

[Excerpted from . . .]

Sixth Annual WERC Public Sector Labor Relations Conference

April 29, 2010

And the Winner Is...The Year in Interest Arbitration

**Eileen A. Brownlee
Kramer & Brownlee, LLC**

. . .

SUMMARY OF 2009 INTEREST ARBITRATION AWARDS

COUNTIES

Lincoln County (Yaeger 12/2/08)

Union (Health Care)

ATB wage increases of 2% 1/1/08, 1% 7/1/08, 1.5% 1/1/09 and 1.5% 7/1/09
Add one floating holiday for a total of two

County

ATB wage increases of 2.5% 1/1/08 and 2.5% 1/1/09
On wage schedule, change top step to 25 years rather than 20 years

Award:

For the Union

1. All other bargaining units had settled for wage proposed by Union
2. All other bargaining units had 2 floating holidays

Oneida County (Brotslaw 12/13/08)

Union (Courthouse employees)

Add a call time provision
Maintain health insurance status quo for current employees and retirees

County:

No call time provision
Increase health insurance deductibles to \$1000 (single), \$1500 (single + 1) and \$2000 (family)
Establish HRA and fund deductibles in HRA accounts in the amounts of \$750 (single), \$100 (single + 1) and \$1500 (family)

Terminate/phase out post-retirement health insurance benefit program but contribute to HRA for retirees for five years after retirement (\$5000 for those retiring down to \$1000 for those retiring in 2013)

Award:

For the Union

1. Although none of the external comparables had post-retirement health insurance, the County's offer provided no quid pro quo for elimination of the benefit
2. No quid pro quo provided for health insurance change

Milwaukee County (Roberts 12/29/08)

Union (Firefighters)

2% ATB wage increase effective pay period 8 and 2% ATB wage increase effective pay period 21 in 2007

\$250 base lift 1/1/08

1% ATB wage increase effective 4/6/08, 1% ATB wage increase effective 6/29/08 and 1% ATB wage increase effective 10/5/08

Eliminate pay steps 5 and 6 effective 12/31/08

Introduction of post-employment health plan (PEHP)

Add language pertaining to meeting attendance

County

1% ATB wage increase effective 11/4/07, 1% ATB wage increase effective 4/6/08 , 1% ATB wage increase effective 6/29/08 and 1% ATB wage increase effective 10/5/08

Lump sum of \$250 to employees working 20 or more hours per week on first pay date after issuance of arbitration award

Award:

For the County

1. Both restructuring the salary schedule and establishment of the PEHP are substantial changes for which no quid pro quo was offered; only deputy sheriffs among internal comparables have a PEHP but they gave up longevity in exchange for the benefit
2. External comparables support Union wage offer but no clear support among internal comparables for either offer

Racine County (Bellman 1/25/09)

Union (Courthouse and Human Services Employees)

3% wage increase each year 2007 and 2008

County

2% wage increase each year 2007 and 2008

Change retirement health insurance from retirees paying 20% of premium when retiring with between 15-19 years of service, 10% when retiring with between 20-24 years of service and 5% when retiring with 25 years of service or more to retirees paying 20% when retiring with between 15-19 years of service and 15% when retiring with 20 years of service or more only for employees hired after 1/1/08

Award:

In favor of Union

1. Public Works award with substantially the same issues was decided in favor of Union because the wage rate did not favor either party, there was no internal settlement pattern at the time of the award and no adequate justification offered by County for change to retirement benefit
2. Public Works award established a strong internal comparable
3. The absence of a quid pro quo and the parties' history of bargaining health insurance benefits support the Union's offer
4. No compelling comparables for either wage proposal

Outagamie County (McAlpin 2/11/09)

Union (Highway Department)

Remove contract provision permitting employer to request a doctor's certificate for sick leave used before approving sick leave after an employee has used 4 days of sick leave without a doctor's excuse in a calendar year

County

Status quo

Award:

In favor of County

1. Substantial change in the agreement with no quid pro quo
2. Employer has compelling need to ensure highway workers are on the job and, when returning from leave, are able to do the job; Union showed no compelling need for change. County's unrefuted evidence showed higher sick leave payout in Highway Department
3. Change to health care plan design was addressed through wage (.12/hr) quid pro quo in 2008-10 agreement (agreement at issue)
4. Language at issue had come into the contract in the 2005-07 agreement; no change in either internal or external comparables over that time

Washington County (Honeyman 2/18/09)

Union (Sheriff's Department)

Uniform allowance of \$530 in 2008 and \$550 in 2009
.25 per hour shift differential for 2nd, 3rd and swing shifts

County

Uniform allowance of \$550 in 2008 and \$570 in 2009

Award:

In favor of County

1. Uniform allowance is a new "not insubstantial" benefit
2. No internal comparables support shift differential; external comparables show that regular wage rate is lower than County's by more than the shift differential in those counties that have a shift differential
3. Consistency in the internal settlement pattern is compelling

La Crosse County (Honeyman 6/26/09)

Union (Health Care)

ETO (Earned Time Off) instead of holidays
3% ATB 2008; 4% ATB 2009

County

5th week of vacation after 20 rather than 22 years
Sick leave pay-out rate increase from 40% to 60%
Three-tier drug plan
2% ATB 2008; 2% ATB 1/1/09; 1% ATB 7/1/09

Award:

In favor of County

1. No justification whatsoever for ETO provision; unmatched in either internal or external comparables
2. All the external and most internal comparables support three tier drug plan and change is relatively minor
3. Internal settlements uniformly support County's wage proposal; external comparables more closely aligned with County offer
4. Vacation time and sick leave pay-out small but credible quid pro quo for drug plan

Langlade County (Bielarczyk 9/9/09)

Union (Professional Employees)

3 year contract

Wage offer same as County except \$.15 ATB increase on 1/1/09

County

3 year contract

Wage offer same as Union except \$.15 increase for social workers only on 1/1/09

Insertion of word "not" in vacation and seniority accrual during worker's comp leave; correction of error

Award:

For the County

1. Internal comparables support Employer as Union's \$600 per affected employee significantly higher than other employees received
2. Union failed to put proposal on the table during bargaining, but external comparables favor Union because County lowest among comparables
3. Interest arbitration is the appropriate forum to correct the error in worker's comp language despite Union's assertion that appropriate forum was grievance forum

Kewaunee County (Petrie 8/9/09)

Union (Highway)

\$5.00/hour shift differential between 11/15 and 5/15 for hours worked between midnight and 7:00 a.m. (up from \$1.00)

Comparables included a county with only Class 5 roads and a couple of smaller cities

County

\$1.50/hour shift differential between 11/15 and 5/15 for hours worked between midnight and 7:00 a.m. (up from \$1.00)

Comparables are other counties

Longevity paid in other counties not sufficiently measurable (median, mean) to use for comparability purposes

Award:

For the County

1. County's proposed comparables are appropriate; meet traditional criteria
2. Union's calculation of comparable wages by including longevity based on some form of average calculation questionable practice
3. With or without longevity, comparability favors County
4. When only issue is shift differential, it does not open the case up to argue overall compensation levels the parties have agreed to over a series of bargains
5. Fact that County has ability to pay Union's proposal is not particularly relevant as the real issue is whether there is an absolute and proven inability to pay that would cause that criterion to have dispositive weight

Calumet County (Strycker 9/25/09)

Union (Sheriff's Department)

3% increase applied after market increases for certain positions

County

3% wage increase 2nd year

Residency requirement

Change to insurance plan (HSA) and employee contributions

Clothing allowance \$25/yr increase; increase to field officer training pay (.40/hr)

Add ½ day holiday

Many other items characterized as "housekeeping"

Award:

For the Union

1. Much discussion and debate on comparables because Calumet County significantly different in all respects from its neighbors
2. Wage proposal of County slightly preferred
3. County premium costs significantly reduced in 2007 when plan changes were made
4. Residency requirement not supported by external comparables
5. Some of the "housekeeping" items have substantive impact and are not merely editorial; interest arbitration is not the place to make editorial changes in any case

Monroe County (McGilligan 10/1/09)

Union (Dispatch Employees)

2% ATB wage increase 1/1/09 plus add a step .37/hr after 7 years employment 7/1/09

2% ATB wage increase 1/1/10

Increase deductible 100/200 to 250/500 3/1/09; put deductible language in contract

County

2% ATB wage increase 1/1/09

1% ATB wage increase 1/1/10

Increase deductible 100/200 to 250/500 3/1/09 and to 350/700 1/1/10

Award:

For the County

1. New 7 year step results in 4.1% wage increase for over ½ bargaining unit; not supported by comparables (either external or internal); step itself not supported by comparables either
2. Negates 2003 voluntary settlement wherein longevity was eliminated in exchange for significant wage increase
3. Union should not be rewarded for being lone holdout among internal comparables for wages
4. Deductible not supported by comparables but neither is requirement that deductible language be included in contract itself (neither is outcome determinative)

Columbia County (Engmann 10/19/09)

Union (Highway Employees)

2.9% wage increase 2008

Delete asst. sign person; change to additional sign person (Grade 4 to Grade 3)

New CDL language (reassignment)

One year contract

Back pay by separate check

County

2.9% wage increase 2008

Reclassify pay grade of asst. sign person (Grade 4 to Grade 3-same as sign person)

New CDL language (leave of absence)

One year contract

Award:

For the Union

1. Sign person title and separate check issues are minor and favor the County
2. External comparables strongly favor Union's offer

Ozaukee County (Shaw 11/2/09)

Union (Deputy Sheriffs)

3% ATB wage increase 1/1/08, 1/1/09 and 1/1/10

County

2.75% ATB wage increase 1/1/08 and 1/1/09 and 2.9% ATB wage increase 1/1/10

Award:

For the County

1. Internal comparables strongly favor County's offer; Union seeks higher wage increase than any other comparable group
2. Primary external comparables favor County; secondary favor Union as far as wage increases but County's deputies are still the highest paid among comparables, primary or secondary

Sheboygan County (Hempe 11/19/09)

Union (Deputy Sheriffs)

1% ATB wage increase 1/1/09, 3% ATB 7/1/09, 1% 1/1/10 and 2% ATB wage increase 7/1/10

County

2.95% ATB wage increase and 2% ATB wage increase 1/1/10

Award:

For the Union

1. Adds a City (Sheboygan) as a secondary comparable
2. External comparables clearly in favor of Union
3. Internal comparables not given a great deal of weight due to erosion of deputies' salary vis a vis external comparables and the fact that no other comparable is a protective service unit

CITIES AND VILLAGES

Village of Ellsworth (Torosian 1/23/09)

Union (Police Department)

HSA funding by Employer of full deductible (\$2,000/\$4,000)

3% wage increase each year 2007-09

Status quo (97%) premium contribution for 2007 and fixed employee contributions of \$20 single and \$50 family/month for 2008 and 2009 (equal to 3% and 4%)

Village

HSA funding by Employer of partial deductible (\$1,750/\$3,500)

2.75%, 2.75% and 3% wage increase 2007-09

Status quo (97%) premium contribution for 2007 and an additional 1% in 2008 and an additional 1% in 2009

Award:

In favor of Village

1. Internal comparable was settled two years earlier with the HSA change, so 3% wage increase each of 3 years plus .35 in 2007 was funded by health insurance savings; the Union did not agree to health insurance change until two years later
2. External wage comparables heavily favor Union
3. For other units, Employer paid full deductible but other units agreed to change in 2007; thereafter, Employer deductible was reduced to \$1,750/\$3,000 in 2008 and \$1,500/\$3,300 in 2009
4. Association's change from percentage to flat dollar amounts is contrary to state and national trends, is supported by only one external comparable and seeks to change the financial relationship between the employees and Employer and is out of step with the trends and status quo

City of Franklin (Dichter 5/20/09)

Union (Police)

Two year agreement (2007 and 2008)

3% ATB wage increase each year

Move retirement date and benefit calculation date to 1/1/07

City

Three year agreement (2007-2009)

3% ATB wage increase in 2007 and 2008; 3.25% wage increase in 2009

Continue 1/1/05 retirement date plus amount active employees pay toward health insurance as of retirement date

Award:

In favor of Union

1. On wage proposals, both internal and external comparables are a wash.
2. History of bargaining demonstrated a moving retirement date.

3. Not enough information (such as an actuarial study) to support Employer's GASB argument.

City of Menomonie (Greco 8/24/09)

Union (Public Works)

2 year agreement; ATB wage increase 2% 1/1/08; 1% 7/1/08; 2% 1/1/09 and 1% 7/1/09
"College towns" of Stevens Point, Whitewater and Platteville should be used as comparables

City

2 year agreement; ATB wage increase 2% 1/1/08 and 2% 1/1/09
Clothing allowance increase of \$25 per year
Increase of \$.16/hour in laborer's position (combining it with park caretaker)

Award:

For the City

1. Parties have never gone to interest arbitration, so necessary to settle internal and external comparables
2. Internal comparables are only rank and file police and firefighter units; supervisory units and non-bargaining unit employees cannot proceed to arbitration
3. College towns are not appropriate comparables
4. Other cities proposed by union as comparables were rejected in a rank and file police arbitration with respect to wage level (Minneapolis metro area) but not with respect to wage increases, one other city added (New Richmond)
5. No City comparables accepted
6. Union's argument that police contract offers benefits to employees not offered here undercut by the fact that last settled contract between these parties occurred after police contract
7. Longevity pay with this unit was important factor
8. Wage increases support Union's offer; time it takes to get to maximum supports City's offer
9. Internal comparables favor City; external comparables favor Union
10. Mixed external comparables do not support breaking internal wage pattern

City of Altoona (Grenig 9/5/09)

Union (Public Works)

Effective date of employee 3% health insurance premium contribution should be 6/1/08
Second wage increase in 2010 should be 7/1/10 (1%)

City

Effective date of employee 3% health insurance premium contribution should be 1/1/08
Second wage increase in 2010 should be 12/31/10 (1%)

Award:

For the City

1. Comparables generally agreed upon
2. All but one require employee contribution toward health insurance premiums
3. External comparables not very helpful regarding wages
4. Proposal to hold off on employee health insurance premium contributions not favored because it does not promote labor peace and is inconsistent with bargaining agreement language that requires contributions 1/1/08
5. Internal comparable (police) settled for exact same package as City proposed

City of Wauwatosa (Hempe 8/25/09)

Union (Firefighters)

Reduce City's share of health insurance premiums for retirees to from 100% to 70% for persons hired after 1/1/08

Annual sick leave conversion of $\frac{1}{4}$ accumulated unused sick leave up to a maximum of 36 hours for employees hired after 1/1/08

Additional sick leave conversion at retirement only for employees hired after 1/1/08 (Employees hired before 1/1/08 receive health insurance premiums equal to 110% of the previous year's premium)

One-time lump sum payment of \$500 into employee's Retirement Health Care HAS for employees hired after 1/1/08; no lump sum payment for employees hired prior to 1/1/08

Nationwide to administer Post Employment Health Plan

City

Reduce City's share of health insurance premiums for retirees to from 100% to 50% for persons hired after 1/1/08

Annual sick leave conversion of $\frac{1}{4}$ accumulated unused sick leave up to a maximum of 36 hours for all employees

Additional sick leave conversion at retirement only for employees hired after 1/1/08 (Employees hired before 1/1/08 receive health insurance premiums equal to 110% of the previous year's premium)

One-time lump sum payment of \$500 into employee's Retirement Health Care HAS for employees hired after 1/1/08; \$250 lump sum payment for employees hired prior to 1/1/08

ICMA to administer Post Employment Health Plan

Award:

For the City

1. Internal comparables strongly favor the City's offer
2. Persuasive evidence for proposed change based on skyrocketing health insurance costs; City's offer will not have a significant impact on bargaining unit for a quarter century

Village of Winneconne (Honeyman 10/9/09)

Union (Public Works)

Employees contribute \$30/month for health insurance 1/1/08 and \$45/month 1/1/09 (either single or family)

Village

Employer contributes 95% for health insurance starting 1/1/08 (either single or family)

Award:

For the Union

1. Status quo is employees contributing \$15/month after employer pays 105% of lowest cost plan
2. Internal comparability does not favor employer because police percentage contribution went into effect a year later and was supported by substantial wage increase; what employer was willing to pay to police versus what it is willing to pay for health insurance change tipped the balance
3. Much discussion of comparables

City of Cudahy (Krinsky 10/28/09)

Union (Fire Fighters)

City to pay 75% of health insurance premiums for fire fighters disabled before the age of 50 until they reach Medicare age eligibility

City

Continue past practice (over age 50 only)

Award:

For the City

1. The past practice claimed by the Union did not exist; a couple of errors were made when disabled fire fighters received benefit sought by Union
2. No sufficient quid pro quo offered by Union (raise retirement age to 53 and 5% share of health insurance premium paid by employees; nothing at bargaining table or in negotiations to suggest that this was a quid pro quo and was voluntarily settled

SCHOOL DISTRICTS

School District of Wausaukee (Schiavoni 3/31/09)

Union (Support Staff)

\$0.29 wage increase each year (2007-09 contract)

Health insurance 96/4% premium split 2007-08; 94/6% 2008-09

District

Allow District to subcontract transportation services

Health insurance for individuals employed on 7/1/08 (or on layoff status with recall rights as of that date:

90% if working 35-40 hours/wk for at least 9 months

63% if working 30-35 hours/wk for at least 9 months

50% if working 15-30 hours/wk for at least 9 months

None if working less than 15 hours/wk; 50% of premiums for bus drivers who have 1 consecutive prior year of employment until bus services are subcontracted

Health insurance for individuals employed after 7/1/08 (or on layoff status with recall rights as of that date:

80% if working 35-40 hours/wk for at least 9 months

56% if working 30-35 hours/wk for at least 9 months

50% if working 20-30 hours/wk for at least 9 months

None if working less than 20 hours/wk

No scheduled wage increase; up to \$1,000 bonus each year prorated based on 2080 hours

Up to \$1,000 severance payment to bus drivers prorated based on 900 hours

Award:

In favor of District

1. District was in dire financial straits.
2. District had filed for dissolution proceedings
3. External wage comparables and settlements favored Union
4. Internal wage settlements favored District
5. Same for health insurance

6. Greatest weight and greater weight factors favor the District
7. Compelling need to address unfunded pension liability
8. Severity of economic recession
9. Steps District took (layoffs, deferred spending, unfunded pension liability payment deferral) and settlement with teachers (“share the pain”) ultimately swayed the arbitrator

Milwaukee Board of School Directors (Grenig 6/30/09)

Union (Various Support Positions)

Seniority language that would change overall seniority to seniority by classification

Board

Change hours paid to Union President for Union business and pay secretarial time Union currently purchasing

Award:

In favor of Board

Board’s release-time offer more reasonable than Union’s dual-classification seniority offer.

Rice Lake School District (Petrie 7/14/09)

Union (Clerical/Aide Support Staff)

3 year (7/1/06 to 6/30/09) 3% ATB wage increase 7/1 of each year

District

ATB of 3% each of first two years; 3.5% ATB third year

Change health insurance from percentage to flat dollar amounts for both employer and employees effective 7/1/08 (from 95% single and 100% family coverage provision); flat dollar amounts reflect 90%/95%

Award:

For the District

1. Teachers had agreed to health insurance change and custodians had lost an arbitration in which the issue was contested resulting in 75% of the represented employees having the language proposed by the District

2. Compelling need for change in the health insurance area need not be predicated on an impaired ability to pay premiums; nothing prohibits employer from recognizing and reasonably responding to the problem
3. Union's argument that proposal has disproportionate impact on lower-paid employees in this bargaining unit could have proposed a higher quid pro quo at the bargaining table rather than merely resisting change to health insurance program
4. Prior health insurance program had applied to all employees (i.e. nothing carved out for this unit as a consequence of lower wages) and wage increases were done uniformly in the past; no complaints then
5. External comparables more important with respect to wage comparisons; internal comparables more important criterion with respect to benefit package comparisons

Neenah Joint School District (Engmann 9/24/09)

Union (Support Staff)

Remove MOU relating to posting food service positions and subcontracting only if posting to current foodservice workers goes unfilled to requiring posting of all vacancies, permitting them to be filled by any qualified bargaining unit member and only subcontracting if no qualified person posts; put in body of agreement

Move retirement MOU to body of contract

Maintain emergency room co-pay at \$50

Maintain 3-tier drug co-pay of \$5/15/30; eliminate practice of reimbursing \$15 of \$30 3rd tier co-pay

Leave other insurance language status quo (including 100% paid dental premiums by District)

District

Remove MOU relating to posting food service positions

Modify retirement MOU to limit it to employees hired before 6/30/08

Raise emergency room co-pay to \$100

Raise 3-tier drug co-pay to \$10/25/50; eliminate practice of reimbursing \$15 of 3rd tier co-pay

Increase threshold for insurance benefit eligibility from 600 hours/year to 20 hours per week

Prorate health premium contribution for employees working 20 hours but less than full time per week

Eliminate grandfather clause for no premium proration for part-time employees hired prior to 7/1/05

Reduce dental premium share to 95% and prorate same as health insurance; threshold change applies as well

Award:

For the Union

1. Subcontracting proposal changed significantly by broadening scope beyond Food Service is a major change in the status quo as is placing the language in the body of the contract; quid pro quo absence is also significant
2. Increase in co-pays unsupported by comparables
3. Change in eligibility for dental and health insurance benefits and proration or premiums unsupported by comparables or an adequate quid pro quo

Iowa-Grant School District (Honeyman 9/25/09)

Union (Support Staff)

Change from WEAIT FED to POS 7/1/09

Wage increase ATB of .32/hr 2008-09 (also extra trips for bus drivers)

Wage increase ATB of .53/hr 2009-10

Bus routes double wage increase per route

District

Dean insurance 7/1/09 or ASAP after decision

Wage increase ATB of .75/hr 2008-09 (also extra trips for bus drivers)

Wage increase ATB of .50/hr 2009-10

1.25/1.00 bus routes

Award:

For the District

1. Wages for bargaining unit are higher than most of the comparables
2. Both offers would enhance position
3. No significant differences in the two health insurance providers qualitatively or as to coverage or out of pocket costs
4. Union evidence of available funds from referendum and federal stimulus money unpersuasive (referendum non-recurring)
5. District budget situation and financial situation perilous
6. Union overreached on wage proposal when it sought "half" the savings from the change in insurance premiums
7. Union's costing inexplicable

Cassville School District (Engmann 10/6/09)

Union (Support Staff)

.38/hr ATB wage increase 2007-08

.38/hr ATB wage increase 2008-09 plus an additional .62 when POS goes into effect

Change from FED to POS WEAIT; move from 2-tier to 3-tier drug card; add waiver of premium benefit to insurance plan

District

.15/hr ATB wage increase 2007-08

Modify wage schedule to front-load rather than backload (3 steps rather than 11); eliminate longevity

Modify insurance qualification language from 5 ½ hours/day to 27 ½ hours per week

Hours of work make-up change

Award:

For the District

1. Small comparable pool accepted
2. Union wage proposal for first year preferred
3. District proposing to change status quo in two significant respects; reduction of steps and elimination of longevity
4. WEAIT insurance plan said 2-tier drug benefit would not be available as of 7/1/09; insurance carrier changed plan consistent with wishes of one of the parties to interest arbitration; did not sit well with arbitrator
5. Real difference is that District offered quid pro quo for its changes while Union did not

TECHNICAL COLLEGES

Western Wisconsin Technical College (Yaeger 3/4/09)

Union (PSRP Unit)

3% ATB wage increase 7/1/07 and 7/1/08

College

2% ATB wage increase 7/1/07 and 7/1/08

Award:

In favor of Union

1. 3% ATB increase for faculty. Internal comparability a very significant factor. The fact that they do different work is not a significant factor.
2. No evidence of custodial increase for either 2007 or 2008 (only other bargaining unit)
3. Employer's asserted rationale; i.e., that providing a lower increase to support staff will enable it to "catch-up" on faculty pay is "unconventional and in opposition to conventional thinking regarding how to achieve its objective" and is unpersuasive.

4. Employer not offering Union same protection against wage erosion as other employees received is not justified by implicit argument that they are “overpaid” vis a vis comparables
5. External comparables were 3% or greater

Waukesha County Technical College (Torosian 7/7/09)

Union (newly accreted positions to professional staff Union)

Milwaukee and Madison should be included as primary comparables
Place accreted positions on counselors/instructors salary schedule

College

Comparables previously determined and no significant change to warrant modification of comparables

New salary schedule more closely aligned with non-unit professionals

Award:

In favor of College

1. Accreted positions are neither counseling nor instructional
2. External comparables do not provide clear guidance
3. College’s offer is “in the ballpark” with the comparables in overall compensation
4. for 2008-09, parties’ offers only +/- \$6,300 apart
5. Award is probably not a long-range solution

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION
SIXTH ANNUAL PUBLIC SECTOR LABOR RELATIONS CONFERENCE
APRIL 29, 2010**

ALLIANT ENERGY CENTER, MADISON, WI

AND THE WINNER IS. . .THE YEAR IN INTEREST ARBITRATION

Has the last year been a sea change, or just a passing squall?

OR

Have arbitrators left the parties lost at sea

or have they given them a compass and directions on how to proceed?

AN ARBITRATOR'S PERSPECTIVE PRESENTED BY JAMES W. ENGMANN¹

I. Comparables

A. Internal Comparables

1. What weight do arbitrators assign to internal comparables?

- a. When it comes to benefits, internal comparables are important. As all employees of the Municipal Employer (hereinafter ME) are under the same insurance plan and percentage basis as offered by the ME, not with dollar caps as proposed by the Labor Organization (hereinafter LO), the ME's final offer was determined to be more reasonable. *Village of Ellsworth (Police)*, Dec. No 32360-A (Torosian, 1/23/09) at page 23.
- b. Internal comparability or, in other words, what terms and conditions of employment the ME has negotiated with other represented bargaining units, is a very significant factor and, in certain circumstances, can be a controlling factor in deciding which final offer is selected. *Western Wisconsin Technical College*, Dec. No. 32531-A (Yaeger, 3/04/09) at page 8.
- c. Generally, internal comparables have been given great weight with respect to basic fringe benefits. *Milwaukee Board of School Directors*, Dec. 32429-A (Grenig, 6/13/09) at page 22.
- d. Internal settlements ordinarily must be given considerable, if not great weight, which is why a party seeking to break an internal wage pattern must establish the clear need to do so. *City of Menomonie (DPW)*, Dec. No.

¹James W. Engmann has hired and fired and been hired and fired. He has worked as a carnival worker, McDonald's grill cook, foundry laborer, truck driver, reporter, UW-O Student Association president (yes, a paid position!), managing editor, high school teacher, UW-MTA, DOJ law clerk, attorney, WERC mediator-hearing examiner, arbitrator, ministry, counselor and chaplain. His father said he could never hold a career. Though trying to be semi-retired, he is available as an arbitrator, counselor and wedding and funeral officiant.

The Winner Is - An Arbitrator's Perspective - P. 2

32631-A (Greco, 8/24/09) at page 19.

- e. Internal comparables of voluntary settlements carry heavy weight in interest arbitration. If the ME is to maintain labor peace within the many bargaining units with which it negotiates, changes in wages and benefits must have a consistent pattern. *City of Altoona (Public Works)*, Dec. No. 32673-A (Grenig, 9/05/09) at pages 16-17.
 - f. An internal settlement pattern should control unless it can be demonstrated that adherence to that pattern would cause unreasonable and unacceptable wage relationships relative to the external comparables. *Ozaukee Co (Sheriffs)*, Dec. No. 32592-A (Shaw, 11/02/09) at page 15.
2. What weight is given to internal employee groups without access to binding arbitration?
- a. Non-represented employees are not usually regarded as a persuasive internal comparable because their wages, hours and conditions of employment are usually not bargained, but imposed. In this case, however, it may be worth noting that the non-represented employees also received the same retiree health care benefits as those negotiated with the internal general service bargaining units, thus presenting an overall pattern of internal consistency. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 27.
 - b. Supervisory units may “meet and confer” with the ME to present information and arguments supporting their positions but, in the end, such units lack a meaningful mechanism to resolve any deadlocks reached with the ME. They therefore are unable to obtain what the ME absolutely does not want to give them, which is why they cannot be compared to other bargaining units which have that capacity. *City of Menomonie (DPW)*, Dec. No. 32631-A (Greco, 8/24/09) at page 5.
 - c. The ME’s unrepresented employees lack a meaningful mechanism to resolve any deadlocks reached with the ME, which is why they do not constitute an appropriate internal comparable. *City of Menomonie (DPW)*, Dec. No. 32631-A (Greco, 8/24/09) at page 5.
 - d. Non-organized employees do not have the leverage possessed by represented employees. As such the adjustment such employees receive will be noted but assigned lesser weight. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at page 37.
3. What weight do certified final offers have in terms of an internal settlement pattern? Certified final offer with one unit and current offers to two other bargaining units show the ME’s consistency of position but they do not carry the same weight as a voluntary agreement. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at page 37.

The Winner Is - An Arbitrator's Perspective - P. 3

4. What makes a settlement pattern?
 - a. Although a single award does not represent a pattern, it does provide a material internal comparable, especially if the provision at issue is such as should be consistent employer wide. *Racine County (Courthouse)* and *Racine County (Human Services)*, Dec. Nos. 32423-A and 32422-A (Bellman, 1-23-10) at page 6.
 - b. One internal unit has reached a voluntary settlement and, as the ME has three other units which are not settled, this does not establish a settlement pattern. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at page 40.
 - c. The ME cannot place much reliance on its treatment of its non-represented employees to establish a settlement pattern. Settlements reached voluntarily through collective bargaining must carry more weight than conditions that have been unilaterally established by an ME. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at page 40.
 - d. It is difficult to conclude that the ME's proposed change was unreasonable, due to the fact that it has already been agreed upon and implemented for a significant majority of the LO's represented employees. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 26.
5. What weight is given to uniformity of general wage increases?
 - a. While the ME's other represented employees may be dissimilar in terms of the nature of the jobs they perform, the general wage increase is not intended to take into account such differentiations. Just as maintaining uniformity of fringe benefits among the ME's various bargaining units is important, so, too, absent some extraordinary circumstance, is uniformly protecting the existing wage levels from erosion. *Western Wisconsin Technical College*, Dec. No. 32531-A (Yaeger, 3/04/09) at pages 8-9.
 - b. That portion of the annual across-the-board increase for cost of living, annual improvement and productivity increases, should generally be a mirror image across represented bargaining units. This also explains why internal comparability is seen as a significant factor when across-the-board wage increases. *Western Wisconsin Technical College*, Dec. No. 32531-A (Yaeger, 3/04/09) at page 10.
6. What impact does employee morale play in arbitral decision making?
 - a. MEs should attempt to have consistency and equity in the treatment of its employees. Hard feelings are avoided when all employees are treated alike. Deviations from a historically established pattern can be disruptive and have a negative effect on employee morale. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 27-28.

The Winner Is - An Arbitrator's Perspective - P. 4

- b. ME's have a valid interest in equity and the fair treatment of all of its employees. When one LO gets more than the others, this has a negative impact on employee morale. When one LO receives more than what other LOs had voluntarily agreed to, this has a negative impact on the ME's credibility and on future negotiations in that those LOs will be reluctant to reach a voluntary agreement with the ME in the future for fear that if they does, the ME would then offer more to the other LOs. *Ozaukee Co (Sheriffs)*, Dec. No. 32592-A (Shaw, 11/02/09) at page 15.

B. External Comparables

1. What is needed to make an external comparable comparison based upon job classifications? If, instead of an across-the-board percentage increase comparison, the comparison would be to the actual wages of the classifications, the job descriptions would need to be analyzed in order to evaluate if the jobs had the same level of responsibility, notwithstanding that the positions might carry the same job title. *Western Wisconsin Technical College*, Dec. No. 32531-A (Yaeger, 3/04/09) at page 11.
2. What weight is given to external comparables which do not have right to arbitration?
 - a. MEs with less than 2500 residents which meet the criteria used to determine external comparables but whose law enforcement units are not covered by the arbitration statute were included as external comparables but not given as much weight as other comparables. *Village of Ellsworth (Police)*, Dec. No. 32360-A (Torosian, 1/23/09) at pages 16-17.
 - b. The cases supporting the exclusion of employees in comparable MEs that are not organized were issued within a few years after the burst of collective bargaining organization which followed the passage of the original mediation-arbitration law. In a later era, when employee groups who wish to be represented have had plenty of time to organize collectively, the fact that some employee groups here and there have employment conditions that are set without collective bargaining can no longer be regarded as a matter over which the employees have had no effective choice. The logic of excluding unrepresented from comparison is therefore weaker than it once was. *Iowa-Grant School District (Support Staff)*, Dec. No 32684-A (Honeyman, 9/25/09) at page 15.
 - c. While the parties disagree as to what external comparables should be used in this case, especially in terms of non-represented units, the comparable pool is determined to be those districts in the athletic conference which are organized for purposes of collective bargaining. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at page 14.
3. What standards are used to create the external comparable pool? The selection of appropriate comparables is a challenging task. While there are objective

The Winner Is - An Arbitrator's Perspective - P. 5

criteria that can be relied upon, a certain amount of subjectivity is always involved. The factors to consider in establishing comparability include similarity in services provided, similarity in level of responsibility, geographic proximity and similarity in the size. There are many other criteria relied upon to make judgments regarding the similarity of MEs. The weight provided to these various criteria can vary depending upon specific circumstances, thus, confirming the unscientific nature of the process. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at pages 30-31.

4. What is the standard used to change an existing external comparable pool? External comparables, once established, shall be maintained unless there is a sufficient change in circumstances to warrant a change. It is not that an established comparable pool will not or cannot be changed, but there must be compelling reason to do so. The reason is simple: to provide predictability and stability and guidance to the parties in their negotiations. This can only be done with a strict standard for change. *Waukesha County Technical College (Educators)*, Dec. No 32555-A (Torosian, 7/07/09) at page 32.

C. Internal v. External Comparables

1. What weight is given internal v. external comparables?
 - a. More compelling for a new benefit which is not a “catch up” item is the consistency of the internal settlement pattern: where one other bargaining unit has the benefit and where bargaining units representing the vast majority of ME employees are settled on the same wage and with the same health insurance provisions offered to the LO, without the new benefit, the often-cited importance of internal consistency greatly outweighs evidence of better benefits among some of the external comparables. *Washington County (Sheriff's Dept)*, Dec. No. 32426-A (Honeyman, 2/19/09) at page 7.
 - b. While external comparisons are normally the most important arbitral criterion in connection with wage determination, this is not normally the case with health insurance where LOs seek internal uniformity. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 28.
2. What weight is given to private sector comparables? While the Wisconsin Taxpayer Report indicates that the ME's health insurance benefits compare favorably with those in the private sector, such comparisons are not afforded as significant weight in the final offer selection process as the more definitive and meaningful public sector comparisons. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 29.

D. Protective vs. General Employees

1. Does Sec. 111.77(6) prohibit comparison of protective service employees with non-represented or general employee internal comparables?
 - a. While Sec. 111.77(6)(d) directs a comparison of protective service units with

The Winner Is - An Arbitrator's Perspective - P. 6

“other employees performing similar services,” it also directs comparisons between protective service employees “and other employees generally,” language broad enough to compare both non-represented employees and internal general service employee units with protective service units. The use of the ME’s internal bargaining units and non-represented employees goes to the weight to be given such evidence, not to its admissibility. *Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at page 17.

- b. While Sec. 111.77(6)(d) does not specifically direct the arbitrator to make a comparison of protective employees with other employees generally in public employment in the same community, this does not demonstrate the Legislature's intent to limit comparison of protective service employees to other protective service employees. While protective employee units may be the strongest comparison, Sec. 111.77(6)(d) does not preclude a comparison with non-protective service employees. Indeed, that subsection directs a comparison with “other employees generally” in public employment in comparable communities. *Ozaukee Co (Sheriff's Dept)*, Dec. No. 32592-A (Shaw, 11/02/09) at pages 14-15.
 - c. Subsection Sec. 111.77(6)(h), which includes other factors which are normally or traditionally taken into consideration in arbitration, is sufficiently broad to include internal comparisons with general employees. Certainly how an ME treats its other represented employees compared to how it proposes to treat the protective service employees has traditionally been taken into account in interest arbitration. *Ozaukee Co (Sheriffs)*, Dec. No. 32592-A (Shaw, 11/02/09) at page 15.
2. How should internal vs. external comparables be compared?
 - a. Comparison of a protective service unit with external comparables is appropriate and given considerable weight because it is a comparison with other protective service units, as opposed to the one internal comparable consisting of non-protective service personnel. *Village of Ellsworth (Police)*, Dec. No 32360-A (Torosian, 1/23/09) at page 22.
 - b. The comparison between both non-represented employees and internal general service employee units with protective service units must be made by exercising reasonable, discretionary judgment as to the appropriate weight to be accorded any comparisons, including employment duties, conditions and requirements of employment, and consideration of exposure to risks to personal health or safety to which employees in general service units may not be normally exposed. *Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at page 17.
 3. What weight is given an internal settlement pattern vs. protective employee external comparables?
 - a. The ME has demonstrated a credible, consistent pattern of wage increases

The Winner Is - An Arbitrator's Perspective - P. 7

with five of its bargaining units. Its effort to obtain a consistent pattern of wage increases with all of its bargaining units is understandable. Yet none of the members of the settled units are engaged in protective occupation participation, none are subject to the same Sec. 111.77(6) arbitration criteria as the ME's protective service employees, and the record is silent as to how their settlements ranked with their comparables. Considering the considerable dissimilarity of employment requirements, duties and risks to personal safety assumed by and expected of protective service employees, as well as the erosive effect the ME's offer would have on its protective service employees' wages, the five internal comparables are not determinative on the issue of wages for the protective service employees. Whatever presumptive weight these internal comparables may have is overcome by the weight accorded to the external comparables. *Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at page 26.

- b. General service internal bargaining units should be accorded an appropriate weight as to matters they share with each other and protective service units. Clearly, a discernable, consistent and equitable benefit structure and pattern of bargaining treatment by the ME of its internal bargaining units is entitled to greater arbitral weight than a more scattered, haphazard approach. This does not mean the pattern of treatment to all the internal units must be necessarily identical. Obviously, variances in response to individual, significant differences among internal bargaining units created by duties, work schedules, and legal rights may be made from time to time and still remain within the guidelines of a consistent and equitable policy pattern. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 25.
- c. The ME's desire to provide a uniform wage increase to all its employees is understandable. From a bookkeeping standpoint it is, of course, far simpler. Moreover, hard feelings may be avoided when employees are treated alike, and in many instances such patterns are persuasive. MEs should attempt to have consistency and equity in the treatment of its employees. But consistency with respect to treatment of internal units is not always equitable. It basically requires a "one size fits all" approach that appears to assume all employees perform similar tasks, require similar training and share similar risks. This is not an accurate assumption when the protective service employees are the only such employees employed by the ME, and perform substantially different tasks, require different training, and frequently encounter dangers to their personal safety not normally encountered by more general service employees. *Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at page 25.
- d. Protective service personnel may be considered independently from other internal bargaining unit comparisons. Internal comparables generally are not directly comparable to protective service units with the possible exception of the other protective service unit and, in some cases, protective service

The Winner Is - An Arbitrator's Perspective - P. 8

supervisors. These units are involved in public safety and are often put at great personal risk in carrying out their assigned duties. This is not to say internal units consisting of general service, as opposed to protective service, employees should be discontinued as comparables with the protective service units. The question is rather how much weight should be assigned to internal comparables where there exist dissimilarities of the respective positions' responsibilities, training, physical requirements and hazards. *Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at pages 25-26.

4. What impact does employee morale play in arbitral decision making?
 - a. Considering the considerable dissimilarity of employment requirements, duties and risks to personal safety assumed by and expected of protective service employees, as well as the erosive effect the ME's offer would have, presumably, on protective service employees' morale vis-à-vis the external comparables, the five internal comparables are not determinative on the issue of wages for the protective service employees. *Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at page 26.
 - b. The small differences in the percentages of the wage increases the parties are proposing (.25% in 2008, .25% in 2009, and .1% in 2010) are not enough to seriously affect the morale of these employees if the ME's lower wage increase is selected, especially since these employees would remain the highest paid among the primary external comparables, as well as the highest paid employees among the ME's represented employees. *Ozaukee Co (Sheriffs)*, Dec. No. 32592-A (Shaw, 11/02/09) at pages 13-14.
5. What did arbitrators say about Police and Fire Fighter Parity?
 - a. Firefighters and police officers continue to be justifiably linked as protective service groups, statutorily and in the mind of the public. The duties of each include physically exhausting, debilitating and at times personally dangerous activities, to which employees in non-protective or general service groups are not normally exposed. This is recognized, in part, by earlier retirement opportunities afforded them than to general service employee groups. Another consequence of this linkage is that a police officer bargaining unit and a firefighting bargaining unit employed by the same municipality usually constitute a close and accurate internal comparable for the other. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 25.
 - b. In addition to the fire fighters bargaining unit, the ME negotiates agreements with four other bargaining units. None of those agreements include the language of the LO's final offer. The City's non-represented employees also do not receive such a benefit. The other protective services bargaining units representing police officers and police supervisors do not have this benefit. Given that the benefit does not appear in any of the other collective agreements, the internal comparisons favor the ME's final offer. *City of*

The Winner Is - An Arbitrator's Perspective - P. 9

Cudahy (Fire), Dec. No. 32675-A (Krinski, 10/28/09) at page 4.

II. *Status Quo* and *Quid Pro Quo*

A. Statutory Basis

1. What is the statutory basis for requiring a *quid pro quo*?

- a. The *quid pro quo* criterion falls well within the intended scope of Section 111.70(4)(cm)(7r)(j) of the Wisconsin Statutes. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 23.
- b. The proponent of change is normally faced with the need to provide an adequate *quid pro quo* in support of proposals, a requirement which falls well within the scope of Wis. Stats. 111.77(6)(h). *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 30.

B. Changing the *Status Quo* via Interest Arbitration

1. What do arbitrators require in order to change the *status quo*?

- a. The proponent of change to the *status quo* must fully justify its position, provide strong reasons, and a proven need. It is an extra burden of proof placed on those who wish to significantly change the collective bargaining relationship that the party desiring the change show that there is a *quid pro quo* or that other groups comparable to the group in question were able to achieve this provision without the *quid pro quo*. *Outagamie County (Highway Dept)*, Dec. No. 32530-A (McAlpin, 2/11/09) at page 14.
- b. When a party wishes to make a change in the substantive terms of the collective bargaining agreement, the party is obligated to justify its proposed changes. When a party proposes significant changes to the *status quo*, the party must present an appropriate *quid pro quo*. *Milwaukee Board of School Directors*, Dec. 32429-A (Grenig, 6/13/09) at page 24.
- c. When either party to a labor agreement proposes elimination or significant modification of a previously negotiated right or benefit, arbitral approval of such a proposal is normally conditioned upon three determinative factors: first, that a significant and unanticipated problem exists; second, that the proposed change reasonably addresses the underlying problem; and, third, that the proposed change is normally but not always, accompanied by an appropriate *quid pro quo*. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at pages 23-24.
- d. When unilateral demands for significant modification of or elimination of previously negotiated provisions arise, the proponent of change normally needs to provide an adequate *quid pro quo*. In addition, the proponent must demonstrate a compelling need for the change and that the proposed change reasonably addresses the need for change. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 30.

The Winner Is - An Arbitrator's Perspective - P. 10

- e. The ME has persuasively indicated a need for the proposed change because rapidly escalating health insurance costs on behalf of municipal employees have become at least a matter of serious concern in many municipalities and an actual crisis in others. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 31-32.
 - f. Arbitrators are reluctant to adopt extensive changes to a wage structure via interest arbitration. The burden on the party seeking to change the *status quo* is to show that there is an actual, significant and pressing need for the change; that the proposed change addresses the need in as limited a manner as possible; that comparables are consistent with and supportive of the change; and that a proper *quid pro quo* is offered to compensate, at least in part, the party resisting the change. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at pages 18-19.
2. What constitutes a sufficient *quid pro quo*?
- a. ME's life insurance proposal should not be considered as *quid pro quo* for its release proposal because it was not offered contemporaneously with the release time offer. While the ME's life insurance proposal was made during collective bargaining, its release proposal was not made during bargaining; it did not appear until the ME made its final offer in this interest arbitration. As the life insurance was already on the table, it was not an added wage or benefit package to accompany the release time proposal, and therefore cannot be considered a *quid pro quo* proposal. *Milwaukee Board of School Directors*, Dec. 32429-A (Grenig, 6/13/09) at page 24.
 - b. There is no set answer as to what constitutes a sufficient *quid pro quo*. It is directly related, inversely, to the need for change. Thus, the *quid pro quo* need not be of equivalent value or generate an equivalent cost savings in the change sought. Generally, the greater the need, the lesser the *quid pro quo* required. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 31.
3. When is a lesser or no *quid pro quo* needed?
- a. Some proposed changes in the negotiated *status quo* which are directed toward the resolution of mutual problems may require either no or a substantially reduced *quid pro quo*, depending on individual case-by-case determinations. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 24.
 - b. Just as labor agreements must evolve and change in response to changing circumstances which are of mutual concern, similar considerations must be addressed pursuant to the requirements of Section 111.70(4)(cm)(7)(j), such as the situation where the costs and/or the substance of a long standing policy or benefit have substantially changed over an extended period of time, to the extent that they no longer reflect the conditions present at their

The Winner Is - An Arbitrator's Perspective - P. 11

inception. In such circumstances, the proponent of change must establish that a significant and unanticipated problem exists and that the proposed change reasonably addresses the problem, but it is difficult to conclude that a *quid pro quo* should be required to correct a mutual problem which was neither anticipated nor previously bargained by the parties. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 24.

- c. The proponent of elimination or substantial change in a previously negotiated policy or benefit is required to advance a *quid pro quo* equivalent to that which would have evolved in the give and take of conventional bargaining. An exception may exist where the costs or the substance of a long standing policy or benefit have substantially changed over an extended period of time, where they no longer reflect the conditions present when they were negotiated, and where the proposed change is directed toward correction of a mutual problem which was neither anticipated nor previously bargained about by the parties. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 25.
 - d. There are times when a lesser *quid pro quo* or even no *quid pro quo* is needed for a change to be made. Such cases include the situation where a contract clause or benefit has caused or will cause a significant problem, unseen at the time of agreement, to one or both parties, or the clause or benefit is so significantly out of line with the comparables as to be an aberration, or the clause or benefit is of such a nature that there is a mutual interest and benefit to changing it because it no longer serves the parties well, but only one party has offered a reasonable resolution. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at page 21.
4. When is a *quid pro quo* needed in terms of health insurance changes?
- a. The meteoric escalation in the cost of health insurance since the time the parties agreed to include it in the agreement has exceeded all reasonable expectations, and the immediate prospect for future escalation is also significantly higher than could have been anticipated by either party some twelve or thirteen years ago. In short, the situation represents a significant mutual problem, and it is clearly distinguishable from a situation where one party is merely attempting to change a recently bargained for and/or a stable policy or benefit for its own purposes. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 24.
 - b. A compelling need for change in the *status quo* in health insurance need not be predicated upon an employer's impaired ability to continue to pay the growing costs of such insurance. To the contrary, the rapidly escalating costs of health insurance is widely recognized as a very significant problem. An employer is not prevented from recognizing and reasonably responding to this problem before it is bereft of the financial ability to continue to pay such premiums. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A

The Winner Is - An Arbitrator's Perspective - P. 12

(Petrie, 7/14/09) at page 26.

5. How does the current economic situation affect the need for a *quid pro quo*?
 - a. While a traditional *status quo* analysis, including the need for a *quid pro quo*, may be appropriate in normal financial times, these are not normal financial times. The general economy has gone into a serious recession. There are foreclosures, job losses, and shrinking sources of revenue within the state of Wisconsin. Credit has all but dried up. This unanticipated turn in the general economy is a factor to be considered under subsections 7r. (j) and (i). No one anticipated the severity of the recession even as of the date of the arbitral hearing in this matter. *Wausaukee School District (Support Staff)*, Dec. No. 32479-A (Schiavoni, 3/31/09) at page 33.
 - b. Given the state of the current economic climate, the ME showed the necessity for its proposed departure from the *status quo* because it has taken measures to address its financial difficulties, including laying off employees, deferring necessary expenditures, borrowed short-term, delaying capital expenditures and delaying paying the principal on its unfunded pension liability. It has also succeeded in persuading the only other bargaining unit in its employ to "share the pain." *Wausaukee School District (Support Staff)*, Dec. No. 32479-A (Schiavoni, 3/31/09) at page 33.
6. What happens when, instead of the party seeking a change offering a *quid pro quo* to the other party in order to make the change, a party offers a concession and determines the *quid pro quo* it should receive?
 - a. The LO adds 23¢ an hour in the second year on the grounds that its proposal to change to a different health plan saves the ME money, such that the employees should be entitled to half the savings. Under more ordinary circumstances, the LO's logic might make more sense. In general, when a LO agrees with the ME on a less expensive benefit, it may logically expect something in return. But the present circumstances of this ME, as well as the circumstances governing the reasonableness of health insurance costs generally, are currently anything but ordinary. It is not merely that the national debate concerning how to address extraordinarily high health insurance costs has reached a crescendo; the assumption of what constitutes a reasonable baseline expectation is a local matter as much as a national one. Here, that assumption has been thrown into doubt by the availability of a generally well-regarded alternative to the LO's plan at markedly lower costs. Since the escalation in health costs began in earnest, the concept of "*status quo*" is itself challenged by such cost increases, which necessarily change the parties' economic expectations even without any change in contract language. *Iowa-Grant School District (Support Staff)*, Dec. No 32684-A (Honeyman, 9/25/09) at page 17.
 - b. The parties have agreed upon the health insurance plan in the past and now

The Winner Is - An Arbitrator's Perspective - P. 13

the LO wants to change the plan and have all savings from the change, calculated by the LO as 61¢ an hour, applied to the wage schedule as a *quid pro quo* for making the change. Upon analysis, the savings to the ME does not amount to 61¢ an hour. A companion issue is the LO's proposal to change to a less costly prescription drug card which, according to the LO's computations, amounts to a 19¢ per hour wage increase. Again, the change in the prescription drug card has not been voluntarily accepted by the District, nor has the savings of 19¢ per hour been agreed to by the parties.

7. What are the consequences of ignoring an insurance proposal and not bargaining a higher *quid pro quo*? If the LO felt that the ME proposed change in group health insurance had a disproportionate impact upon those in the bargaining unit, it might have considered proposing a higher *quid pro quo* at the bargaining table, and its failure to do so detracts from the persuasiveness of its current arguments. Instead, however, it chose to resist any modification in the health insurance program. *Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09) at page 26.
8. Are there other criteria arbitrators may require? Arbitrators are loath to change insurance plans via interest arbitration. Insurance coverage is a very personal choice and impacts both parties so this is the kind of change that should take place at the bargaining table. In addition, the insurance plan may very well impact more than this bargaining unit. There is nothing in the record as to how the LO's proposal would affect the health insurance plan the ME may have with other bargaining units. As the LO is attempting to change the *status quo*, the burden is on it to present evidence of the plan change's impact on the other bargaining units of the ME. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at page 20.
9. Can there be too much of a good thing? There is no rule or precedent that disqualifies a proposed *quid pro quo* because it is more generous than it need be. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 31.

III. Finances

A. "Greatest" and "Greater" Weight Criteria

1. How are the "Greatest Weight" and "Greater Weight" factors applied?
 - a. In order for the Greatest Weight factor to come into play, MEs must show that selection of a final offer would significantly effect the ME's ability to meet State-imposed restrictions. *Milwaukee Board of School Directors*, Dec. 32429-A (Grenig, 6/13/09) at page 20 and *City of Altoona (Public Works)*, Dec. No. 32673-A (Grenig, 9/05/09) at page 11.
 - b. In terms of the Greatest Weight factor, it is clear no law or directive seriously impacts the ME's ability to meet the LO's offer. However, the fact that an

The Winner Is - An Arbitrator's Perspective - P. 14

employer can afford the costs of an offer does not mean this criterion cannot favor the Employer. *Waukesha County Technical College (Educators)*, Dec. No. 32555-A (Torosian, 7/07/09) at page 36.

- c. There is no specific evidence demonstrating how the economic crisis has hit the ME. Indeed, the ME acknowledges that it is not making an inability to pay argument. The LO has not filled vacant positions because of economic belt-tightening caused by declining state aides and revenue limits. Such belt-tightening standing alone, however, is insufficient to warrant finding that any state law or directive should be given “greatest weight” or that local economic conditions should be accorded “great weight,” as the ME has the financial ability to meet the costs of the LO’s Final Offer. *City of Menomonie (DPW)*, Dec. No. 32631-A (Greco, 8/24/09) at page 16.
- d. The ME will have a Fund 10 deficit by 2012-2013 no matter which scenario or offer is selected. The voters passed the referendum after the third try in large measure as a result of “shared sacrifices” on the part of the teachers and the administration. The “greatest weight” standard, under these circumstances, requires the undersigned to consider the delicate balance between all of these interests. Should the LO’s offer be selected, it is highly likely that the teachers unit, which sacrificed during this bargaining cycle, will come back seeking to be treated as favorably as the support staff in the next cycle. Moreover, there is a good possibility that the LO’s having reaped the benefit of holding out will interfere with the trust the voters had in approving the referendum on the assumption that everyone would “share the pain.” Looking at the totality of the situation, the ME’s offer is preferred over that of the LO under the greatest weight criterion. *Wausaukee School District (Support Staff)*, Dec. No. 32479-A (Schiavoni, 3/31/09) at page 31.
- e. Wis. Stats. 111.70(4)(cm) includes two factors, Factors 7 and 7g, not found in Wis. Stats. 111.77(6). So the factor given greatest weight to state laws or directives that place limitations on municipal expenditures or revenue collections and the factor given greater weight to economic conditions in the jurisdiction of the municipality than any of the other factors does not apply to protective service employees. *Sheboygan County (Sheriff’s Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at page 16.

B. Economy’s Impact on Interest Arbitration

1. What are arbitrators’ perceptions of the economy?

- a. The economy-wide changes during the pendency of this proceeding have been radical. This was hardly something the parties could anticipate. *Washington County (Sheriff’s Dept)*, Dec. No. 32426-A (Honeyman, 2/19/09) at pages 6-7.
- b. No one can deny the county is in a deep, deep recession, the worst since the depression. *Waukesha County Technical College (Educators)*, Dec. No.

The Winner Is - An Arbitrator's Perspective - P. 15

32555-A (Torosian, 7/07/09) at page 38.

- c. Wage offers need to be assessed in light of current economic conditions. Clearly we are in troubled economic times. Unemployment rates have risen dramatically, local and state governments are experiencing significant economic hardships and revenue shortfalls. Taxpayers have been negatively impacted in many areas. While the difference between these two wage offers will have minimal impact on the citizens of the ME, it is important to recognize and appreciate the economic challenges we face. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at pages 37-38.
 - d. Considering current economic conditions facing governments at all levels, it is in the best interests of the public for government to reduce its expenditures, especially where it is possible for it do so without reducing the level of services it provides. *Ozaukee Co (Sheriffs)*, Dec. No. 32592-A (Shaw, 11/02/09) at page 13.
 - e. Over the past several months the economy has moved into a severe recession which must be considered. *Milwaukee County (Fire)*, Dec. No. 32999 (Roberts, 12/29/09) at page 43.
2. Does the economy dictate what final offer should be accepted?
- a. Sec. 111.70(4)(cm)(7r)(j) recognizes that collective bargaining is not isolated from those factors comprising the economic environment in which bargaining takes place. Good economic conditions mean that the financial situation is such that a more costly offer may be accepted. (The assumption that good economic conditions favors the more expensive offer is flawed. While bad economic conditions may foreclose consideration of an expensive benefit, good economic conditions allows the analysis to continue).² A conclusion that the ME's economic condition is strong does not automatically mean that the higher of two offers must be selected or, conversely, a weak economy automatically dictates a selection of the lower final offer.³ *City of Altoona (Public Works)*, Dec. No. 32673-A (Grenig, 9/05/09) at page 14 and *Milwaukee Board of School Directors*, Dec. 32429-A (Grenig, 6/13/09) at pages 22-23.

²See *Northcentral Technical College (Clerical Support Staff)*, Dec. No. 29303-B (Engmann 1998) at page 16 which is cited by Arbitrator Grenig for this proposition. The parenthetical material is added here to clarify the original meaning.

³See *Iowa Village (Courthouse and Social Services)*, Dec. No. 29393-A (Torosian 1999) which Arbitrator Grenig cites for this proposition and which is meant, I believe, to be a restatement of the previous proposition. Arbitrator Torosian's formulation is clearer and more to the point than mine cited earlier in the paragraph. I meant my formulation to be consistent with Arbitrator Torosian's.

The Winner Is - An Arbitrator's Perspective - P. 16

- b. The LO is seeking many economic improvements, but giving up nothing in return. Section 111.77(6)(g) requires that the arbitrator consider “Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.” Over the past several months we have moved into a severe recession, which must be considered and further weighs against the LO’s more costly offer. The ME’s offer is thus more reasonable. *Milwaukee County (Fire)*, Dec. No. 32999 (Roberts, 12/29/09) at page 43.
3. Does the Greater Weight factor related to the municipal employer’s economy preclude consideration of the state and national economies? The LO argues that the Greater Weight factor requires consideration of the economic conditions of the jurisdiction of the ME, not the state or the nation. While the LO’s reading of the statute is correct, it does not mean the state and the national economy cannot be considered as they impact local economies. For instance, the ME receives a portion of its revenue from state aid which is affected by the state economy. No one can deny the county is in a deep, deep recession, the worst since the depression. Of course, different sections of the country and areas within the state are impacted to varying degrees but all are impacted. It may be that the county is one of the most prosperous and wealthiest in the state by various indices, but it has been impacted by the recession in terms of business closings and/or layoffs and a rise in unemployment. Further, the taxpayers who are called upon to support the ME, although more affluent than those in most counties, undoubtedly suffered a loss of personal wealth and retirement savings like everyone else. *Waukesha County Technical College (Educators)*, Dec. No 32555-A (Torosian, 7/07/09) at page 38.
4. Does a comparison between the Municipal Employer’s and the Comparable’s Economic Condition play into the decision?
 - a. There is stress on the ME’s finances, as there is on most municipal employers, but the evidence does not indicate that these stresses are especially acute for the ME. Likewise, the record does not indicate that general economic conditions in the ME require the selection of the ME’s offer. The fact that the ME has engaged in layoffs and position reductions does not *per se* disclose such economic conditions. *Racine County (Courthouse)* and *Racine County (Human Services)*, Dec. Nos. 32423-A and 32422-A, (Bellman, 1-23-10) at pages 7-8.
 - b. Hyperbole and simplicity aside, determinations about the reasonableness of both offers rest in ultimate conclusions and analysis about the financial state of this ME as compared to other comparable districts in the past, at present, and as best as can be anticipated, in the near future. *Wausaukee School District (Support Staff)*, Dec. No. 32479-A (Schiavoni, 3/31/09) at page 29.
 - c. One clear measure of current financial status of the ME as compared to its comparables is the extent to which all of the districts continue to have

The Winner Is - An Arbitrator's Perspective - P. 17

unfunded pension liability obligations. *Wausaukee School District (Support Staff)*, Dec. No. 32479-A (Schiavoni, 3/31/09) at page 30.

5. Do the financial measures taken by employers in response to the current economic conditions impact arbitration results?
 - a. In light of the economic climate as it currently exists, the ME has demonstrated that it has taken measures, to address its financial difficulties. It has laid off employees, deferred necessary expenditures, borrowed short-term, delayed making capital expenditures and delayed paying the principal on its unfunded pension liability. Given the state of the current economic climate, the ME has shown the necessity for its proposed departure from the *status quo* with respect to the language that it seeks. *Wausaukee School District (Support Staff)*, Dec. No. 32479-A (Schiavoni, 3/31/09) at page 33.
 - b. All other things being equal, there is a clear preference under interest arbitration for the *status quo*. But the ME has made a strong showing of financial adversity; has proposed an alternate health insurance plan which saves a great deal of money without any major loss to employees in either coverage, continuation with the same providers, or quality of service; and has offered a large wage *quid pro quo*. At the same time, the LO's wage proposal contains an unjustified extra increment in the second year, given that the employees were already well-off in wage terms compared to other districts. *Iowa-Grant School District (Support Staff)*, Dec. No 32684-A (Honeyman, 9/25/09) at page 19.
6. How does stimulus money impact the analysis? Federal stimulus monies cannot be regarded as a continuing source of funds. It is therefore inappropriate to address the ME's finances as if this current sources of funding would necessarily continue. *Iowa-Grant School District (Support Staff)*, Dec. No 32684-A (Honeyman, 9/25/09) at page 18.
7. What other factors influence the arbitration decision? If the public were to learn that maintenance of a high-cost insurance plan was part of the reason for a second referendum, even though an essentially equal one was available at notably lower cost, it is difficult to see how that would improve the chances of passage. *Iowa-Grant School District (Support Staff)*, Dec. No 32684-A (Honeyman, 9/25/09) at page 18.

C. Government Account Standards Board (GASB)

1. What is GASB?

- a. The Government Account Standards Board (the Board or GASB) has set accounting standards which require MEs to calculate, record and report their costs associated with Other Post Employment Benefits (OPEB). GASB 45 is one of those standards established because most governments do not report information needed to assess the long term financial implication of OPEB transactions, including the actuarial accrued obligation related to

The Winner Is - An Arbitrator's Perspective - P. 18

service to date and the potential demands on future costs. *City of Franklin (Police)*, Dec. No. 32579-A (Dichter, 5/20/09) at pages 17-18.

- b. The Board specifically requires that a legal or contractual cap on the employer's share of the benefits to be provided to retirees and the beneficiaries each period should be taken into consideration when projecting benefits to be provided by the employer in future periods. *City of Franklin (Police)*, Dec. No. 32579-A (Dichter, 5/20/09) at page 18.
2. Will GASB impact public sector collective bargaining? Unquestionably, GASB 45 will impact the outcome in negotiations either through voluntary agreement or subsequent arbitration proceedings. *City of Franklin (Police)*, Dec. No. 32579-A (Dichter, 5/20/09) at page 24.
 3. What has been the arbitration response to GASB?
 - a. The ME does not have 15 to 20 percent of its expenditures in its general fund balance which has affected its ability to engage in short-term borrowing. When the ME's desire to retire its principal on the unfunded pension principal within two years with the referendum monies and its desire to maintain a larger general fund balance ratio to debt to save on interest payments is viewed in this context, it is reasonable. *Wausaukee School District (Support Staff)*, Dec. No. 32479-A (Schiavoni, 3/31/09) at page 30.
 - b. GASB 45, while not mandated by Law, is nonetheless of importance and a consideration in evaluating the proposals. *City of Franklin (Police)*, Dec. No. 32579-A (Dichter, 5/20/09) at pages 18.⁴
 - c. The ME gave its best estimate of costs but it is only an estimate. The fact that GASB 45 has only recently taken effect means that there has been little time to determine whether those estimates comport to reality and what variation there might be. There simply has not been enough time to evaluate the accuracy of the predictions and to make adjustments as required. *City of Franklin (Police)*, Dec. No. 32579-A (Dichter, 5/20/09) at page 22.
 - d. Even though it is without doubt in the interest of the public to adhere to the fundamentals of GASB 45, the record justifies postponing resolution of the problem at this time. The Arbitrator is uncomfortable accepting the figures asserted with so little history to back them up, especially given the changes already made regarding health care. *City of Franklin (Police)*, Dec. No. 32579-A (Dichter, 5/20/09) at page 23.

D. Health Insurance

1. What is the standard for employee contribution to health insurance?

⁴ For a thorough summary of pre-2009 decisions involving GASB, see *City of Franklin (Police)*, Dec. No. 32579-A (Dichter, 5/20/09) at pages 18-21.

The Winner Is - An Arbitrator's Perspective - P. 19

- a. The LO does not want to share the cost of the deductible amounts and wants to cap in dollar amounts its exposure to premium increases, thus encumbering the ME with future increases. This, especially the latter, is clearly counter to the trend in the state and nationally. *Village of Ellsworth (Police)*, Dec. No 32360-A (Torosian, 1/23/09) at page 21.
 - b. The LO's offer capping employees' contributions, encumbering the Employer with future increases, is simply out of step with what is occurring in the field. With the rate of increases in insurance premiums, shared responsibility is now well-established and commonly accepted by unions. *Village of Ellsworth (Police)*, Dec. No 32360-A (Torosian, 1/23/09) at page 23.
 - c. Employees need to be active participants in health care cost containment initiatives. As costs increase, effective utilization, program design, education and economic participation become even more important. While the ME's bargaining units have adjusted premium contributions previously and supported health care plan redesign previously, they will need to work actively with the ME to address rising costs in the future. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at pages 41-42.
2. What impact does late settlement of insurance issues have on the arbitral decision?
- a. The LO should not be rewarded for not settling the health insurance issue at the time of the internal comparables by awarding the LO the same wage increase as the internal comparables, but neither should the LO be punished for exercising its statutory right to interest arbitration. While the internal comparables favored the LO, savings in insurance funded part of the wage increase for the internal comparables, which savings was not realized or available to pay the LO the same wage increase. *Village of Ellsworth (Police)*, Dec. No 32360-A (Torosian, 1/23/09) at page 19.
 - b. The ME's lower wage increases proposed in 2007 and 2008 are offset by the LO's delay in the implementation of the agreed-upon health insurance plan until 2009. *Village of Ellsworth (Police)*, Dec. No 32360-A (Torosian, 1/23/09) at page 22.
 - c. The failure to promptly be able to implement the new health insurance program does have costs associated with it and, while the LO certainly has the right to invoke interest arbitration, it is not without additional costs to the ME. *Outagamie County (Highway Dept)*, Dec. No. 32530-A (McAlpin, 2/11/09) at page 16.
 - d. The consequences of delaying commencement of employees' paying their share of the premiums would result in the ME's being required to pay the full premium despite language in the collective bargaining agreement providing for the sharing of premium costs. Not only would this be unfair to the ME, delaying the commencement of premium sharing could encourage LOs to

The Winner Is - An Arbitrator's Perspective - P. 20

insist on interest arbitration in the future simply to delay implementation of a contract provision requiring employees to contribute to health insurance premiums or to pay increased co-pays. Where wages are retroactive, so too should be higher health insurance deductibles and drug co-pays, especially when supported by internal comparables. *City of Altoona (Public Works)*, Dec. No. 32673-A (Grenig, 9/05/09) at page 16.

3. What is the impact of changes in insurance coverage by the provider? The insurance carrier has given notice that the current drug card, part of the ME's status quo offer, is no longer available, having been replaced by the drug card which is part of the LO's final offer. Such a move by an insurance carrier to unilaterally change a plan consistent with the wishes of one party to an interest arbitration does not sit well with this arbitrator. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at page 20.
4. What is the impact on bargaining history between the parties regarding health insurance?
 - a. The parties' history of addressing healthcare benefits in negotiations is a significant basis for not resolving a health item by arbitration. Clearly, the costs of such benefits must be disciplined in the current environment; but to do so by arbitration, without due respect for the *quid pro quo* doctrine, are not grounds upon which the ME's Final Offer would be accepted. *Racine County (Courthouse)* and *Racine County (Human Services)*, Dec. Nos. 32423-A and 32422-A, (Bellman, 1-23-10) at page 6.
 - b. This is not a LO that fights tooth and nail to keep the *status quo* at all costs. Twice, it has recognized the ME's concerns about the high cost of insurance benefits and it has been willing to modify the *status quo* to some extent to give the ME some financial relief with its insurance costs. *Neenah School District (Support Staff)*, Dec. No. 32643-A (Engmann, 9/24/09) at page 24.

E. Additional Financial-Related Issues Raised in 2009

1. How is the comparison of employee benefits with external comparables calculated? It is changes in benefits in other jurisdictions that are the most relevant rather than the current benefit levels because the parties were cognizant of the benefits elsewhere when they agreed to the benefits that they did. *City of Franklin*, Dec. No. 32579-A (Dichter, 5/20/09) at page 5.
2. What information is used to calculate the cost of living? While some arbitration awards suggest that changes are best measured by comparisons of settlement patterns, this does not reflect "the average consumer prices for goods and services." Despite its shortcomings, the Consumer Price Index (CPI) is the standard for measuring changes in the cost of living. *Milwaukee Board of School Directors*, Dec. 32429-A (Grenig, 6/13/09) at page 22.
3. Can the argument be made that in different economic times, different

The Winner Is - An Arbitrator's Perspective - P. 21

settlements would have occurred? The ME argues that the comparables' contracts were negotiated in an easier economic climate and that these contracts would settle at different levels in today's economy. Speculation such as this is pointless because it does not overcome the plain comparison directives of Sec. 111.77(6)(d). That section requires the arbitrator to make comparisons of the parties' respective offers with comparable communities as to the wages and benefits that actually exist, not the wages and benefit settlements that might have been reached had economic circumstances been different. In effect, the ME is asking the arbitrator to engage in a form of guesswork as to what level the comparables would have settled had their crystal balls granted perfect economic foresight, which this arbitrator declines to do. *Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at page 24.

4. What is reverse catch-up? In a sense, what we have here is the reverse of the 'catch-up' argument sometimes used by LOs who say employees need a larger than average wage increase or benefit because they are behind the comparables. The standard arbitral response is that it took more than one contract to put the employees in the position they are in, and that it will take more than one contract to achieve "catch-up." So it is with the ME in this case. In this bargain, the ME achieved some financial relief in terms of the prescription drug co-pay and the health insurance premium, the cost of which were shifted from the ME to the LO's members. *Neenah School District (Support Staff)*, Dec. No. 32643-A (Engmann, 9/24/09) at page 25.
5. What is the arbitral response when a proposal is first made in the final offer? The LO did not raise the issue until it submitted its final offer. Thus, the parties never discussed the question of comparables as it would apply to the disputed classifications. The ME never had the opportunity to respond to the LO's arguments until the submission of briefs. While the LO has arguments that may justify its proposal, such arguments should be initiated at the bargaining table. To select the LO's final offer would, in effect, provide the LO with a gain it did not seek during negotiations. Further, the ME may have, during the give and take of negotiations, voluntarily agreed to some of the increases the LO seeks for the disputed positions. *Langlade County (Professionals)*, Dec. No. 32588-A (Bielarczyk, 9/09/09) at page 12.
6. Can the argument be made that one bargaining unit should receive a smaller wage increase so another one, behind in the comparables, can be given a larger increase at the next opportunity for bargaining?
 - a. The ME proposes giving this bargaining unit a smaller wage increase so that it will have additional funds available to grant a larger wage increase to the faculty bargaining unit which needs to catch up to its external comparables. While the arbitrator appreciates the ME's dilemma in these difficult economic times, its rationale is unconventional and in opposition to conventional thinking regarding how to achieve its objective. First, there is no guarantee

The Winner Is - An Arbitrator's Perspective - P. 22

that the ME would spend any monies generated by granting a smaller increase to the LO unit in this bargain on faculty wages. Second, the ME would not be required to do so, and intervening events might occur which would preclude the ME from fulfilling those intentions. *Western Wisconsin Technical College*, Dec. No. 32531-A (Yaeger, 3/04/09) at page 9.

- b. The ME's argument that it should save money on one bargaining unit in order to provide more money to another unit is not only unconventional but also unpersuasive in overcoming the persuasiveness of maintaining internal comparability among represented bargaining units in terms of the annual general across-the-board wage increase. *Western Wisconsin Technical College*, Dec. No. 32531-A (Yaeger, 3/04/09) at page 10.
7. What is the arbitral response to a local residency requirement in order to lower response time during an emergency? Residency is a very sensitive issue. It is difficult to argue against the concept of being prepared in the event of a disaster. To insist that one or two calamities occur in order to justify the need to be prepared would be irresponsible. Residency and response time are but one part of an effective emergency response process. Even though an employee resides within the response time area, there is no guarantee that he or she will be able to be contacted. Also, if contacted, there is no guarantee that the employee will be in the response area at the time of contact. Creating a residency and response time requirement alone will not enhance preparedness in the event of an emergency. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at pages 42-43.
8. What costing process should be used? In terms of wages, the LO argues that cost forward and total package costing are meant only for teachers under the QEO, but in its insurance proposal, it argues that, like the teachers in the QEO where money not allocated to benefits was translated into wages, so it should be here. Besides this inconsistency, another problem is that there is no statutory increase limitation of 3.8% total package as in a teacher case. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at page 19.
9. Are voluntary changes and arbitrator imposed changes viewed differently? The LO argues that when comparables voluntarily accepted a change of insurance plans which resulted in a savings of premium, the wage schedule was increased beyond the wage increase in LO's without an insurance premium savings. The LO glosses over are two key words: voluntarily accepted. That is not the situation here. The LO is trying to impose its preferred insurance plan while also imposing the LO-calculated savings on the salary schedule. That is a world of difference from the comparables. In the comparables, both parties agreed to the change in insurance plan and to the amount that would be added to the wage schedule to compensate employees for that change. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at page 20.

The Winner Is - An Arbitrator's Perspective - P. 23

- 10 What was decided about loss of a Commercial Drivers License? The issue involving loss of Commercial Driver's License (CDL) is relatively new, having come as a result of substantial changes in the CDL standards in 2005; therefore, this issue has not had the years of bargaining and arbitration which tends to see the more effective and agreeable language survive. Indeed, in this case, the comparables are all over the place. *Columbia County (Highway)*, Dec. No. 32671-A (Engmann, 10/19/09) at Page 12.
- 11 How will tentative agreements be viewed by the arbitrator?
 - a. Some arbitral recognition exists that even though a tentative agreement was rejected for ratification by one party, the tentative agreement contained a degree of reasonableness or the parties never would have agreed to it. But if arbitrators accept the principle that once a tentative agreement was entered into, that agreement should be enforced, the result would have a chilling effect on collective bargaining. The legal authority to ratify a tentative agreement necessarily implies the legal authority to reject it, subject, of course, to long established parameters of good faith bargaining. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 29.
 - b. A tentative agreement can be a sign of reasonableness as a meeting of the minds has occurred. But arbitrators have been unwilling to impose the terms of the tentative agreement based on that argument alone. A tentative agreement establishes a certain degree of reasonableness but imposing a rejected tentative agreement could have a chilling effect on bargaining and should be avoided in the interest of encouraging collective bargaining between the parties. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at page 35.

IV The Rest of the Story

A. Role of Interest Arbitration and the Interest Arbitrator

1. What is the role of the arbitrator in interest arbitration?
 - a. The role of an Arbitrator in interest arbitration is substantially different from that in a grievance arbitration. Interest arbitration is a substitute for a test of economic power between the Parties. The Wisconsin legislature determined that it would be in the best interest of the citizens of the State of Wisconsin to substitute interest arbitration for a potential strike involving public employees. In an interest arbitration, the Arbitrator must determine not what the Parties would have agreed to, but what they should have agreed to, and, therefore, it falls to the Arbitrator to determine what is fair and equitable in this circumstance. The statute provides that the Arbitrator must choose the last best offer of one side over the other. The Arbitrator must find for each final offer which side has the most equitable position. We use the term "most equitable" because in some, if not all, of last best offer interest arbitrations, equity does not lie exclusively with one side or the other. *Outagamie County*

The Winner Is - An Arbitrator's Perspective - P. 24

(*Highway Dept*), Dec. No. 32530-A (McAlpin, 2/11/09) at pages 13-14.

- b. This Award is not a long-range solution. The parties can negotiate a more appropriate schedule in their next negotiations using the arbitrator's analysis and conclusions as guidance. *Waukesha County Technical College (Educators)*, Dec. No 32555-A (Torosian, 7/07/09) at page 46.
 - c. It is a truism that arbitrators are an extension of the parties' collective bargaining process. Another truism is that an arbitrator's goal is to attempt to place the parties into the position they would have been but for their inability to reach agreement at the bargaining table. I now doubt both propositions. Arbitrators serve not as an extension of the collective bargaining process but as referees in a fight to the knock out such that they do not extend the bargaining process but put an end to it. . .until the next time. And in total package interest arbitration, arbitrators cannot put the parties in the same position at which they should have arrived but did not. Indeed, if one side's offer represents the position that the parties should have gotten to but did not, that is an easy case. That side wins. Let's go home. But those cases don't get to arbitration; instead, this arbitrator is seeing most cases as having two unreasonable offers. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at page 12.
 - d. The ME is attempting to eliminate a previously negotiated wage structure and longevity plan while the LO is attempting to force the ME to change insurance plans while giving itself a huge raise as a *quid pro quo*. How to put the parties in the position they would have been but for their failure to agree? Can't be done. One side is going to get stuck with something it would not have agreed to at the table. *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at page 12.
 - e. The ME rejects the LO's insurance offer and does not include a valid *quid pro quo* for its wage schedule offer. The LO rejects the ME's wage schedule offer and does not include a valid *quid pro quo* for its insurance offer. I cannot put these parties in the position they would have been but for their failure to reach agreement at the bargaining table. One party is going to get stuck with something it does not want and would not agree to. But what else can happen? What else can I do? *Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09) at pages 21-22.
2. Is interest arbitration an appropriate forum for correcting an error in drafting the previous collective bargaining agreement? In grievance arbitration the LO could raise the argument that the ME failed to change the contested language during negotiations and that the ME is therefore bound by the clear meaning of the language. The LO could also argue that the matter was clearly discussed during negotiations and the ME voluntarily made the decision to settle the collective bargaining agreement leaving the contested language unchanged. In effect, the LO could claim in grievance arbitration

The Winner Is - An Arbitrator's Perspective - P. 25

that it opposed the language change sought by the ME and the ME therefore waived any bargaining history arguments when the ME chose to settle the agreement without changing the language. Such a fact would carry great weight in determining the outcome of the grievance arbitration. Therefore, interest arbitration is an appropriate forum to correct an alleged error in the drafting of the previous collective bargaining agreement. *Langlade County (Professionals)*, Dec. No. 32588-A (Bielarczyk, 9/09/09) at pages 10-11.

3. What role does interest arbitration have in terms of contractual housekeeping matters? The interest arbitration process is not intended to make editorial changes. If a party chooses to include these types of proposals in its offer, that party runs the risk of having them be construed as substantive. *Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09) at pages 44-45.

B. Arbitrator as Economist

1. Do all the numbers have to be so boring? In the end, each of the economic predictions and projections the parties have exchanged appear rational and plausible – and each fully justifies Victorian Historian Thomas Carlyle’s description of economics as “the dismal science.” As an arbitrator, not an economist, I choose neither to derogate nor rebut any of them. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 22.
2. For whom is interest arbitration designed to provide full-time work? Accurately converting the facts presented into complete comparisons with external comparables would require more detail and complexity (necessarily including economic assumptions) than those offered in this matter. Presumably, they would also require a good deal more preparation time and expense the parties would prefer to avoid. After all, though data driven, interest arbitration was not designed to provide full-time work for professional economists. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 25.
3. What type of education does an arbitrator need these days?
 - a. One need not be a graduate of the London School of Economics to realize that America has experienced the worst economic crisis since the Great Depression and that nearly all employers - be they in the public or private sectors - have faced enormous economic and fiscal challenges. *City of Menomonie (DPW)*, Dec. No. 32631-A (Greco, 8/24/09) at pages 15-16.
 - b. I am not an economist. *Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09) at page 27.

C. “Belling the Cat”

1. Are arbitrators to “bell the cat”? Comparing the competing offers with what each of the comparables will be paying in premium contribution in 26 years might offer more insightful guidance. But that smacks of an Aesopian “belling the cat” suggestion, far easier said than done, for it requires a clear crystal ball

The Winner Is - An Arbitrator's Perspective - P. 26

or some other uncanny means of accurately predicting the future to which neither parties nor the arbitrator currently has access. *City of Wauwatosa (Fire Dept)*, Dec. No. 32645-A (Hempe, 8/15/09) at page 24.

2. What is "belling the cat"? Aesop's fable *The Mice in Council* (as adapted from Wikipedia – the Free Encyclopedia) reads something like this:

Long ago, the mice had a general council to consider what measures they could take to outwit their common enemy, the Cat. Some said this, and some said that; but at last a young mouse got up and said he had a proposal to make, which he thought would meet the case.

"You will all agree," said he, "that our chief danger consists in the sly and treacherous manner in which the enemy approaches us. Now, if we could receive some signal of her approach, we could easily escape from her. I venture, therefore, to propose that a small bell be procured, and attached by a ribbon round the neck of the Cat. By this means we should always know when she was about, and could easily retire while she was in the neighborhood."

This proposal met with general applause. But then an old mouse got up and said: "That is all very well, but who is to bell the Cat?" The mice looked at one another and nobody spoke. Then the old mouse said: "It is easy to propose impossible remedies."

So "belling the cat" or "to bell the cat" is an English colloquialism that means to suggest or attempt to perform a difficult or impossible task. The moral of the story, as commonly given, is that it is easy to suggest difficult (or impossible) solutions if the individual giving the solution is not the one who has to implement it.

- V. Closing: So has this been an attempt on my part to "bell the cat": that is, to review the Awards issued in 2009 and to offer commentary which would give professionals in the field direction on what arbitrators might rule and why they might do so in 2010 and beyond? Or are you still loss at sea? Let me know.

2009 AWARDS

- City of Altoona (Public Works)*, Dec. No. 32673-A (Grenig, 9/05/09).
- Calumet County (Police)*, Dec. No. 32700-A (Strycker, 9/25/09).
- Cassville School District (Support Staff)*, Dec. No 32649-A (Engmann, 10/06/09).
- Columbia County (Highway)*, Dec. No. 32671-A (Engmann, 10/19/09).
- City of Cudahy (Fire)*, Dec. No. 32675-A (Krinski, 10/28/09).
- Village of Ellsworth (Police)*, Dec. No. 32360-A (Torosian, 1/23/09).
- City of Franklin (Police)*, Dec. No. 32579-A (Dichter, 5/20/09).
- Iowa-Grant School District (Support Staff)*, Dec. No 32684-A (Honeyman, 9/25/09).
- Kewaunee County (Highway)*, Dec. No. 32548-A (Petrie, 8/29/09).
- Langlade County (Professionals)*, Dec. No. 32588-A (Bielarczyk, 9/09/09).
- City of Menomonie (DPW)*, Dec. No. 32631-A (Greco, 8/24/09).
- Milwaukee Board of School Directors*, Dec. 32429-A (Grenig, 6/13/09).
- Milwaukee County (Fire)*, Dec. No. 32999 (Roberts, 12/29/09).
- Monroe County (Dispatchers)*, Dec. No 32738-A (McGilligan, 10/07/07).
- Neenah School District (Support Staff)*, Dec. No. 32643-A (Engmann, 9/24/09).
- Outagamie County (Highway)*, Dec. No 32530-A (McAlpin, 2/11/09).
- Ozaukee Co (Sheriffs)*, Dec. No. 32592-A (Shaw, 11/02/09).
- Racine County (Courthouse) and Racine County (Human Services)*, Dec. Nos. 32423-A and 32422-A, (Bellman, 1-23-10).
- Rice Lake School District (Support Staff)*, Dec. No. 32580-A (Petrie, 7/14/09).
- Sheboygan County (Sheriff's Dept)*, Dec. No. 32740-A (Hempe, 8/25/09).
- Washington County (Sheriff's Dept)*, Dec. No. 32426-A (Honeyman, 2/19/09).
- Waukesha County Technical College (Educators)*, Dec. No 32555-A (Torosian, 7/07/09).
- Wausaukee School District (Support Staff)*, Dec. No. 32479-A (Schiavoni, 3/31/09).
- City of Wauwatosa (Fire)*, Dec. No. 32645-A (Hempe, 8/15/09).
- Village of Winneconne (Public Works)*, Dec. No. 32610-A (Honeyman, 10/09/09).
- Western Wisconsin Technical College (Professionals)*, Dec. No. 32531-A (Yaeger, 3/04/09).