



STATE OF WISCONSIN
/ BEFORE THE ARBITRATOR

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| In the Matter of the Petition of | : | |
| WISCONSIN PROFESSIONAL POLICE | : | |
| ASSOCIATION/LEER DIVISION | : | |
| To Initiate Arbitration Between | : | Case 123 |
| Said Petitioner and | : | No. 54662 MIA-2095 |
| SAWYER COUNTY | : | Decision No. 29199-A |
| ----- | : | |

Appearances:

Richard T. Little and Gary Gravesen on behalf of Wisconsin Professional Police Association/LEER Division.

Weld, Riley, Prenn & Ricci, S.C., by Kathryn J. Prenn, Esq. on behalf of Sawyer County.

ARBITRATION AWARD

The Wisconsin Professional Police Association/LEER Division (WPPA, Association or Union) is the exclusive collective bargaining representative of all regular full-time and regular part-time law enforcement employees of Sawyer County (Employer) excluding the Sheriff, supervisory, confidential employees, matrons and the Chief Deputy. The parties have negotiated an agreement of all of the issues relating to the terms for a successor to their 1995-96 labor agreement, except for one issue. Being unable to resolve that issue, which relates to shift selection, the Union requested the Wisconsin Employment Relations Commission (Commission) to initiate arbitration pursuant to Sec.

111.77(3) of the Municipal Employment Relations Act. The petition was filed on November 21, 1996. On February 7, 1997, a representative of the Commission advised the Commission that the parties were at an impasse. The undersigned was named to act as arbitrator by an order of the Commission dated October 27, 1997.

After proper notice had been given to the public, the arbitration hearing was conducted at the Sawyer County Courthouse in Hayward, Wisconsin, on January 21, 1998. Both parties presented oral testimony and documentary evidence on the hearing record. That record was closed at the end of the January 21 hearing. The parties exchanged initial post-hearing briefs through the arbitrator on March 2, 1998. The Association chose not to file a reply brief. The county's response was received on March 18, 1998.

ISSUES IN DISPUTE

The parties' negotiations have resulted in agreements to revise nine sections of their prior contract. They have also agreed to add a provision to provide for reimbursing employees for certain travel expenses, and they have agreed to across-the-board wage increases of 3% for each 1997 and 1998.

The only issue in dispute is the proposal included in the Association's offer which would permit the bargaining unit members in the patrol, jail, investigative and dispatch

divisions, to select their shift for the next succeeding calendar year by seniority within each classification annually.

THE ASSOCIATION'S POSITION

The Association noted that under the system now in place, "a work shift becomes available any time a member of the bargaining unit quits, retires or is terminated. The open shift created by such event is posted. The most senior applicant for the posted position is then assigned to the position. The Association's offer would amend the parties' contract to provide for shift selection as follows:

Shift Selection by Seniority: On or before December 1st of each calendar year the Sheriff or his designee shall post available shifts in the patrol, jail, investigative and dispatch divisions for bargaining unit members to select their shifts for the next calendar year. The designated shifts shall denote both beginning and ending times.

Shift selection shall be by seniority within classification. Shifts shall be selected for the next succeeding calendar year and shall commence on the first day of January 1998. Thereafter, shift selection shall be on an annual basis.

The parties mutually agree that the Sheriff or his/her designee, may assign bargaining unit personnel to perform work in the following categories or classification; K-9 Officer, Patrol Sergeant, Tribal Deputies, Secretaries, Cook and Cook's Assistant. These classifications shall be exempt from shift selection by seniority. However, Section A, of Article 11 shall still apply as to the daily and weekly guarantee in such assignments for those classifications exempt from shift selection by seniority.

The Association reviewed the statutory factors which arbitrators are required to consider in interest arbitration proceedings. It said that because of the positions of the parties, the evidence on the record, and the nature of the issue in dispute, the majority of those factors for decision making are not relevant to the outcome of this proceeding.

The Association said that the most important comparison in this proceeding is the comparison of working conditions in Sawyer County with conditions in comparable counties. It said that the two offers in this proceeding should be compared to practices in effect in the other 14 county sheriffs' departments in northwestern Wisconsin. It said that there is no relevant historical comparable group for comparison with the Sawyer County Sheriff's Department. It said that while the selection of appropriate comparables "is generally an area of great debate ... due to the nature of the singular issue at hand, a broad comparison is most appropriate." It argued that data from all of the law enforcement departments in northwestern Wisconsin should be considered appropriate by the arbitrator in deciding this issue.

The Association said that a review of the evidence "clearly indicates that many of the departments have some form of time repetitive shift selection procedure." It said that its offer would permit employees to change their shift at the beginning of each year by seniority, "exactly as shifts have been filled in the past with the exception that employees must no longer wait

for another employee to quit, retire or be terminated." It argued that presently employees "may be required to wait years to be afforded the opportunity to work a shift that best fits the needs of the employee."

In response to evidence that there have been numerous opportunities for employees to change shifts in the past, the Union said, "there is no indication that employees are requesting to fill shifts because it best fits needs or it simply comes closer than the shift they occupied before." It said that the Association's proposal might reduce the number of employees who change shifts, because it would allow changes to occur on an annual basis. The objective "is to allow access to all shifts on a regular basis. Thus, allowing opportunity for all employees to indicate which work shift best fits their individual needs." The Association said that while the issue in this proceeding involves a non-economic proposal, "it must be noted that the agreed upon wage increases provide a cost that is below the average of the comparable departments and a lift that is equivalent to the lowest wage increase for both 1997 and 1998."

The Association argued that its offer would not result in only senior employees working during the most desirable day shift hours, because employees receive premium pay for working undesirable hours. It responded to testimony that some employees were concerned about the proposed change, by stating the Association's offer "clearly suggests that the majority of the membership has agreed that the current shift selection is in need

of modification... ." The Association said that this issue was deemed important enough to cause the impasse which had delayed the implementation of agreed upon changes, including pay increases.

The Association argued that its offer would best serve the "interests and welfare of the public." It stressed the need to maintain morale, which it argued is of equal importance with the more tangible benefits of employment. It cited Elkouri & Elkouri, "Employees are sure to compare their lot with that of other employees doing similar work in the area" It said that law enforcement officers work side by side with officers from other departments. They provide services in their own community 24 hours a day 365 days a year. Officers deal with the kinds of individuals "that most only read about in the newspaper or see on the evening news." The Association pointed to statistical data which shows Sawyer County had 24 violent offenses and 290 property offenses in 1996. It said that the issues presented by the law enforcement personnel are not found in any other kind of interest arbitration case. It said that its offer would maintain a high level of morale by providing a fair and equitable shift selection to all members of the bargaining unit.

"The Association recognized that arbitrators have given weight to internal comparables." It said recent arbitral opinion and the facts of this case dictate that internal comparability should not be given weight in this proceeding. It cited comments

by Arbitrator Bellman that the essence of separate units is to allow different employee units to define their own positions. Bellman said that placing a high value on uniformity subordinates that interest. It also cited comments by Arbitrator Fleischli that there is a sound basis for comparing law enforcement personnel with other law enforcement personnel. The Association argued that the Employer submitted evidence that it follows a uniform wage bargaining policy. It said internal bargaining units with standard 9 to 5 work schedules and weekends off, do not have to address the types of issues that are involved in this proceeding. "Accordingly, conclusions based upon internal comparisons ... can give no cause to select the Employer's final offer." The Association argued that its offer is the more reasonable and is supported by specific statutory criteria.

THE COUNTY'S POSITION

The County said that since these parties have not been involved in an arbitration proceeding in at least twenty years, it is appropriate to re-examine the appropriate comparables. It said that Ashland, Bayfield, Price, Rush and Washburn Counties, which are contiguous to Sawyer County and the City of Hayward, meet the criteria for comparability. It noted that population, geographic proximity and income levels are widely accepted criteria by most arbitrators. The County also included comparable data showing the numbers of law enforcement officers in Sawyer County and its proposed comparable counties. It said

that it did not consider Barron and Douglas Counties, which merely touch "points" of Sawyer County "because of their larger populations of 42,114 and 42,256 respectively." It said that the population of Sawyer County, 15,108, is comparable to the range of the populations of the other contiguous counties, "from 14,414 in Washburn County to 16,650 in Ashland County. Similarly, the average income in Sawyer County is consistent with the average income in the contiguous counties."

The County said that the 14 counties of Northwestern Wisconsin, which were recommended by the Union, are not comparable for a number of reasons. It said a pool of 14 counties is too large a pool to work with during future negotiations. It argued that the larger populations of St. Croix County (52,359) and Chippewa County (52,233) "negate their validity as comparables." It said that Polk, St. Croix, Dunn, Chippewa, Taylor and Iron Counties do not share Sawyer County's labor market. St. Croix County's proximity to the Twin Cities' labor market makes it one of the fastest growing counties in Wisconsin.

The County noted that the undersigned has previously said that "once a pool of external comparables has been established, the presumption of comparability will continue until facts are presented to support changing the composition of the pool." The County said that its proposed pool of comparables will be the more reasonable in this and in future disputes.

The County explained that there is no current contract language relating to the selection of work shifts. The practice is that when a job vacancy exists, "a shift is designated in the posting for the vacancy. The position, with its designated shift, is then awarded to the most senior employee who signs the posting and is qualified for the position." It noted that the Union's offer would change this practice by adding contract language that would require that work shifts be selected on a seniority basis before December 1, each year.

The County cited a series of prior arbitration decisions. In these, arbitrators had discussed the burden that a proponent of changing the terms of a collective bargaining agreement through arbitration assumes. "Arbitral authority has almost unanimously held over the years that the proponent of change has the burden of establishing the need for the change which it proposes." It cited precedent for requiring a "compelling" reason for change and for requiring the moving party to offer a quid pro quo for the change. The County cited Arbitrator Vernon's summary of the factors which have been requisite to justify arbitrators to impose changes in the terms of a contract:

... When an arbitrator is deciding whether a change in the status quo is justified, he/she is really weighing and balancing evidence on four considerations. They are: (1) if, and the degree to which, there is a demonstrated need for the change, (2) if, and the degree to which, the proposal reasonably addresses the need, (3) if, and the degree to which, there is support in the comparables, and (4) the nature of a quid pro quo, if offered. Vernon, Elkhart Lake School District, Dec. No. 26491-A (12/90).

The County said that the Union had failed to meet its burden to demonstrate the need to change the status quo. It said that the Union justified its request because, as the employees' lives and lifestyles change, they would like to be able to change their work shifts. The County argued, because a few officers desire a change does not demonstrate the need for change. It cited an observation by Arbitrator Barron. "Certainly the Association has a wish to provide the best possible wage and benefit package for its constituents, but simply put, wishing does not make it so." Barron, Boyceville Community School District, Dec. No. 27773-A (2/94).

The County said that there is little merit to "the Union's allegation that employees become 'stuck' in a shift with no opportunity to get out." It reviewed the evidence relating to one deputy, who a witness testified had been "stuck" on a shift. It pointed out that this person has only been a road deputy since June 1993. It pointed to evidence that this deputy had turned down the opportunity to go from the night shift to the 10:30 a.m. - 6:30 p.m. shift in February 1994, and he turned down the chance for a 4 a.m. - noon shift in February 1995. This deputy "filed a grievance in January 1996, alleging that he should be allowed to post into a 4 a.m. - noon shift because he had seniority over the incumbent deputy. ... The Union did not advance the grievance to arbitration." The County noted that except for this one deputy who chose not to change shifts, "all road officers have

been in their current shift three years or less." It said that this does not constitute being "stuck" in a shift.

The County said that it has a policy to help officers if they have family problems. "This assistance may include time off and/or assistance from various health care professionals." The County said that the first time this issue arose was the 1996 grievance, which is discussed above. The first time it became an issue in bargaining was during bargaining for this 1997-98 contract. Arbitrators are reluctant to change language relating to working conditions without evidence of the need for change, "particularly when there has been little bargaining over the issue." The Employer cited a series of five prior arbitration decisions in which arbitrators in Wisconsin said that language changes should be arrived at through voluntary negotiations and not through arbitration unless there are compelling reasons for imposing the change. The County said that evidence shows that the Union's proposal change is a "knee-jerk reaction" to the demands of a minority of the bargaining unit. "The Union has not defined any legitimate problem which needs correcting."

The Employer said that the proposed change would place an unreasonable burden upon the County. It noted evidence that the Chief Deputy is already required to fill approximately 1000 road deputy shifts a year due to sick days, holidays, vacation, mandatory training and special events. The Union's proposal would require additional shift changes every January when the officers change shifts. It said the same burden would be imposed

upon the Jail Administrator who schedules the jailers and dispatchers. The Employer argued that the Union's proposal would require some employees to lose some work days and other employees would have to work overtime when changes in shifts are implemented annually. Another problem with that proposal is that "a more senior, for example, 15-year road deputy can post into a jailer or dispatcher position, be in that position as little as a few months, and be able to rely on his/her seniority the following December to post into a more desirable daytime jailer or dispatcher shift held by an existing jailer or dispatcher with 14 years of seniority in the position."

The County noted that both the Sheriff and the Chief Deputy had testified that members of this bargaining unit approached them with concerns or displeasure about the proposed changes. The Sheriff said that he was concerned about maintaining harmony "within the Department when many employees expressed unhappiness over the potential of being bumped from their posted positions." The Sheriff said that he didn't think that unit members should be subjected to having their shifts changed just because "an officer's wife has a baby, or an officer goes through a divorce, etc." The County argued that the Union is proposing to change the lifestyles of "countless senior employees simply" to accommodate the lifestyle change of one senior employee. It argued that the proposed change is unreasonable "in light of the effects it will have on individual employees, as well as on the department as a whole."

exercise his/her seniority to post into a shift which better met his/her needs."

The County said that the assertion that agreed upon wage increases "provide a cost that is below average ... and a lift that is equivalent to the lowest wage increase ...," is unfounded. The County argued that its exhibits show that wage increases during this contract period "are right on target with the settlement pattern among the comparables." It said that Sawyer County wages are above average comparable wages, therefore, the 3% increase in Sawyer County wages will result in above-average increases during each year of the contract. "While the Union did not provide any wage rate data, a review of Union Exhibits (relating to 1997-98 wage increases) further demonstrates that the proposed wage rate increases for 1997 and 1998 are well within the pattern in place among the Union's expansive comparable pool."

DISCUSSION

The fact that the only remaining issue is a "non-economic" dispute has not tempered the parties' enthusiasm in this proceeding. The Association's argument that its offer would permit shift selection "exactly as shifts have been filled in the past with the exception that employees must no longer wait for another employee to quit, retire or is terminated," is not convincing. The Employer's arguments, that many of the Association's members do not support the proposed change to

annual shift selections and that the proposal is a knee jerk reaction to demands by a minority, are refuted by the fact that the bargaining unit has deferred wage and benefit adjustments in order to participate in this proceeding.

The nature of the unresolved issue distinguishes this interest arbitration proceeding from most other proceedings under sec. 111.77(3), Wis. Stats. The fact that all of the economic issues have been agreed upon and only the Association's proposal, which would effect the conditions of employment, remains, renders most of the traditional factors for decision making under the statute inapplicable. The County's argument, that the Association bears the burden of establishing the need to add a provision to the parties' collective bargaining agreement through arbitration, is correct. In view of the fact that focus is upon the Association's ability to establish the need for its proposed change, the record is void of evidence relating to most of the statutory factors which arbitrators customarily apply in analyzing interest arbitration disputes.

The Association has argued that its "final offer is supported by the comparables." The parties agree that no appropriate comparable pool has been established for this unit in prior arbitration proceedings. While it would be desirable to establish a set of external comparables to provide these parties a reference point during future negotiations, it is not necessary to make that decision in this proceeding. The Association argued that due to the nature of the issue involved in this dispute, it

is appropriate to compare its offer with practices in a wide range of other counties. It said that the 15 counties of northwestern Wisconsin, including Sawyer County, should be compared for the purpose of this proceeding. The County argued that only Ashland, Rusk, Price, Bayfield and Washburn Counties and the City of Hayward should be considered comparable to Sawyer County. These five counties are included in the group recommended by the Association. Each party presented some evidence to support its position. However, the record does not contain sufficient information to permit a comprehensive evaluation of which counties should be included in a comparable pool along with Sawyer County during future negotiations. It does not appear that the County's position will be prejudiced by considering how all of the other counties in northwestern Wisconsin resolve questions about shift selection. Since the burden to establish the need for change is placed upon the Association, the undersigned has considered data from the 15 northwestern counties in Wisconsin, and from the City of Hayward in arriving at the decision herein.

The Association said that the change to permit these officers to select their shifts by seniority would maintain morale. It inferred that it is important that officers in Sawyer County have the right to select their shifts because that is "the prevailing practice of the same class of employer within locality or the area for comparison." The Association also argued that its evidence "clearly indicates that many of the departments have

some form of time-repetitive shift selection procedure." While it can be argued that the Association produced evidence that three of the 14 counties that it chose as comparables have contract language similar to the language it has proposed, it is a stretch of the imagination to say that three of fourteen is equivalent to many. Language in two additional contracts may qualify as "time-repetitive shift selection procedure," but that language does not bear any similarity to the Association's proposed language. The Association has failed to demonstrate that shift selection practices in those Sheriffs' Departments that it considered comparable support the Association's offer.

The other argument that the Association has presented in support of annual shift selection based upon seniority is that it would allow all employees to indicate which work shift best fits their individual needs. The Association said that "the primary objective of its proposal is to allow access to all shifts on a regular basis." It is not apparent how the adoption of the Association's offer would accomplish the foregoing results. For the purpose of this discussion, we will assume that the Association's primary objective would be accomplished. The Association has not shown that permitting the employees to select shifts which best suit the employees' needs, is either necessary or in the interest of the employer. The Employer has correctly noted that arbitrators are reluctant to change language relating to working conditions without evidence of need for the change "particularly when there has been little bargaining over the

issue." The record shows that, except for the 1996 grievance, the first time that the Association pursued shift selection by seniority was during bargaining for this 1997-98 contract. That brief a period of discussion about a proposal which the Employer believes "places an unnecessary burden on the County" does not justify the imposition of this provision upon the Employer through arbitration.

Evidence shows that there are many different kinds of provisions relating to workday, workweek, staffing and shift selection contained in the bargaining agreements for the 15 County Sheriffs' Departments in Northwestern Wisconsin. Arbitral authority has long recognized that it is preferable for the parties to collective bargaining to agree upon changing conditions of employment rather than to permit either party to impose a change in working conditions through arbitration. The Association has failed to show that it has made a reasonable effort to negotiate for changes in the manner that shifts are assigned through the bargaining process. It has also failed to demonstrate why the proposed change in contract language is necessary. For the foregoing reasons, the offer of Sawyer County is found to be most reasonable. The County's offer shall be incorporated into the terms of the parties' 1997-98 collective bargaining agreement.

Dated at Madison, Wisconsin, this 25th day of March, 1998.



John C. Oestreicher
Arbitrator