IN THE MATTER OF THE ARBITRATION PROCEEDINGS

BETWEEN

MILWAUKEE BOARD OF SCHOOL DIRECTORS,

Employer,

and

ARBITRATOR'S AWARD
Case 385 No. 58814 INT/ARB-9017
Decision No. 30136-A

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION (ACCOUNTANTS/BOOKKEEPERS),

Union.

Arbitrator: Jay E. Grenig

Appearances:

For the Employer: Donald L. Schriefer, Esq.
Assistant City Attorney

For the Union: Barbara Zack Quindel, Esq.
Perry, Shapiro, Quindel, Saks, Charlton & Lerner

I. BACKGROUND

This is a matter of final and binding interest arbitration for the purpose of resolving a bargaining impasse between the Milwaukee Board of School Directors ("Board" or "Employer") and Milwaukee Teachers' Education Association ("Association"). The Board is a municipal employer. The Association is the exclusive collective bargaining representative for a bargaining unit composed of approximately 24 accountants and bookkeepers employed by the Board.

The Association and the Board have long been parties to a series of collective bargaining agreements. After their negotiations failed to result in a successor to the 1997-99 contract, the Board filed a petition on April 27, 2000, with the Wisconsin Employment Relations Commission ("WERC") alleging that an impasse existed between it and the Association in their collective bargaining and requesting the WERC to initiate arbitration pursuant to Wis.Stat. § 111.70(4)(cm)(6).

Final offers were exchanged by the parties and submitted to an investigator for the Wisconsin Employment Relations Commission on May 11, 2001. On May 21, 2001, 2001, the WERC certified that the investigation was closed and submitted a list of arbitrators to the parties. The parties selected the undersigned to resolve their dispute. On August 2, 2001, the Employer issued an order appointing the undersigned as the arbitrator.

A hearing was conducted on October 25, 2001. Upon receipt of the parties' reply briefs, the hearing was declared closed on February 21, 2002.

II. FINAL OFFERS

A. EMPLOYER

U-2. Modify Part III, Section B(12)(b), to read as follows:

> b. The Board will pay twelve dollars-($12) per month toward the premium for employes with single coverage and thirty eight ($38) per month toward the premium for employes with family coverage in either the indemnity or prepaid group dental insurance. Effective upon ratification between the parties, if the foregoing amounts do not reflect 93.9 percent of the family premium and 97.4 percent of the single premium the Board contributions will be adjusted to reflect such percentages.

B-7: Modify Part V, Section B(2), to read as follows:

> B. Transfers, Reassignments, and Seniority
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> . . .
>
> 2. Employes may apply for transfers when a vacancy exists and shall be interviewed by the building principal. The principal shall select from among the three (3) most senior qualified applicants.

B. ASSOCIATION

U-2. Modify Part III, Section B(12)(b), to read as follows:

> b. The Board will pay twelve dollars-($12) per month toward the premium for employes with single coverage and thirty eight ($38) per month toward the premium for employes with family coverage in the prepaid group dental insurance. If the foregoing amounts do not reflect 93.9 percent of the family premium and 97.4 percent of the single premium the Board contributions will be adjusted to reflect such percentages.

III. STATUTORY CRITERIA

111.70(4)(cm)

. . .

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 legislative 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 employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.

e. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities.

f. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes 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 municipal employes, 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

A. THE EMPLOYER

The Board contends that the Union's proposal regarding dental premium costs is unreasonable. The Board believes that the Association's proposal is unambiguous and that the Association's claim as to its meaning is untenable. According to the Board, the Board utilizes two distinct types of dental plans: an "indemnity" plan and two "prepaid"

plans (dental maintenance organizations). The Board asserts that none of these two terms subsumes the other, and there is no overlap whatsoever in their meaning—they reference separate, distinct, clearly distinguishable plan types.

The Board rejects the Association's contention that the Association's proposed language merely tracks language from the educational assistants' contract. According to the Board, the Association's language only loosely tracks that in the assistant's contract. The Board points out that, while the educational assistant's dental provision references only the prepaid plan, the provision was accompanied by a bargaining note referring to the dental provisions in the previous contract. The Board explains that authorization for payment of indemnity plan premiums by the Board exists only as a consequence of the negotiating note and the parties' understanding when they negotiated the educational assistant language, with their negotiating note, that percentage contributions applied to both plan types covered by the predecessor agreement.

The Board relies on *Northeast Wisconsin Technical College*, Dec. No. 29320-A (Petrie 1999), in which Arbitrator Petrie noted that "the final offer statutory interest arbitration process is not well-suited to handling broad areas of language disagreement." Arbitrator Petrie also observed that "interest arbitrators are reluctant to select final offers which are ambiguous on their faces and/or in their intended applications."

It is the Board's position that the Union has failed to offer any quid pro quo for its dental proposal. The Board points out that other groups have received enhanced dental benefits only in the context of quid pro quo bargaining in which both parties to the bargaining gave and received items in exchange for bargained provisions.

According to the Board, the Association's proposal, properly construed, is unreasonable even to the Association. The Board says that under the Association's proposal Board contributions are required only toward prepaid plan premiums and not toward indemnity plan premiums.

Stressing what it characterizes as the significant degree of uncertainty attending the Association's proposal, the Board contends that its proposal is more reasonable than the Association's.

With respect to its transfer proposal, the Board argues that appointing accountants/bookkeepers solely on the basis of seniority is inappropriate in light of the level of responsibility associated with the position, the variable nature of the job from one school to another, and the variable levels of qualification and experience among the accountants/bookkeepers themselves. The Board also argues that the use of seniority in making transfers is not supported by internal comparables and is contrary to a strong trend against pure, seniority-based transfers that has been on-going at the Board for several years, and especially since decentralization of schools began in the mid 1990s. The Board asserts that it has offered an enhancement in dental benefits in exchange for its

transfer language, whereas the Association offers nothing for its proposed dental enhancement.

B. THE ASSOCIATION

According to the Association, its proposal is more reasonable than the Board's final offer. The Association argues that its proposal for percentage-based dental premium is a necessary catch up. Reviewing the history of dental benefits, the Association contends that accountants/bookkeepers have fallen behind all but one other bargaining unit with respect to the Board's share of the dental premium.

With respect to quid pro quo, the Association submits that no quid pro quo is necessary where a proposed change is for catch-up and there is clear support among the comparables. The Association asserts that the evidence fails to support the Board's contention that other bargaining units had received the percentage premium in return for concessions in other areas.

It is the Association's position that the Board's recent interpretation of the Association's dental proposal does not comport with the evidence and must be rejected. According to the Association, the Board's counsel contacted it the day before the hearing and indicted that the Board construed the Association's proposal as not including any premium contributions for the indemnity dental play for 2001. The Association contends that it intended, and the Board understood, that its proposal covered both the prepaid and the indemnity plans. The Association also asserts that the language used in its final proposal is that contained the collective bargaining agreement of the educational assistants, which has been interpreted and implemented for years as including the indemnity dental plan.

The Association argues that the Board's transfer proposal changing seniority rights of bargaining unit members represents a fundamental change in the status quo not supported by compelling need or quid pro quo. Because vacancies do not frequently arise, the Association says that the Board's proposal could easily prevent senior employees from ever receiving a transfer, thus rendering their seniority irrelevant.

According to the Association, there has been no showing that the current transfer selection method for filing vacancies is unworkable. It states that there is no evidence of any complaints about the present selection procedure or any problems with how it ha operated. While each of the principals who testified said they supported the Board's proposal, the Association points out that the principals had nothing but praise for the accountants/bookkeepers with whom they were currently working. Of the thirteen bargaining units in the District, the Association stresses that only three bargaining units have a transfer provision such as that proposed by the Board here.

The Association rejects the Board's claim that the Board's dental insurance proposal is quid pro quo for the Board's transfer proposal. The Association claims that the Board's proposal simply brings this bargaining unit into line with all other District bargaining units. Furthermore, the Association argues that, under the Board's dental proposal, there is virtually no benefit to bargaining unit employees under this contract as the percentage-based premium does not begin until after ratification—which is now after the expiration of the contract. The Association points out that the accountants/bookkeepers bargaining unit is the only District unit where the Board seeks to obtain a fundamental change in seniority without a voluntary agreement.

V. FINDINGS OF FACT

A. State Law or Directive (Factor Given the Greatest Weight)

No state law or directive lawfully issued by a state legislative or administrative officer, body or agency placing limitations on expenditures that may be made or revenues that may be collected by a municipal employer is at issue here. Neither party argues that this criterion is relevant here.

B. Economic Conditions in the Jurisdiction of the Municipal Employer (Factor Given Greater Weight)

This factor relates to the issue of the municipal employer's ability to pay. Ability to pay is not at issue in this proceeding. Neither party argues that this criterion is relevant here.

C. The Lawful Authority of the Employer

There is no contention that the Board lacks the lawful authority to implement either offer.

D. Stipulations of the Parties

While the parties were in agreement on many of the facts, there were no stipulations with respect to the issues in dispute. They have, however, reached agreement on a number of issues not in dispute here.

E. The Interests and Welfare of the Public and the Financial Ability of the Unit of Government to Meet these Costs

This criterion requires an arbitrator to consider both the employer's ability to pay either of the offers and the interests and welfare of the public. The interests and welfare of the public include both the financial burden on the taxpayers and the provision of appropriate municipal services. There is no contention that the Board lacks the financial ability to pay either offer.

The public has an interest in keeping the Board in a competitive position to recruit new employees, to attract competent experienced employees, and to retain valuable employees now serving the Board. Presumably the public is interested in having employees who by objective standards and by their own evaluation are treated fairly. What constitutes fair treatment is reflected in the other statutory criteria.

F. Comparison of Wages, Hours and Conditions of Employment

The purpose in comparing wages, hours, and other conditions of employment in comparable employers is to obtain guidance in determining the pattern of settlements among the comparables as well as the wage rates paid by these comparable employers for similar work by persons with similar education and experience.

Generally, internal comparables have been given great weight with respect to basic fringe benefits. *Winnebago Village*, Decision No. 26494-A (Vernon 1991). Significant equity considerations arise when one unit seeks to be treated more favorably than others. Ordinarily, employers try to have uniformity of fringe benefits for all their bargaining units because it avoids attempts by bargaining units to whipsaw their employers into providing benefits that were given to other bargaining units for a very special reason. *Village of Grafton*, Decision No. 51947 (Rice 1995).

The record indicates that with respect to dental insurance, the final effect on bargaining unit members of the current flat rate has resulted in the percentage of employee contributions increasing from 27 percent to over 50 percent in the Blue Cross/Blue Shield single and family plans. This compares to a contribution of roughly three percent (single) and six percent (family) contributions for the other district bargaining units.

G. Changes in the Cost of Living

The governing statute requires an arbitrator to consider "the average consumer prices for goods and services, commonly known as the cost of living." While a number of arbitration awards suggest that changes in the cost of living are best measured by comparisons of settlement patterns, such settlements, do not reflect "the average consumer prices for goods and services." Despite its shortcomings, the Consumer Price Index ("CPI") is the customary standard for measuring changes in the "cost of living." Settlement patterns may be based on a number of factors in addition to changes in the "average consumer prices for good and services."

H. Overall Compensation Presently Received by the Employees

In addition to their salaries, employees represented by the Association receive a number of other benefits.

I. Changes During the Pendency of the Arbitration Proceedings

No material changes during the pendency of the arbitration proceedings have been brought to the attention of the Arbitrator.

J. Other Factors

This criterion recognizes that collective bargaining is not isolated from those factors comprising the economic environment in which bargaining takes place. See, e.g., *Madison Schools*, Decision No. 19133 (Fleischli 1982). There is no evidence that the Board has had to or will have to reduce or eliminate any services, that it will have to engage in long term borrowing, or that it will have to raise taxes if either offer is accepted.

VI. ANALYSIS

A. Introduction

While it is frequently stated that interest arbitration attempts to determine what the parties would have settled on had they reached a voluntary settlement (See, e.g., *D.C. Everest Area School Dist. (Paraprofessionals)*, Decision No. 21941-B (Grenig 1985) and cases cited therein), it is manifest that the parties' are at an impasse because neither party found the other's final offer acceptable. The arbitrator must determine which of the parties' final offers is more reasonable, regardless of whether the parties would have agreed on that offer, by applying the statutory criteria. In this case, there is no question regarding the ability of the Board to pay either offer. The most significant criterion here is a comparison of wages, hours and conditions of employment.

B. Discussion

1. Dental Plan

The record indicates that other bargaining units in the District receive dental benefits similar to those proposed by both the Board and the Association. Other than the difference in language stressed by the Board, both proposals provide for similar benefits—differing only in the implementation date.

The language in the Association's proposal referring only to the prepaid dental plan and making no express reference to the indemnity dental plan is troubling. While there is similar language in the educational assistant's contract, that language is supplemented by a negotiating note. No such negotiating note is present in this case. When parties change contract language, arbitrators have generally found an intention to change the meaning of the contract. See Grenig, *Contract Interpretation and Respect for Prior Proceedings*, 1 LABOR AND EMPLOYMENT ARBITRATION § 9.02[3][i] (2d ed. 1997). Although the Board originally costed the Association's proposal as though it had contained express references to both dental plans, at the hearing the Board argued that the missing

language should be taken into account. Given the uncertainty caused by the omission of the language in question, the Board's proposal regarding the dental plan premiums is somewhat more reasonable than the Association's.

2. Transfer

Arbitrators generally hold that a party proposing a change in the status quo is required to offer justification for the change and to offer a quid pro quo to obtain the change. See, e.g., *Middleton-Cross Plains School Dist.*, Decision No. 282489-A (Malamud 1996). Arbitrator Malamud has explained:

> Where arbitrators are presented with proposals for a significant change to the status quo, they apply the following mode of analysis to determine if the proposed change should be adopted: (1) Has the party proposing the change demonstrated a need for the change? (2) If there has been a demonstration of need, has the party proposing the change provided a quid pro quo for the proposed change? (3) Arbitrators require clear and convincing evidence to establish that 1 and 2 have been met.

Unions traditionally consider that seniority is a useful method of preventing arbitrary action by management. One authority has explained:

> Unions, as organizations formed to give coherent voice to the interests of their members, seek due process in the workplace not only through establishment of grievance machinery but also by means of seniority rules. Seniority is germane to due process because its implementation serves to restrict management's capacity for making invidious distinctions among employees. Invidious distinctions may be unavoidable when one person is promoted while another is passed over and when one is retained while another is laid off. Seniority rights provide an element of due process by limiting nepotism and unfairness in personnel decisions.

Carl Gersuny, *Origins of Seniority Provisions in Collective Bargaining*, PROCEEDINGS OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 518 (1982). See also Carl Schedler, *Arbitration of Seniority Questions*, 28 LA 954, 954 (1951) ("Traditionally, a union considers seniority both as a organizing tool and as a basic objective in collective bargaining negotiations. It is, therefore, utilized in invoking what is often considered a latent, if unexpressed, need of worker; and it also employed to demonstrated the value of concerted activities as opposed to the results workers can expect from trying to "go it alone" in dealing with the management.").

The importance of seniority rights was described by Arbitrator Edgar Jones, Jr., as follows:

> A major reason why unorganized workers decide to elect a union as their representative is to insulate their job tenure from the adverse effects of the preferential treatment of favored workers in cases of workforce reduction and work opportunities or the retaliatory decisions of supervisors whom they might offend.
>
> The seniority system has obvious imperfections when compared to an ideally efficient method for determining whom to retain or dismiss in a workforce reduction. To the extent that it is enforced, however, seniority does not militate against personal retaliation or preference.

Overly Mfg. Co., 68 LA 1343, 1345-46 (Jones 1977).

Seniority rights have been described as a form of job security by one authority. Jay Kramer, *Seniority and Ability*, PROCEEDINGS OF THE 9TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 41 (1956). Of course, seniority provisions reduce to some degree, the employer's control over employees.

The Board has presented evidence indicating that management personnel prefer the Board's proposal to the current language. However, there is no evidence establishing the need to make such a fundamental change in a very important contract provision. The testimony of building administrators with respect to accountants/bookkeepers selected under the current contract seniority language discloses that they have no complaint or concerns about those accountants/bookkeepers. The building administrators' preferences does not provide the compelling evidence needed to show that the current system is unworkable and a new system should be imposed in this proceeding.

There have been changes in district organization, with more site-based management. However, the accountants/bookkeepers are not involved in the classroom and perform what is essentially a skilled clerical function. They perform a common set of duties performed at every school as outlined in the job descriptions.

While some of the District bargaining units have agreed to modifications of the seniority provisions in their collective bargaining agreements, they have done so voluntarily. No bargaining unit has had modification of seniority provisions imposed by interest arbitration.

As accountant/bookkeeper vacancies arise infrequently and there are only approximately 24 accountants/bookkeepers, the Board's proposal could make seniority virtually irrelevant in transfer decisions. Because the need for a change in the seniority provision has not been established, it is concluded that the Association's proposal to maintain the status quo is more reasonable than the Board's proposed change diminishing the employee's seniority rights.

3. Conclusion

The Board's proposal regarding dental plan premiums is more reasonable than the Association's and the Association's proposal regarding the role of seniority in transfers is more reasonable than the Board's. Because of the importance of the seniority provision over the long term, it is concluded that the Association's final offer is more reasonable than the Board's.

VII. AWARD

Having considered all the relevant evidence and the arguments of the parties, it is concluded that the Association's final offer is more reasonable than the Board's final offer. The parties are directed to incorporate into their collective bargaining agreements the Association's final offer.

Executed at Delafield, Wisconsin, this March 31, 2002.

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Jay E. Grenig