast, the increase among the comparables was 11.43 percent. In addition, the Association's final offer includes holiday pay concessions that could amount to a $309 a year (or 1.2 percent of yearly salary) loss of compensation for bargaining unit employees (compared to what the employees would have had under the current agreement). This justifies the increase retirement benefit contributions from the current 13 percent to 16.3 percent. Indeed, 1996 package costs under the Association's final offer are more than 1.3 percent less than under the Employer's offer.

The Union also directly addresses the offers in light of all the relevant statutory criteria, including the stipulations of the Parties, the interest and welfare of the public, the Employer's financial ability, the comparables regarding wages and holiday pay, the cost of living, and criteria (H). Most detailed among these arguments is the interest and welfare of the public. It is not served well by the Employer's offer, in their opinion, because of the morale problems caused by the fact all the other departments the police interact with enjoy the vastly superior benefits of WRS. There are advantages to WRS for the other Village employees too. For instance, under a defined contribution plan such as that currently provided by the Village, employees cannot determine the amount of their retirement under the time they retire. Moreover, on the average, the WRS formula benefit retirement plan will provide significantly higher retirement benefits to long-term employees. With the same level of contributions, a WRS formula benefit is about 25 percent higher for career employees with 25-30 years than a defined contribution plan.

B. The Employer

Addressing the major issue of retirement, it is the position of the Village that an order of the Arbitrator which requires the Village to place all its employees into the state retirement system would constitute an unconstitutional taking--without due process--of the other Village employees' property rights in their vested pension plan. The Village submits that any order of an arbitrator to so affect the employees' rights in their pension plan would be an unconstitutional taking of property, and the implementation of it would be beyond the lawful authority of the Village Board. This is relevant because Wisconsin Statutes 111.70(4)(G)(7) requires the Arbitrator to consider "the lawful authority of the municipal employer." In support of this position they rely on the fact that non-police employee would have, at best, 5 percent employee and 5 percent Employer share paid into the state retirement to provide for ultimate benefits (the 1.4 percent additional payments by Employer for benefit adjustment is not credited to the employees account), compared to 13 percent under the present plan. Accordingly, for all remaining years of employment, the non-police employee loses from his fund the equivalent of 3 percent of his salary in the annual computations (plus the cumulative effect on higher compensation as time goes on and the lesser earnings on smaller contributions).

Requiring the Employer to put the police under WRS would require putting everyone else under WRS too. This would mean the consideration by the Arbitrator of statutory factors of the "interest and welfare of the public" (which includes non-police employees) and "comparison of conditions of

employment of the municipal employees involved in the arbitration proceeding with conditions of employment of other municipal employees in the same community". When these factors are considered they require a decision rejecting the Union proposal. There is also the matter of vesting. If any of the present employees should die, take early retirement because of disability or any other reason, or go back to the private sector for a better job, all within five years, under WRS they will lose pension funds paid in by the Village for their use as contrasted with the contribution of the present plan where all contributions in the period would be available and credited to the vested employee's fund.

The City notes, too, that the Union attempted to discount the effect of the 3% difference in the contribution for non-police by alleging that under the State plan, the ultimate benefit would be better under the State plan because of its size and profitability for most of the Village employees, and the Village could make up any difference for them by supplemental retirement plans or annuities. However, the city claims this is an admission by the Union that certain participants would lose property rights from their present pension system even if we were to assume the speculative future scenario of the Union on the Wisconsin plan. They argue the Arbitrator cannot base his decision on such speculation, nor should he reverse the voluntary agreement of the Union to become part of the local plan originally in the mid-70s.

Even apart from the constitutionality and lawful authority of the Employer issue, the Employer contends that the consideration by the Arbitrator of statutory factors of the "interest and welfare of the public" (which includes non-police employees) and "comparison of conditions of employment of the municipal employees involved in the arbitration proceeding with conditions of employment of other municipal employees in the same community" require a decision rejecting the Union proposal. In this regard it is the Village contention that the principal of comparative "fairness" requires the rejection of a proposal that substantively adversely affects eight employees to benefit the Police Chief and three Union policemen. In their opinion, the Arbitrator must consider the effect of the Union's proposal on other employees. Such changes should be made through negotiations and not arbitration. The Union could, it is noted, propose changes in the present pension plan that do not affect the property rights of the non-Union employees. However, they have not done so.

Based on other considerations beyond legality and fairness, the Employer questions whether the Union was justified in its proposal. For instance, at most, the cost of living index increased 13.9 percent in the period 1991-95 and is projected at less than 3 percent in 1996 (2-8) or a six-year total of 16.7 percent). During that same period of five years Village police salaries increase 26.45 percent, and if the Village offer of 3 percent is added, the six-

year increase would be 29.45 percent. Additionally, a wage survey of salaries of police officers or deputy sheriff in the eight-county Western Wisconsin area finds most police officers (68) in the $12 to $13.99 range (including the West Salem officers) with 84 officers receiving less and 39 more. They also reject the Union's comparisons to departments with more than eight officers. When looking at similarly sized departments, West Salem is in the middle. In view of this, the lift under the Union proposal totals 10.3 percent over three years. Given that the Employer's offer gives a 6 percent lift over two years which exceeds the inflationary rate and leaves the salary structure in average range of like departments, they submit theirs is a fair offer and should be approved by the Arbitrator. The Union offer in contrast is excessive.

V. OPINION AND DISCUSSION

There can be no serious dispute that the controlling issue in this case is the retirement/WRS issue. As goes this issue, so goes the rest of the case.

There is one consideration that makes this a very difficult case and that is the undisputed fact that under applicable WRS rules, all Village employees would have to be covered by WRS if any employee is covered. In this instance, unlike school districts where teachers can be separated from non-teachers, WRS doesn't allow protective service employees to be segregated for coverage from general employees. It is all or none.

If it weren't for the fact that nine other employees may be affected by an award for the Union, there would be no hesitation in adopting the Union retirement proposal. It is fully supported based on (1) the fact comparables universally, without exception, provide WRS coverage, (2) the fact there is in protective services a need for greater than-normal disability benefits, (3) the fact a quid pro quo has been offered, and (4) the fact the Employer plan is relatively (compared to other similar police employers) deficient in age eligibility, length of disability payments, and amount of contribution.

There is a hesitancy in awarding for the Union because there is arguably an adverse impact on other employees which potentially bears on the reasonableness of the respective offers. This warrants a detailed analysis. However, it does need to be said that the Arbitrator, in the final analysis, is not persuaded that an award for the Union would not require the Employer to exceed its lawful authority. First, the Employer has the discretion under the local pension trust to terminate the plan at any time which, by its term, results in all employees becoming 100 percent vested and a distribution of those vested contributions. Second, termination of the plan and substitution of WRS would not result in the denial rights under the pension plan so long as the Employer complied with the termination requirements. Indeed, it appears that the

Employer could choose to discontinue and/or substitute new plans at its discretion, independent of any arbitration order. Any new plan might indeed have lesser benefits with respect to vesting, contributions, etc., and it would be perfectly "legal" for the Employer to adopt such a plan, insofar as this record shows. Last, the Arbitrator does not find Milwaukee County persuasive particularly relevant.

What is legally permissible and what is reasonable are entirely separate issues. There are legitimate questions of whether the impact of WRS on non-bargaining unit employees is reasonable with respect to vesting and the level of contribution. The relative advantages and disadvantages of vesting under WRS versus the local plan are certainly mixed for non-police employees. There is no clear preference for either system.

Under the local plans none of the contributions are vested the first two years. Under WRS the employee contribution of 5.1 percent only is returned to the employee if he/she leaves employment of the Village and go to work at a non-WRS entity. In the event they got to a WRS employer, the employer contributions follow them. So in the worse scenario, if an employee leaves prior to three years and goes to a non-WRS entity, they will be better off under WRS since they will accumulate their own contribution in each year and thus are entitled to 50 percent of the total contribution. Under the local plan, vesting is 0 percent with less than three years. Under the local plan there is a graduated vesting of the total contribution which doesn't exceed 50 percent until after five years at which time 60 percent vesting is achieved. The same employee under WRS becomes fully vested for 100 percent of the total employee and employer contributions after five years. Indeed, if a hypothetical employee with a salary of $22,000 per year starts under WRS at the same time an employee under the local plan, a detailed analysis shows they are better off under WRS through year six, and the advantage of the higher contribution level under the local plan, because of its graduated vesting, doesn't evolve until year seven when they become fully vested.

There might seem to be a disadvantage for existing employees who are not fully vested under the local plan to have to start over vesting for the Employer share of the WRS contribution. However, 100 percent vesting occurs upon the termination of the plan even if an employee has less than seven years of service. So an employee gains if, as is the case with 6 of the 12 employees, he or she isn't fully vested at the time of the plan termination.

As for employees who are 100 percent vested under the local plan, they would start over in terms of vesting of employer contribution under WRS. As noted their employee contribution is protected immediately. However, it must be remembered the employee's entire account upon termination is available for rollover into another tax deferred vehicle. They will not lose a dime, in such a

case, of the past contributions. The Employer did express a concern that employees might not reinvest all their contributions, thus defeating the original purpose of the pension benefit. This, however, doesn't give the employee much credit for understanding the tax consequences of not rolling over accumulated contributions at plan termination. Moreover, if an employee is vested and resigns, he/she is already faced with such a choice. This argument also ignores the fact the plan administrator is obligated to give employees a detailed explanation of an employee's options, including rollovers to qualified plans upon any distribution from the local plan.

The real sticking point for the Arbitrator in awarding for the Union is that, while participation in WRS for the police employees results in a higher Employer contribution, it results in a smaller Employer contribution (even assuming the Employer would choose to pay the employee share, of which there is no guarantee) for the other general non-police employees. Currently non-police employees in the Village receive 13 percent. Under WRS the total combined contribution is only 11.6 percent (consisting of 5.0 percent employee contribution, 1.5 percent employee contribution for benefit adjustment which is treated as an Employer contribution, and 5.1 percent Employer contribution). Thus, under WRS the general employee would receive at best 1.4 percent less of their salary in retirement contributions than they do under the local plan. This is troublesome.

The Arbitrator, as is acknowledged by the Union, is obligated to consider any impact their proposal may have on non-bargaining employees (Cite: *See* City of Clintonville, Dec. No. 19532-A (Weisberger, 1982)) The Union deals with the potential impact of the 11.6 percent contribution versus the 13 percent contribution in two ways. First, they argue that the Employer has not demonstrated that in justification for its position that there would be a reduction in benefits. Commenting on this argument first, the Arbitrator firmly believes that the burden is on the Union under these unique circumstances to demonstrate that its proposal doesn't adversely impact the non-bargaining employees touched by it. After all, these other employees are without representation, and it would take reliable evidence that they consented to the change or compelling evidence that this change was for their own good. This burden is particularly placed on the Union since they are placing the Arbitrator in the unusual position of making a binding order affecting employees it does not represent. Significantly, these employees have no right to representation or access to the impasse procedures under the statute from which the Arbitrator draws his authority. This is compounded by the fact the Union is asking that the wishes of three employees dictate and control the fate of nine others.

The Union also addresses the issue of potential adverse impact on the other employees by suggesting the Employer could contribute the difference in

a supplemental plan and by touting the success of the WRS hybrid defined benefit/defined contribution plan. There are several problems with the Union's approach. First, there may be significant administrative costs and inconvenience with maintaining two plans. Second and foremost, the evidence is insufficient in this record for the Arbitrator to say with positive assurance that a 11.6 percent Employer contribution in a defined benefit plan, such as WRS, is clearly better for non-police employees than a 13 percent contribution in a defined contribution plan. The Union cites Exhibit 68 and 69 in support of its position. However, Exhibit 69 merely says a defined benefit plan "usually" results in a higher retirement benefit. Moreover, the endorsement contained in Exhibit 70 of WRS yielding a 25 percent higher benefit rests on the assumption that the level of the contribution is the same. Obviously +1.6 percent is not the same level as 13 percent. Moreover, that analysis rests on the assumption that the employee is a career employee. The Union's own exhibits show that a defined contribution plan such as the local plan generally provides higher benefits to short-term employees. There are certainly advantages and disadvantages of both types of plans depending on certain assumptions, such as career length. In this, the Arbitrator is without information on whether the other non-police employees are likely to be career or short-term employees. He is also without specific analysis of the performance of the local plan.

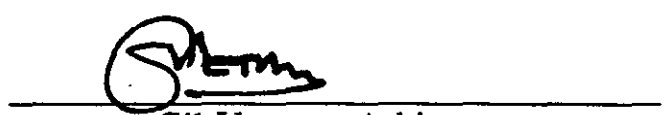
The evidence simply leaves the Arbitrator short of the comfort level necessary to impose a reduced contribution on the unrepresented employees. The Arbitrator is aware of the morale problems that can result when a police professional is faced with a glaring deficiency in a benefit as a fundamental as meaningful disability protection and favorable retirement eligibility. However, this case, because of the unique WRS rules, is about more than comparative working conditions and benefits. The interest of many other employees are at stake and not enough information is known about them and the local plan to say that unconditionally and with reasonable certainty WRS is good for them too. It should also be noted WRS is not without additional impact on the Employer since eligibility is lowered to 600 hours from 1,000, increasing their cost exposure.

The Arbitrator is mindful, too, that awarding the Employer's offer gives the Union the opportunity to bargain the issue again in a few months. These kinds of situations, particularly since the local plan was bargained in the first instance, are best resolved by negotiations. The Arbitrator would have to give greater weight to the Union argument had they been unsuccessful over the course of several bargains, thus suggesting that the Employer was merely being stubborn. An imposed change should be, under these most unique circumstances, a last resort. A new round of bargaining will give the police employees the opportunity to solicit support of non-police employees and even

the public for the switch to WRS. This support will lend credence to their bargaining goal. They also have the alternative of a legislative remedy to the WRS rule lumping protective services with general employees. They also have the alternative of making improvements to the existing plan or adding disability insurance if some consensus doesn't arise with respect to WRS. In the process the Employer, too, must appreciate that protective services do have special needs, and that if these needs aren't met, the forces of low morale and the availability of other police jobs in the regional labor market may cause the loss of experienced officers. The Employer also must realize that an arbitral solution is available if evidence of the benefits of WRS for non-police employees become clearer or if they fail in the future to address the special needs of its police employees in some significant and meaningful way.

AWARD

The final offer of the Employer is selected.



Gil Vernon, Arbitrator

Dated this 23rd day of October 1996