BEFORE THE ARBITRATOR

In the Matter of the Petition of SCHOOL DISTRICT OF STURGEON BAY To Initiate Arbitration Between Said Petitioner and STURGEON BAY SCHOOL DISTRICT EMPLOYEES LOCAL 1658, AFSCME, AFL-CIO	Case 30 No. 61709 INT/ARB-9765 Decision No. 30884-B

Appearances:

Davis & Kuelthau, S.C., by Mr. Clifford B. Buelow, Esq. and Mr. William G. Bracken, Labor Relations Consultant, on behalf of the District.

Mr. Neil Rainford, Staff Representative, AFSCME Council 40, on behalf of the Union.

ARBITRATION AWARD

The School District of Sturgeon Bay, herein "District," and the Sturgeon Bay School District Employees Local 1658, AFSCME, AFL-CIO, herein "Union," are signatories to a collective bargaining agreement which expired on June 30, 2002. That agreement covered certain support staff personnel employed by the District consisting of all regular full-time and regular part-time employees, but excluding supervisory, professional, confidential, student and craft employees.

The parties engaged in negotiations for a successor collective bargaining agreement and the District filed an interest arbitration petition with the Wisconsin Employment Relations Commission, ("WERC"), on October 21, 2002, wherein it alleged that an impasse existed between the parties, and wherein it further requested the Commission to initiate Arbitration pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act, ("MERA"). The WERC appointed Steve Morrison, a then-member of the Commission's staff, and later

appointed Marshall L. Gratz to serve as investigators and to conduct an investigation. The investigation was closed on April 13, 2004, and the WERC on June 1, 2004, issued an Order appointing the undersigned to serve as the Arbitrator.

A hearing was held in Sturgeon Bay, Wisconsin, on August 19, 2004. The hearing was transcribed and the parties subsequently filed briefs and reply briefs which were received by November 11, 2004.

Based on the entire record and the arguments of the parties, I issue the following Award.

FINAL OFFERS

The parties have agreed to a number of tentative agreements which are not in dispute.

The District has proposed the following Final Offer:

. . .

1. Three year agreement effective July 1, 2002 (change dates accordingly).

2. Existing terms of the collective bargaining agreement except as modified by the parties' tentative agreements of January 29, 2003 (attached) and below.

3. Appendix B and C Wages:

   Increase rates in each cell of the agreement 3.0% in 2002-2003
   Increase rates in each cell of the agreement 3.0% in 2003-2004
   Increase rates in each cell of the agreement 3.0% in 2004-2005

4. Clarify Article 1 – Management Rights Reserved to read as follows:

   "Unless otherwise herein provided, the management of the work and the direction of the working force are vested in Employer. Employer specifically retains the right to subcontract its transportation services. Employer may adopt reasonable rules and amend the same from time to time, and Employer and Union will cooperate in the enforcement thereof."

The Union has proposed the following Final Offer:

. . .

1. Three year agreement effective July 1, 2002, modify dates through out (sic) accordingly.

2. Existing terms of the collective bargaining agreement shall continue in the successor agreement except as modified herein and as modified by the parties' tentative agreements dated January 30, 2003 (attached).

3. **WAGE SCHEDULES – Appendix B and Appendix C**

Increase rates in each cell of the agreement 3.00% in 2002 – 2003
Increase rates in each cell of the agreement 3:00% for 2003 – 2004
Increase rates in each cell of the agreement 3.00% for 2004 – 2005

Since both parties have agreed to a three-year agreement providing for 3.00% across-the-board wage increases for each year of the agreement, the only issue in dispute centers on subcontracting and the District's desire to subcontract its transportation services.

STATUTORY CRITERIA

Section 111.70(4)(cm)7 of MERA reads in part:

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 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 in 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 municipal 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.

POSITIONS OF THE PARTIES

The District contends, inter alia, that "Application of the Greatest Weight Factor of Revenue Controls Requires Adoption of the District's Offer" because the District's "budget crisis provides a compelling need to subcontract the bus operation"; because subcontracting is the "best option" to address its budget problems and will produce "significant savings without detracting from the education program"; because its proposal "strikes a fair balance between the needs of the District and its employees"; and because the District will be "forced to make cuts that will affect the quality of its educational program" if subcontracting is not achieved. The District also maintains that its "proposed comparables match those previously determined by Arbitrator Tyson," and that the "Greater Weight Factor of Economic Conditions" favors its proposal because the District is "unique among its comparables in several important areas" and because "local economic conditions are mixed."

It also argues that "Other factors" support its proposal because the District has the "lawful authority to decide whether it wants to subcontract its bus operation and the Arbitrator should support the District's decision"; because the stipulations of the parties support its offer; because the interests and welfare of the public will be "enhanced" by providing a bus operation at a more competitive rate while at the same time retaining the quality of the education program; because its wage rates rank "well above" the comparable wage rates, thereby "underscoring the need to economize in areas that are possible"; and because the other criteria relating to cost of living, overall compensation, and internal settlements all favor its proposal. The District also asserts that the Union has misrepresented the history of subcontracting between the parties and

that the District has not changed its offer; that its proposed subcontractor, Kobussen Buses Ltd., ("Kobussen"), has promised to hire Sturgeon Bay drivers and pay them Sturgeon Bay wages if it is awarded the work in dispute; and that the District's proposal "clarifies a right it already has." It adds that external settlements support its offer and that the internal settlement pattern "should receive little or no weight"; that no quid pro quo is needed because of "the unique facts of this case"; that it in any event has offered a sufficient quid pro quo; that total package costing is the only "fair way to gauge the value of the wages and benefits bargained" and that its costing is accurate; that its Fund 10 Balance is "at risk"; and that its estimated cost savings are accurate.

The Union asserts, inter alia, that the "District's promise to bargain the impact of subcontracting" constitutes a "profound change" in the District's offer, and that the "Addition" of Kobussen's hire, wage and benefit promises are "not part of the District's offer or the instant proceeding." The Union also claims that the "greatest weight" factor favors its proposal because the District's Fund 10 Balance is "not at risk"; because the behavior of the District's Board and other wage settlements "belie limits of budget pressures"; and because the levy and cost per member data are "comparatively strong." It adds that the "greater weight" factor favors its proposal because the levy rate, area wage settlements, and per capita income growth all indicate a "strong local economy."

The Union claims that its Final Offer also is supported by "Other factors" because the claimed subcontracting savings are "exaggerated"; because the District can save money by not transporting students who live close to school; because both internal and external settlements "uniformly" support its status quo offer; because the District's failure to offer a substantial quid pro quo is "fatal"; because the District's total package costing is inappropriate since cost of living is not a "relevant" factor; and because the District's costing is "fundamentally flawed" and

must be rejected. The Union adds that the District's proposed comparables are "flawed" and that the Union's proposed set of comparables should be adopted because they are "well established"; that there is no merit to the District's "reserved rights" claim regarding the supposed concession it is making over subcontracting; that the interests and welfare of the public are "best served with in-house busing"; and that total package costing "misrepresents" the Union's offer. It also asserts that prior layoffs involving other District employees "do not justify subcontracting"; that subcontracting is not a "viable option"; and that its offer does not necessitate program cuts.

DISCUSSION

This dispute centers on the District's desire to obtain new contract language giving it the express right to subcontract its transportation and bussing services which will result in the projected terminations of up to nine employees, including 6 part-time bus drivers, 2 full-time bus driver/maintenance employees, and 1 full-time maintenance employee who will be displaced when 5 other part-time bus drivers/maintenance employees will be retained by the District and converted to full-time maintenance employees, (District Exhibit 36; Union Exhibit 8). The District estimates that this will allow it to save about $243,000 in yearly operating costs, and another $120,000 by selling its current bus fleet.

The District in the past has subcontracted certain work on about 56 occasions relating to custodial service, maintenance service, bus repair, lawn maintenance, and painting, (Union Exhibit 7). While the parties disagree as to whether bargaining unit personnel were available to perform any of that work, it is clear that the District has subcontracted such work apparently without objection from the Union. None of that subcontracting, though, involved driving busses and none of it resulted in displacing any bargaining unit personnel or in reducing their hours.

The first issue which needs to be discussed involves the scope of the District's Final Offer and whether it is proper to consider the District's verbal promise to retain 5 bus drivers as full-time employees and to not enter into any subcontracting agreement with Kobussen unless it agrees to hire all displaced bus drivers at the wages in effect at the time of the subcontracting.

District Administrator Robert Grimmer testified that he already has discussed this issue with Joe Kobussen, the President of Kobussen busses, who has orally agreed to hire the dispatched drivers at their current rates, and Kobussen himself testified that he would do so.

The Union claims that the District's verbal representations "are merely castles in the air about what may or may not occur . . ."; that "the District's promise to bargain the impact of subcontracting constitutes a profound change . . ." in the District's offer because Kobussen's promises are "not part" of the District's offer; and that: "The District deliberately decided not to include any limitations on the effects in its final offer because it knows there will be no incentive to bargain any impact restrictions after it has been granted the unfettered right to contract."

The District contends that the Union has misrepresented the parties' bargaining history and that the District has not changed its Final Offer because "This is a two-stage process" which calls for impact bargaining only after the District is given the contractual right to subcontract. The District thus claims that "neither party agreed to place impact proposals in their respective final offers," and that: "There is no legal requirement that the District is obligated to bargain both the decision and the impact at the same time in this arbitration case."

The Union relies upon a February 27, 2003, letter written by Union Staff Representative Neil Rainford to District Administrator Grimmer wherein Rainford memorialized a meeting they had earlier in the day by stating: "The parties agreed to meet to further negotiate the decision and the impact of the subcontracting as well as the successor agreement on April 28, 2003, at

4:00 p.m., (Union Exhibit 2), (Emphasis added). By letter dated November 15, 2003, Rainford told Grimmer that if the District's Board voted to subcontract bus services, the Union wanted to meet with the subcontractor and then with the District "to negotiate the decision and the impact," and that final offers should be prepared "after the parties have had an opportunity to voluntarily negotiate the decision and the impact," (Union Exhibit 4), (Emphasis added).

Rainford's letters establish that the Union, at least, wanted the parties' final offers to include both the decision to subcontract and the impact of any subcontracting decision.

This is a difficult issue to resolve because a legitimate misunderstanding may have arisen between the parties and because it is clear that the District has acted in good faith in trying to protect the interests of any displaced bus drivers.

However, the Union correctly points out that a party's final offer at this stage of an interest arbitration proceeding must stand and fall on its own without consideration of any other verbal conditions. This issue thus could have been easily avoided if the District's Final Offer simply stated words to the affect: "In the event the District does subcontract out its bussing operations, it will retain five bus drivers and convert them to full-time employees, and any displaced bus drivers will be rehired by the bussing subcontractor at their then-current wage rates."

The District claims that if it does not honor the verbal promises it has made here, the Union can then file a prohibited practice complaint with the WERC. That would be necessary because the Union is not a party to whatever arrangements the District negotiates with Kobussen, and because nothing on the face of the District's Final Offer - if it is included in the parties' agreement - contains any kind of written guarantees to the displaced bus drivers. The complaint

route, though, is generally far more expensive and time consuming than the arbitration route, particularly if there is an appeal to the courts, thereby putting the Union at a great disadvantage if it finds it necessary to enforce the District's verbal promises.

The scope of the District's Final Offer has a direct bearing on whether the District has offered a quid pro quo in exchange for the right to subcontract its bussing services.

The District maintains that while it is not required to offer a quid pro quo under the "unique facts of this case," its verbal representations regarding job security nevertheless constitute a quid pro quo, as does the language in its Final Offer to the effect that it cannot subcontract any other work because it otherwise retains the reserved right to do so. The Union disagrees, and claims that the face of the District's Final Offer does not offer any job guarantees; that the District in any event is not offering a large enough exchange for the language it seeks; and that there is no merit to the District's claim that it currently has the reserved right to subcontract.

As a general proposition, a party seeking to obtain a new contractual provision in an interest arbitration proceeding has the burden of proving: (1), that there is a compelling need for change; (2), that its proposal will, in fact, remedy the problem addressed; and (3), that it has offered a sufficient enough quid pro quo in exchange for the new benefit. See Adams County, Dec. No. 25479-A, (Reynolds, 1988); Mineral Point School District, Dec. No. 28879-A, (Barron, 1997). But, there are exceptions to that general rule, which is why some arbitrators have ruled that no quid pro quo is needed for "catch up" and to be brought into the comparable mainstream. See Delavan-Darien School District, Dec. No. 27152-A, (Yaffe, 8/31/92); Bristol School District No. 1, Dec. No. 27580-A, (Weisberger, 1993). In addition, Arbitrator Richard Tyson in a recent

case involving these parties ruled that a quid pro quo generally is needed "unless its offer has clear support such as among the comparables," (Union Exhibit 13, p. 21). [1]

As for whether there is a compelling need for the District's subcontracting proposal, I find that the District is, indeed, facing very difficult financial difficulties and that drastic action must be taken to reduce its budget. Hence, the record establishes that the District in the 2001-2002 school year cut its budget by $150,000 and that its fund balance then declined by about $552,317 to meet a $500,000 shortfall, and that it in the 2002-2003 school year faced a $750,000 shortfall.

The District in the 2002-2003 school year therefore was forced to cut 10.8 FTE teachers, 3½ FTE support staff positions, and an administrator, (District Exhibit 16). Its budget problems in the 2003-2004 school year led it to lay off 2.6 FTE's, (District Exhibit 19), and it also realigned its elementary schools to save money. The layoffs here have far exceeded the number of layoffs found in comparable school districts, (District Exhibit 25). The District over the last few years also has been forced to cut a host of programs and to delay needed maintenance of its schools.

The District's financial difficulties have been caused by a combination of declining enrollment and tight revenue limits, and are summed up in District Exhibit 12. It shows that the District's revenue limits between 1999-2004 only have risen by about $1,045,000, while wages have increased by about $1,639,446. At the same time, its equalized aid has decreased from $5,725,133 to $5,010,4853, for a loss of $714,638. These gaps have been met in part by increased property taxes of about $1,756,086.

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[1] See Sturgeon Bay School District Employees Local 1685, AFSCME, AFL-CIO, and Sturgeon Bay School District, WERC Case 33, No. 59106, INT/ARB-9066, Decision No. 30095-A (Tyson, 12/29/2001).

All this is why School Board President Joel Kitchens credibly testified that the District's situation is "very poor"; that "Enrollments continue to decline steadily"; that "we had major budget deficits and we had to eliminate positions"; and that some of the projected savings obtained from subcontracting would go towards purchasing new computers, new text books, and needed maintenance projects. He added that if the District is not permitted to achieve those savings via the subcontracting of its bus services, the District then will be looking "at some more deep cuts" which "has to be teachers and programs" because "this is not a bluff." He also stated that "over the last four years we have found ourselves in very difficult straits," and that was why the District's Board in the past has proposed four separate referenda to raise state-imposed revenue caps only one of which was eventually passed, and why it also has scheduled another one.

District Administrator Grimmer testified, "I don't think the importance of this [subcontracting] plan can be overstated" because it is "the one remaining place where we can find nearly a quarter of a million dollars in our budget to support our educational programs." He explained "Without this arbitration going in our direction, we are going to have to make some major changes" in staffing and programs.

He added that subcontracting would reduce the cost of daily bussing operations; that it would eliminate the need to purchase or repair busses; that cost controls in the proposed contract with Kobussen would allow the District to better forecast its transportation costs; that it will provide for greater custodial help when 5 part-time bus drivers/maintenance employees are converted to 5 full-time maintenance positions; that it would free up District personnel from bussing tasks; and that the sale of the bus fleet will generate money to upgrade computers and to purchase textbooks and equipment.

The Union claims that the District can save money by not transporting students who are not required to be transported under state law; that the District's budget pressures are not as great as claimed; and that the District's financial difficulties are no different from the financial problems faced by comparable school districts.

The District can, indeed, save money by discontinuing the bussing services it offers to students who live nearby. However, the District's Board has decided to continue those services which is a public policy choice it is entitled to make, as it seeks to effectuate cost savings in other parts of its budget.

As for the severity of the District's financial difficulties, the District's Fund 10 balance is about $938,909, (District Exhibit 12), which is less than the recommended amount. In addition, the District's difficulties have not prevented it from offering 3% raises for each year of the three years of this agreement; from offering 4½%, 3½%, and 3½% wage increases to its teacher aides; and from offering 3.8%, 4.1% and 4.1% total package increases to its teachers. This case therefore does not involve any inability to pay.

Nevertheless, the District has met its burden of proving that there is a compelling need to either subcontract its bussing services or cut something else of major significance out of its budget to properly deal with its ongoing budget squeeze.

It therefore is necessary to determine whether the District's proposal will, in fact, achieve the savings claimed if its bussing services are subcontracted.

The Union asserts that the District's proposed savings are "exaggerated"; that the proposed contract between the District and Kobussen contains a "wide open force majeure clause which leaves the public vulnerable and which absolves the subcontractors of responsibility"; that

the "Failure to carefully define service provided makes service shortfall . . ." likely; and that the lack of a private transport provider market risks low-ball bids and "excessive profits."

In order to properly address this issue, it is necessary to examine the details of the District's proposed contract with Kobussen, (District Exhibit 47). It states, inter alia, that: "Subsequent years pricing" can be increased up to 4% a year and that if the costing figure exceeds 4%, "the parties agree to enter into negotiations to determine the appropriate percent change." The proposed contract also contains the following language:

. . .

9. FORCE MAJEURE

> In the event CONTRACTOR is unable to provide the transportation services herein specified because of any act of God, civil disturbance, fire, flood, riot, war, picketing, strike, lockout, labor dispute, loss of transportation facilities, oil or fuel shortage or embargo, governmental action or any condition or cause beyond CONTRACTOR'S control, DISTRICT shall excuse CONTRACTOR from performance under this Agreement.

. . .

At the hearing, Joe Kobussen stated that his $389,000 bid to the District was a firm quote which covered all of the District's bussing needs, and that "this" - i.e. District Exhibit 47 - "is the contract" he wants the District to sign. He has no intention of changing that proposed agreement, but he would be willing to put into a separate document his verbal promise to hire the District's bus drivers at their current rates of pay. He said that a fuel shortage is different from an embargo and that the proposed contract language relating to a fuel shortage "came from the 1970's when we had a huge fuel shortage and if we cannot buy fuel to put into the buses we cannot transport," and that "in the 1970's there was a very limited amount of fuel that you could purchase," a situation he said was "Highly unlikely" to happen again. He also said that his company can

reduce the District's transportation costs because "We buy bulk fuel"; because what "we can do is insurance; high volume; parts; purchasing of equipment"; and because of his company's "management style."

Grimmer agreed that Kobussen's quote covered all of the District's transportation needs and that it is a fixed quote. He explained that the District had not yet signed the proposed contract because "we are in this arbitration proceeding and we didn't want to commit ourselves to a contract not knowing how this was going to eventually be adjudicated." But, he added that Kobussen's proposed contract "was a sample contract and has not been negotiated" and that "we haven't negotiated yet," which is why "there is no dollar figure in there."

The terms of the proposed contract establish that the District will, in fact, effectuate cost savings in its bussing operations over the short term, thereby making it unnecessary for the District to make other budget cuts. However, there is no guarantee that that will be true for the long term because the force majeure clause allows Kobussen to immediately terminate the contract under certain circumstances, and the contract allows Kobussen to demand whatever it wants if the CPI exceeds 4% a year for "the subsequent years of the contract . . ."

Either eventuality can place the District at a grave financial risk if the District is then unable to secure another bussing service because the District by that time will have sold its entire bussing fleet, thereby leaving it with very few options. While this might not be a problem in another geographic location, it is a very real problem here given the District's remote geographic location and the fact that only one other bus company submitted a recent bid for the bussing work in dispute.

That can happen given the District's past experience in soliciting bids for its bussing needs. It solicited bids in 1998-1999 from 6 or 7 bus companies and the results were hardly

encouraging. Four bus companies did not respond at all, and only two submitted preliminary quotes which were higher than Kobussen's quote here. One of the largest bus companies in the state, Laidlaw, refused to even submit a quote as it explained to the District:

. . .

> We studied this opportunity and after careful consideration, we have concluded that it would not be cost effective for us to provide your service. Since there are only 11 regular and 3 special bus routes there is not enough base business to effectively spread out the start-up and fixed costs associated with this service. We also considered providing this service from our nearest location to you, Green Bay. Since this facility is nearly 50 miles away, we felt we would be too inefficient and we likely would not be responsible enough to your needs, (District Exhibit 52).

. . .

This experience shows that there is a reluctance for other bus companies to bid for the District's bussing needs. Hence, if no other company bids when the District's contract with Kobussen must be renegotiated, the District will be utterly at Kobussen's economic mercy.

The proposed contract here differs from the bussing contracts involving the Algoma, Kewaunee, and Oconto school districts because none of those contracts contain a force majeure clause and because none of them call for renegotiating the contract if the CPI exceeds 4%, (District Exhibit 69).

In addition, Kay Stack, who has handled part of the District's bus operations for several years, testified that Kobussen's bid is flawed because the District failed to inform Kobussen about its four year old kindergarten routes, an early childhood bus, and specials which are not routes. She therefore stated that Kobussen would either charge extra for these extra bus services or that the District would have to cut out such bus services. She added: "I have a very deep

concern that the savings that the District hopes to realize from going to a contractor will, in fact, not be realized."

She also stated that while Kobussen's proposed contract provides for a two-hour minimum for co-curricular and field trips, some of those trips "are definitely less than two hours," which is why the District now pays a one-hour minimum for those trips. She also stated that former school bus head Buechner some time ago told bus drivers to put down four hours on their time cards rather than the three and a half hours they actually spend driving in the morning and also in the afternoon because there is more money in the bus budget than in the maintenance budget. This alone, said she, would save about $20,000 a year. She also said that part-time drivers are now paid for two hours in the morning and in the afternoon instead of the one and a half hours they used to be paid.

The District questions Stack's testimony and claims it should be discredited because she "has no first hand knowledge of the discussions that occurred between the District and Kobussen"; because she has a "strong self-interest to preserve the status quo and her job"; and because the District, in fact, did not "miss" any bus services or routes.

I find no reason to discredit Stack, as she testified in a highly credible fashion even though her duties will change under the District's subcontracting proposal. In addition, Kobussen's own proposals to the District list the following bus services: nine (9) regular bus routes; an optional bus route for 85 days; 4 special education bus routes; and co-curricular and field trip costs. Hence, there is nothing in those proposals which expressly refers to four year old kindergarten routes, or an early childhood bus, or special events. The District's own estimated cost analysis of that subcontracting proposal, (District Exhibit 34), also fails to expressly address

these other bus services because it only refers to "Nine Regular routes"; "10th Large Bus for 85 days"; "Special Education routes"; and "Co-Curricular and Field Trips."

Stack's testimony therefore shows that the District's projected savings from subcontracting may be overstated.

I therefore conclude that while the District's subcontracting proposal will generate some savings right away and therefore avoid the need for other immediate budget cuts, that it is not necessarily true for the long term because of the District's precarious bargaining position when the contract must be renegotiated.

Turing now to whether a quid pro quo is needed and whether the District has offered a sufficient quid pro quo for its proposal, the District claims that no quid pro quo is needed because subcontracting its bus operations merely represents "bringing the District into the overwhelming practice enjoyed by the vast majority of Wisconsin School Districts," as it points to evidence showing that two-thirds to three-fourths of all public school districts in the state subcontract bussing, (District Exhibits 60-61). It also asserts that it has offered a sufficient quid pro quo and that, "The quid pro quo should not accrue to the entire bargaining unit but only those employees directly affected by the subcontracting . . ." i.e. the displaced bus drivers.

The Union objects to the consideration of such an "extremely novel comparison group" on the grounds that it includes the employees of private bus companies who do not work for school districts, and that "this type of comparison is not at all supported by the statutory criteria . . ."

The Union is correct. The statutory criteria in Section 111.70(4)(cm)7.r., e. and f. refers to private and public employment "in the same community and in comparable communities," thereby establishing that those are the primary comparables. In addition, it is well established

that school districts generally must be compared with other school districts of the same size in the same area when applying the criteria in Section 7.r.d. Hence, there is no basis for establishing a state-wide pool of comparables consisting of the state's 426 or so school districts.

Turning, then, to local school comparables, Arbitrator Richard Tyson previously ruled in 2001 that the following school districts constitute the appropriate comparables for the purposes of determining wages and benefits: Algoma, Denmark, Gibraltar, Kewaunee, Luxemburg-Casco, Oconto, Oconto Falls, Sevastopol, and Southern Door, (Union Exhibit 13).

The Union maintains that Kewaunee and Luxemburg-Casco "should not be given any consideration in the instant proceeding ". . . because the support staffs there are not represented by a union and thus do not have a collective bargaining relationship with their employers, and it cites several cases where arbitrators have ruled it is inappropriate to consider non-unionized comparables when considering contract language. See Potosi School District, Dec. No. 19997-A, (Johnson, 1983); Washburn School District, Dec. No. 24278-A, (Kerkman, 1987); Webster School District, Dec. No. 23333-A, (Kessler, 1986); Dane County, Dec. No. 18181-A, (Miller, 1981); Merton Joint School District #9, Dec. No. 27568-A, (Baron, 8/30/93).

The District maintains that all of the Union's cited cases are "outdated"; that "The comparability issue was settled in Arbitrator Tyson's last Award"; and that "I should confirm Arbitrator Tyson's Award which utilized all of the districts used by the District throughout this case."

As a general proposition, I agree that non-unionized settings should not be considered as comparables when resolving language disputes because those settings do not reflect the give and take found in collective bargaining relationships. However, I am extremely reluctant to disturb

an earlier set of comparables established through an interest arbitration proceeding even when some of those comparables involve non-unionized settings.

Here, Arbitrator Tyson included Kewaunee and Luxemburg-Casco when he ruled that the District's offer regarding wages, health insurance, and several other issues should be adopted. That case, then, did not center exclusively on language issues, which is why it was proper in that case to look at those two comparables on economic issues. It thus is not at all clear that Arbitrator Tyson would have included them if the case before him only involved a language issue since he stated that "the weight given such [non-union] comparisons may vary," and that: "Non-union wages and benefits more or less normally impact collective bargaining outcomes." Id., at 21.

Given the narrow scope of his ruling, I therefore agree that Kewaunee and Luxemburg-Casco should be included in the comparables, but find, like Arbitrator Tyson, that "the weight given such comparables may vary," which means that they will not be given as much weight as unionized comparables.

The record reveals, via Union Exhibit 10 and District Exhibits 62 and 64, the following data regarding educational support staff at comparable school districts:

SUBCONTRACTING – CONTRACT LANGUAGE	
Algoma Educational Support Personnel Union	Article XXII – Subcontracting. The Board agrees that supervisors or non-unit personnel will not be used at any time to displace employees regularly employed in the bargaining unit, except in emergencies when the bargaining unit members are not available to do the work assigned. For purposes of this provision, an emergency shall be defined as an unforeseen circumstance or combination of circumstances which call for immediate action in a situation which is not expected to be of a recurring nature.

	The Board shall give bargaining unit members preference for the work they have customarily performed. In accordance therewith, the Employer will not subcontract work unless; (a) the skills and equipment needed to perform the work specified are unavailable in the school system or cannot be obtained in a reasonable time, or (b) the schedule for such work cannot be met with the equipment for skills available for such work.
Bus Drivers – Non-Union	Bus services subcontracted through Dworak Bus Company
Denmark Educational Support Personnel Union	Article III – Management Rights. Section 3.01 J. To contract out for goods or services provided that no bargaining unit employee will be reduced in hours or laid off as a result of subcontracting.
Bus Drivers – Non-Union	Contract silent District provides its own bus services
Gibraltar All Educational Support Personnel Union	Contract silent
Bus Drivers – Union	Contract silent District provides its own bus services
Kewaunee All Educational Support Personnel Non-Union	
Bus Drivers – Non-Union	Bus services subcontracted through Dworak Bus Company and Erichsen Bus Company
Luxemburg-Casco All Educational Support Personnel Non-Union	
Bus Drivers – Non-Union	District provides its own bus services
Oconto Custodians/Food Service Union	Article III – Management Rights. Section 3.01 (10). To contract inside or outside the District for goods or services so long as current custodians or food service employees do not experience a reduction in hours or are laid off.

Bus Drivers – Non-Union	Subcontractor Kobussen Bus Company provides bus service
Oconto Falls All Educational Support Personnel Union	Article III – Management Rights. Section 3.01 (10). To contract out for goods or services provided that no employee will be laid off as a result of subcontracting. (15) To utilize temporary employees or workfare or New View or other similar program personnel provided that at the time of, or as a result of such action, no existing positions are eliminated, no employees are laid off or on layoff.
Bus Drivers – Union	District provides its own bus services
Sevastopol Educational Support Personnel Union	Contract silent
Bus Drivers - Union	District provides its own bus services Article III – Management Rights. C. "If the District contracts out, (a), the District shall not lay off any employees hired on or before June 30, 1995: or, (b), the contractor shall hire the employees who were hired by the District on or before June 30, 1995 at substantially equivalent wages and benefits and the contractor shall not terminate these employees except for cause for one year after their date of hire by the contractor."
Southern Door All Educational Support Personnel Union	Contract silent
Bus Drivers - Union	District provides its own bus services except for special ed. routes which are subcontracted

The District thus points out that Algoma, Denmark, Kewaunee, Luxemburg-Casco, Oconto and Southern Door either use subcontractors or non-union drivers for all or some of their

bussing needs or retain the right to do so. It therefore argues: "of the nine other comparable school districts, six of the nine (67%) school districts currently subcontract or have the ability to subcontract their bus operation."

The central issue here, however, centers on whether comparable school districts have the kind of subcontracting language sought here for its support staff personnel, and not whether other school district schools subcontract all or part of their bussing services because of different circumstances that have arisen over the years.

Furthermore, the record shows that while Southern Door subcontracts out its special education routes, the rest of its bussing needs are performed by its unionized bus drivers. Unionized bus drivers also perform all of Denmark, Gibraltar, Oconto Falls and Sevastopol's bussing needs. In addition, while Algoma and Oconto subcontract out their bussing services, those bus drivers are not unionized, which also is true for Kewaunee and Luxemburg-Casco where there is no unionized support staff. Algoma, Denmark, Oconto, Oconto Falls, and Sevastopol also all have language expressly stating that subcontracting cannot result in the displacement of certain support staff bargaining unit personnel.

Hence, not one of the seven unionized comparables has the kind of subcontracting language sought here.

The District's Final Offer also is not supported by the comparables involving "public employment in the same community . . ." On that score, the record, (Union Exhibit 10), establishes that the following local municipal employers, all of whom are unionized, address subcontracting in the following manner:

City of Sturgeon Bay DPW	Contract Silent
City of Sturgeon Bay Police	Contract Silent
City of Sturgeon Bay Firefighters	Contract Silent
City of Sturgeon Bay Utilities	"Employer may subcontract on short term basis, three months or less, provided no layoff of employees. Employer may subcontract on a long term basis, more three months, provided the Employer shall pay the Employees their normal straight time hourly earnings, assuming forty hours per week minus all interim earnings, for fifty two weeks."
Door County Highway	Contract Silent
Door County Social Services	Contract Silent
Door County Courthouse	Contract Silent
Door County Courthouse	Contract Silent
Door County EMT	Contract Silent
Door County Sheriff's	Contract Silent

Not one single municipal employer in the City of Sturgeon Bay or Door County therefore is party to a collective bargaining agreement which contains the kind of subcontracting language sought here.

The District claims that references to the City of Sturgeon Bay and Door County bargaining units are "misplaced in that neither provides for school transportation services as is currently in dispute," and that "only school district should be used" because: "The issue in dispute is not the right to subcontract in general but rather with the very specific issue of subcontracting school transportation services."

The statutory criteria in Section 7.r.e., however, is not limited to municipal employees performing identical services, but rather, addresses "other employees generally in public employment in the same community and in comparable communities." It therefore is proper to look at other City of Sturgeon Bay and Door County labor agreements to determine whether the District's Final Offer is supported by local comparables.

It of course is true that bussing students is unique to school districts and that no other local municipal entities provide that service. Nevertheless, the collective bargaining agreements involving those other municipal employers establish that those municipal employers have not secured the kind of subcontracting language sought here for any purpose and that, as a result, none of them reflect the policy decision the District's Board wants to make here, i.e. to terminate part of its workforce and to subcontract out work to deal with its financial difficulties. This is important because it shows that these other local municipal entities, which are subjected to the same local economic conditions as the District, are balancing their budgets through other means.

A look at the above comparables establishes there is no merit to the District's claim that its "offer simply moves the Sturgeon Bay School District into the comparable mainstream practice when it comes to subcontracting bus services," thereby making it unnecessary to offer a quid pro quo. The District therefore must offer a meaningful quid pro quo for the language it seeks here.

That it has failed to do. For even if the District's verbal promises are considered and the displaced bus drivers were to be hired by Kobussen at their current wages, and even if the District does create five new full-time positions for five other bus drivers/maintenance

employees, the displaced drivers would still suffer a substantial decline in their economic fortunes because of the drastic reduction of their benefits and because of their inability to immediately enforce the promises being made to them.

Joe Kobussen thus agreed that all of his company's wage and benefits could be changed at any time, and that there is no enforcement mechanism to enforce the offers he has made here. In addition, his company now pays 60% of an employee's health care premiums if he/she works 1,560 hours annually and employees must pay the full costs for their life insurance, disability benefits, dental and vision insurance. That represents a substantial reduction in the benefits now enjoyed by full-time employees after their first year of employment who only pay 10% of their health insurance premiums for a better insurance plan and who receive free term life insurance and long-term disability insurance, and by part-time employees who receive pro-rated medical insurance, dental insurance, and long-term disability insurance. Moreover, while Kobussen pays an annual bonus of about $600 or $650 to employees who earn it, and while it also contributes 20¢ for every dollar set aside in the company's 401K plan, that is less than the 12.5% retirement benefit employees now receive. Furthermore, while Kobussen offers 7 paid holidays, full-time District employees receive 10 paid holidays and part-time employees receive 5 paid holidays.

Joe Kobussen said that his company's longevity plan is based upon: "The longer they are there, the more money they get paid. I do not know the pay scale off hand." Here, there is a clearly defined annual longevity payment of $1.25 per month for each month of employment up to seven years and $1.75 per month for seven or more years of service for employees working 900 or more hours per year. Kobussen did not know the specifics of his company's paid vacation plan. Here, employees get two weeks vacation in their first two years; two weeks after two years; three weeks after nine years; and four weeks after 15 years. The agreement here also

provides for other economic benefits relating to call-in time, overtime, holiday pay, workers' compensation, and up to 12 full paid sick leave days for full-time employees. Kobussen has no paid sick leave.

It is necessary to point this out because Kobussen's bid in large part is based upon either stripping away or reducing all of the above contractual benefits from the bargaining unit employees who will be displaced. Kobussen's verbal promise to hire them at the wage rates at the time of the proposed subcontracting therefore does not come close to making them whole for all of the reduced benefits they will be receiving if they end up working for Kobussen.

The District also claims that it now has the right to subcontract work under the "reserved rights" doctrine and that its proposed language, which guarantees that no services other than its transportation needs will be subcontracted, represents a meaningful quid pro quo because it represents the relinquishment of its right to subcontract other services and because "This is the quid pro quo that the District is offering the Union and the remaining employees." [2]

The Union disagrees and maintains that the District has no such reserved right because the contract is silent on this issue and because the parties must first bargain over subcontracting.

Arbitrator Saul Wallen addressed this subject some time ago when he stated:

. . .

> To the employer or his spokesman the contract's silence shouts an intent to preserve for him the untrammeled exercise of his "reserved rights" to determine, in the name of efficiency, what work should be done by his own employees and what should be done by other parties with whom the union has no direct relationship.

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[2] The District relies upon the following authorities in support of its "reserved rights" claim. Zack and Block, Labor Agreement In Negotiation and Arbitration, BNA Books (1983), p. 56; Wonewoc-Union Center School District, Dec. No. 26960-A, (Jones, 3/20/92); City of Monona, Dec. No. 28405-A, (Jones, 3/28/96).

> To the union or its spokesman the silent contract is not silent at all. The recognition clause designates the union as bargaining agent for the employees engaged in production and maintenance work. The seniority clause confers on them the right to such work when it exists to be done. The union security clause guarantees the union as an entity. The wage clause puts a price on the work to be done. Singly or in concert, these provisions bespeak an intent to retain for the bargaining unit all production and maintenance work, the union argument runs. Wallen, "How Issues of Subcontracting and Plant Personnel Are Handled by Arbitrators." See 19 Indus. & Lab. Rel. Rev. 265, 265 (1966).

Not unsurprisingly, such polar views have produced considerable disagreement over whether an employer can or cannot subcontract under the "reserved rights" doctrine. There is no point in elaborating on the considerable body of arbitral thought that has addressed this issue other than to point out that most arbitration cases are fact specific and that the generalized answer is best summed up by simply stating: "It all depends."

In this connection, it has been recognized that:

> Where subcontracting has little or no effect on the unit or its members, it is likely to be upheld by an arbitrator. Where subcontracting is used either to replace current employees or in lieu of recalling employees on layoff, it is less likely to be upheld. A second factor – the employer's justification for subcontracting work – also is an important factor. Arbitrators are more likely to uphold the contracting out of work where it is justified by sound business reasons. (Footnote citations omitted.)
> See Elkouri and Elkouri, How Arbitration Works, (BNA, 6th Ed., 2003, pp. 746, 747.

In Wisconsin, it is well settled that the decision to subcontract certain services such as bussing constitutes a mandatory subject of bargaining and that the impact of any such decision also constitutes a mandatory subject of bargaining. See Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89, (1977).

Here, there is no evidence, let alone proof, that the Union has ever waived its statutory right to bargain over both of these issues. To the contrary, Union representative Rainford's above-quoted February 27, 2003, and November 15, 2003, letters, (Union Exhibits 2, 4), establish that the Union has vigorously preserved its right to bargain over both issues.

The expired agreement's silence on this issue therefore does not mean that the District has reserved the right to subcontract. It only means that the parties have never expressly bargained over this issue and that until they do so, the District cannot unilaterally subcontract out its bussing services if that results in the displacement of bargaining unit personnel. As a result, the District's subcontracting proposal - which protects the jobs of other non-bussing personnel - does not constitute a meaningful quid pro quo for the rest of the language it seeks.

I therefore conclude: (1), that the District has established a compelling need to either subcontract its bussing services or effectuate other drastic budget cuts to deal with its mounting budget problems; (2), that the projected savings from subcontracting are probably overstated and that while subcontracting will lessen the District's financial problems in the short term, there is a substantial possibility that the District will not be able to maintain those savings over the long term because of its precarious bargaining position when its contract with Kobussen must be renegotiated; and (3), that the District has not offered a substantial enough quid pro quo for the language it seeks.

The Union cites several interest arbitration cases where arbitrators have ruled against an employer's attempt to secure new subcontracting language by stating they "all have recognized the gravity of a proposal for the unrestricted right to subcontract current bargaining unit work."

See Mineral Point School District, Dec. No. 38322-A (Tyson, 1995), ("Mineral Point I"); Mineral Point School District, Dec. No. 28879-A (Baron, 1997), ("Mineral Point II"); Lake Holcombe School District, Dec. No. 23836-A (Fogelberg, 1997).

The District asserts that these cases are all distinguishable because the school district in Mineral Point I wanted a subcontracting clause to cover all services, unlike here which only centers on bussing services; because the school district in Mineral Point II wanted to subcontract its bus services to achieve savings of only $23,000 - $50,000 annually, unlike here where the District intends to save $250,000 annually; and because the school district in Lake Holcombe did not present any evidence that it in fact had to subcontract, unlike the evidence here which shows that subcontracting is needed. The District also cites the following cases where unions were unable to further restrict already existing subcontracting language: Holmen School District, Dec. No. 28164-A, (Baron, 1995); City of Mequon, Dec. No. 28399-A (Baron, 1995); Manitowoc County (Health Care Center), Dec. No. 30514-A (Zeidler, 2003).

While all of these decisions are instructive, this dispute must be resolved within the context of the unique facts of this case and the applicability of the statutory criteria to those facts.

As for the statutory criteria, the District asserts that "Application of the greatest weight factor of revenue controls requires adoption of the District's offer" because its budget crisis provides "a compelling need to subcontract its bus operation"; because that is the best option; because its proposal "strikes a fair balance between the needs of the District and its employees"; and because the District will be required to make other cuts which "will affect the quality of its educational program" if subcontracting is not achieved.

In support of its position, the District cites Arbitrator William Petrie's Award in Rusk County, Dec. No. 29258-A, (1998), p. 17-18, wherein he stated, inter alia:

. . .

The Greatest Weight and Greater Weight Factors

. . .

> In applying the two new criteria, it is emphasized that the specified limitations on expenditures or revenues must be present to trigger the application of the "greatest weight" criterion, but the "greater weight" criterion does not require such limitations and it can apparently be applied in at least two ways: first, by ensuring that an employer's economic conditions are fully considered in the composition of the primary intraindustry comparables; and second, by ensuring that the economic costs of a settlement are fully considered in relationship to the ". . . economic conditions in the jurisdiction of the municipal employer." In other words, like employers should be compared to like employers, and undue and disparate economic burdens should not be placed upon an employer without appropriate statutory consideration of comparable economic conditions.

. . .

The District also cites Tomahawk School District, Dec. No. 30024-A, (2001), p. 13, wherein Arbitrator Gil Vernon stated that the "greatest weight" factor "requires arbitrators to take into account the financial and budgetary influence, impact and pressures that come to bear under legislative revenue limitations (wise or unwise as they may be)."

The Union asserts that this factor favors its proposal because the District's Fund 10 balance is "not at risk," thereby evidencing the District's strong financial condition; because the District's wage offers to other bargaining units and administrators "belie budget pressures"; because low levy rates and the low cost of educating each student reflect the District's comparatively strong economic position; and because the District should go back to the local community if it wants to upgrade its computers.

The Union thus cites Arbitrator June Miller Weisberger's Award in Manitowoc School District, Dec. No. 29491-A, (6/99), wherein she stated:

. . .

As set forth above, the undersigned is obligated to give **greatest** weight to the factor contained in Section 111.70(4)(cm)6 of MERA. The Employer has argued that state imposed revenue controls (including the requirement that school district voters must approve budgets exceeding imposed revenue caps) and the statutory limits placed on total compensation increases for teachers who bargain collectively under MERA strongly support the Employer's final offer on economic issues. It argues that the financial resources required to fund the Union's offer (in contrast to the Employer's final offer) must come from the Employer's budget which is already committed to other needed expenditures and the District's reserve fund and that an arbitrator should not "second guess" the District's decisions on its budget priorities.

The District further argues that the **greater** weight factor set forth in Section 111.70(4)(cm)7g of MERA also supports the District's more modest final offer because of local economic conditions including the fact that Manitowoc School District taxpayers have lower average incomes than taxpayers in comparable school districts.

If these Employer arguments were to prevail in this proceeding, they would determine the outcome herein without further consideration of any other arguments made by both parties to support their respective final wage offers. Although the undersigned is able to conceive of circumstances in which there is unmistakable evidence of some specific facts which would direct such a result due to the language of Section 111.70(4)(cm)7 and 7g, she does not believe that the evidence and arguments in this proceeding are sufficient to require such a summary result. State imposed school district cost controls are applicable to all school districts. There is no specific state law or directive which limits implementation of the Union's final offer by the District. While state revenue controls must be considered in this proceeding, the undersigned concludes that their existence is insufficient by itself to mandate adoption of the Employer's final offer at this stage in her analysis of MERA's statutory factors. Any other conclusion would undermine the statutory impasse procedures retained by the legislature in Section 111.70(4)(cm) of MERA. Similarly, she believes that data on local economic conditions in the Manitowoc School District are relevant and need to be considered in this proceeding. However, she does not believe that the data presented by the Employer justify giving this factor controlling weight. Accordingly, she will consider the "other" statutory factors while continuing to give appropriate weight to the evidence and arguments presented by the Employer relating to the factors specified in Section 111.70(4)(cm)7 and 7g.

. . .

I agree with Arbitrator Weisberger's analysis and find that this factor cannot be given the greatest weight here because there is no risk of exceeding revenue caps under either party's Final Offer.

The District also contends that the "greater weight" factor favors its offer because economic conditions make it "unique among its comparables," as shown by the higher number of layoffs it has experienced; because of the relatively low average income of its residents; because of its relatively low fund balance; because of its lower transportation costs; because of its declining enrollment; and because of its higher mill rate and other "socio economic" factors. It also asserts that the economy is in a "very precarious position"; that area wage settlements "do not indicate a strong local economy"; that per capita income in Sturgeon Bay is "very low"; and that it "ranks well above comparable wages underscoring the need to economize in areas that are possible."

The Union claims that this factor favors its offer because area wage settlements and per capita income growth reflect a "strong local economy."

Without going into an extensive analysis of all this data, it suffices to state that the local economy is neither as bleak as portrayed by the District nor as rosy as depicted by the Union.

For while the District is facing severe financial pressures, it also is true that the District has agreed here to grant annual 3% across-the-board wage increases for three years; that it has agreed to grant its teacher aides annual wage increases of 4.5%, 3.5%, and 3.5%, and that it has granted annual package increases of 3.8%, 4.1% and 4.1% to its teachers. Nine local area wage settlements involving the City of Sturgeon Bay and Door County also have provided for wage increases ranging between 3% - 3½% in 2002 – 2004, with the bulk of them providing for 3¼%

increases, (Union Exhibit 12). Such wage increases help establish that local economic conditions are mixed, and that the local economy can support either party's offer.

Turning now to "Other factors," there is no dispute over the lawful authority of the District.

As for the stipulations of the parties, the District argues that this criterion supports its proposal because it has offered 3% for each of the three years of the agreement, and that such increases translate into 9.4%, 5.6%, and 5.3% total package increases when both wages and fringe benefits are added together. That, claims the District, supports its proposal because subcontracting is needed to "realize needed savings, in part, caused by relatively high wage and benefit packages bargained with employees."

Those benefit packages, however, were voluntarily agreed to by the District apparently because the District believed they were warranted and affordable even if the District does not secure its subcontracting language, as there was no guarantee that its language here would be selected when those wage settlements were agreed upon.

Moreover, the wage increases here are consistent with the District's internal comparables, thereby indicating that its offer here has more to do with internal comparability, rather than with offering an additional economic quid pro quo to "buy" its subcontracting language. The District's offer here in any event is not enough to constitute a quid quo pro for the displaced bus drivers given the substantial reduction in their benefits related above. The stipulations of the parties thus do not favor either party.

As for "The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement," the District has made a compelling case as to why it must cut its budget because of the financial burdens it is facing and its

subcontracting proposal certainly will help alleviate that burden. There also may be merit to the District's additional claim that the public's interest will be served in the short term by discontinuing its bus operations rather than by cutting the quality of its education program.

On the other hand, the District's proposed contract with Kobussen must be renegotiated at some point, at which time the District may have little, or no, bargaining leverage after it sells its current bus fleet. At that point, there is a very real possibility that the short-term savings envisioned now may disappear and that the District's bussing expenses may soar.

Because of this latter consideration, I find that this factor does not favor either party.

As for factor 7.r.d. and the comparison with other school district, I have concluded for the reasons stated above that the external comparables relating to comparable school districts favor adoption of the Union's Final Offer because no comparable unionized school district has the kind of subcontracting language proposed here.

As for factor 7.r.e. and the comparison with other local municipal employees, no collective bargaining agreements covering municipal employees in the City of Green Bay or Door County contain the kind of subcontracting language sought here.

As for internal comparables, neither the teachers nor the teacher aides' agreements contain any subcontracting language.

The District maintains that "comparisons to the paraprofessionals and teachers should be disregarded . . ." because its offer "focuses solely on subcontracting bussing" which is not an issue for these other two groups. The Union, on the other hand, asserts: "The failure to secure this right with the paraprofessionals or the teachers, and the absence of such a provision in either agreement clearly and strongly supports the Union's offer in the instant proceeding."

Ordinarily, considerable weight must be given to internal comparables because employers, as a general proposition, should treat their employees the same. However, that cannot always be done when there are legitimate reasons for treating them differently. Here, it is difficult to see how the District can ever subcontract the work now performed by teachers and paraprofessionals, which is why the District's need to subcontract there is not as great as the need to subcontract here. As a result, while this criteria favors the Union, this latter caveat must be considered.

No weight can be given comparisons with private employment because this case does not center on comparing the overall wages, hours and conditions of employment of municipal employees with private employees, but rather, with the very narrow question of whether a municipal employer can subcontract out its public bussing needs, which is an issue that has no counterpart in the private sector.

As for cost of living, the parties disagree over the cost of the District's offer; how it should be calculated; and what weight it should be given under the statutory criteria.

The District asserts that the agreed-upon 3% annual across-the-board wage increases total 6.3%, 4.7% and 4.7% when step movement is included, for an average annual increase of 5.1%, and that its total package costs are 9.4%, 5.6% and 5.3% for an average annual package cost of 6.8%. The District maintains that its offer exceeds the cost of living and that total package costing must be considered because Section 111.70(4)(cm)7r.-h. requires that consideration be given to "overall compensation" and because Arbitrator Tyson in a prior proceeding involving the parties took that approach.

The Union claims that cost of living is "not a relevant factor," and that the District has misapplied this factor. It also contends that total package costing is "not supportable" because it

seeks to include step and longevity increments; because such costing is inappropriate for non-teacher units; because it represents a "major change" in how the parties have historically bargained; because the District has not offered a quid pro quo for such costing; and because the comparables do not support it. The Union also states that the District's costing is "fundamentally flawed" because it incorrectly calculates the cost of health insurance for the 2001-2002 base year.

Arbitrator Tyson addressed cost of living in his prior decision affecting these parties when he ruled that it was proper to consider the total package cost generated by increases in health insurance, and Arbitrator Gil Vernon reached that same result in Tomahawk School District, Dec. No. 30024-A, (2001).

While it is necessary to look at "overall compensation," the parties here have completely agreed on what wages and benefits are to be paid over the course of the agreement, thereby lessening the importance of this factor. Moreover, and regardless of what the District's actual costs may be over the course of the agreement, and regardless of whether step movement is or is not included, one fact stands clear: The District's wage offer alone exceeds the CPI of 2.4%, which is why this factor, to the extent that it is relevant, favors the District no matter how the District's offer is calculated.

Factor 7.r.h. does not favor either party because while the "overall compensation" enjoyed by all other members of the bargaining unit may favor adoption of the District's offer, the displaced drivers will enjoy little of that if they are severed from their employment with the District. The lack of "continuity and stability of employment . . ." referenced in this part of the statute therefore offsets the overall compensation that other employees will enjoy.

Factor j, which relates to "Such other factors . . .," which are normally or traditionally taken into consideration in a collective bargaining setting, favors the Union because the District, as the proponent of change, has not offered a sufficient quid pro quo for its subcontracting language. The bargaining over this issue therefore has not included the kind of "give and take" found in negotiations because the District is attempting to displace bargaining unit employees without offering them enough in return.

In addition, when weighing whether there is a need for any subcontracting language, it must be remembered that the District already has some flexibility to subcontract other services, as the District over the last 4-5 years has subcontracted out bargaining unit work on about 56 occasions, (Union Exhibit 7), thereby showing that the Union does not object to subcontracting, per se, provided only that it does not displace any bargaining unit personnel or reduce their regular work hours.

CONCLUSION

The District claims: "The real question in this case is the application of scarce resources."

I agree that that is a large part of this case, which is why this is such a difficult case. But, there also are other factors which must be considered under Section 111.70(4)(cm)7 of MERA in determining whether the District, despite its best intentions, has clearly proven that its subcontracting proposal must be adopted.

While there certainly is a compelling need for the District to do something, and while subcontracting the District's bussing services will help in some degree to alleviate its budget crunch, there is no certainty that long term savings can be guaranteed through such subcontracting once its proposed contract with Kobussen must be renegotiated. More

importantly, the District has not offered a sufficient quid pro quo for its language proposal, which is an essential part of the collective bargaining process. When that is coupled with the fact that the District's offer is not supported by any comparable unionized school districts or by any local comparable municipal employers, I conclude that the Union's offer must be selected.

In light of the above, it is my

AWARD

That the Union's Final Offer be incorporated in the successor agreement.

Dated at Madison, Wisconsin, this 24th day of December, 2004.

Amedeo Greco /s/
Amedeo Greco, Arbitrator