ARBITRATION OPINION AND AWARD

OCT 23 1997
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of Arbitration<br><br>Between<br><br>WAUKESHA COUNTY<br><br>And<br><br>WISCONSIN PROFESSIONAL POLICE ASSOCIATION - LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION | Case 145<br>No. 53922<br>MIA-2060<br>Decision No. 29000-A |

Impartial Arbitrator

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Hearing Held

Waukesha, Wisconsin
June 25, 1997

Appearances

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BACKGROUND OF THE CASE

This is a statutory interest arbitration proceeding between Waukesha County (Sheriff's Department) and the Wisconsin Professional Police Association Law Enforcement Employee Relations Division, with the matter in dispute the terms of a two year, renewal labor agreement covering calendar years 1996 and 1997.

After the parties preliminary negotiations had failed to result in a complete settlement on the terms of the renewal agreement, the Union on March 11, 1996, filed a petition with The Wisconsin Employment Relations Commission requesting the initiation of final and binding arbitration, pursuant to Section 111.77 of the Municipal Employment Relations Act. After the completion of a preliminary investigation by a member of its staff, the Commission on February 5, 1997, issued certain findings of fact, conclusions of law, certification of the results of investigation, and an order requiring arbitration; following the selection of the parties, the Commission on February 19, 1997, appointed the undersigned to hear and decide the dispute.

A hearing took place in Waukesha, Wisconsin, on June 25, 1997, at which time both parties received full opportunities to present evidence and argument in support of their respective positions. Both parties then closed with the submission of post hearing briefs, and the record was closed by the Arbitrator effective August 22, 1997.

On September 9, 1997, a letter on behalf of the Employer alleged that the deadline for filing post-hearing briefs had been August 6, 1997, noted that the Union's brief had been filed on August 15, 1997, and urged that *it be stricken* by the Arbitrator. On September 10, 1997, a letter from the Union referenced a possible misunderstanding with respect to the deadline for filing

briefs, apologized for any delay, and requested that its brief not be stricken from the record.

THE FINAL OFFERS OF THE PARTIES

The certified final offers of the parties, hereby incorporated by reference into this decision and award, provide in summary as follows:

(1) The Employer's offer includes the following: 3% across the board wage increases effective December 30, 1995 and December 28, 1996; and increases in the employee mileage allowance for the use of personal vehicles to 29¢ per mile in 1996, and to 30¢ per mile in 1997.

(2) The Association's final offers includes the following: wage increases of 25¢ per hour effective January 1, 1996 and January 1, 1997; 3.5% across the board wage increases effective July 1, 1996 and July 1, 1997; changes in Article VII, Section 7.03, to provide for payment for training outside of normally scheduled work days at time and one-half, and for pay for voluntary training for three or more hours at straight time; and for employee mileage reimbursement for the use of personal vehicles to be paid at the allowable rate established by the Internal Revenue Service.

THE ARBITRAL CRITERIA

Section 111.77(6) of the Wisconsin Statutes provides that the Arbitrator shall give weight to the following arbitral criteria in reaching a decision and rendering an award in these proceedings:

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.

POSITION OF THE EMPLOYER

In support of the contention that its final offer is the more appropriate of the two offers before the Arbitrator, the County emphasized the following principal considerations and arguments.

(1) That the *issues in dispute* may generally be described and characterized as follows.

(a) That the primary issue between the parties is contained in the two *final wage offers*, including the costs and the lifts associated therewith; that the two remaining issues relate to Association proposed changes in the status quo in the areas of *training pay* and *mileage reimbursement*.

(b) That Section 7.03 of the prior agreement provided *pay for training time* at straight time if the training was three hours or more, and at time and one-half if the training was less than three hours.

That the Association proposes a new and unexplained concept of paying time and one-half for mandated training time outside of normally scheduled work days, and straight time for "voluntary" training scheduled for three hours or more; that it has provided no justification or explanation for the proposal, it does not define what is meant by "voluntary" or "mandated," and it has not indicated how "voluntary" overtime of less than three hours is to be paid.

(c) That previous contracts have always provided for *employee mileage reimbursement* at specified cents per mile, the same procedure used for all other County employees. That the Association urges a new and unexplained change by proposing, in ambiguous terms, to "Reimburse for use of own automobile at current IRS rate as allowed."

That the County proposes two increases in mileage reimbursement, from 25¢ in 1995 to 29¢ per mile in 1996, and to 30¢ per mile in 1997; that significant principles are involved, in that the County uniformly reimburses all employees for the use of personal vehicles at its proposed amounts.

(d) That the Association has offered no explanations and no quid pro quo for its proposed changes in the status quo.

(2) That various background facts are relevant in evaluating the positions of the parties, which facts have not been summarized here by the Arbitrator due to their selective discussion, as necessary, in the *findings and conclusions section* of this decision.

(3) That the County Offer is more appropriate when the statutory factors are applied to the facts.

(a) That interest arbitrators closely consider both internal and external comparables in the final offer selection process.

(b) That Waukesha County has consistently worked to maintain *internal consistency* and to provide *uniform across the board percentage wage increases to its employees.*

(i) That such internal consistency is reflected in *uniform percentage wage settlements* over a period of at least ten years.

(ii) That in 1996 and 1997 three of six settled units agreed upon 3% wage increases in each of the two years, and the same across the board percentage increases were applied to the County's 400 non-represented employees.

(c) That the Employer's final offer for 1996 and 1997, puts the County exactly in the middle of the external comparables, with Racine, Walworth and Ozaukee counties ahead and Washington, Jefferson and Dodge counties behind Waukesha County.

(i) That the County's offer will keep its Deputy Sheriff's above the average of the comparable counties for 1996 and 1997.[1]

(ii) That the Association's offer would put the Deputy Sheriff's $.38 per hour above the external comparables for 1996, and the Deputy II at $.78 above the comparables for 1997; that such figures are considerably higher than the differentials in 1995.

(iii) That if the Association urges that Ozaukee County moved ahead of Waukesha County in 1995, 1996 and 1997, the evidence shows its officers received larger wage increases in consideration of their larger

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[1] Citing the contents of Employer Exhibit #11.

health insurance contributions.[2] That in 1997 Ozaukee officers paid $56.32 per month for family health insurance, versus a $28.07 per month contribution level in Waukesha County.[3]

(d) That arbitral consideration of the cost differential between the two final offers favors selection of the final offer of the County. That if the Association's final offer were selected rather than the County's, it would cost between $90,000 and $105,670 more during the two year contract term, with the higher of the two figures attributed to and determined by the Association.[4]

(e) That arbitral consideration of the total lift differential between the two offers favors selection of the final offer of the County.

(i) That the final offer of the County develops a lift of 6.11% over the two year agreement.

(ii) That the final offer of the Association develops a total lift of 9.7% over the two year agreement, or 3.59% higher than proposed by the County; that the differential between the two lifts is $.61 per hour or $1,269 per employee per year.

(iii) That if the Union offer were accepted, the County would be sitting down for contract renewal bargaining later this year and looking at a built-in lift of 3.59% for 1998, or a total of $163,701 per year before bargaining even started. That the total lift proposed by the Association would create a larger 1998 wage increase than received by other units for an inducement to agree to three year agreements, and such a lift is justified by neither evidence in the record nor any potential arguments.

(iv) That the County's wage offer would generate increases of $1.08 per hour for Deputy IIs, in addition to the fact that 29 such deputies (38%) would be eligible for merit increases; that such merit increases in 1997 averaged 1.27% for the eligible group.[5]

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[2] Citing *the testimony of Mr. Richter* at Hearing Transcript, pages 77-78, wherein he explained that Ozaukee officers had gone from a 5% health care contribution to 8¼% in 1996, and to 10% in 1997, while Waukesha County Deputies had continued at a 5% contribution level.

[3] See the contents of Employer Exhibit #10.

[4] Citing the contents of Association Exhibit #62.

[5] Citing the contents of Employer Exhibit #5.

(4) That the final offer of the County is favored on the training/overtime issue.

(a) That the Association at no time, in bargaining or at arbitration, either explained the intended difference between *mandated training* and *voluntary training*, or explained why its proposed change in language would be appropriate.

(b) That the Association's proposal creates ambiguity which could require grievances/arbitration to determine its meaning.

(c) That the Association offered no comparisons in support of its proposed change in language, and it offered no reason to change the status quo which has existed since at least 1980-1981.[6]

(d) That the County offered testimony as to the need for professional training and orientation for officers, indicated that it is less disruptive and more effective to offer such training in short increments, often prior to or immediately after work shifts, and notes that such training time is already paid for at time and one-half.[7]

(e) That the Association offered exhibits to show that the County had erroneously overpaid officers for certain training time in the past, and that such error had been corrected; that such a clerical error in connection with a payroll change does not justify the proposed change in overtime pay for training activities.[8]

(f) That testimony confirmed that the County carefully tracks all hours worked to ensure full compliance with the requirements of the Fair Labor Standards Act.

(g) That the Association has offered no evidence relating to economic value, or to need or other support for the proposed change, and has offered no quid pro quo for such a change in the status quo.

(5) That the final offer of the County is favored on the mileage reimbursement issue.

(a) That County's offer to continue mileage reimbursement on a specified cents per mile basis is more reasonable than the

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[6] Citing *the testimony of Mr. Richter* at Hearing Transcript, page 86.

[7] Citing *the testimony of Mr. Richter* at Hearing Transcript, page 88.

[8] Citing the contents of Association Exhibits 63-68.

Association's final offer requesting reimbursement at the "current IRS rate allowed."

(b) That the current IRS rate for 1997 is $.315 cents per mile, while the County has offered $.29 cents per mile for 1996, $.30 cents per mile for 1977, and has offered $.32 per mile for its 1998 contract, which is more than the current IRS rate.

(c) That the Association has offered no exhibits focusing on mileage, and that comparable county contracts provide mileage reimbursement on cents per hour bases and none utilizes the IRS mileage rate.[9]

(d) That the County has always reimbursed mileage on a specified cents per hour basis, that it has always negotiated increases rather than basing them on an outside factor, and that other bargaining units which use employees cars more frequently have already settled on the bases described in (b) above.[10]

(6) That the Union proffered evidence does not support the selection of its final offer.

(a) That the Union exhibits and arguments are, to a considerable extent, based upon irrelevant data and time frames, and the use of comparables which have not previously been utilized or agreed upon by the parties.

(b) That in the parties' most recent interest arbitration involving a wage dispute in the bargaining unit, they agreed that Milwaukee County was not a comparable, the remaining six counties contiguous with Waukesha County, Washington, Racine, Ozaukee, Dodge, Jefferson and Walworth counties, have been or are now agreed to be comparables, and neither Dane, Rock nor Kenosha counties either have been used or agreed upon as comparables.

(c) That Association Exhibits 7, 8, 9, 10, 12, 14, 15, 18 and 19, addressing such factors as population comparisons, numbers of full time law enforcement personnel, percentages of clearance rates for violent offenses, comparisons of property offenses, unemployment rates and contract durations are irrelevant to the dispute at hand.

(d) That Association Exhibits 21-30 contain comparisons which utilize comparable and non-comparable communities, and also

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[9] Citing the testimony of Mr. Richter at Hearing Transcript, page 94.

[10] Citing *the testimony of Mr. Richter* at Hearing Transcript, pages 90-91, 93-94.

refer to time periods which go back beyond any relevant period.

(e) That the relevant base period for wage comparison purposes is 1995, the last year of the parties' prior agreement; that this agreement was voluntarily bargained by the parties, and it gives a rational basis for the assessment of the current final offers of the parties.

(f) That in 1995 the County was above the average pay of comparable counties, and its final offer would keep it above that average in 1996 and 1997; that even Association Exhibits 26, 27, 28 and 29, which use a number of non comparable counties, place Waukesha County's top deputy at $27.77 above the comparable average in 1995, $29.50 above the average in 1996, and $128.15 above the average in 1997.

(g) That in Association Exhibit #30, the Association manipulates the comparables by removing three lower paying counties and adding Milwaukee County, but even this is insufficient to render the County's pay below average.

(h) That the Association has understated the impact of its proposed lifts by presenting them year-by- year, rather than calculating them over the term of the new contract; that Employer Exhibit #13 correctly shows the County proposed package lift to be 6.11% versus the Association proposed lift of 9.70%.

(i) That Association Exhibits 31 and 33 show its proposed 1996 lift of 4.7%, higher than any other county, and its proposed 1997 lift of 4.64%, higher than all but Ozaukee County, which was affected by its negotiated insurance cost shifting agreement; that when the lifts for both years are added together, the two year figure is higher than any other County.

(j) That the differences in total lift between the final offers of the Association and the County can be stated as over 3.5%, $.61 per hour, $1,269 per employee, and/or $163,701 in 1998, and every year thereafter.

(k) That various Association exhibits containing unrelated fringe benefits comparisons, are irrelevant to these proceedings.

(7) That analysis of the Statutory criteria supports arbitral selection of the final offer of the County.

(a) The lawful authority of the County is not in issue in these proceedings.

(b) That the stipulations of the parties are in the record, and they mutually agreed to their incorporation into the final award.

(c) That the interests and welfare of the public criterion favors the selection of the final offer of the County, in that there are sufficient applicants for any bargaining unit jobs, there is no evidence of problems in the Department which would adversely affect the public, and the Association's offer, if accepted, would create significant and unnecessary taxpayer costs which are adverse to the interests of the public.

(d) That the comparison criteria favor the selection of the final offer of the County.

(e) That the cost of living criterion favors the selection of the final offer of the County.

(f) That the overall level of compensation criterion favors the selection of the final offer of the County.

(g) That the changes in circumstances during the pendency of the arbitration criterion favors the selection of the final offer of the County.

In summary and conclusion that the final offer of the County should be selected on the basis of the following principal considerations.

POSITION OF THE ASSOCIATION

In support of the position that its final offer is the more appropriate of the two before the Arbitrator, the Association emphasized the following principal arguments and considerations.

(1) That Section 111.77(6) of the Wisconsin Statutes sets forth the arbitral criteria to be used in selecting the more appropriate final offer, each of which will be addressed by the Association.

(2) That the lawful authority of the Employer is not in issue in these proceedings; neither the arguments nor the evidence advanced by either party has alleged the existence of any legal deficiencies and, accordingly, that this criterion should have no effect upon the final offer selection process by the Arbitrator.

(3) That the stipulations of the parties criterion is not in issue in these proceedings, in that the parties have reached full agreement on all issues except those contained in their respective final offers.

(a) That most of the tentative agreements between the parties are "housekeeping" items and should have little effect upon the final offer selection process.

(b) That the only settled issue that could have an impact upon package costs is the uniform allowance, which costs have been incorporated into the Association costing and comparison exhibits.

(4) That the <u>interests and welfare of the public</u> will best be served by selection of the final offer of the Association.

(a) That the Association's final offer best serves the citizens of Waukesha County by recognizing the need to maintain the morale of its officers and to retain the best and the most qualified officers.

(b) In the above connection, that overall working conditions must be both desirable and reasonable, and that such conditions include tangibles such as fair salary and fringe benefits and steady work, and such intangibles as morale and unit pride.

(c) That comparisons with law enforcement officers employed within Waukesha County to other officers employed by similar departments is important in this area, as well as within the discussion of appropriate comparables later in this brief.[11]

(d) That the above referenced intangibles are magnified when one recognizes the unique circumstances under which law enforcement officers must function, and the distinction between such officers and other municipal employees.[12]

(e) That the major issue in these proceedings is wages, with the Association proposing split increases, with fixed increases the first of each year and percentage adjustments each mid-year; that this proposal directs funds more equally across the scale, while minimizing costs to the Employer.

(f) That acceptance of the Employer's final offer would provide County Deputies with the second lowest increases of the settled law enforcement units, with only the Kenosha County

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[11] Citing the following excerpt from Elkouri, Frank and Edna Asper Elkouri, <u>How Arbitration Works</u>, Bureau of National Affairs, Third Edition - 1973 , pages 750-751: "In many cases strong reason exists for using the prevailing practice of the same class of employers within the locality or area for the comparison. Employees are sure to compare their lot with that of other employees doing similar work in the area; it is important that no sense of grievance be thereby created." (footnote omitted)

[12] Citing the contents of <u>Association Exhibits 10-17</u>, depicting the types of issues that law enforcement personnel are required to address.

wage freeze keeping its proposed increase out of the basement.

(g) That morale and unit pride would be negatively affected by adoption of the County's final offer, that the interests and welfare of the public would be similarly affected, and, accordingly, that the Association's wage offer is the more reasonable of the two final offers in issue.

(5) That there is no dispute that the County has the financial ability to meet the costs of the final offer of the Association and, accordingly, that this criterion should not be a factor in the final offer selection process.

(6) That a comparison of wages paid employees represented by the Association, with the wages of other employees in public employment performing similar services in comparable communities, strongly favors arbitral selection of the final offer of the Association.

(a) That the comparability group urged by the Association is preferable to that urged by the Employer.

(b) That a review of the past decisions involving the parties shows that they have consistently disagreed on the comparison pool, and pursuant to which the Association has excluded comparisons with municipalities within the County.[13]

(c) That Wisconsin interest arbitrators have recognized the comparability of municipalities when they are substantially equal in such areas as population, geographic proximity, mean income of employed persons, overall municipal budget, total complement of relevant department personnel, and wages and fringe benefits paid such personnel.[14]

(d) That the Association has applied the factors referenced immediately above in establishing appropriate comparables,[15] and these comparables should be deemed more appropriate by the Arbitrator, and utilized in the final offer selection process.

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[13] Citing the following arbitral decisions: *the decision of Arbitrator Mueller* in Waukesha County, Case 78, No. 32566, MIA-831 (12/85), wherein he utilized larger municipalities within Waukesha County on issue by issue bases; and *the decision of Arbitrator Krinsky* in Waukesha County, Case 115, No. 43399, MIA-1494 (12/90), wherein he excluded county municipalities and suggested that the County should be compared to other Counties;

[14] Citing *the decision of Arbitrator Raskin* in City of Cudahy, Case XVIII, No. 20070, MIA-219 (7/76).

[15] Citing the contents of Association Exhibits 7-19.

(7) That the final wage offer of the Association is supported by consideration of the appropriate external comparables.

(a) That a six year history of the base monthly wages of top patrol officers places Waukesha County in fifth place overall in each year.[16]

(b) That selection of the Employer's final wage offer would retain Waukesha County officers at fifth place for both 1996 and 1997, while selection of the Association's final wage offer would move them to third place in 1996 and fourth place in 1997.

(c) That the Association does not attempt to get top pay in these proceedings, but only to prevent further backward movement in wages; that the Employer simply cannot justify that base wages should not step backwards.

(d) That the Kenosha County agreement, which provides for the lowest wage adjustment of any of the external comparables, was based upon a three year agreement, with a six percent adjustment in the first year and a two year wage freeze, and it also provided for certain other benefits increases.

(e) On the above described bases, that the final wage offer of the Association must be viewed as the most reasonable of the two final offers, and it should be selected by the Arbitrator in these proceedings.

(8) That each of the parties has submitted final offers relating to mileage reimbursement, with the Association proposing the use of IRS rates and the County proposing specific listed cents per mile. That the selection of either offer will have a minimum impact, relative to the other offer, that the offer of the Association will merely simplify this area of the agreement, and that this issue simply should not be determinative in these proceedings.

(9) That the Association has proposed a modest change to the training pay section of the agreement, which would more logically provide for the compensation of training time.

(a) That the current agreement provides for training scheduled for three hours or more to be compensated at regular straight time rates; the Association proposes for mandated training outside of the normally scheduled work day to be paid at time and one-half, and for voluntary training for three or more hours to be compensated at regular straight time wage rates.

(b) That the Association's proposal only applies to training that an employee is required to attend, it only applies to

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[16] Citing the contents of Association Exhibits 21-28.

hours outside of an Officer's regular hours of work, and it merely provides a fair method of compensation for training.

(10) That the internal comparables submitted by the Employer should not be considered the primary comparables in these proceedings.

(a) That while arbitrators have given some weight to internal wage comparisons, recent arbitral opinion and the present fact situation indicate that they should receive limited weight in these proceedings.

(b) That various Wisconsin interest arbitrators have indicated that uniform bargaining may not be in the best interests of parties, and that law enforcement personnel should properly be removed from internal comparisons.[17]

(c) That while the record suggests that the Employer has followed a uniform wage bargaining policy for other represented units, such internal comparisons have not been controlling within this bargaining unit in the past.

(d) That Employer coverage of increased retirement costs for other employees should not be given significant weight in arbitral consideration of the internal comparables in these proceedings.[18]

(11) That arbitral consideration of the cost of living criterion favors the selection of the final offer of the Association.

(a) That cost of living can appropriately be considered by application of the comparison criterion, because this factor already reflects a reasonable indication of the weight that should be placed upon cost of living in the final offer selection process.[19]

(b) That the final offer of the Association more closely conforms to 1996 cost of living increases, and while its 1997 wage proposal exceeds most recent CPI data by approximately three-quarters of one percent, the Employer offer falls below the such CPI increases.

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[17] Citing the following arbitral decisions: *the decision of Arbitrator Bellman* in Waushara County (Health Department), Decision No. 26111-A (3/91); *the decision of Arbitrator Fleischli* in Portage County (Sheriff's Department), Case 73, No. 41434, MIA-1366 ((/89).

[18] Citing the contents of Association Exhibits 48-51.

[19] Citing *the decision of Arbitrator Kerkman* in Merrill Area Education Association, Decision No. 17955-Ah (8/81).

(c) That the COL criterion, when applied on the basis of both CPI levels and external wage settlements, favors the selection of the final offer of the Association in these proceedings.

(12) That arbitral consideration of the overall level of compensation criterion favors the selection of its final offer in these proceedings.

(a) That only the Association has provided data on benefits other than those addressed in the final offers, and this data shows Waukesha County benefits to be at or near the bottom on such comparisons.

(b) That nothing in the record relating this criterion indicates the final offer of the Association is unreasonable.

In summary, that the Association has applied the various statutory criteria to the final offers, and has shown its offer to be more reasonable than that of the Employer; accordingly, that the final wage offer of the Association should be selected by the Arbitrator.

FINDINGS AND CONCLUSIONS

The parties primarily disagree relative to the wage increases to be implemented during the term of the renewal agreement, but they also remain at impasse on two other items: *first*, the amounts to be paid and the method used to determine mileage allowances for the use of employee personal vehicles; and, *second*, Association proposed changes in the payment of straight time/overtime for certain training time. In arguing their positions, they disagreed in various respects relative to the application of the statutory arbitral criteria, particularly the *weight to be placed upon internal versus external comparisons*, the *makeup of the primary external comparison pool*, the *base period to be used in the analysis of their wage offers*, and the *significance of the union proposed changes in the status quo ante*. These considerations will first be addressed by the undersigned in conjunction with preliminary observations relating to the *nature of the interest arbitration process*, after which the various *components of the two final offers of the*

*parties* will be considered against the statutory criteria, and the more appropriate of the two final offers will be selected and ordered implemented by the Arbitrator.

The Nature of the Interest Arbitration Process

As emphasized by the undersigned in many prior proceedings, an interest arbitrator operates as an extension of the parties' collective bargaining process and normally attempts to put the parties into the same position they would have occupied but for their inability to reach complete agreement at the bargaining table. In doing so, the arbitrator will normally closely review the parties' *past practices*, their *prior agreements*, and their *negotiations history* in applying the other statutory criteria. This principle is very well discussed and described in the following excerpt from the widely respected and authoritative book by Elkouri and Elkouri:

> "In a similar sense, the function of the interest arbitrator is to supplement the collective bargaining process by doing the bargaining for both parties after they have failed to reach agreement through their own bargaining efforts. Possibly the responsibility of the arbitrator is best understood when viewed in that light. This responsibility and the attitude of humility that appropriately accompanies it have been described by one arbitration board speaking through its chairman, Whitley P. McCoy:
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> > 'Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon consideration of policy, fairness, and expediency, of what the contract rights ought to be. In submitting their case to arbitration, the parties have merely extended their negotiations - they have left to this Board to determine what they should in negotiations, have agreed upon. We take it that the fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men have agreed to? ... To repeat, our endeavor will be to decide the issues, as upon their evidence, we think reasonable negotiators, regardless of their social or economic theories might have decided them in the give and take of bargaining..."[20]

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[20] Elkouri, Frank and Edna Asper Elkouri, How Arbitration Works, Bureau of National Affairs, Fourth Edition - 1985, pp. 104-105. (footnotes omitted)

In attempting to put the parties into the same position they might have reached at the bargaining table, it is clear that interest arbitrators should not lightly modify or set aside language or benefits previously agreed upon by the parties. When faced with demands for significant change in the negotiated status que ante, therefore, Wisconsin interest arbitrators have normally required the proponent of change to establish *a very persuasive basis for such proposal,* by showing that *a legitimate problems exists which requires attention,* that *the proposed change reasonably addresses the problem,* and that *the proposed change is accompanied by an appropriate quid pro quo.*

In the absence of definitive legislative prioritization of the statutory criteria, it is widely recognized by interest arbitrators that *comparisons* are normally the most frequently cited, the most important, and the most persuasive of the various arbitral criteria, and that the most persuasive of these are normally the so-called *intraindustry comparisons,* which principles are very well addressed in the respected book by Irving Bernstein:

> "a. Intraindustry Comparisons. The intraindustry comparison is more commonly cited than any other form of comparison, or, for that matter, any other criterion. Most important, the weight that it receives is clearly preeminent; it leads by a wide margin in the first rankings of arbitrators. Hence there is no risk in concluding that it is of paramount importance among the wage-determining standards...."[21]

In the case at hand the parties disagree relative to *the makeup of the primary intraindustry comparison group*, with the Employer urging a group consisting of Dodge, Jefferson, Walworth, Racine, Ozaukee and Washington Counties (i.e., the six counties contiguous to Waukesha County, with the single exception of Milwaukee County), and the Union urging the addition to the group of Milwaukee, Rock, Kenosha and Dane counties. Where the parties' bargaining history indicates that they have previously utilized a particular

[21] Bernstein, Irving, The Arbitration of Wages, University of California Press (Berkeley and Los Angeles), 1954, pg. 56.

external comparison group, an arbitrator will be very reluctant to abandon, to modify, or to otherwise vary either the composition of the group or the weight historically placed upon such comparison(s). This principle is described as follows by Bernstein:

> "This, once again, suggests the force of wage history. Arbitrators are normally under pressure to comply with a standard of comparison evolved by the parties and practiced for years in the face of an effort to remove or to create a differential.....
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> * * * * *
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> The last of the factors related to the work is wage history. Judged by the behavior of arbitrators, it is the most significant consideration in administering the intraindustry comparison, since the past wage relationship is commonly used to test the validity of other qualifi-cations. The logic of this position is clear: the ultimate purpose of the arbitrator is to fix wages, not to define the industry, change the method of wage payment and so on. If he discovers that the parties have historically based wage changes on just this kind of comparison, there is virtually nothing to dissuade him from doing so again..."[22]

The weight and the importance of bargaining history in arbitral selection and utilization of comparisons, is also briefly addressed as follows by the Elkouris:

> "Where each of the various comparisons had some validity, an arbitrator concluded that he should give the greatest weight to those comparisons which the parties themselves had considered significant in free collective bargaining, especially in the recent past."[23]

In applying the above considerations to the case at hand, the Arbitrator notes that the Employer is urging use of the same external intraindustry comparison group utilized by the parties in their prior negotiations and interest arbitration proceedings, which established the terms of their 1990-1991 renewal labor agreement.[24] While certain of the evidence presented by

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[22] The Arbitration of Wages, pp. 63, 66.

[23] How Arbitration Works, pg. 811.

[24] In his December 5, 1990 decision and award in Waukesha County -and- WPPA, LEER Division, Case 115, No. 43399, MIA-1494, at page 3, Arbitrator

the Association might be material and relevant if the undersigned were required to establish the appropriate external intraindustry comparison group, there is simply nothing in the record sufficient to support arbitral modification of the parties' previously established and utilized external comparison group; accordingly, the undersigned has preliminarily concluded that the primary intraindustry comparison group in these proceedings should continue to consist of Racine, Walworth, Ozaukee, Washington, Jefferson and Dodge counties.

What next of *the appropriate base period* to utilize in evaluating the parties arguments relating to the comparison and the cost of living criteria? In this connection it is noted that interest arbitrators normally refuse to go beyond the parties' most recent prior trip to the bargaining table in considering various types of evidence, particularly *cost-of-living data.* The obvious rationale for this principle is arbitral reluctance to reopen or to relitigate the parties' prior negotiations or interest arbitrations, which is summarized as follows by Bernstein:

> "Base period manipulation...presents grave hazards. Arbitrators have guarded themselves against these risks by working out a quite generally accepted rule: the base for computing cost-of-living adjustments shall be the effective date of the last contract (that is, the expiration date of the second last agreement). The justification here is identical with that taken by arbitrators in the case of a reopening clause, namely, the presumption that the most recent negotiations disposed of all the factors of wage determination. 'To go beyond such a date,' a transit board has noted, 'would of necessity require a relitigation of every preceding arbitration between the parties and a reexamination of every preceding bargain between them.' This presumption appears to be made even in the absence of evidence that the parties explicitly disposed of cost-of-living in their negotiations. Where the legislative history

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Edward B. Krinsky cited the agreement of the parties, and he utilized the six contiguous counties of Jefferson, Walworth, Ozaukee, Dodge, Racine and Washington as comprising the primary external intraindustry comparison group.

demonstrates that this issue was considered, the holding becomes so much the stronger."[25]

On the basis of the above, and as urged by the Employer, the undersigned has preliminarily noted that the base period for arbitral consideration of the cost of living criteria in these proceedings would normally be the beginning of the prior agreement which expired on December 31, 1995; since the parties have presented no definitive COL data prior to the beginning of calendar year 1995, however, this will be used as the base period for cost of living purposes in these proceedings. The most persuasive base period for applying the wage comparison criteria will also be 1995, the last year in which the parties' previously negotiated wage rates were applicable.

The Wage Increase Impasse

What next of the wage impasse of the parties, wherein the Employer urges 3% increases on December 30, 1995 and December 28, 1996, and the Union urges 25¢ per hour increases on January 1, 1996 and January 1, 1997, and 3.5% wage increases effective July 1, 1996 and July 1, 1997?

In applying the intraindustry comparison criteria within the appropriate intraindustry comparison group and with 1995 as the base year, the Arbitrator experienced some difficulty in reconciling the figures supplied by the parties, due to what appears to be differences in the numbers of regularly scheduled hours in some of the departments.

(1) *The County utilized Top Deputy hourly wage rates* for comparison purposes, which indicate as follows:

(a) That Waukesha Deputies had been ranked fourth among the comparables in 1995, when their hourly wage rate of $17.80 had been 17¢ per hour above the average of the comparables.

(b) That *under the County's wage proposal*, the Waukesha Deputies would retain their fourth ranking in 1996 and 1997, and

[25] The Arbitration of Wages, pg. 75. (included citation: Public Service Coordinated Transport and Amalgamated Street Railway Employees, 11 LA 1050)

would go to 7¢ per hour above the comparables in 1996, and to 16¢ above the comparables in 1997.

(c) That *under the Association's wage proposal*, the Waukesha Deputies would be ranked third among the comparables in 1996 and 1997, and would go to 38¢ per hour above the comparables in 1996, and to 78¢ per hour above the comparables in 1997.[26]

(2) *The Association utilized Top Deputy bi-weekly wage rates* for comparison purposes, which indicate as follows:

(a) That Waukesha Deputies had been ranked fourth among comparables in 1995, at an average bi-weekly rage rate of $1423.74, which was $44.34 above the average for the comparables.

(b) That *the County's final offer* would move the Top Deputy wage rate to $1,466.45 in 1996 and to $1,510.44 in 1997, would retain its fourth ranking among the primary external comparables in both years, but it would move to $44.70 above the average comparables in 1996, and to $37.29 above the average comparables in 1997.

(c) That *the Association's final offer* would move the Top Deputy wage rate to $1,490.71 in 1996 and to $1,559.86 in 1997, would rank second in 1996 and third in 1997, and would move $68.96 above the average comparables in 1996, and to $86.71 above the average comparables in 1997.[27]

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[26] The data was contained in Employer Exhibit #11.

[27] The referenced data was extracted from Association Exhibits #26, #27 and #28, and applied within the seven county primary intraindustry comparison group, with the following results:

(a) The Top Deputy base rate comparisons negotiated by the parties for 1995 were as follows:

| | Department | Bi-Weekly Base |
|---|---|---|
| 1. | Racine County | $1,507.01 |
| 2. | Ozaukee County | $1,436.01 |
| 3. | Walworth County | $1,426.47 |
| 4. | Waukesha County | $1,423.74 |
| 5. | Washington County | $1,391.20 |
| 6. | Dodge County | $1,236.00 |
| 7. | Jefferson County | $1,235.38 |
| | Average | $1,379.40 |

Despite the arbitral difficulties in fully reconciling the bi-weekly and the hourly wages submitted by the parties for comparison purposes, it is quite clear that the Employer's final offer falls somewhat below the primary intraindustry comparables in 1997, and that the Association's final offer significantly exceeds these comparables in both 1996 and 1997. In light of the fact that the Employer's final offer is considerably closer to such comparables, the undersigned has preliminarily concluded that *arbitral consideration of the intraindustry comparison criterion clearly favors the final wage offer component of the Employer's final offer.*

In next applying the internal comparison criterion it is noted that there is undisputed evidence in the record indicating a high degree of consistency has yearly wage increases within the county over an extended period of time, and indicating that settlements in other bargaining units have

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(2) The appropriate bi-weekly, Top Deputy base rate comparisons for 1996 are as follows:

| | Department | Bi-weekly Base |
|---|---|---|
| 1. | Racine County | $1,559.76 |
| 2. | Ozaukee County | $1,486.27 |
| 3. | Walworth County | $1,476.68 |
| 4. | Washington County | $1,439.89 |
| 5. | Dodge County | $1,286.10 |
| 6. | Jefferson County | $1,281.80 |
| | Average | **$1,421.75 (average increase = $49.74)** |

(3) The appropriate bi-weekly, Top Deputy rate comparisons for 1997 are as follows:

| | Department | Bi-weekly Base |
|---|---|---|
| 1. | Racine County | $1,606.55 |
| 2. | Ozaukee County | $1,561.48 |
| 3. | Walworth County | $1,522.75 |
| 4. | Washington County | $1,490.29 |
| 5. | Dodge County | $1,331.11 |
| 6. | Jefferson County | $1,326.72 |
| | Average | **$1,473.15 (average increase = $51.40)** |

provided wage increases of 3% in 1996, 3% in 1997 and 3% in 1998, and that groups of non-represented employees have also received 3% increases in 1996 and 1997.[28] Without unnecessary elaboration, the undersigned must recognize that *arbitral consideration of the internal comparison criterion favors the final wage offer component of the Employer's final offer.*

In next addressing *the cost of living criterion,* the Arbitrator will reiterate the above referenced conclusion that only changes in the CPI since the beginning of 1995 are material and relevant in these proceedings. With this principle in mind, it is clear that the annual increases in the BLS Consumer Price Indexes for either the Urban Wage Earners and Clerical Workers or the All Urban Consumers were between 2.5% and 2.6% in calendar year 1995, were between 3.8% and 3.9% in calendar year 1996, and have, for the most part, dropped below 3% during 1997.[29] Although it is difficult to directly compare percentage wage or salary increases with percentage increase in the CPI, it is clear that the County proposed 3% across the board wage increases for 1996 and 1997 much more closely track the CPI data than do the 4.7% and 4.64% lifts proposed by the Association for 1996 and 1997.[30] Accordingly, and while this factor is entitled to significantly less weight during periods of relative price stability, *arbitral consideration of the cost of living criterion favors the final wage offer component of the Employer's final offer.*

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[28] In this connection, see the contents of Employer Exhibit #12, and *the testimony of Mr. Richter* at Hearing Transcript, page 62, line 4, through page 64, line 8.

[29] In this connection, see the contents of Association Exhibits #69, #70 and #71, and Employer Exhibits #6 and #7.

[30] See the data contained in Association Exhibits #31 and #33.

The Mileage Allowance and the Training Pay Impasse Items

What next of the parties' proposed changes in the mileage allowances paid for the use of employees' personal vehicles, and in the Association proposed changes in training pay? In these areas the Association proposes to move away from the use of specific mileage allowances negotiated by the parties in favor of utilizing whatever future mileage allowances are adopted by the IRS, and it proposes the changes in training pay described earlier. The Employer proposes continued use of negotiated mileage allowances, increases in such allowance for 1996 and 1997, and no change in the previously negotiated contract language governing payment for training pay.

The record involving these two impasse items is unusual in that both parties identify the wage impasse as the principal item in issue, and the Union presented little separate evidence and argument in support of these impasse items other than urging that they were of insufficient importance to be determinative in the final offer selection process in these proceedings.

Wisconsin interest arbitrators, when faced with demands for significant changes in the negotiated status quo ante, normally require the proponent of change to establish a very persuasive basis for the change, normally by demonstrating that *a legitimate problem exists which requires attention,* that *the disputed proposal or proposals reasonably address the problem,* and that *the proposed change is accompanied by an appropriate quid pro quo.* The Union, however, has failed to address these requirements in connection with either its proposed change in the determination of mileage allowances and/or in connection with its proposed changes in payment for training time, and it has also failed to support these proposals on the bases of other arbitral criteria, such as comparisons. Indeed, there is no indication in the record that the employees had been disadvantaged by the past level of reimbursement

or the past method of determining the mileage allowance, and no evidence of problems with the current method of paying employees for training time.

On the above described bases, and despite the fact that the two items are obviously less important that the parties' wage impasse, the undersigned has preliminarily concluded that the final offer of the Employer is clearly favored on the mileage allowance and the training pay impasse items.

The Interests and Welfare of the Public Criterion

In this connection, the Union submits that the interests and welfare of the public are best served by recognizing the need to maintain officer morale and to retain the best and the most qualified officers, and it argues that these interests would best be served by arbitral adoption of the wage increases urged by the Association, rather than those urged by the County. The County, on the other hand, cited the number of applicants for bargaining unit jobs, indicated the absence of any significant problems in the Department which might adversely affect the public, and urged that the Association's final offer would create unnecessary taxpayer costs which are adverse to the public interest.

In the above connections, the undersigned notes that while the financial interests of the taxpaying public are valid considerations, the necessity of maintaining qualified and capable police officers obviously also serves the public interest. There is no claim of inability to pay in the case at hand, and the evidence and the arguments of the parties are difficult to quantify and objectively use in the final offer selection process. Accordingly, the undersigned has preliminarily concluded that arbitral consideration of the interests and welfare of the public criterion does not definitively favor the position of either party in these proceedings.

The Changes in Circumstances Criteria

In this connection it is noted that the Employer's attorney, in a letter dated September 9, 1997, urged that the Association's post hearing brief had been submitted on an untimely basis, and asked that "it be stricken" from the record in these proceedings. In its letter of response dated September 10, 1997, the Association conditionally apologized if its brief had been late due to an error in its notes, and urged that its brief be considered by the Arbitrator. Section 111.77(6)(g) of the Wisconsin Statutes provides that Wisconsin interest arbitrators shall give weight to *changes in circumstances during the pendency of the arbitration proceedings*, and this general language could probably apply to and be a significant factor in situations where a delay or delays in the submission of briefs had significantly affected one or both the parties. In the case at hand, however, there is no indication of intentional delay on the part of the Association, and absolutely no indication that the interests of the Employer were adversely affected in any way.

On the above described bases, the Impartial Arbitrator has preliminarily concluded that arbitral consideration of the changes in circumstances criterion does not significantly favor the position of either party in these proceedings.

Summary of Preliminary Conclusions

As discussed in more significant detail above, the Impartial Arbitrator has reached the following summarized, principal preliminary conclusions.

(1) The primary focus of a Wisconsin interest arbitrator is *to attempt to put the parties into the same position they would have occupied but for their inability to achieve a complete settlement at the bargaining table.*

(a) When faced with demands for *significant change in the negotiated status quo ante*, Wisconsin Interest Arbitrators normally require the proponent of change to establish a *very persuasive basis for such change*, typically by showing that *a legitimate problem exists which requires attention,* that

*the disputed proposal reasonably addresses the problem,* and that *the proposed change is accompanied by an appropriate quid pro quo.*

(b) In the absence of definitive statutory prioritization of the statutory criteria, the *comparison criterion* is normally the most important and persuasive, and the so-called *intraindustry comparisons* are normally regarded as the most important of the various comparisons.

(c) In the case at hand, the *primary intraindustry comparison group* should consist of Dodge, Jefferson, Walworth, Racine, Ozaukee and Washington counties.

(d) The *base period for arbitral consideration of the comparison and the cost of living criterion* in these proceedings, should begin with calendar year 1995.

(2) In considering the *wage increase components of the final offers* of the parties, the Arbitrator has preliminarily concluded as follows.

(a) Arbitral consideration of *the intraindustry comparison criterion* clearly favors the wage component of the final offer of the Employer.

(b) Arbitral consideration if *the internal comparison criterion* clearly favors the wage component of the final offer of the Employer.

(c) Arbitral consideration of *the cost of living criterion* favors selection the wage component of the final offer of the Employer.

(d) Principally on the above described bases, *the final wage offer of the Employer is clearly favored* in these proceedings.

(3) The final offer of the Employer is clearly favored on the *mileage allowance* and on the *training pay* impasse items.

(4) Arbitral consideration of *the interests and welfare of the public criterion* does not definitively favor the position of either party in these proceedings.

(5) Arbitral consideration of *the changes in circumstances criterion* does not definitively favor the position of either party in these proceedings.

Selection of Final Offer

Based upon a careful consideration of the entire record, including a review of all of the various statutory criteria, the undersigned has

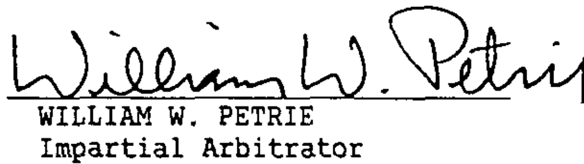
preliminarily concluded that the final offer of the County is the more appropriate of the two final offers before the Arbitrator.

AWARD

Based upon a careful consideration of all of the evidence and arguments advanced by the parties, and a review of all of the various arbitral criteria provided in Section 111.77(6) of the Wisconsin Statutes, it is the decision of the Impartial Arbitrator that:

(1) The final offer of the Employer is the more appropriate of the two offers before the Arbitrator.

(2) Accordingly, the final offer of the County of Waukesha, hereby incorporated by reference into this award, is ordered implemented by the parties.



WILLIAM W. PETRIE
Impartial Arbitrator

October 20, 1997