

BEFORE THE ARBITRATOR

ROSE MARIE BARON

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In the Matter of the Petition of

Northwest United Educators

and

WERC Case 22, No. 58759  
INT/ARB-9003  
Decision No. 29963-A

Cooperative Educational Service Agency #11,  
(CESA #11)

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APPEARANCES

Alan D. Manson, Executive Director, Northwest United Educators, appearing on behalf of the CESA #11 professional staff.

Stephen L. Weld, Esq., Weld, Riley, Prenn & Ricci, S.C., appearing on behalf of Cooperative Educational Service Agency #11.

I. BACKGROUND

Cooperative Educational Service Agency #11 is a municipal employer (hereinafter referred to as the "Agency" or the "Employer"). The Northwest United Educators (the "NUE" or the "Union") is the exclusive bargaining representative of certain Agency employees, i.e., a unit consisting of all certified professional employees of CESA #11. The parties exchanged their initial proposals for a successor contract, and after bargaining on matters to be included, were unable to reach agreement. The Union filed a petition requesting the Wisconsin Employment Relations Commission to initiate binding arbitration pursuant to Section 111.70(4)(cm)6, Wis. Stats. Following an investigation and declaration of impasse, the Commission issued an order of arbitration on August 22, 2000.. The undersigned was selected by the parties from a panel submitted by the Commission and received the order of appointment dated September 14, 2000. Hearing in this matter was held on November 8, 2000 at the Agency offices in Turtle

Lake, Wisconsin. No transcript of the proceedings was made. At the hearing the parties had the opportunity to present documentary evidence and the sworn testimony of witness.

Briefs and Reply Briefs were submitted by the parties according to an agreed-upon schedule. The record was closed on December 27, 2000.

## II. ISSUE AND FINAL OFFERS

The sole issue in this case is the Union's proposal to modify Article XIV, Salary and Fringe Benefits, Part K, the post-retirement insurance provision, also known as voluntary early retirement, by providing that eligible employees would receive seven (7), rather than five (5), years of paid health insurance premiums. As a *quid pro quo* for this change, the Union's final offer provides for a salary increase in the second year of the contract which is 1/10 of one percent (0.1%) less than the salary increase which the parties had previously agreed upon in the stipulation of tentative agreements. The Employer proposes to keep the language of Article XIV, Section K as it is written in the existing contract (Employer Ex. 27; NUE Ex. 5). The Employer notes that the Union's final offer is somewhat unusual in that the proposed 0.1% salary reduction would require a modification to a tentative agreement. However, it has no objection to the Union's formulation of its final offer in this manner.

## III. STATUTORY CRITERIA

The parties have not established a procedure for resolving an impasse over terms of a collective bargaining agreement and have agreed to binding interest arbitration pursuant to Section 111.70, Wis. Stats. (May 7, 1986). In determining which final offer to accept, the arbitrator is to consider the factors enumerated in 95-96 Wis. Stats., Employment Relations, Sec. 111.70(4)(cm)7::

7. 'Factor given greatest weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislature or administrative officer, body or agency which

places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

7g. 'Factor given greater weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.

7r. 'Other factors considered.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors.

- a. The lawful authority of the municipal employer.
- b. Stipulations of the parties.
- c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
- d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employees performing similar services.
- e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and comparable communities.
- f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.
- g. The average consumer prices for goods and services, commonly known as the cost of living.
- h. The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

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

#### IV. POSITIONS OF THE PARTIES

The following statement of the parties' positions does not purport to be a complete representation of the arguments set forth in their extensive briefs and reply briefs which were carefully considered by the arbitrator. What follows is a summary of these materials and the arbitrator's analysis in light of the statutory factors noted above. Because the selection of the appropriate communities for purposes of comparability will have a major impact on the selection of one of the parties' final offers, that matter will be addressed first. Following that, the final offers of the parties will be considered in light of the statutory criteria.

##### A. The Comparables

##### 1. The Union

The Union relies on two prior arbitration awards, a 1978 decision by Arbitrator Zeidler (Union Ex. 12), and a 1987 award by Arbitrator Vernon (Union Ex. 13), for its position that the appropriate comparables are the member school districts in the CESA. Arbitrator Zeidler first examined the member school districts of the CESA and found them to be tied on the issue; he then turned to the CESAs to break the tie. In 1987, Arbitrator Vernon found no reason to rely on other CESA districts because 36 or 41 member schools had settled, providing a representative sample.

The Union asserts that the established bargaining history supports its position that the most appropriate comparables in this case are the 39 CESA #11 member school districts, all of

which have settled teacher contracts for the 1999-2001 term. Further, salary schedule increases since Arbitrator Vernon's award have been based solely on direct comparisons with CESA #11 member school districts.

In its Reply Brief the Union argues that the evidence presented by the Employer shows that there is a wide variety of fundamental differences among statewide CESAs, i.e., only four of the other 11 CESAs have union contracts for their teachers (a fifth is in the process of bargaining its first union contract). Although some data were presented in Employer Ex. 14 regarding basic comparisons, it is asserted that the Employer has not provided persuasive evidence that CESAs statewide have more in common with CESA #11 teachers than the latter do with member school districts. Statewide CESAs represent differences in local economies, regional prevailing wage patterns, geography, and tax bases which effect working conditions.

The Union also contends that the Employer's argument that early retirement insurance payment is not a fringe benefit, but is a non-economic operational issue, is based on faulty reasoning. It is argued that the Employer's position that the early retirement plan is not a fringe benefit because it is paid after retirement starts and employment ends, is unreasonable. Funds are budgeted for both union and non-union professionals for early retirement benefits—it is no less a benefit, nor does it become non-economic, because it is paid upon retirement. Although the Employer relies on Arbitrator Fleishli's 1982 award for its position on statewide CESAs, the Union claims that the award supports *its* position, referring to salary and fringe benefits paid to employees of the districts served by the CESA. Thus, the Union concludes that the appropriate comparables in the instant case are the 39 CESA #11 member school districts.

## 2. The Employer

The Employer argues that the 12 statewide CESAs are unique entities and differ in the way they are funded, the services they offer, and the way in which they receive compensation from the member school districts whom they serve. It is asserted that the Union's proposed comparables of the 39 K-12 school districts found within CESA #11's geographical borders provides little guidance on the issue in dispute.

The Employer contends that this cases does not involve wage increases or salary levels, but rather the expansion of an existing contractual benefit, a benefit to be paid after the service has been provided. Reliance is placed on Arbitrator Fleishli's award (CESA #14 (Teachers) Dec. No. 19403-A 9/82) in which he said:

First of all, with regard to the parties' argument concerning the appropriate comparable group, it would appear to the undersigned that other CESA districts are more persuasive for certain comparisons, other than salary. Thus, as noted above, other CESA districts, particularly those with negotiated agreements, are considered persuasive for purposes of certain working conditions...(Emphasis added).

In addition, the Employer points to Arbitrator McAlpin's award in CESA #12 (Support Staff), Dec. No. 27601 (10/93) which reached the same conclusion, that is, in regard to non-economic operational issues all CESAs within the state would be the appropriate comparables.

The Employer does not disagree with the use of member school districts as comparables if the issue was salaries. This has been a long-accepted practice of calculating salary increases and is important because CESA teacher salaries cannot exceed salaries of teachers in the districts that purchase CESA's services. The only way to ensure that this does not happen is to establish a connection between CESA teachers salaries and those of the member districts. Arbitrator Fleishli recognized this in his 1982 award:

...However, on the issue of salary (and fringe benefits such as insurance and STRS contribution) the other school districts within the area served by the CESA agency are deemed to be the most comparable group. It is these districts which purchase the services of the CESA agency and dominate its Board of Control. As the Agency points out, if the salary and fringe benefits paid to CESA employees are not in line with those paid to employees of the districts served by the CESA, the districts are given an incentive to make other arrangements for purposes of obtaining the specialized services provided by the CESA agency. (Emphasis added)

The Employer expects that the Union will argue that early retirement is a fringe benefit, not a non-economic operational issue and therefore the 39 member school districts are the appropriate comparables according to Arbitrators Fleishli and McAlpine. However, the Employer argues that there is a distinct difference between benefits which are earned and paid out concurrent with employment and benefits which are earned and paid out only after employment ends. Insurance and state retirement contributions noted in Arbitrator Fleishli's award are tied to current employment. Early retirement incentive payments are after-the-fact, post-employment benefits. The Employer is required to fund the post-retirement benefit even though it no longer receive the services of those employees. Because CESAs have no taxing authority and limited state aids, their ability to fund future liabilities differs from that of a school district.

The statute requires the arbitrator to compare wages, hours and condition of employment of the municipal employees in this case with those of other employees performing similar services. The teachers in other CESAs are the individuals who perform services most similar to those performed by CESA #11 teachers, e.g., attendance at numerous meetings and conferences, travel among school districts, dealing with extensive paperwork. Working conditions in CESA #11 are no different than other CESAs. Although early retirement benefits are widespread among K-12 school districts in other CESAs, this provision has not been incorporated into their benefit structures.

Finally, it is pointed out that the Wisconsin legislature changed the arbitration statute to

permit K-12 districts to avoid interest arbitration for teacher employees if they make a “qualified economic offer.” However, CESAs were not included in this legislation, thus making a clear distinction between CESAs and K-12 school districts.

The Employer submits that the other CESAs in the state provide a more reasonable foundation for the comparison of final offers particularly when the dispute does not relate to salaries but to a post-employment benefit.

B. Post-retirement insurance

1. The Union

The Union’s final offer proposes a change from a five-year post-retirement insurance benefit to seven years, along with a general wage *decrease* in the 2000-01 wage increase by 1/10 of 1 percent as a *quid pro quo*. It is claimed that this deduction is directly proportional to the original *quid pro quo* of 1/4 of 1 percent which was agreed to when the post-retirement was first negotiated in the 1998-99 contract.

The Union reviewed the statutory factors which arbitrators are to consider in deciding which final offer to select:

Factor given greatest weight: This factor specifies limitations on expenditures and revenues as a result of a state law or directive. CESA #11 receives nearly all of its \$19 million annual budget from its service contracts with member school districts. Only \$25,000 comes directly from the state to cover the costs of administration. CESA #11 has had in place for several years a surcharge percentage on all its service contracts to finance the post-retirement insurance benefit for administrators and NUE-represented employees. It is noted that since CESA #11 is dependent upon its services contracts with member school district, it must not price its services so high that contracts would be canceled. At this time, as a result of negotiated wages and benefits, CESA #11 is far below the average of the member school districts.



The Union contends that since there are no explicit state laws or directives which specifically limit CESA #11 expenditures or revenues, the “greatest weight factor” does not apply in this case.

Factor given greater weight: This factor deals with economic conditions of the municipal employer. The Union does not believe there is anything in the record which would cause the arbitrator to conclude that certain economic conditions exist in the jurisdiction of CESA #11 which would favor the selection of either final offer.

Other factors considered: The Union discusses ten factors.

1. Lawful authority of the municipal employer: Although EEOC is conducting audits of voluntary early retirement provisions in negotiated contracts in Wisconsin school district, there is no evidence that the Employer does not have the lawful authority to extend the present benefit from five to seven years. If EEOC found that such plans were unacceptable, either final offer would be affected.

2. Stipulations of the parties: The parties reached stipulation on several matters, e.g., wage rates and fringe benefits for new bargaining unit members, etc., without difficulty. Nothing in these stipulations provide any significant information which would favor the selection of one final offer over the other.

3. Interests and welfare of the public and the financial ability of the unit of government: The Union cites the testimony of Administrator Rykal that ability to pay is not an issue in this case. The Union asserts that there is evidence which shows that CESA #11 has a much higher level of staff turnover and that improvement in the post-retirement insurance benefit would provide an incentive for staff to remain until retirement, a goal which is shared by the Employer. Union Ex. 15 indicates that the average number of years of service in CESA #11 bargaining unit members is 8.3 compared to an average of slightly more than 11 years among 11 CESA #11

member school districts.

That the Employer acknowledges that turnover is a problem is found in the early retirement plan for CESA #11 professional non-union staff which states in part, "WHEREAS, offering such a benefit would be a factor in reducing turnover among professional non-union staff...(Union Ex. 8, p. 2).

4. Comparison of wages, hours, and conditions of employment with other employees performing similar service: The Union asserts that this factor is primary. Bargaining history over the years as well as two interest arbitration decisions (Zeidler and Vernon) have been based on a direct comparison with CESA #11 member school districts. All 39 member school districts are settled for 1999-2001; complete data is available for comparison of early retirement provisions, wages, and other benefits and working conditions.

Union Ex. 6 and 7 provide data on early retirement provisions in the member school districts. Comparison of the Union's final offer shows that the median age of retirement is 56, matching that of the CESA #11 (no change in this portion of the contract). However, the years of service required by the member school district is 15, compared to CESA #11's 20-year requirement under both offers. The non-union professionals employed by CESA #11 are required to work only 16 years to obtain eight full years of benefits, compared with the Union's proposal of seven years. The Union outlines costs of the proposed expansion of benefits and concludes that CESA #11 figures show a need for catch-up. If no change is made, the existing plan would drop substantially further below average, i.e., if no change it is 72 percent of the average maximum; if the Union's final offer is awarded, the early retirement maximum benefit would be 85 percent of the average.

The Union also points out that in the area of sick leave and personal leave CESA #11 is below average and that average seniority of CESA #11 staff is about three years below the

average of CESA #11 member school districts. Nor do CESA #11 staff enjoy job security as compared with professional staff bargaining units as they do not have seniority layoff rights. These conditions provide justification for improving the early retirement benefit.

The Union argues that such a discrepancy might not require a *quid pro quo*, however, it is noted that the bargaining history reveals that it gave back 1/4 of 1 percent on wage rates earlier for the five year benefit and that at present the offer of 1/10 of 1 percent for an additional two years is an adequate *quid pro quo*.

5. and 6. Comparisons with other public and private employees in the same community and in comparable communities: Little data is provided in the record upon which to base such comparisons. Most significant is the voluntary early retirement plan in effect for non-union professional staff of CESA #11, i.e., administrative assistants and administrators, 20-25 employees. However, the Union does not believe this secondary comparable group is necessary based upon the data available for the 39 member school districts. However, it is asserted that the non-union professional staff comparison is more appropriate than the statewide CESAs proposed by the Employer.

7. Cost of living: Employer Ex. 10 presents data on the Consumer Price Index, i.e., a 2.2 percent increase in 1999 and a 3.3 to 3.4 percent increase for 2000. The wage rate increase which the parties stipulated to is 2.53 and either 1.77 or 1.67 percent in the second year. Thus wage rate increases for the two years are below the official CPI.

The Union surmises that total package costing may be argued by the Employer, however, it is argued that all 39 school districts have similar costs to CESA #11. Therefore, it is contended that the cost of living factor is not likely to determine the outcome.

8. Overall compensation factor. As discussed regarding comparability, the below average wages and benefits and working conditions of CESA #11 employees warrants the

maintenance and improvement of the early retirement benefit. This factor favors the Union offer.

9. Changes in the foregoing circumstances. There do not appear to be any changes during this arbitration proceeding, thus this factor is not relevant to the outcome of the case.

10. Such other factors. The Union accepts the burden of showing the need for its proposed change based upon generally accepted arbitral standards. These questions are: Is there a need for a change due to the existence of a legitimate problem; does the proposed change effectively address the problem; is there an appropriate *quid pro quo*?

The Union asserts that there are legitimate problems regarding post-retirement insurance payments, i.e., the plan is already below the percent level of the comparable school districts at 72 percent and will decline to 61 percent if left as it is. Further, the testimony of bargaining unit members reveals working conditions which produce burnout which affects the health of employees and the quality of services offered by CESA #11. These employees testified to observing the better early retirement benefits received by their colleagues in the member school districts. The Union argues that their proposal would not solve the problems caused by the high demands on special education employees, but at least would alleviate the situation by offering an incentive to employees to stay with CESA #11 until retirement. Finally, the Union contends that its final offer of giving back 1/10 of 1 percent of the wage increase is an appropriate *quid pro quo*. This amount is directly proportional to the original *quid pro quo* in the prior negotiations for the early retirement benefit. It is asserted that the costing presented by the Employer is flawed because of the assumption that all current CESA #11 employees would remain until 2015-2016 or until eligible for the benefit. Since no CESA #11 employee has retired from active employment to go directly to WRS retirement, the employer projections based on such an assumption is not reasonable. It is further shown that all but one of the 39 CESA #11 member school districts have negotiated early retirement benefits; what is not known

is whether a *quid pro quo* was involved or not. The Union argues that if some of the wage rate increases were traded for this benefit, there would have been a negative impact on CESA #11 salary schedules; if not, no effect would have been felt, since CESA #11 salaries have been driven by the salary schedule formula of the member school districts.

In its Reply Brief, the Union responds to the Employer's argument it has not met the showing of a real need for a proposed change, of showing that the proposed change meets the need, and for providing an appropriate *quid pro quo*. It is the Union's position that despite the Employer's statements regarding turnover, difficult working conditions, et al, teachers will benefit if the early retirement is improved. Teachers testified that there is direct link between difficult working conditions and their desire to have an improved retirement plan, one which is closer to that enjoyed by colleagues on the member schools and closer to that provided to the professional non-union employees at CESA #11. The Union reiterates its belief that the Employer's financial projections are grossly unrealistic. It is noted that the Employer's argument confirms what the Union has stated all along, that this is an economic issue and as such it is necessary for the arbitrator to follow the Fleishli/McAlpin standards. Further, the argument by the District that it will cost too much and the *quid pro quo* is inadequate, is a version of an inability to pay argument. However, that is not an issue in this case as testified to by the Administrator. For these reasons, the Union states that its final offer for a modification of a fringe benefit is supported by the primary comparables as well as a *quid pro quo* and will maintain the existing balance between employee wages and benefits and the economic viability of CESA #11.

## 2. The Employer

The Employer points out the existing early retirement language was voluntarily agreed to for the first time in the parties' 1997-99 contract. For the Union to demand through interest arbitration the expansion of a new benefit brings into question the Union's good faith in bargaining. Only one of the 11 other CESAs has such a benefit.

Arbitral precedent is cited regarding the strict standards to be applied when a change in *status quo* is sought: establishing that a compelling need exists and providing a *quid pro quo* for the benefit. The Employer argues that the Union has failed to prove a compelling need. The Union's argument is that all but one of CESA #11's 39 member school districts have some sort of contractual early retirement benefit and that CESA #11 falls below the average of the districts in terms of dollars expended. The Employer points out that the comparables relied upon by the Union are not correct, but rather all other 11 CESAs are. Five CESAs have no early retirement provision, four allow retiring employees to convert sick leave into post-retirement health insurance payments, one contributes an extra 1% toward WRS after five years and 2% after 10 years. Only CESA #10 provides similar benefits, but at a lesser rate. On the comparable criterion, it is argued, the Union has failed to show a compelling need to change the status quo.

The Union's data regarding seniority is suspect as it is based on a response of only 11 school districts, i.e., 28% of the 39 member school districts in CESA #11. In viewing reasons for high turnover among teachers in CESA, the Employer concludes that it is not an inferior wage or benefits package but rather the fact that CESA teachers are often hired in to the very districts that they served as CESA #11 employees. Further, CESA employment is based on year to year contracts so that employment with CESA is not as stable as employment with a school district.

The Union correctly noted that no teacher in CESA #11 has retired into a Wisconsin Retirement System pension. However, there is no evidence that any teachers have left the employ of CESA #11 specifically because of a lack of early retirement benefits. Nor is the fact that non-union administrative staff, who receive between five and eight years of paid health insurance based upon a sliding scale tied to years of service, compelling. Two of the Employer's organized employee groups, both represented by NUE, do not have any contractual early retirement benefit. Thus, there is no overwhelming pattern among internal comparables which would compel the adoption of the Union's final offer.

The Employer asserts that the Union has failed not only to show a compelling need to improve upon the early retirement benefit, but also that its proposed improvement would rectify the problem. Even if the Union's proposal were adopted, teachers would still face the same working conditions and many will continue to be hired away by the school districts they serve.

The Employer also argues that the Union has failed to offer an adequate *quid pro quo*. The Employer has provided a 15-year projection of costs comparing both final offers which is based on the assumption that every currently employed teacher utilizes the early retirement benefit as soon they meet age and years-of-service requirements and that there is a 10% increase in health insurance premiums (Employer Ex. 20-22). The cost of the Employer's final offer maintaining the status quo is \$1,426,763 over the next fifteen years; the additional two years of coverage proposed by the Union will cost \$1,747,959--an increase of \$321,196 over the Employer's offer. It is asserted that the Union's *quid pro quo*, i.e., 0.1% in the second- year salary schedule, is only \$2,326 less than the Employer's offer, an amount which is not an adequate *quid pro quo*.

The Employer argues that the Union has not provided clear and convincing evidence that the first two prongs of the *status quo* test have been met. A costly change such as proposed, coming only one contract term after the original benefit was first introduced into the contract, should not be achieved through the arbitration procedure without a commensurate give-back. It is the Employer's position that the change in the *status quo* sought by the Union did not occur in voluntary negotiations for several reasons. First, the CESAs and school districts are dissimilar entities with respect to funding, operations, taxing authority and managerial strategy. Second, only one other CESA has an early retirement provision that approaches CESA #11's current provision, thus there is no support among the appropriate comparables for the expansion of an already competitive benefit. Third, the Union's proffered *quid pro quo* is not adequate in the face of a potential added liability in the hundreds of thousands of dollars.

In its Reply Brief, the Employer refers to awards by Arbitrators Zeidler and Vernon and reiterates its position that statewide CESAs are the appropriate comparability group. In the latter case, wages were the issue and it is conceded that the member school districts are the appropriate comparable group. However, Arbitrator Fleischi and McAlpin concluded that for purposes other than salary, the appropriate group was other CESAs. It is argued now that there is nothing unique about other CESA settlements that would preclude the arbitrator from considering them.

The Union claims that the Employer's early retirement cost projections are flawed because not all employees will remain until they become eligible for early retirement benefits. This contradicts the Union's argument that current staff would remain employed if they become eligible for improved early retirement benefits. Further, the Union's claim that its offer would rectify the turnover problem is nothing more than conjecture.

The Employer discusses the Union's arguments that CESA #11 salaries are falling behind those of the member school districts, that sick leave, personal leave and layoff rights are all at lower than the member districts. The Employer concludes that these facts show the fundamental differences between CESAs and their school districts, thus reinforcing its argument that the member school districts are not appropriate comparables.

For all these reasons, the Employer asks that the Union's final offer be rejected by the Arbitrator.

## V. DISCUSSION AND FINDINGS

### 1. Selection of comparables

This case involves a single issue, the Union's desire to expand the early retirement insurance benefit from five to seven years. At hearing the parties indicated their agreement that the selection of either of their differing comparability groups would determine which of the parties' final offers would prevail. As discussed above, the Union is proposing the 39 member



school districts which comprise the CESA #11 service area while the Employer proposes the 11 other statewide CESAs.

In support of its position, the Union relies on prior arbitration awards of Arbitrator Zeidler regarding fair share and Arbitrator Vernon who considered salary and who utilized the member school districts to reach their decisions. It is argued that CESA #11 staff have more in common with the teachers in the member school districts than with those employed by statewide CESAs based upon local economies, regional wage patterns, geography and tax bases.

The Employer relies on, inter alia, an early award by Arbitrator Fleishli who is quoted as saying that "...other CESA districts are more persuasive for certain comparisons, other than salary..." Arbitrator McAlpin also held that with respect to non-economic operational issues, statewide CESAs were the appropriate comparables.

It is of value in considering the competing arguments of the parties to examine the entire paragraph found in Arbitrator Fleishli's award. He said:

Before addressing the salary issue, the undersigned would make a number of observations concerning some of the evidence and arguments presented. First of all, with regard to the parties' arguments concerning the appropriate comparable group, it would appear to the undersigned that other CESA districts are more persuasive for certain comparisons, other than salary. Thus as noted above, other CESA districts, particularly those with negotiated agreements, are considered persuasive for purposes of certain working conditions, such as mileage reimbursement. **However, on the issue of salary (and fringe benefits such as insurance and STRS contribution) the other school districts within the area served by the CESA agency are deemed to be the most comparable group.** It is these districts which purchase the services of the CESA agency and dominate its Board of Control. As the Agency points out, if the salary and fringe benefits paid to CESA employees are not in line with those paid to employees of the districts served by the CESA, the districts are given an incentive to make other arrangements for purposes of obtaining the specialized services provided by the CESA agency....*CESA #14 (Teachers), Decision No. 19403-A, p. 18 (9/82)* (emphasis added)

Arbitrator Fleishli separated contractual provisions into two groups, i.e., "language issues having only an indirect impact on cost, and straight money issues." The first group consisted of hours of work, termination of employment, paid leaves of absence, unpaid leaves

of absence, just cause for adverse actions against probationary employees, and fair share. The money issues consisted of mileage reimbursement, health insurance, rate of contribution for STRS, and salary.

It is noted that, unlike the instant case, in the matter before Arbitrator Fleishli it was the Agency which argued for the adoption of the member schools in the CESA district and the Association which relied upon other CESA agencies (CESA #2 and #4) which had negotiated agreements with professional staff in addition to the districts served by CESA. The argument on comparables made by the Agency in CESA #14 is now being set forth by the Union in CESA #11. The position of the Employer in CESA #14 was:

The Agency contends that, although the practices of other CESA districts, including those who responded to a survey conducted by the Agency (the results of which were introduced into evidence), are relevant, **the controlling comparable group for most purposes consists of the districts which are served by the Agency.** This is true, according to the Agency, not only because both parties utilized these districts in support of their arguments, but also because **these districts do in fact represent the existing level of wages and benefits in the geographic area in which the agency operates.** (emphasis added).

In the instant matter the Employer argues that health insurance benefits for retirees is not an economic benefit because it is paid to employees only after they cease service to CESA #11 and, therefore, following Fleishli and McAlpin, a comparison with statewide CESAs is appropriate. The arbitrator does not agree with this characterization of the benefit. The record is replete with information on how much the Union's final offer will cost the Employer over the next fifteen years for the 24 employees who will have become 56 years old with 20 years of service. Applying the categories noted above by Arbitrator Fleishli, payment of a benefit after retirement does not change it from a "money issue" to a "language issue having only an indirect impact on cost." This arbitrator is persuaded that health insurance for retirees (and the proposed improvement in the length of time the benefit is to be granted) is an economic issue and it is therefore appropriate to rely on data from samples which are, *inter alia*, geographically

proximate, of similar size, similar economic conditions, of unionized status.

In the instant case, the Employer argues for the adoption of the state-wide CESA districts as the appropriate comparables. Clearly there are large distances between CESA #11 and the majority of CESA districts; only CESA #12, #10, and #4 are contiguous. The only data supplied regarding size is found in Employer Ex. 14, which contains school district data by CESA for 1992-93--very outdated for purposes of comparability today. Nonetheless, a review of the table (page 4) indicates that CESA #11 falls at the midpoint of the range in terms of number of school districts, number of schools, teachers (FTE), students, school district general fund spending, and school district equalized value. However, the data also show a large range when absolute values among the agencies are considered. For example, in terms of general fund spending, there are vast differences from the high of \$1.4 billion dollars in CESA #1 to a low of \$110.8 million in CESA #12, with CESA #11 at \$254.3 million. The School District Equalized Value is a high of \$46.2 billion in CESA #1, a low of \$2.8 billion in CESA #12, with CESA #11 at \$6.5 billion. The large disparity between these CESAs in terms of size, number of teachers and students, as well as financial expenditures negate their value as appropriate comparables.

Another factor which points to commonality is whether the units being compared are unionized. Data provided by the Employer (Exhibit 19) regarding early retirement benefits of CESAs statewide also provides this information. Of the 11 other CESAs in Wisconsin, four are unionized, i.e., #2, #3, and #9 are covered by collective bargaining agreements and CESA #6 is in the process of bargaining its first union contract. The others are not unionized, i.e., CESA #1, #4, #5, #7, #8, #10, and #12. This arbitrator does not believe that it is appropriate to compare benefits which are being sought through collective bargaining with those which are available to employees only through the unilateral dispensation of the employer.

The proposed comparables of the Union are the member school districts with whom CESA #11 teachers and professional staff interact on a daily basis, who share to a large extent

regional wage patterns, geography, and tax bases. According to the Union all 39 school districts have settled teacher contracts for the 1999-2001 term.

Based upon a review of the evidence of record and the arguments of the parties, the arbitrator concludes that the Union's proposed group of comparables of the 39 member school districts in the CESA #11 service area is the more reasonable and it will therefore be adopted in order to determine which of the parties' final offers is selected.

## 2. Statutory criteria

Section 111.70(4)(cm)7 Wis. Stats. requires the arbitrator to consider certain factors in rendering the award.

**7. Factor given greatest weight.** The parties are in agreement that CESAs are not covered by the qualified economic offer limitation placed on other teachers. There are no state laws or directives which specifically limit CESA #11 expenditures or revenues. CESA #11 administrator Rykal testified that nearly all of the annual budget comes from service contracts with the member school districts. Only \$25,000 comes from the state to cover the cost of administration. The Union's assertion that the greatest weight factor does not apply in this case nor does it favor one selection of a final offer over the other was not challenged by the Employer. The arbitrator concludes that this factor will not affect the selection of a final offer.

**7g. Factor given greatest weight.** The arbitrator is required to consider and give greater weight to economic conditions in the jurisdiction than those in subd. 7r. Neither party argued that economic conditions in the jurisdiction of the municipal employer was a factor which would influence the selection of a final offer. The arbitrator concludes that this factor will not favor the selection of either offer.

**7r. Other factors considered.**

a. Lawful authority of the municipal employer: The Employer raised the possibility that, as a result of an audit conducted by the U.S. Equal Employment Opportunity Commission, it is possible that voluntary early retirement provisions in negotiated contracts in Wisconsin school districts may be held to be in violation of the age discrimination laws. As the Union noted, if there were to occur, both final offers would fail. At this time the arbitrator finds that there is no legal impediment to the authority of the Employer to implement either of the final offers.

b. Stipulations of the parties: The parties entered into stipulations on August 2, 2000 (Union Ex. 4; Employer Ex. 3). Nothing in these stipulations favor the selection of either of the final offers.

c. Interests and welfare of the public and the financial ability of the unit of government. There has been no assertion by the Employer of an *inability* to pay the added costs of the Union's final offer. Rather the concern of the Employer is that in order to meet the additional costs it may be necessary to raise the fees it charges to the member school districts for the services of CESA #11 teachers and professional staff. Therefore the Employer would prefer to keep its costs at a competitive level; if its fees for service becomes too costly, school districts may terminate their contracts and seek less costly options—a scenario which could lead to layoffs of staff. While this unfortunate outcome is a possibility, it cannot be assumed to be a likelihood. The school districts purchasing CESA #11 services are well aware, through their Board participation, of the costs that are incurred and any resulting fee increases, which based on the comparables, reflect, often at a lesser rate, the benefits which their own employees are receiving. Since at this time the Employer is facing only future costs, and there is no assertion of an inability to pay, the arbitrator concludes that the Union's final offer is not unreasonable.

The Union asserts that there is evidence that staff turnover is much higher in CESA #11 than in its comparables and that the Employer has expressed an interest in reducing such turnover. The Union is in agreement with the Employer's goal which would serve to improve the quality of services it offers thus serving the interests and welfare of the public. It is the Union's belief that its offer to improve the early retirement plan would in fact serve as an incentive for staff to remain with CESA #11 until retirement. The Union further notes that the Employer's early retirement plan for non-union professional staff clearly states that "offering such a benefit would be a factor in reducing turnover among professional non-union staff." The arbitrator has considered this factor and has come to the conclusion that the Union's final offer to extend the post-retirement insurance benefit to seven years may well be a step toward improving the morale of the staff and affect their willingness to continue their employment in order to enjoy this improved benefit. This factor favors the Union's offer.

d. Perhaps the most relevant of all the factors to be considered by the arbitrator is the comparison of wages, hours, and conditions of employment with other municipal employees performing similar services. Although the Employer's argument that only other CESA employees perform similar services has some merit, the arbitrator does not believe that the statute requires an *identical* level of service. While CESA teachers perform their professional services as "itinerant" teachers, and have particular areas in which they specialize, they are nonetheless part of the area educational system and deliver their services in member school districts in a relationship with regular classroom teachers. As the arbitrator has determined above, a comparison of fringe benefits received by teachers in the 39 member school districts is reasonable.

Union Exhibits 6 and 7 provide, *inter alia*, data regarding early retirement provisions in these member school districts. For purposes of this award only the information regarding health insurance will be discussed in this section and the following analysis will be based on the most recent information, that of April 2000 . Inspection of Union Ex. 7 shows that of the 38 districts (not including CESA #11 and Clayton) which have a specific age requirement for eligibility, the median is 55.<sup>1</sup> This is slightly below CESA #11's requirement of 56 years. Regarding years of service for eligibility, the median is 15 years – 5 years less than that required by CESA #11.

A further analysis of these data show that not all of the 38 school districts which provide early retirement benefits include health insurance. These include Clear Lake, Pepin, Prairie Farm, and St. Croix Central. Of the 34 remaining districts, the cost of health insurance is in a range of \$21,000 in River Falls to a high of \$95,609 in Menomonie, New Richmond, and

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<sup>1</sup>Age 57: 16 districts; Age 56: 2 districts; Age 55: 20 districts. The median falls halfway among the listing, i.e., between the 19<sup>th</sup> and 20<sup>th</sup> entries.

Osceola. The median falls at \$52,650. CESA #11 costs for health insurance are listed at \$33,000, an amount approximately 63% of the median employer for this benefit.

The arbitrator was unable to determine the period of time over which these benefits were paid to retirees employed by the comparables. Nonetheless, the evidence supports the Union's contention that in terms of the bottom line, CESA #11 employees are well behind the comparables and that if benefits are not improved, they will fall even farther behind. The Union also argues that the relation of CESA #11 employees to the comparables in sick and personal leave, lack of seniority layoff rights, and wages support its position. The arbitrator has determined that the issue before her is limited to post-retirement insurance benefits and therefore will not make specific findings on these matters.

Based upon the record, the arbitrator finds that based upon a comparison with employees performing similar services, i.e., the member school districts served by CESA #11, the Union's final offer is preferred.

e. Comparison with other public employees in the same or comparable communities. There is a voluntary early retirement plan in effect for CESA #11 non-union professional staff (Union Ex. 8). This plan was originally approved by the CESA #11 Board on March 28, 1991 and has been amended several times, the latest being December 10, 1998. The stated intent of the plan was to provide early retirement incentives which would be a factor in reducing turnover in this employee group. To be eligible for the plan employees must complete a minimum of ten years employment, be at least 57 years of age, not be members of the bargaining unit, and are retiring to receive benefits under the Wisconsin Retirement System. Payment of health insurance benefits is provided over a range of 5 years of paid health insurance after 10 years of employment with CESA #11 to 8 years of paid health insurance after 16 years of employment. Although non-union employees must wait one year more to become eligible than represented employees, i.e., to age 57, they may become eligible after far fewer



years of employment than represented employees who must have worked 20 years, i.e., a non-represented employee would receive 5 years of paid health insurance after 10 years. A non-union employee would only have to work 14 years in order to receive 7 years of the benefit, while the Union's final offer still requires represented employees to work six more years. Even taking into consideration the one-year difference in the non-represented employees' age of retirement, it appears that they will receive a more generous benefit than the represented professional staff. Have made that observation, the arbitrator believes that this factor is of lesser significance than the comparison already made with other *unionized* entities, and therefore will be given less weight than other factors.

No other information is available regarding other employees in public employment in the same or comparable communities.

f. No information was provided which would permit a comparison of the municipal employees in this arbitration proceeding with employees in private employment in the same or comparable communities.

g. The cost-of-living data was introduced by the Employer (Ex. 10). The average consumer price index for 2000 was 3.3% for all urban consumers and 3.4% for urban wage earners and clerical employees. The Employer's final offer for the first year of the contract is for a 2.53% per cell increase and for the second year, 1.77% per cell. The Union's final offer is for 2.53% for the first year and 1.67% for the second. These wage increases are based on the average of the majority of CESA #11 member school districts (Employer Ex. 8 and 9). Both offers fall below the consumer price index. This factor will therefore not influence the selection of one of the two final offers.

h. A comparison of the overall compensation of CESA #11 professional employees with those in the member school districts is provided in Union Ex. 6 and 7. These include dental insurance, stipend, and sick leave payout. Other information was also provided including sick

leave incentives (Union Ex 9), personal leaves (Union Ex. 10), as well as a narrative describing the fact that CESA #11 staff do not have a seniority-based layoff clause unlike many of the comparable schools districts (Union Ex. 11, p. 2). It is argued that CESA #11 employees receive benefits well below the comparables in all these areas and thus it is important to keep their retirement benefits from falling so far below average.

There has been no significant rebuttal to the Union's argument and the data speak for themselves. The arbitrator concludes that this factor favors the Union's final offer.

I. There has been no assertion that there have been any changes in the foregoing circumstances during the pendency of the arbitration proceedings, therefore, this factor does not play a part in reaching a determination of the selection of one of the final offers.

j. Such other factors normally taking into consideration. The Employer argues that the Union's attempt to improve a benefit which it received only during the last negotiations for the 1997-99 contract is unreasonable. It is the Employer's position that the Union has failed to meet strict standards for changing the status quo, i.e., there must be a showing of a need (or compelling need) to change the language, the party seeking to change the must provide an adequate *quid pro quo* for the change, and finally there must be clear and convincing evidence that the two prongs of the test have been met.

The Employer contends that the Union's argument that the current early retirement provision falls below the average of the 39 districts is flawed because it is based on inappropriate comparables. When the 11 other CESAs are examined, only one, CESA #10 has an early retirement benefit similar to the present benefit offered by CESA #11, but which is less generous. The Employer also points to the flaws in the Union's argument regarding seniority among CESA #11 teachers when compared with the member school districts. Among the points it disputes, the Employer notes that many special education teachers leave CESAs and are hired by school districts where they have served. There is also uncertainty as to tenure because

CESAs are driven by one-year contracts.

It is also asserted that internal comparables do not support the Union's final offer.

Although CESA #11's non-union administrative staff receive health insurance benefits upon retirement, two other groups of employees represented by NUE do not. These are the Associate Staff, and the Head Start Associate and Professional Staff.

The Employer cites this arbitrator's decision in the *Rusk County Sheriff's Department*, citation omitted) in which it was held that the Union had not shown compelling need regarding a change in contract language on shift schedules. The specifics of this case differ from the instant one. The rationale was that the Union's proposed language would create an unreasonable burden on the Employer's ability to manage its operation in a flexible manner. Such is not the case here.

The arbitrator is not persuaded by CESA #11's argument regarding proof of the Union's need for the contractual change. First, the comparables which have been approved support the Union's position. Less weight has been accorded to any internal comparable. There is no evidence that the improvement in benefit will create an unreasonable burden on the Employer, i.e., there is no evidence that the Employer will be unable to meet the additional costs. "Need" may be a somewhat subjective concept -- having gained a benefit a relatively short while ago perhaps was a short-term objective, with an enhancement now in the forefront of the desires of the membership of the bargaining unit. It has not been disputed that the professional staff face issues of extensive travel, increased paperwork, required attendance at meetings, and job burnout. The testimony of Union witnesses, Joan Lystig, a 46-year old teacher, Trudy Carlson, a 38-year old teacher, Judy Knickerbocker, a 47-year old teacher, and John Nielsen, a 55-year old school psychologist, all indicated how important this benefit would be to them. For example, Ms. Lystig said, "If I can't do my job well and I could retire, the choice of retiring is important." Ms. Carlson was asked how the additional two years would affect her. She replied, "We need an

incentive to work here to retirement.” Perhaps another expression of “need” may be found in the willingness of the bargaining unit to take a reduced wage increase in the second year of the contract in order to improve their retirement benefit. The Employer has cited this arbitrator’s decision in *Boyceville Community S.D. (Teacher Aides)* (citation omitted), however, it has omitted a significant part of the section quoted which helps explain why the Union’s final offer failed in that case. The relevant quotation follows:

...The arbitrator is not convinced that the Union has shown a need for this benefit, particularly if one looks beyond comparability, **and takes into account that this proposal was never subject to prior bargaining.** Certainly the Association has a wish to provided the best possible wage and benefit package for its constituents, but simply put, wishing does not make it so. **However, even if we assume that the Union has demonstrated a need, it nonetheless fails to met the second criterion, that of providing a quid pro quo for the proposed change. This aspect is doubly confounded since, if there was no face-to-face bargaining on this issue, there could have been no opportunity for movement or “horse-trading” on this issue. Arbitral precedent supports the District’s position that there should be no fundamental change without voluntary negotiations and that arbitrators should refrain from imposing such a change without exception circumstances. In the instant case, there is no evidence that there is a compelling need for such a major change. (at page 20)**

It is clear that the instant case differs significantly from *Boyceville*. On August 3, 2000, the NUE notified the WERC that the parties had exhausted all chances for a voluntary settlement, enclosed their final offers along with stipulations and a modification of a stipulation (Union Ex. 4). On August 22, 2000, WERC issued its order requiring arbitration which stated, *inter alia*, that the parties had exchanged their initial proposals and bargained on matters to be included in a collective bargaining agreement and had reached impasse (Documents sent to arbitrator along with order of appointment). There is no question that the parties in the instant case conducted face-to-face bargaining, but in the end failed to reach agreement on one issue, that of health insurance for retirees. And as will be discussed in greater detail below, the Union in the instant matter has offered a *quid pro quo*.

Based on this record, the arbitrator concludes that the Union has shown that its members perceive a need for an improvement in the contract, that is, an incentive to remain in an admittedly difficult job until retirement.

The Employer argues that the Union has failed to offer an adequate *quid pro quo* for the proposed change. As support for its position, the Employer points to the early retirement costs it will incur for the next 15 years under the two final offers. An assumption is made that every currently-employed teacher will retire as soon as they become eligible. The Employer's costs would be \$1,426,763 while under the Union's offer it would be \$1,747,959, an increase of \$321,196; it is projected that when averaged out among the 24 employees who will be eligible to retire during the 15 years, it equates to an additional \$13,383 per employee. In exchange for this benefit, the Union offers a .1% salary reduction in the second year of the contract, i.e., 1.67% per cell versus the Employer's 1.77%. For 2000-01, this amounts to a difference of \$2,326 less than the Employer's offer. It is asserted that this is not a sufficient give back.

The Union's position is that the Employer's argument is a variation of an "inability to pay" position which is not at issue herein. The projected costs are unrealistic in light of the fact that not a single member of the bargaining unit has retired to the WRS. The Union points to the fact that bargaining history shows that the Union gave 1/4 of 1 percent in order to gain the five-year benefit for 1998-99 contract. The present *quid pro quo* offer of 1/10 of 1 percent is directly proportional and is believed to be appropriate for the modification of the *status quo*, that is, it is not of the same magnitude as the change from no early retirement benefit to one with five years of insurance payments.

There appears to be an inherent contradiction in the arguments set forth by the parties. Both parties contend that the data and/or conclusions provided by the other are based on conjecture, i.e., the Employer challenges the Union's belief that if its final offer is accepted, the result will be a reduction in turnover of employees, while the Union disputes the Employer's

assumption that all employees will retire as soon as they are eligible and that as a result the projected costs are far too high. There does not seem to be much concrete information to assist the arbitrator in determining whose argument will prevail since neither of their assumptions can be proven at this time.

The argument of the Union that its offer to take a lesser wage increase in the second year of the contract as a “give back” for the expanded retirement benefit has some merit. While it is true that in the context of insurance costs it is far from a perfect trade-off, it does represent a good faith effort on the part of the Union to meet the *quid pro quo* standard. In the last bargain the Union traded 1/4 of 1 percent for a five-year benefit. Now for an additional two- year benefit they are prepared to give back 1/10 of 1 percent, a proportion of the last bargain ( $.0005$  per year  $\times 5$  years =  $.0025$  compared to  $.0005 \times 2$  years =  $.001$ ).

The arbitrator cannot give the *quid pro quo* argument in this case the same quantum of weight that it might receive under different circumstances. As noted above, the arbitrator does not believe either party has shown conclusively the future effect of their final offers on the costing of the additional two years of health insurance for retirees. The Union has provided a good faith *quid pro quo* for the sought-after benefit. While not as clear-cut as one would wish, the record favors the Union’s position.

What tips the balance in this case, and the factor which receives more weight than the other relevant factors, is that of the comparables. Based on the fact that CESA #11 employees are far behind their colleagues in post-retirement health insurance benefits, the arbitrator finds that the Union’s final offer providing for an expansion of this benefit from five to seven years is the more reasonable.

## VI. AWARD

The final offer of Northwest United Educators, along with the stipulations of the parties, shall be incorporated into the parties’ written Collective Bargaining Agreement for 1999-2001.

Dated this 24<sup>th</sup> day of February, 2001 in Milwaukee, Wisconsin.

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Rose Marie Baron, Arbitrator