IN THE MATTER OF THE ARBITRATION PROCEEDINGS

BETWEEN

BERLIN SUPPORT STAFF ASSOCIATION
(Paraprofessionals and Custodian/Maintenance Employees),

Union,

and

ARBITRATOR'S AWARD
Case 20 No. 59975
INT/ARB-9250
Decision No. 31161-A

BERLIN AREA SCHOOL DISTRICT,

Employer.

Arbitrator: Jay E. Grenig

Appearances:

For the Employer: William G. Bracken
Labor Relations Coordinator
Davis & Kuelthau, s.c.

For the Union: John D. Horn
UniServ Director
Three Rivers United Educators

I. BACKGROUND

This is a matter of final and binding interest arbitration for the purpose of resolving a bargaining impasse between the Berlin Area School District ("District" or "Employer") and the Berlin Support Staff Association ("Association" or "Union"). The District is a municipal employer. The Association, affiliate of Three Rivers United Educators and the Wisconsin Education Association Council is the exclusive collective bargaining representative for all paraprofessional (aides or educational assistants) and custodial employees of the District.

The parties began negotiations for their initial contract on February 5, 2001. They were unable to reach agreement on all terms and conditions of an initial collective bargaining agreement. On May 24, 2001, the Association filed a petition for interest arbitration with the Wisconsin Employment Relations Commission to initiate arbitration pursuant to Section 111.70(4)(cm)6 of the Wisconsin Municipal Labor Relations Act. A member of the Commission's staff conducted an investigation, and, on November l9, 2004, recommended to the WERC that an order directing arbitration be issued.

The parties selected the undersigned as the Arbitrator. An arbitration hearing was conducted on April 13, 2005. Upon receipt of the parties' reply briefs, the hearing was declared closed on June 28, 2005.

II. FINAL OFFERS

A. Introduction

This being the parties' first collective bargaining agreement, there is a substantial number of issues in dispute in this proceeding. The Parties' final offers are on file with the Wisconsin Employment Relations Commission. The total difference between the two offers over the three-year contract is $6,784.

B. Summary of Offers

1. Hourly Threshold Defining District's Contribution to Health and Dental Insurance

The Association proposes using 1,820 hours in defining a full-time employee for the purpose of prorating a part-time employee's hours in determining the Employer's contribution to health and dental insurance premiums. The Employer offers to continue the status quo of 2,080 hours for defining a full-time employee from which a part-time employee's hours would be prorated in determining the Employer's contribution to health and dental insurance premiums.

2. Total-Package Bargaining

The Association's proposal treats the wage increase separately from the impact of the increase on fringe benefits. The Employer's proposal uses the total package approach, taking into account all wages and fringe benefits that the parties propose. Using the total package approach, the Employer is proposing 9.5, 7.0, and 10.9 percent total package increases in 2000-01, 2001-02, 2002-03, respectively. The Association is proposing an increase of 9.6, 7.0, and 11.4 percent in 2000-01, 2001-02, 2002-03, respectively.

3. Wage Increases

The Association's and the Employer's final offers for 2000-01 both include individual salary increases, one time adjustments, and special bonuses for an overall wage increase of 9.8%. Their final offers for 2001-02 are based on average cents per hour plus a percentage increase. Custodians would receive a raise of thirty-five cents per hour plus two percent or nine cents, producing an average wage increase of 6.1%. Regular education paraprofessionals would receive an across-the-board increase of thirty-one cents per hour plus an additional two percent or sixteen cents for an average wage increase of 6.7%. The special education paraprofessionals would receive an increase of thirty-seven cents per hour plus an additional two percent or sixteen cents producing an overall wage increase of 8.5%.

In 2002-03, employees are placed on a salary schedule under both offers. The Association's is based on a different salary schedule that would be in effect for the last day of the contract. Under the Association's offer, in the third year of the contract the custodian wage increase averages 6.4% and for paraprofessionals it is 9.7%. The Employer's offer would result in an average wage increase of 5.9% for custodians and 8.9% for paraprofessionals.

4. Layoff Procedure

The Association's final offer proposes that a layoff be defined as any reduction in an employee's current regularly scheduled hours. The Employer proposes that a layoff apply only to the complete elimination of a position.

The Association's final offer grants a laid off custodial employee the right to bump any less senor employee in the department. Under the Association's final offer, paraprofessionals would only have the right to transfer to the least senior employee's position in the department with the same or greater hours. The Employer proposes that a laid off employee can transfer to the position of the least senior employee with the same or less regularly scheduled hours.

The Employer's proposal contains a bad-faith standard for reviewing layoffs—the same language as in the teachers' contract. The Union has no proposal regarding the standard for reviewing a layoff decision.

5. Vacation

The Association's vacation proposal maintains the status quo with respect to resolving employee conflicts over vacation choices. It provides that all vacation shall be requested by a custodian and granted at the discretion of the Director of Buildings and Grounds.

The Employer proposes that all vacation requested by a custodian is to be granted at the discretion of the Director of Building and Grounds. If there are conflicts between employees as to vacation scheduling, preference will be given in order of seniority. The Employer reserves the right to limit the length of an employee's vacation to one week increments. The Employer also proposes that vacation time is not cumulative and may not be carried over.

6. Retirement

The Association's offer mandates that the full share of an employee's retirement contribution be paid by the Employer. The Employer proposes capping its contribution to 5.6%.

7. Miscellaneous

The Association proposes adding two afternoon holidays, Good Friday and New Year's Eve, for a total of ten holidays. The Employer proposes a total of nine holidays.

The Association proposes a thirty cents an hour premium for paraprofessionals working with cognitively disabled, educationally disabled, learning disabled, and at-risk students. The Employer's final offer proposes a fifty cents per hour increase for these positions, excluding the learning disabled paraprofessionals.

The Association makes no proposal regarding a fair share referendum and the Employer proposes a secret ballot election conducted by the WERC before the fair share clause becomes operative.

The Employer's final offer provides that the management rights clause in the collective bargaining agreement is not subject to grievance arbitration. The Association made no proposal on this issue.

The District practice when school is called off for a snow day has been that, after the District Administrator closes school for the day, the custodians all report on a day shift as soon as possible. The Employer proposes that custodians would have to obtain their immediate supervisor's approval before coming in to work on snow days. The Association did not make a proposal on this issue.

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 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.

IV. POSITIONS OF THE PARTIES

A. The Association

The Association asserts that the Employer has the financial ability to implement the Association's final offer. It points out that the economic difference between the parties' offers will take place outside the terms of the 2000-03 contract. The Association also contends that the Employer's choice not to levy to the maximum allowed under the revenue controls for the 2003-04 school year should move consideration of this matter to the other factors under the law or give weight to the Association's final offer as being more reasonable.

The Association argues that it has long been accepted in interest arbitration that the party seeking a change in the status quo must show a need for the change and offer a quid pro quo. The Association claims the Employer cannot meet its burden to show that the changes in the status quo the Employer seeks should be made.

The Association claims that the bargaining history refutes the contention that the parties agreed to total package bargaining. The Association states that the interest arbitration process is intended to resolve disputes consistent with what the parties may have

done in the past or what they might do under different circumstances—not to create bargaining history.

The Association contends that the wage structures and rates in its offer are more reasonable than the Employer's. The Association says there is a significant issue with respect to the wages of Special Education Assistants. By putting all employees on a wage structure at the end of the initial contract, the Association states that employees will thereafter move with a standard annual step increase. The Association argues that the inadequate wage rates on the Employer's shorter structure coupled with an extraordinary number of employees off schedule make the Employer's offer far less desirable than the Association's.

According to the Association, its wage schedule implementation proposal recognizes what parties do all the time to balance justifiable increases in wages, while limiting the cost of the wage increases. The Association concedes that the Employer's wage structure length would be preferred from the Association's perspective, but the Association contends the Employer's proposal leaves too many employees off a structure that has inadequate wage rates. The Association declares that the schedule length is simply way too long for custodians.

The Association argues that the Employer's wage structure requiring a custodian to be in the District twenty years to reach the maximum wage rate is unreasonable and contrary to the comparables. Acknowledging that the minimum and maximum wage rates for custodians in the parties' offers are identical, the Association says that the maximum wage rates are below the comparables.

It is the Association's position that there is little or no comparable support for the Employer's final offer regarding its proposal to restrict the ability to grieve management rights, having a fair share referendum, and paraprofessionals losing pay for closing school for a portion of the day.

Pointing out that the parties stipulated at the hearing that the District Administrator has granted a total of ten paid holidays to custodians, including full-day holidays on Good Friday and New Year's Eve, the Association argues the Employer now wants to change to a total of nine holidays with only half-day holidays on Good Friday and New Year's Eve.

According to the Association, the Employer does not have support in the comparables for its proposal on the amount the Employer will pay of the employees' share of Wisconsin Retirement System, custodial holidays, custodian hours of work on emergency days, and limiting custodians to one week of vacation. Thus, the Association says that its proposals are more reasonable that the Employer's.

The Association argues that its layoff proposal is more reasonable, not only because it protects the employees from incremental loss of job security, but because it recognizes the difference in the working conditions, different hours of work, and nature of the work of the two classifications of workers represented in the bargaining unit. The Association points out that, unlike educational assistants whose work days generally correspond to the school day, custodians work various shifts. If a shift with preferred hours is eliminated, the Association says its proposal will allow a custodian to bump a less senior employee from a preferred shift.

With respect to the Employer's proposal to include a "bad faith" provision as a condition to grieving a layoff, the Association says there is no external comparable that includes such a barrier to grieving the layoff provision. The Association also says its proposal to include reduction of hours in the definition of layoff provides seniority protection for full and partial layoffs. The Association states that its proposal gives greater protection to the employees without sacrificing the Employer's interests.

It is the Association's position that the Employer's proposal regarding prorating health insurance benefits is a change in the status quo. The Association claims that the Employer has been using a thirty-five-hour standard for custodians—1,820 hours, but now proposes moving to using forty-hours per week, or 2,080 per year for custodians.

Pointing out that the parties have agreed to offer additional pay to some paraprofessionals in the bargaining unit, the Association says that its proposal to include LD (Learning Disabled) paraprofessionals is more workable than the Employer's. The Association explains that the District uses multi-categorical classrooms containing students with more than one category of disability. This means there may be LD, ED, and CD students in the same classroom at the same time.

For the foregoing reasons, the Association asks that the Arbitrator rule that its final offer is the more reasonable.

B. The Employer

The Employer emphasizes a comprehensive view of all the issues and tentative agreements in the entire dispute. The Employer stresses that it has not agreed to sign off the agreed upon wage adjustments for 2000-01 and 2001-02 because it wants to emphasize that all three years must be viewed in their entirety—not independently.

According to the Employer, it has offered a tremendous wage and benefit package averaging 9.1% in each year of the three-year contract. In essence, the Employer says it has proposed a high wage and benefit package as a trade for the rest of its offer. The Employer argues that the Association wants the benefits of all worlds: the Association will gladly take the Employer's high wages, but it is unwilling to take the language and economic items that go with it.

The Employer urges the Arbitrator to realize the infancy of the relationship between the parties and leave it to them to negotiate significant items in their contract. It contends the Arbitrator should exercise restraint in selecting an offer that seeks the ideal contract from the Union's standpoint in the parties' first contract.

Facing increasing budgetary pressures as a result of revenue controls, the Employer says that fiscal responsibility is of paramount importance. Although the parties are approximately $7,000 apart, the Employer says that the Association's offer builds in another $11,521 with its "one-day" wage schedule. It is the Employer's position that the Association's offer does not contribute to the goals of efficiency and effectiveness in supporting the Employer's true mission—educating students. The Employer asserts that the Union's offer is merely an attempt to bargain a deferred raise into the next contract.

With respect to health insurance, the Employer asserts that the Association's offer fails to deal with the crisis in the cost of health and dental insurance benefits. It says the Association's proposal bucks the trend of having employees contribute more towards the cost of health and dental insurance. On the other hand, the Employer claims its offer improves the percentage paid by the District for part-time employees through pro-ration.

The Employer states that the Association's proposal on layoff is not workable, asking why should there be two systems of bumping—one for custodians who get two bumps and one for the paraprofessionals who only get one bump. The Employer argues that the Association's layoff clause would result in conflict and grievances.

By relying on someone's memory of the past, the Employer states that the Association's vacation offer is problematic. By spelling out how competing vacation dates would be selected, the Employer contends its offer provides a simple, easy way to ensure that vacations are allocated fairly among employees.

The Employer estimates that its offer provides an average annual increase in total compensation of 9.1%. It says salaries would increase 9.8% in 2000-01, 6.2% in 2001-02, and 7.2% in 2002-03. The Employer estimates the Association's offer would provide an average annual total compensation increase of 9.3%. Under the Association's offer, salaries would increase by 10.0% in 2000-01, 6.2% in 2001-02, and 7.8% in 2002-03.

It is the Employer's position that the Association's final offer, providing a wage schedule that will become operative only on the very last day of the contract, is a clever "ruse." The Employer claims the Association is deferring tremendous costs into the next round of bargaining and attempting to minimize the costs in this round of bargaining.

The Employer asserts that the Association has not presented justification for creating a wage schedule, particularly since the parties have already agreed that there will be no wage schedule for the first two years of the contract. Given the increase in health in-

surance premiums, the Employer argues that this is not a time to reduce the threshold for receiving benefits.

The Employer has proposed an additional stipend of fifty cents per hour for CD, Ed, and At-Risk paraprofessionals. The Association has proposed an additional thirty cents per hour for these same positions and the LD paraprofessionals. The Employer does not believe the LD paraprofessionals should be included because the job duties of the LD paraprofessionals are not as demanding as the others.

Pointing out that the Association was certified in June 2000, the Employer argues that its proposal for a fair share referendum constitutes a "reality check" to make sure that a majority of employees favor fair share. The Employer says it recognizes that employees have a right to be represented by a labor organization, but it also recognizes that some employees may feel strongly about financially supporting a labor organization.

The Employer proposes that "the rights that belong exclusively to the District" not be subject to the grievance procedure. The Employer explains that its not seeking a waiver of the Association's ability to grievance those rights that are contained elsewhere in the collective bargaining agreement, but only those rights belonging exclusively to the Employer that are not referenced elsewhere in the agreement.

For the foregoing reasons, the Employer asks that its offer be selected by the Arbitrator.

V. FINDINGS OF FACT

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

In order for this factor to come into play, employers must show that selection of a final offer would significantly effect the employer's ability to meet State-imposed restrictions. *See Manitowoc School Dist.*, Dec. No. 29491-A (Weisberger 1999). 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.

While the Employer, like other school districts, is operating under legislatively imposed revenue limits, there is no showing that either offer will require the Employer to exceed those limits. In 2003-04, the Employer levied $121,964 less than it could have levied under the law. In 2004-05, the Employer levied $19,408 less than it could have levied under revenue restrictions. In 2003-04, the Employer made staffing cutbacks, including a library aide, a special education/physical education aide, a janitor, and bus route cuts.

This factor favors neither party.

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

This factor relates to the issue of a municipal employer's ability to pay. There is no showing that the Employer is unable to pay either party's final offer.

C. The Lawful Authority of the Employer

There is no contention that the Employer 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. The public has an interest in keeping the Employer in a competitive position to recruit new employees, to attract competent experienced employees, and to retain valuable employees now serving the Employer. Presumably the public is interested in having employees who by objective standards and by their own evaluation are treated fairly.

F. Comparison of Wages, Hours and Conditions of Employment

1. Introduction

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.

2. External Comparables

One of the most important aids in determining which offer is more reasonable is an analysis of the compensation paid similar employees by other, comparable employers. Arbitrators have also given great weight to settlements between an employer and its other

employees. See, e.g., *Rock Village (Deputy Sheriffs' Ass'n)*, Dec. No. 20600-A (Grenig 1984).

The Employer proposes using the following school districts as comparables: North Fond du Lac, Omro, Ripon, Rosendale-Brandon, Waupaca, Waupun, Wautoma, Westfield, Weyauwega-Fremont, Wild Rose, and Winnecone. Some of the Employer's comparable districts are not unionized.

The Association relies on the athletic conference, suggesting Horicon, Hortonville, North Fond du Lac, Omro, Waupaca, Waupun, Wautoma, and Winnecona as comparables. The Association uses Hortonville for custodians but not for paraprofessionals. Hortonville, Waupaca, and Waupun are not in the some athletic conference as the Employer. In addition, Hortonville has 2,874 students compared with 1,697 in the Employer. The Association does not include Rosendale-Brandon, Lomira, Markesan, Mayville, Oakfield, and Ripon—districts in the same athletic conference as the Employer.

In *Monticello School Dist. (Support Staff)*, Dec. No. 31029-A (Schiovoni 2005), the arbitrator wrote:

> [W]ith respect to wages and health insurance, these are the two factors that drive the labor market. Employees seek or avoid employment with certain public employers based upon wages offered and health insurance packages available to the employee and/or his/her family. Often, it is health insurance benefits alone that dictate selection of employment in one district over that in another. As Arbitrator Torosian observed, "regardless of organizational status, employers are competing for the same employees. The marketplace is the market place, regardless of how determined."

See Rio School (Support Staff), Dec. No. 30092-A (Torosian 2001). As far as wages and health benefits are concerned, it is immaterial whether the comparable employers are unionized. *See Cameron School Dist. (Support Staff)*, Dec. No. 27562-A (Gundermann 1993); *Benton School Dist. (Auxiliary Personnel)*, Dec. No. 24812-A (Baron 1988); *Green Bay School Dist. (Substitute Teachers)*, Dec. No. 21321-A (Weisberger 1984); *Kenosha Unified School Dist. (Substitute Teachers)*, Dec. No. 19916-A (Kerkman 1983); *Montello School Dist.* Dec. No. 19955-A (Briggs 1983); *Wautoma Area School Dist.*, Dec. 20338-A (Gundermann 1983).

Geographic proximity is particularly important with respect to support staff employees. *See Kewaskum School Dist. (Auxiliary Personnel)* Dec. No. 26484-A (Johnson 1990) (labor market is geographically restricted); *City of Marshfield*, Dec. No. 25298-A (Nielsen 1988); *Richland School Dist. (Support Staff)*, Dec. No. 24064-A (Miller 1987) ("Arbitrators must afford great weight to geographic proximity in the determination of a labor market for noncertified staff); *Montello School Dist.* Dec. No. 19955-A (Briggs

1983) ("[I]t makes good sense to use geographical proximity as one of the tests of comparability.")

Accordingly, it is concluded that the most appropriate comparables are the comparables proposed by the Employer. These districts are geographically proximate to the Employer, and they operate under comparable economic conditions.

The Employer ranks first among the twelve comparables in state aid percentage received at seventy-one percent. Its enrollment dropped from 802 students to 730 students in 2002-03. The Employer ranks sixth out of the twelve comparables with respect to its tax rate. In terms of individual income, the Employer ranked ninth in 2000, tenth in 2001, and tenth in 2002. The average total income per taxpayer in the District is significantly below the average of the comparables.

The Employer's contribution for health insurance premiums is comparable to the contributions made by the comparable districts. The Employer's plan has the lowest deductible found among all but one of the comparables. It also has one of the lowest copays for drug cards. Employer contributions in the comparables range from 85 percent in Waupaca to 100% in Wild Rose. The average employer contribution in the comparable districts is 91%. The Employer's contribution is 92%—slightly higher than the average employer contribution in the comparables.

Some of the comparable districts pay the entire dental insurance premium and others do not provide any dental insurance benefit. In those comparables providing dental insurance benefits, the employer contribution to the family premium in the comparables is 91 percent and the Employer here contributes slight more—92%.

Most of the comparables require a higher standard than the 1,820 hours proposed by the Association to qualify for health and dental insurance. Omro requires 1,950 hours for paraprofessionals and 2,080 hours for custodians; Ripon, 2080 hours; Waupaca, 2080 hours; and Westfield, 2080 hours. North Fond du Lac requires employees to work at least seven hours per day to be eligible for the family benefits, while employees working between four and seven hours a day are eligible for the single plan. Rosendale requires 1,560 hours, but provides no benefits for employees working less than six hours per day. Wautoma prorates benefits based on 2,080 hours. Waupun prorates based on a minimum of 1,820 to 2,080 hours. Weyauwega-Fremont defines full-time at 1,440 hours, and Wild Rose defines full-time based on 1,800. In Winneconne, a full-time employee is defined as 30 hours per week, but a nine-month employee does not receive coverage in the summer months; the employer's liability for a nine-month employee on family coverage is limited to the single coverage during the summer. It is apparent that most of the comparables use 2,080 or more when determining full-time benefits. Employees in most of the comparables who work less than 2,080 hours receive a prorated contribution to the employers' share of the benefit premium.

A majority of the external comparables utilize a total package in determining the economic benefits received by employees, wages as well as fringe benefits. The districts using a total package approach include Ripon, Rosendale-Brandon, Waupaca, Waupun, Westfield, Wild Rose, and Winneconne. In this case, the Employer is offering an annual total package increase of 9.1%. The Employer's and the Association's offers exceed the prevailing settlement pattern in the comparable districts by a wide margin. However, the Employer's offer is closer to the settlement packages in the comparables than the Association's.

In terms of total package, the Employer's 2000-01 offer of 9.5% exceeds the range of 3.8% to 8.16% in the comparables. Most of the comparables settled around 4.0%. The Employer's 2001-02 offer of a total package of 7.0% exceeds the range of total package increases in the comparables of 3.8% to 6.5%. In 2002-03, the Employer's offer of a 10.9% increase exceeds the settlements in the external comparables, which range from 3.8% to 8.9%.

For regular education paraprofessionals, in 2000-01 the median maximum wage rate was $8.97 in the comparables, with a wage rate range from $8.24 to $10.53. The Employer's maximum wage rate offer is $8.84. In 2001-02, the median maximum salary was $9.31 (with a range from $8.66 to $10.81). The Employer is at the median at this benchmark. In 2002-03, the Employer's offer of $9.00 per hour places the Employer at the median. The range of wage rates in 2002-2003 was from $8.98 to a high of $10.95. The Employer's offer includes a red-circled regular education professional at $9.95 per hour. The Employer ranked eighth of thirteen in 2000-01 and seventh of thirteen in 2001-02. The Employer's offer would place it sixth of thirteen in 2002-03 and the Association's would place it second of thirteen.

In 2000-01, the median maximum wage rate for special education professionals was $9.35 (with a range from $8.24 to a high of $11.10), compared with the Employer's maximum of $9.05. In 2001-02, the median wage rate was $9.63 (with a range from $8.74 to $11.20), compared with the employer's maximum of $9.58. In 2002-03, the median maximum wage rate was $10.13 (ranging from $9.24 to $11.44), compared with the Employer's maximum of $9.50. The Employer ranks ninth of fourteen in 2000-01 and eighth of fourteen in 2001-02. The Employer's offer would place it eleventh of fourteen in 2002-03 and the Association's would place it fourth of fourteen.

With respect to custodians, in 2000-01 the median maximum wage rate was $11.24 compared with the Employer's maximum of $11.50. The range for custodians at the maximum wage rate was $9.49 to $15.50. The Employer's maximum wage rate in 2000-01 is $11.50. In 2001-02, the median wage rate was $11.45 compared with the Employer's $12.04. The range at the maximum wage rate was from $9.68 to $15.95. In 2002-03, the median was $12.01 compared with the Employer's $12.30. The range was from $10.13 to $16.40. The Employer ranked sixth of fourteen in 2000-01 and fifth of

fourteen in 2001-02. The Employer's offer and the Association's offer would each place the Employer seventh of fourteen in 2002-03.

As to layoff clauses, some of the comparables treat a reduction in hours as a layoff while several do not. Some of the comparables specify the number of hours that must be reduced before the reduction is considered a layoff. Several of the comparables do not allow bumping. No comparable has a two-bump rule similar to that proposed by the Association.

The Association proposes that the Employer pay the full employees' share of the contribution to the Wisconsin Retirement System. The Employer proposes to continue contributing the employees' share of 5.6% to the Wisconsin Retirement System. Five of the comparables have a percentage cap on the employers' contribution; in five of the comparables the employers pay the 100% of the Wisconsin Retirement System contribution. Through January 2005, 5.6% represented the full employee contribution to the Wisconsin Retirement System. (The employees' share increased to 5.8% effective January 2005—after the expiration of the current contract.)

3. Internal Comparables

Generally, internal comparables have been given great weight with respect to basic fringe benefits. *Rio Community School Dist. (Educational Support Team)*, Dec. No. 30092-A (Torosian 2001); *Winnebago Village*, Dec. 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*, Dec. No. 51947 (Rice 1995). Compensation of nonunionized employees is of little persuasion in an interest arbitration. An employer can utiliaterally make changes for nonunionized employees, while an employer must bargain those changes for unionized employees. See *Columbia County (Professionals*), Dec. No. 28987-A (Krinsky 1997).

The Employer provides clerical employees who work 40 hours per week during the school year and 20 hours per week during the summer with 100 percent of the health plan and 92 percent of the dental plan. A part-time employee averaging 20 hours per week receives 50 percent of the benefit package. For food service personnel working at least 35 hours per week during the school year, the Employer pays 50% of the health premium. Food service employees do not receive dental insurance. Teachers working 50% or more, but less than full-time, receive a prorated contribution to the health and dental insurance. District teachers receive full-time benefits for working 1,820 hours per year (35 hours per week).

On a total package basis, the Employer's offer is the highest settlement among all the internal comparables in the District.

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." Both offers provide for increases well above the increases in the CPI during the period covered by the contract. The Employer's final offer results in an increase closer to the CPI than the Association's.

H. Overall Compensation Presently Received by the Employees

In addition to their salaries, employees represented by the Association receive a number of other benefits. While there are some differences in benefits received by employees in comparable employers, it appears that persons employed by the Employer generally receive benefits equivalent to those received by employees in the comparable employers.

The Employer has offered total package increases of 9.5%, 7.0%, and 10.9% over a three year contract. The Union has proposed total package increases of 9.6%, 7.0%, and 12.5% over the three year contract.

I. Changes During the Pendency of the Arbitration Proceedings

The parties have not brought any changes during the pendency of the arbitration hearings to the Arbitrator's attention.

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*, Dec. No. 19133 (Fleischli 1982). Good economic conditions mean that the financial situation is such that a more costly offer may be accepted and that it will not be automatically excluded because the economy cannot afford it. *Northcentral Technical College (Clerical Support Staff),* Dec. No. 29303-B (Engmann 1998). See also *Iowa Village (Courthouse and Social Services),* Dec. No. 29393-A (Torosian 1999) (conclusion that employer's economic condition is strong does not automatically mean that higher of

two offers must be selected or, conversely, a weak economy automatically dictates a selection of the lower final offer).

With respect to the parties' layoff procedure, the Association proposes one bumping procedure for teacher paraprofessionals and another covering custodians. The Association's offer would allow a custodian to bump any less senior bargaining unit employee in the department with an equivalent or greater number of hours. The employee who is bumped and then has one additional bump the employee can use. After two custodians have bumped, the least senior employee will be laid off. The Association also proposes that a laid off paraprofessional bump the least senior employee in the department with the same or greater number of hours. The Association treats a reduction in an employee's current regularly scheduled weekly hours as a layoff. Finally the Employer proposes a bad faith standard for determining whether a layoff is proper. The Employer proposes that layoffs are not subject to the grievance procedure unless there is an allegation that the Employer acted in bad faith in utilizing and/or applying the layoff procedure.

The Employer proposes that a laid-off employee, whether custodian or paraprofessional, will simply transfer to the position of the least senior employee in the department with the same or less hours. The Employer does not consider a reduction of an employee's currently regularly scheduled weekly hours to be a layoff. Paraprofessional hours fluctuate more than those of other District employees. Treating fluctuation of hours as a layoff could result in frequent bumping, and disruption of the relationship between a teacher and a paraprofessional.

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)*, Dec. 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. Realistically, if the parties reached a negotiated settlement, the final resolution would probably be the result of compromise and the outcome would be contract provisions somewhere between the two final offers here. The arbitrator must determine which of the parties' final offers is more reasonable, regardless of whether the parties would have agreed to that offer, by applying the statutory criteria.

Undeniably there are some provisions in the Association's final offer that are more reasonable than some provisions in the Employer's final offer and vice versa. However, the Arbitrator is required to select one party's final offer; the Arbitrator cannot choose some provisions in one offer and some provisions in the other offer. Nor can the Arbitrator modify or edit final offers. Clearly, a negotiated agreement in which the parties select the best individual offers, modify them so they are mutually acceptable, and

work together to clarify the language would be preferable to imposing one final offer on the parties. Unfortunately, the parties were unable to reach a negotiated settlement and it was necessary to have the matter resolved in this arbitration proceeding.

The parties have been very thorough and comprehensive in their presentations, including two large binders of exhibits and nearly 200 pages of briefs. This being the parties' first collective bargaining agreement, there are numerous unresolved, significant issues, including wages, health benefits, scope of the grievance procedure, and layoffs. All the exhibits and all the arguments of the parties have been closely examined and considered in making this award. However, this analysis will focus on selected, key issues that are considered outcome determinative.

As is normal in interest arbitration and required by statute, attention has been given to the situation in comparable school districts and employers. However, this criterion must be examined with caution as employers and unions have become skilled at selecting "comparables" that are most favorable to their positions. Additionally, although a district may be geographically proximate or of similar size, the are many variables in each district that make an exact comparison difficult.

The concept of changes in the status quo and the importance of quid pro quo are not as important here, where the contract is the parties' first, than in situations where the status quo is the result of agreement between a bargaining representative and an employer. Here, where the status quo is the result of custom or the Employer's exercise of discretion, the parties are not always in agreement as to the nature and scope of the claimed status quo.

Total package or overall compensation is an important part of analyzing final offers. One arbitrator has written:

> [T]he total package data must be given weight even if it includes increases in insurance premiums. It is valid to consider total cost, including increased cost of insurance premiums, because it is a cost experienced by the employer as a result of a benefit negotiated by the Union. This cost, like the cost of any other benefit, which can be expressed in dollar terms, should be considered in comparing final offers of the parties to comparable districts. There is simply no way to ignore the fact that health insurance is a benefit negotiated in the agreement and is of benefit to the bargaining unit members and moreover, that the cost of this benefit is experienced by the employer.

Marion School Dist., Dec. No. 19418-A (Vernon 1983). *See also Kenosha Service Employees*, Dec. No. 19882-A (Yaffe 1983) (one must consider the total value of benefits received by benefits and not ignore increased costs).

Total package analysis recognizes that an employee's compensation include all benefits, including wages, health insurance, sick leave, and vacations. Total package analysis also recognizes that the money for an employee's compensation comes from a single source—the employer's budget. In determining the budget, including the budget for employee compensation, priorities must be set and choices must be made.

B. Wage Increases

The parties' wage increases are relatively similar except for the last year of the contract. The Employer's final offer on wages is slightly more reasonable than the Association's with respect to custodians and regular education paraprofessionals. However, it takes more years for custodians in the District to reach the maximum wage rate than in most of the comparables. Based on an Employer exhibit comparing the Association and Employer offers, it appears that the wage rate of District special education paraprofessionals placed the District ninth out of fourteen comparable districts in 2000-01, and eighth out of fourteen comparable districts in 2001-02. The Employer's exhibit shows that its wage offer would drop the District to eleventh out of fourteen comparable districts in 2002-03, while the Association's offer would raise the wage rate to fourth out of fourteen comparable districts.

The Association's wage schedule proposal for the last day of the contract year does not, in itself, make the Association's wage proposal unreasonable. Wage settlements not infrequently include provisions giving a wage "lift" at the end of the contract period, representing a compromise mitigating the financial impact on the Employer and still providing employees with an appropriate wage increase. While such a proposal has an impact on the succeeding contract, a wage increase in the first, second, or third year of a contract will have a similar impact.

Given the years it takes a custodian in the District to reach the maximum salary and the drop in the comparative ranking of special education paraprofessionals that would result from acceptance of the Employer's offer, the Association's wage offer is slightly more reasonable than the Employer's.

C. Employee Benefits

In its reply brief, the Employer acknowledges that, for "custodians, a full-time twelve-month employee working 35 hours or more per week received a 92 percent contribution to single or family health and dental insurance." Thirty-five hours per week for fifty-two weeks works out to 1,820 hours per year—the number of hours the Association proposes be used as the base for determining full-time employment in calculating health benefits. The 2,080 hours proposed by the Employer would mean an employee would have to work forty hours per week for fifty-two weeks—more hours than the Employer presently considers to be full-time status. Paraprofessionals who work more than 35 hours in a week and who generally are not on a twelve-month contract receive a 50%

Employer contribution to single or family or family health insurance. Both offers would provide coverage only to those paraprofessionals working 35 hours or more per week.

One arbitrator has considered the issue of part-time status and employee benefits, writing:

> An employee who works the whole school day for the whole school year is not a part-time employee . . . . Employment on a school year basis is unique in employment settings, and an employee so employed is not a part-time employee as that term is generally understood in employment relations generally.

Lake Geneva Joint School Dist. No. 1, Dec. No. 26826-A (Vernon 1992).

No persuasive reason has been given why paraprofessionals in the bargaining unit who work thirty-five hours or more per week should be treated differently than custodians who work thirty-five hours or more per week for a total of 1,820 hours per year, and who are considered full-time employees for purpose of benefit contributions. Accordingly, it is concluded that the Association's health benefit proposal is more reasonable than the Employer's.

D. Layoffs

Arbitrators generally interpret the term "layoff" to include any reduction in the normal workweek that results in loss of work. Elkouri & Elkouri, HOW ARBITRATION WORKS 786 (6th ed. 2003). Exempting reduction in hours from a layoff clause would permit an employer to reducing the hours of senior employees in order to avoid laying off junior employees. One Wisconsin arbitrator addressed a proposal to include reduction of hours in the definition of layoff, writing:

> The parties' present contractual language provides that full layoffs will be by seniority within job categories. The Association's proposal extends the same seniority rights to employees in the event of reduction in hours, a 14-day notice of same, and the Association's right to a seniority list upon request. The District proposes to keep the language as is.
>
> The Arbitrator notes that the Association's proposal is mainstream and typical in bargaining units of this type. Internally, the teachers have a seniority based layoff provision, including reduction in hours by department. The instant proposal by the Association requires reduction of hours by seniority within a job category. If anything, in the opinion of the Arbitrator, reduction in hours by seniority in the teaching unit would be more

> problematic for the District than the instant support staff unit. Furthermore, the Arbitrator finds nothing onerous for the Employer.

Rio Community School Dist., Dec. No. 30092-A (Torosian 2001).

Layoffs often give rise to "bumping" issues. In the absence of any contract prohibition, it is "almost universally recognized" that senior employees have the right to bump junior employees from their jobs in order to avoid their layoff. The Employer's proposal drastically restricts employee bumping rights. Because it would permit a senior employee only to bump the most junior employee, the Employer's proposal has the potential for placing a senior employee in one of the more undesirable assignments or shifts. However, the Association's proposal could result in the disruption caused by multiple bumpings. *See e.g., Johnson Outboards*, 7-2 ARB ¶ 8506 (Grant 1978).

Given the exclusion of reductions of hours from the definition of layoff and the restrictions on bumping in the Employer's final offer, the Association's final offer with respect to layoffs is more reasonable than the Employer's.

E. Vacations

The use of seniority in the Employer's offer provides an objective, readily ascertainable standard for determining priority in assigning vacations. The limit on the right to a vacation of more than one week is reasonable in light of the need to staff adequately and properly the custodial positions. If business needs permit, nothing in the Employer's offer that would prevent a custodian from being permitted to take more than one consecutive week of vacation. The Association's offer provides only vague standards for determining when vacations may be assigned when more than one person requests a vacation. Under the circumstances here, the Employer's vacation offer is more reasonable than the Associations.

F. Grievance Procedure

1. Management Rights Clause

If the collective bargaining agreement contains a management rights clause, the specified management decisions are normally subject to the grievance procedure and arbitral interpretation. *See Baker Mine Service, Inc.*, 92 LA 1179 (1989) (alleged contracts involving managements rights clause are arbitrable since it was provision of the agreement). *See also* THE COMMON LAW OF THE WORKPLACE § 3.7 (St. Antoine ed. 2d ed. 2005). Management cannot count on a management right to preclude arbitration on the manner in which it exercised the right; unions, while frequently able to obtain a review of a management action, are not going to upset the management position unless it is found to have been seriously unreasonable. G. Gershenfeld & W. Gershenfeld, *Management*

Rights: Overview and Case Review, in 1 LABOR AND EMPLOYMENT ARBITRATION § 11A.03[3] (2d ed. 1997).

While honoring the employer's right to operate the business, arbitrators do not permit a management rights clause to override a specific union or employee right set forth in the collective bargaining agreement. *Id.* Arbitrators are called upon to determine whether the mere existence of the collective bargaining agreement requires an employer to engage in bilateral decision making, or whether the contract under all the circumstances permits the exercise of unilateral employer control. *Id.* This balancing of rights between the employees and the employer is precisely what the parties expect from a grievance procedure and from the arbitrator. *Id.* Management rights may be protected through the arbitration provisions of an agreement. Chamberlain, THE UNION CHALLENGE TO MANAGEMENT CONTROLS 107 (1948), quoted in Elkouri & Elkouri, HOW ARBITRATION WORKS 659 (6th ed. 2003).

There are ways in which management can prevent the invasion of management rights without seeking to impose a blanket prohibition of arbitrating or grieving the management rights clause. *See, e.g., Oak Hills Local School*, 108 LA 171, 173 (Oberdank 1997) ("The arbitrator shall expressly confine himself/herself to the precise issue(s) submitted to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue(s) not so submitted."). *See also* Elkouri & Elkouri, HOW ARBITRATION WORKS 660 (6th ed. 2003) and suggested clauses contained therein.

No persuasive reason for excluding the management rights clause from the grievance and arbitration procedure has been proferred. The Association's proposal regarding management rights and the grievance procedure is more reasonable than the Employer's.

2. Layoffs

Numerous disputes can arise in the context of layoffs, including seniority dates, qualifications of employees seeking to bump, assignment of overtime work while employees are laid off, and recall of laid of employees. *See* Bowers, *Layoffs, Bumping and Recall*, in 1 LABOR AND EMPLOYMENT ARBITRATION § 28.02 (2d ed. 1997). The Employer's final offer seeks to limit grievance over layoffs to grievances alleging "bad faith." Given the many contractual issues and disputes that can arise from a layoff, the Employer's proposal is too drastic a limitation on use of the grievance procedure. The Association's proposal is more reasonable.

G. Fair Share Referendum

The Employer seeks a fair share as a "reality check" to make sure that a majority of employees favor fair share, since it has been five years since the Association was certified as the exclusive bargaining agent for the employees. The Employer says it recognizes that employees have a right to be represented by a labor organization, but it also

recognizes that some employees may feel strongly about financially supporting a labor organization.

The evidence does not show a need for a referendum. There are procedures available to employees who wish to challenge the amount of the fair share or who question the majority support of an exclusive bargaining representative. The Association's fair share proposal is more reasonable than the Employer's.

H. Conclusion

This has been a relatively difficult decision. With a couple exceptions the parties wage offers are relatively close together. Each party's final offer contains one or more problematic proposals. Nonetheless, it is necessary to determine which offer is the more reasonable. Taking into consideration the total package, and in particular the language discussed above, it is concluded that the Association's final offer is more reasonable than the Employer's.

VII. AWARD

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

Executed, this sixth day of September 2005.

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Jay E. Grenig