In the Matter of the Petition of

NEW BERLIN CLERICAL ASSOCIATION

Case 26
No. 62555
INT/ARB – 9975
Decision No. 31203-A

To Initiate Interest Arbitration
Between the Petitioner and

NEW BERLIN SCHOOL DISTRICT

APPEARANCES:

Mr. Steven J. Cupery, Uniserv Director, Lakewood Uniserv Council, appearing on behalf of the Union

Quarles & Brady, LLP, by Mr. Gary Ruesch, appearing on behalf of the District

## ARBITRATION AWARD

The New Berlin Clerical Association, hereinafter the Union, and the New Berlin School District, hereinafter District or Employer, reached impasse in their bargaining for their 2001 - 2003 contract. They submitted their final offers to the Wisconsin Employment Relations Commission and the Commission certified their impasse/final offers and provided them with a panel of ad hoc arbitrators from which they selected the undersigned to hear and resolve their bargaining impasse. A hearing in the captioned matter was held on April 14, 2005 in New Berlin, Wisconsin. The parties submitted post-hearing briefs and reply briefs that were received by August 17, 2005.

BACKGROUND:

This dispute is concerned with the terms of the parties 2001-2003 collective bargaining agreement in the bargaining unit of "all regular full-time and regular part-time secretaries (i.e. principals' and vice principals' secretaries, guidance secretaries, departmental and coordinator secretaries, library, Local Vocational Education Coordinator and Audiovisual secretaries and associate secretaries) and regular full-time

and regular part-time teacher assistants and long term substitutes for such secretaries and teacher assistants [at least one half (1/2) of the work year then in effect for that position], employed in the middles schools and high schools of the New Berlin School District." The parties entered into a stipulation of agreed upon items at the time of submission of their final offers. The items that remain in dispute are concerned with wages, discipline/just cause, cost of locating and copy documents requested by the Union that are related to collective bargaining and its administration of the collective bargaining agreement, and the authority of the grievance arbitrator.

FINAL OFFER ISSUES IN DISPUTE:

**Union**

1. Salary:

   Effective July 1, 2001 2.0% per cell increase to all rates of pay and steps Appended to the contract and paid in the 2000-01 contract year.

   Effective July 1, 2001 2.0% per cell increase to all rates of pay and steps Appended to the contract and paid in the 2001-02 contract year.

2. Article IV. Conditions of Employment

   New Proposal

   Section 1. (new subsection) 1.E. Copies of Documents

   The Employer will continue to provide at no cost to the union Xerox or electronic copies of documents consistent with its past practices with the union to the extent the law requires the employer to provide these documents.

3. Article IV. Conditions of Employment

   Section 8. Grievance Procedure C Step H

   The arbitrator shall have no power to add to, subtract from, alter or amend the agreement. ~~Nor shall the arbitrator have any authority to reverse or interfere with any exercise of discretion by the Board permitted by this Agreement. Even if the~~

~~arbitrator shall determine there has been a violation of this Agreement, the arbitrator shall have no power or authority to order the payment of any back pay or other financial award or remedy of any nature whatsoever except such pay as is properly due for services actually performed. In any case where the foregoing limitation upon the authority of the arbitrator would preclude an adequate remedy for the alleged grievance, the grievant may elect to pursue appropriate proceedings before an administrative agency or a court.~~

In return for the changes above, the union would agree to strike the following language as proposed by the employer:

Article IV, Section 9.

C. ~~No clerical employee may be non-renewed, terminated or dismissed except by majority vote of the full membership of the Board.~~

3. Article IV. Conditions of Employment

9. Non-Renewal, Terminations, Suspension and Dismissal

A. A clerical employee shall receive a preliminary notice in writing that the Board is considering non-renewal of the clerk's employment at least fifteen (15) days prior to April 15 of the school year. No employee who has been employed by the District for six (6) months or more shall be **disciplined,** non-renewed, terminated or suspended ~~without pay~~ except for just cause. ~~Such non-renewal decision shall be subject to arbitration~~. A decision on non-renewal for a clerical employee who has been employed for less than six (6) months, i.e., a probationary clerical employee, shall not be subject to the grievance procedure or to binding arbitration.

## District

1. Article IV - Conditions of Employment, 3. Salary Schedule:

Revise Appendix A as follows:

Effective January 1, 2002 increase each step of the Salary Schedule by 2%.

Effective January 1, 2003 increase each step of the salary Schedule by an additional 2%.

2. Article IV – Conditions of Employment:

Add a new paragraph to read as follows:

The Board will provide copies of documents to the extent required by law to the Association. The Board agrees to waive the cost of copying the records. There shall be no charge for locating a record unless the actual, necessary and direct cost therefore exceeds $50, in which case the entire actual costs shall be paid by the Association.

STATUTORY CRITERIA:

In determining which offer to select the arbitrator is required to apply the following statutory criteria established for the evaluation of the parties final offers.

> 7. 'Factor given greatest weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal Employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.
> 7g. 'Factor given greater weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal Employer than to any of the factors specified in subd. 7r.
> 7r. 'Other factors considered.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:
>
> a. The lawful authority of the municipal Employer.
>
> b. Stipulations of the parties.
>
> c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
>
> d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.
>
> e. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities.
>
> f. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours

and conditions of employment of other employes in private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost of living.

h. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

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

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

DISCUSSION:

This is the first time the parties have utilized interest arbitration to resolve their collective bargaining agreement, and consequently there has never been a determination as to the appropriate pool of comparable school districts to be used in evaluating their final offers. However, the parties agree on all but one of the external comparable school districts that are either in the same athletic conference or are contiguous to New Berlin. The Employer includes the Greenfield School District, whose clerical employees are not unionized, because of its similarity to the New Berlin District. The Union argues that it would be inappropriate to include Greenfield because its clerical employees are not unionized. The Union contends that arbitral authority going back many years does not support the inclusion of nonunion comparables as arbitrator Kerkman concluded in 1987 in his Washburn School District(Support Staff), Dec. No. 24278-A (Kerkman 1987).

The undersigned agrees with Kerkman's conclusion, which I believe still represents the mainstream of interest arbitrator opinion and said so in City of Tomah, Decision No. 31083-A (2005). Kerkman stated in his decision

> "the weight of authority is persuasive that only organized districts should be considered in making the comparisons of the comparables. In arriving at the foregoing conclusion, the undersigned not only considers the number of arbitrators, but the quality of the rationale in support of the proposition that unorganized districts fail to establish comparability"

Thus, the Union correctly argues that the District's inclusion of the Greenfield School District's non-unionized clerical employees as an external comparable is inappropriate. Thus, the pool of appropriate comparable school districts includes Cudahy, Elmbrook, Greendale, Mukwonago, Muskego-Norway, Waukesha, Wauwatosa, West Allis, and Whitnall.

1. Wages:

Union:
Effective July 1, 2001 2.0% per cell increase to all rates of pay and steps Appended to the contract and paid in the 2000-01 contract year.

Effective July 1, 2001 2.0% per cell increase to all rates of pay and steps Appended to the contract and paid in the 2001-02 contract year.

District:
Effective January 1, 2002 increase each step of the Salary Schedule by 2%.
Effective January 1, 2003 increase each step of the salary Schedule by an additional 2%.

The Union argues that the difference between it and the District's final offer on wages is small -$12, 040. The Union contends that the District utilized the cast forward method of costing the offers and that is what accounts for the difference in their costing. By utilizing the cast forward method the District used two employees for costing purposes who are no longer in the bargaining unit, and also used January 1st as the date for costing step increases rather than the employee's anniversary date which is when the increase will become effective. These factors inflated the District's costing of the Union's offer. It also argues that $6,000 of the difference in costing is explained by the District delaying the effective date of the ATB wage increase from July 1st to January 1st of the contract year. And even though it disagrees with the District's representation that the difference over the two year contract period is $20,149 in any case even when

utilizing the District's stated difference that difference is very small when compared to the District's annual budget. The Union points to the District's annual fund balance as a percentage of total annual expenditures that was 15.38% and 10.89% for the 2001-02 and 2003-03 school years respectively. Also, during that period the student enrollment increased from 4506 students in 2001-02 to 4557 in 2002-03. The Union argues that bargaining unit employees are being asked to do more with less because the school funding mechanism is broken. And the Union points out that the impact of either party's wage offer on future bargains and contracts is the same because each proposes a 4% wage lift over the two year contract period.

The Union also argues that the CPI increase for the period covered by this contract was 3.71% whereas the employees will only realize a 3% increase in their take home wages under the Employer's proposal. However, under the Union's Offer the employees will realize a 4% gain, which is closer to the 3.71% increase in the Consumer Price Index. Therefore, it concludes that factor favors adoption of its offer. Furthermore, it argues that comparing package costing to the CPI as the District has done is also inappropriate and only wage increases should be compared to increases in the CPI.

The Union also argues that it is inappropriate to consider the District's teacher bargaining unit as an internal comparable against which its offer should be evaluated. It contends that because the teacher bargaining unit contact is governed by the QEO law which does not apply to this bargaining unit, the outcome of that bargain should not be used to compare the District's offer in this case. The QEO law has a unique method for costing the value of a final offer – cast forward costing – that the District used in calculating the value of its offer in this case and results in a higher than actual cost to the District. Other arbitrators have concluded that this method of costing should be applied to support staff units like here. Furthermore, under the QEO law a district is permitted to impose a 3.8% increase to wages and fringes on its teachers and for 2001-03 that is what the District did. Additionally, the Union argues the other internal settlements the District relies upon are unrepresented groups of employees, like the Greenfield School District clerical employees, and thus none of those settlements should be given any weight by the arbitrator because these were also District imposed settlements.

The Union also argues that there is no evidence to support the District's claim that its clerical employees are much higher paid than their city of New Berlin counterparts. As for the other school districts' clerical settlements, the Union contends that the average yearly earnings and lift of those settlements clearly favors adoption of the Union's wage offer in this case. For 2001-02 it claims the average percentage lift among the positions in those units that are comparable to the Associate Secretaries and Clerical Teaching Assistants was 2.64% on the base rate and 3.21% on the top rate in terms of lift and 2.6% and 3.18% in take home pay. In 2000-03 those same percentages were 3.05% on the base and 2.82% on the top rate in lift and 2.72% and 2.48% in take home pay. Over the two year period the average of the comparables is 5.69% at the base rate and 6.03% at the top rate in terms of lift and an average take home pay increase of 5.32% at the base rate and 5.66% at the top rate. Whereas, the District's proposal generates only a 1% take home pay increase in each year and lift in each year of 2%. Thus, it concludes that even though its 4% increase in both lift and take home pay offer is below the average comparable settlement it is none the less supported by the comparables. It also points out that no other comparable district imposed a pay freeze. It also contends that even if the arbitrator compares the District's wage proposal to that of external teacher aide bargaining units, which it believes would be inappropriate because they are not clerical employees, the average lift and take home pay in those units even supports adoption of the Union's proposal. It believes only external clerical bargaining unit wages should be used as the benchmark comparables.

In regard to the four cases cited by the Employer in support of its split wage increase proposal, the Union argues that in two of the cases the arbitrator rejected the claim that just because the District was a wage leader that was justification for a split increase. In the other two cases one wage offer did not contain a wage freeze, but rather only a 3/2 slit increase which amounted to a 4% net wage increase for the year. In the other case the split wage increase was closer to the average increase in the comparables. Also, the Union argues that while the parties have presented total package costs in their exhibits to show the impact of their proposals on the District's budget their was no agreement between the parties to bargain on the basis of total package costs. Therefore, comparisons of other settlements on that basis would change the status quo in terms of

the way in which the parties have historically bargained and, therefore, should not be used. It concludes that there is no basis for the arbitrator to impose cast forward costing and package costing on this bargaining unit.

Lastly, the Union argues that the economic conditions in the New Berlin area favors adoption of the Union's wage proposal. It notes that household income in the District rose 2.95% in 2001 and 3.45% in 2002, and New Berlin ranked 3rd among the external comparables in both 2001 and 2002 in terms of level of household income. Also, over the ten year period from 1992-93 through 2002-03 the District's mill rate has fallen 32%. Yet it notes that the City's portion of the property tax bill has grown from 19.33% to 27.59% during the same period yet the City offered its employees a 4% wage increase in 2001 and a 5% lift in 2002. Furthermore, Moodys in its evaluation of the District's financial condition stated that it expected the District tax base to experience solid growth because of it location near interstate highways 94 and 43 and noted there is still considerable land available for development. It also indicated that the New Berlin median family and per capita income were 142% and 143% respectively of the state average. Therefore, the Union concludes that the District does not have need a to freeze the wage levels for the first six months of each contract year as it has a proposed, and it can clearly afford the Union's proposal

The District, on the other hand, contends that its wage proposal is superior to all other comparables including the school districts, the City of New Berlin and private employers. Both it and the Union's offer result in the same year-end wage rates, which are the highest among comparable school districts. It argues that unlike many districts it pays 100% of its employees' health, dental and vision insurance premiums. It also asserts that its offer results in wages that surpass those paid by the City of New Berlin and private sector employers in the Waukesha, Ozaukee, and Washington counties. The evidence is that the District is a wage leader with respect to wages and insurance.

The District also argues that its wage proposal is the more reasonable and should be selected because it is supported by the statutory criteria for evaluating final offers. It is sensitive to the revenue caps imposed upon the District while still making its clerical employees the highest paid in the New Berlin area, exceeds increases in the cost of living for the period and provides for competitive fringe benefits. Also, the employees end up

in the same position in terms of the wage rates under either the District or Union offer because both provide for a 2% lift. And, the District continues to pay 100% of the health, dental and vision benefits even though those costs increased by 13.27% in 2001-02 and 19.6% in 2002-03. It asserts that the only economic difference between the offers is that the Union's offer will cost the District $20,149 more and will cause that same amount in cuts to programs and services. Therefore, that increased cost will impede the District's educational mission and, therefore, the greatest weight statutory criteria favors adoption of the District' wage proposal.

The District also argues that the arbitrator cannot expect the District to reconfigure its already strained budget merely to effectuate larger wage increases especially when the District is a wage leader. Rather, the arbitrator must consider how the District's educational goals will be impacted by the cost of the Union's proposal if adopted. To that end the arbitrator should consider if the District is making budget cuts, taxing at its maximum allowable rate, whether enrollment is declining, and whether the District would be forced to run down its fund balance. The District argues it has reduced staff and cut educational programs in five of the seven years between 1993-94 and 1999-2000. In 2004-05 the District cut $2,100,000 from its budget, reduced 18.5 full time equivalent employees, eliminated programs, reduced services provided by special education assistants and increased class sizes. Also it has frozen all non-staff budget items in 10 of the 11 school years from 1993-94 and 2003-04 and frozen all maintenance accounts every year since 2001. Also, the District has not been able to obtain additional revenue by referenda because 10 of 11 referendums since 1991 have failed to pass. The District's enrollment declined by 20 students between September of 1999 and September of 2004 and is projected to decline in 2006-06, which would mean a loss of $146,614 for 2005-06. Thus, the District concludes that because it is handcuffed with respect to its finances it makes no sense to select the Union's offer. Doing so would result in a dollar for dollar reduction in other areas and, therefore, it cannot be argued that the difference between the offers is insignificant. Arbitrator Petrie concluded that just because the difference between the offers in terms of the total budget is small that fact does not justify disregarding the greatest weight factor. And, if the arbitrator selects the Union's final offer based upon the amount of the difference between the offers it will encourage the

Union to always arbitrate when the difference between the cost of the parties offers is small in relation to the District's overall budget. Also, the District argues there is no way to determine what the threshold amount beyond which the difference becomes significant.

The District also contends that adoption of the Union's offer would mean the fund balance would have to be drawn down. In 2001-02 the District ranked 7th out of 10 districts and in 2002-03 ranked 9th out of ten districts in terms of fund balance. In real dollars the District's fund balance has decreased from $6,900,000 in 2002 to $4,300,000 in 2004. The District contends that its Fund 10 balance is poor shape both in real terms and when compared to its comparables. Thus, the District concludes that the greater weight factor also favors adoption of its final offer.

The District also asserts that it final offer exceeds the total package cost of settlements over the two year period for all other employees in the District. It contends internal comparability is important and thus, employees employed by the same employer should receive the same or similar settlement. In this case the District offer exceeds the average of the internal settlements by 1.62% and the Union's offer exceeds that average by 3.12%. Also, the District's total package offer cost exceeds the cost of living (CPI) by nearly 150% in year one and 160% in year two of the contract and thus allows employees to keep pace with inflation and maintain the them as an overall compensation leader among the comparables.

For all of the above reasons the District believes its wage offer should be favored.

Analysis:

The difference in the parties' wage proposals is the date when the across the board (ATB) increase is scheduled to take effect. The Employers offer delays implementation from the July 1st , the commencement of the contract term, until January 1st and follows the same pattern for the second year increase. The Union's offer makes the ATB wage increase effective on the first day of each contract year (July 1st). The Union refers to District offer as containing a wage freeze, but I think it more appropriate to refer to it as a delayed implementation. As such it not unlike a split wage increase, for example 2% July 1st and 2% January 1st. In any case, it is not an uncommon practice to provide for delayed or slit wage increases in order to provide for a greater increase to wage rates at a

lower cost to the employer in the year it is implemented than would be the case if the entire increase was effective on the first day of the contract period. In this case that is exactly the result if the District's offer is implemented. The result for employees in these instances is that he/she receives less in take home pay in the year the increase(s) is effective, but in the following year the employee enjoys, in terms of take home pay, the benefit of the entire lift in wage rate. So, in this case the employees will, in the year after the contract expiration, be taking home 4% more that they were before the annual 2% ATB wage increases. Thus, I do not find the delayed implementation of the District's wage offer unreasonable. And, I am unwilling to conclude one offer is preferred over the other simply on the basis that the take home pay that is generated in each contract year is less under one offer than the other where the ending wage rates under each offer are identical.

The District has argued that internal comparability favors adoption of its offer because the total package cost in this unit exceeds that received by any other District employees. I agree with the premise, and have said so in other decisions that internal comparability is a significant factor in evaluating a final offer proposal. As I stated in City of Marshfield, Dec. No. 30726-A "The undersigned believes that internal comparability in matters of a fringe benefit as significant as health insurance should, aside from the greatest weight and greater weight factors, receive paramount consideration". But I have also stated that assumes that the bargaining units being compared are operating under the same or similar collective bargaining statutory framework. And while I was making these statements in reference to employee health insurance benefits the comments are equally applicable to wages/salaries.

In this case the only unionized internal comparable is governed by what is referred to as the teacher QEO law which permits the Employer to unilaterally implement a 3.8% increase in wages and fringe benefits. Thus, because the bargaining units are operating under significantly different bargaining laws the comparable value of the teachers bargain is significantly, if not completely diminished in terms of wages and package costs. Secondly, under the QEO law the cast forward costing methodology is utilized which is not the costing methodology historically employed in costing support staff bargains. Thus, the undersigned believes the District has inappropriately employed

that methodology in costing it and the Union‘s offer in this bargaining unit. And, it had the effect of increasing the cost difference between the two wage offers.

Also, the other District employees that the Employer urges the undersigned to consider as persuasive internal settlements are not unionized. And, for the same reasons that non-unionized external comparables are accorded little if any persuasive value so too are non-unionized internal comparable settlements accorded little if any persuasive value. Consequently, from the undersigned's perspective what the District has been able to achieve in its teacher bargaining unit and with its non-represented employees is not persuasive support for its wage offer in this bargaining unit.

Both parties wage offers in terms of percentage lift to the existing wage rates are lower in terms of percentage increase in lift at 2% each year than the settlements in the comparable Districts for 2001-02 and 2002-03. The average of those settlements for 2001-02 at the base rate and top were 2.64% and 3.21% respectively, and for 2002-03 were 3.05% and 2.82% respectively. That totals to 5.69% at the base rate and 6.03% at the top rate over the two-year contract term. Take home pay under the District's offer is 3% over the two years whereas the average of the external comparables was 5.32% at the base rate and 5.66% at the top rate. However, as I discussed above because I am unwilling to say the Union offer is preferred over the District's simply on the basis of the difference in employee take home pay in that both final offers generate the same wage lift, the external comparables do not favor one offer more than the other.

The District has also argued that it is in poor financial shape, has been unsuccessful in 10 of 11 referendums to obtain additional spending authority, has been spending down its fund balance and is now near the bottom of its comparables in terms of its fund balance as a percentage of annual expenditures. Clearly, the expenditure limitations that the legislature has imposed on school districts including this one are obviously impacting the District's financial condition in a negative way. However, the comparable districts are laboring under the same fiscal constraints and yet were able to grant their employees larger wage increases during the same period. Obviously, each district makes choices as to the how to expend their available resources and those decisions are footed in the unique circumstances of each district. And, there is no evidence that this district has been more adversely impacted by the fiscal constraints than

the comparable districts. Notwithstanding that all the Districts have been adversely impacted by the fiscal restraints placed upon them, those restraints do mean that the greatest weight criteria supports adoption of the District's wage proposal because it spends less of the District's shrinking financial resources during the contract term while at the same time granting employees the same ending wage rates as they would receive under the Union's wage proposal.

Thus, the undersigned believes the District's proposal calling for a 2% ATB wage increase on January 1st of each contract year, were it the only issue in dispute, is reasonable and should be adopted.

2. Costs of Providing Requested Information:

Both parties have proposed the inclusion of new language in the contract to deal with the matter of the cost of locating and reproducing documents/information the Union requests for use in collective bargaining and the administration of the collective bargaining agreement. The Union's proposal is:

> Article IV. Conditions of Employment
>
> New Proposal
>
> Section 1. (new subsection) 1.E. Copies of Documents
>
> > The Employer will continue to provide at no cost to the union Xerox or electronic copies of documents consistent with its past practices with the union to the extent the law requires the employer to provide these documents.

And the Districts' proposal is:

> Article IV – Conditions of Employment:
>
> Add a new paragraph to read as follows:
>
> The Board will provide copies of documents to the extent required by law to the Association. The Board agrees to waive the cost of copying the records. There shall be no charge for locating a record unless the actual, necessary and direct cost therefore exceeds $50, in which case the entire actual costs shall be paid by the Association.

The District argues that its proposal addresses the problem presented by a past dispute over a Union request for information while the Union's proposal perpetuates the problem. The District asserts that its proposal waives all copying costs and charges the Union only the actual costs to compile the requested information only when those costs exceed $50. It believes, therefore, that its is the more reasonable proposal and should be favored. It argues that its proposal is consistent with the Wisconsin Public Records law, WERC precedent, that it balances the Union's need for the information with the District's cost to provide the information and is in line with Board policies and practices. It contends that the public record law gives the Board the authority to impose fees for copying and locating records as long as those fees don't exceed the actual, necessary, and direct costs of the District and if those costs exceed $50.

The District also argues that the Union has been unable to articulate the status quo with respect to past large requests for information and could give no reason why the Union needed or wanted the change. The District also contends that the external comparables supports its proposal in that all of the comparable districts charge the Union for making copies and three districts even charge if the request is minimal or routine. For these reasons the District concludes it proposal should be favored.

The Union, on the other hand, believes that the evidence is that the comparable districts, with the exception of the Whitnall School District, have provided the information requested by their unions at no cost. And it argues that the District's survey of the comparable districts' policies only dealt with requests for public records and not Union requests for information relating to collective bargaining and/or contract administration. It also contends that there is no contract language in any of the comparable district contracts like what the District is proposing here. The Union asserts that while the District may retain the right under 111.70 Wis. Stats. to charge a fee for retrieval and production of documents there has not been an agreement between the parties to any fee schedule. The Union argues that recently the District failed to respond to two union requests for information even after being reminded to do so and then sent a letter stating that it was going to charge the union $3200 for compiling the requested information and $.05 per page for copying the information compiled. However, the prior practice of the parties had been not to charge the Union for copying. Because the parties

were in a contract hiatus at the time the Union viewed the District's letter as notice of the District's intent to end the prior practice with respect to free copying. In such cases arbitrators have not required the proponent of contract language to codify the past practice to offer a quid pro quo. For these reasons the Union believes its proposal should be favored over the District's.

Analysis:

Both parties have made proposals to deal with the issue of costs relating to the compiling and copying of information requested by the Union that it deems necessary for collective bargaining and administration of the collective bargaining agreement. These proposals were spawned by a Union request for information that also resulted in a prohibited practice complaint being filed with the WERC. That complaint was voluntarily resolved but the settlement did not resolve the underlying question of whether there is a binding past practice dealing with the District's charging or not for the cost of compiling and copying information requested by the Union.

The parties do not dispute the WERC case law or the Wisconsin Public Records law dealing with the District's right to charge the Union some fee for the compilation and copying of the information requested. The District's proposal to include language in the collective bargaining agreement is an attempt to set the parameters for what and when it will charge the Union, whereas the Union's proposed language merely contractualizes the alleged past practice. Both parties argue that their survey of the comparable districts supports their respective positions. I must say that I do not find the evidence regarding what the comparables are doing persuasive for either party's position. On the one hand there is the Union's evidence of responses from Union representatives as to whether the applicable District has ever charged the Union for information it has requested, but there is no evidence as to what information has been requested, the extent/volume of the request, the amount of time that was required to compile the information, etc. And, the District's survey was aimed more at what the comparable districts' policies were regarding public records requests rather than zeroing in on Union information requests related to collective bargaining and contract administration. Likewise, the contract language in the comparable contracts in evidence does not deal explicitly with the

subject, unlike the situation with just cause where the explicit language appears in all the comparable contracts.

However, what the undersigned finds as the most persuasive reason for adoption of one or the other proposal is the fact that the Union's proposal leaves to future grievance arbitrations the task of fleshing out whether there is a binding past practice and, if there is, what exactly it is. The undersigned does not believe that a final offer in interest arbitration that merely requires resort to more litigation to flesh out what the future policy will be is preferable to a proposal that explicitly sets forth the policy in unambiguous language. If the Union wanted to preserve what it believes is a binding practice it could have first litigated and substantiated its existence and parameters, and then referred to it as the arbitrally affirmed practice.[1] Alternatively, if did not want to follow that course then its final offer proposal needed to spell out in detail what it believed the practice to be that it was attempting to contractualize.

Thus, the undersigned believes the District's proposal for a new section under Article IV, Conditions of Employment, relating to the costs of compiling and copying information requested by the Union, were it the only issue in dispute, is more reasonable and should be adopted.

3. Authority of the Arbitrator:

The Union's final offer contains a proposal to modify the existing language of Article IV, Conditions of Employment, Section 8 Grievance Procedure C Step H as follows:

> The arbitrator shall have no power to add to, subtract from, alter or amend the agreement. ~~Nor shall the arbitrator have any authority to reverse or interfere with any exercise of discretion by the Board permitted by this Agreement. Even if the arbitrator shall determine there has been a violation of this Agreement, the arbitrator shall have no power or authority to order the payment of any back pay or other financial award or remedy of any nature whatsoever except such pay as is~~

[1] The prohibited practice complaint filed with the WERC presented an opportunity to do so, but it was resolved voluntarily and the settlement agreement did not articulate an agreement as to the existence or parameters of the alleged past practice.

~~properly due for services actually performed. In any case where the foregoing limitation upon the authority of the arbitrator would preclude an adequate remedy for the alleged grievance, the grievant may elect to pursue appropriate proceedings before an administrative agency or a court.~~

In return for the proposed changes the Union would agree to strike the following language the District proposes be maintained in the contract:

Article IV, Section 9.

C. ~~No clerical employee may be non-renewed, terminated or dismissed except by majority vote of the full membership of the Board.~~

The Union does not dispute the District's claim that collective bargaining agreements generally provide that the arbitrator has no power to add to, subtract from, or alter or amend the agreement, and in this case it proposes to retain that language in the agreement. And, the Union argues that the District's rights are not diminished by its proposed language deletion. While the Employer argues that there is not a problem, in a prior case in the teacher bargaining unit a decision by the District's administration to issue an unpaid suspension was reversed by the Board and the employee was awarded back pay. In another case that went to arbitration the District argued in its brief to the arbitrator that even if he found the Employer violated the contract the arbitrator had no authority to award back pay for a wrongful layoff, termination, or suspension. It also denies the District's claim that it "sheepishly" offered its quid pro quo of removing the contractual requirement that there be a majority vote of the full Board in order to non-renew, terminate or dismiss a bargaining unit employee. It notes that the District's claim the proffered quid pro quo is of no value is undermined by its own initial proposal to retain the language. It also contends that this language is of value to probationary employees who do not enjoy just cause protection in such circumstances. Finally, the Union argues that the District's attempt to retain this language limiting an arbitrator's remedial power enjoys no support among the comparables.

The District argues that the Union is proposing to alter the status quo and offers nothing of value as a quid pro quo. It asserts that the language the Union proposes to delete from the contract has been in the agreement for more than two decades – since the 1982-83 contract. And the parties are not having a problem with the language and there

have been no cases where the Union won reversal of a disciplinary decision or an arbitrator refused to award back pay or other financial damages. It contends that employees are not disadvantaged by the provision as it now reads. It doesn't preclude an employee from receiving back pay or financial remedies it merely limits the amount that can be awarded through grievance arbitration. If the grievant believes the arbitral remedy received is inadequate he/she can pursue other avenues as a consequence of the explicit language authorizing pursuit of an action in court or before an administrative agency. The District also contends that the Union's proposed quid pro quo gives up nothing because the Article IV, 9 c. language protections are offered elsewhere in the contract because the contract requires that there must be just cause for non-renewal or termination, and the employee has a right to a private conference with the Board before being non-renewed. Also, it argues that the grievance procedure provides the grievant with due process and an adequate review of disciplinary decisions. Also, it asserts that the internal comparable teacher contract supports it position because it contains the identical language.

The District also argues that the discretionary leeway management derives from this contractual provision is also found in the management rights clauses of other districts' contracts. It argues the District should not be punished for negotiating benefits others haven't obtained. To do so would be contrary to accepted arbitral and bargaining principles. And it believes that an arbitrator cannot dictate how the Board should determine its education methods, direct its operations, etc. Thus, it concludes that the current language is not unreasonable, the Union has not shown a need for the change, and has offered nothing in return. Therefore, its proposal to retain the status quo should be favored.

Analysis:

There are significant aspects to the existing contract language that the Union proposal would remove form the contract. One deals with the arbitrator's authority to review discretionary decisions of the Board/District undertaken in the exercise of its management rights. The second relates to the arbitrator's authority to redress a District violation of the collective bargaining agreement with an award of back pay or other financial reward "except such pay as is properly due for services actually performed".

Depending on the particular grievance both could have a dramatic impact upon an arbitrator's ability to undo and remedy a contractual breach, and a grievant's ability to have the wrong redressed.

An example of just such a case is where a contractual provision involved with an employee bidding on an internal vacancy when the contractual bidding language prohibits an employee from bidding when he/she is already serving a promotional probationary period from an earlier successful bid. But, the same contract section also provides that the employer, in its discretion, can waive that prohibition. Two employees serving promotional probationary periods bid on a vacancy and the employer decides, in its discretion, to consider one of the bidders but not the other and selects the considered employee to fill the vacancy. Under the existing New Berlin language a grievance alleging that the District abused its discretion in waiving the prohibition for one employee and not the other could not be considered by the arbitrator because the current language that the Union proposes be deleted form the contract provides "nor shall the arbitrator have any authority to reverse or interfere with any exercise of discretion by the Board permitted by this Agreement". Thus, this language permits the arbitrary and capricious exercise of District discretion in the name management right. Furthermore, if in this hypothetical, that language were not present, but the remainder of the language the Union proposes to delete were still present and if the arbitrator concluded the grievant's bid should have been considered and that the grievant was more qualified than the successful bidder he/she could undo the promotion, but could not award the grievant any lost pay differential because the employee did not work in the higher classification. Similarly, in a suspension or discharge case where the arbitrator found there was not just cause for the Employer's disciplinary action the arbitrator could order the employee reinstated, but could not award back pay under the current contract language for the time the employee was prohibited from working for the employer because of being suspended or discharged.

Also troubling is the fact that the contract, while recognizing that a grievant might find the arbitrator's award to be inadequate provides that he/she is not precluded from seeking relief before an administrative agency or in court. Like with the preceding discussion of the Union's proposal relating to the costs of compiling and copying

requested information having the effect of requiring additional litigation to flesh out exactly what the practice is, the continuation of this language does not provide a contractual answer for complete redress of a wrong occasioned by the District's breach of contract because that redress is outside the scope of the arbitrator's remedial authority. However, in order to seek relief in another forum for an already established breach of contract it would require additional litigation and expense that cannot possibly be in the public interest or the interest of New Berlin taxpayers. Also, on another level, this answer for an inadequate arbitral remedy seems hollow in the sense that in many, if not most, instances of contractual breaches that result in an employee's loss of pay do not constitute statutory violations capable of being remedied by an administrative agency or court. And, finally the courts have for many years expressed the belief that these disputes are best resolved in arbitration before someone experienced in resolving such matters.

Also, in reviewing the comparable contracts there is no contract containing this or similar restrictions on the arbitrator's authority. Yet, there is overwhelming arbitral and legal precedent acknowledging and upholding arbitrators' broad remedial powers in grievance arbitration where the contract is silent on the subject.[2] The current language places significant limitations on the arbitrator's remedial powers, effectively prevents the exercise of those powers, and leaves a wronged employee without redress. While the District contends that no problem has been shown to exist warranting a change in the status quo of more than two decades, the undersigned concurs with the Union's belief that the changes it proposes should not have to wait for a situation like one of those posed by the undersigned's hypotheticals to occur where the remedy available through arbitration is clearly inadequate in order to establish a need to fix obvious shortcomings in the parties' grievance and arbitration provisions. And, where as here the result sought by one party finds substantial if not universal support among the comparables, and there are no other extenuating circumstances that would require a more substantial quid pro quo in return for the proposed change, as there are not here, the Union's proposed quid pro quo although not significant is sufficient.

For all of these reasons the undersigned believes that the Union's proposal to amend Article IV, Section 8, were it the only issue in dispute, should be adopted.

4. Just Cause:

The Union has included in its final offer a proposal to amend the existing contract language that prohibits the District from non-renewing, terminating or suspending a non-probationary employee without just cause. The Union's proposal if adopted would amend the current language by including "discipline" under this prohibition and delete the words "without pay" in reference to suspensions. The Union's proposal would also eliminate the current requirement that non-renewal decisions are subject to grievance arbitration. The Employer's final offer does not include any proposal to change the existing language of Article IV, section 9.

> Article IV. Conditions of Employment
>
> 9. Non-Renewal, Terminations, Suspension and Dismissal
>
> A. "A clerical employee shall receive a preliminary notice in writing that the Board is considering non-renewal of the clerk's employment at least fifteen (15) days prior to April 15 of the school year. No employee who has been employed by the District for six (6) months or more shall be **disciplined,** non-renewed, terminated or suspended ~~without pay~~ except for just cause. ~~Such non-renewal decision shall be subject to arbitration~~. A decision on non-renewal for a clerical employee who has been employed for less than six (6) months, i.e., a probationary clerical employee, shall not be subject to the grievance procedure or to binding arbitration."

The Union argues in support of its proposal that the need is real and not speculative as the District will argue other arbitrators have said should be required of the party proposing a change in the status quo. The Union also contends that the District's claim that the Muskego-Norway clerical contract does not provide such just cause protection is incorrect and that in fact such protection is provided, not in the management rights section of the agreement, but rather in a section dealing specifically with employee discipline. Also, regarding the District's use of teaching aid contracts for comparison purposes the Union argues that teaching assistant contracts are not relevant because they are not included in this bargaining unit of clerical employees. But, it goes on that even if

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[2] Labor and Employment Arbitration, Second Edition, 2003

the arbitrator was to consider them, all but one of the comparable district's teacher aide contracts provides such just cause protection. Thus, it concludes that the protection is almost universal among the comparables. It also notes that the 1995-97 contract was expanded to cover suspensions without pay and subsequently the District went to paid suspensions under the same language in the teacher contract in order to avoid being required to establish just cause for the suspension. It grieved that suspension to the Board level and the District relied upon its literal interpretation that just cause was not required. Thus, it concludes based upon the District's stance in that case under the same language that indeed there is a problem in this bargaining unit that needs to be addressed. The Union also believes the City of Schofield, Dec. No. 29505 (Petrie, 1999) is distinguishable from this case because there the issue was not unpaid versus paid suspensions, but rather whether the employee must first be given a written warning before he/she can be suspended or discharged. The Union also argues that this arbitrator has previously ruled that the need for and adequacy of a quid pro quo is driven by the individual circumstances of each case. And it concludes that unlike in the City of Marshfield, Dec. No. 60918-A (Yaeger, 2005) case where there was a finding that the Union's proposal was of little practical benefit to employees and did not have significant implications for the parties, here the opposite is the case. Thus, it concludes its proposal is reasonable and should be adopted.

The District argues that the current contract language relating to just cause has remained unchanged since 1995 and there have been no problems in this bargaining unit with the language. It contends that bargaining unit employees are adequately protected under the current language and the Union has not demonstrated a need for the changes it proposes. In this case it argues the only evidence of a need to change the language produced by the Union are two grievances in the teacher bargaining unit. The Union did not demonstrate that the lack of just cause protection in any case involving discipline below the level of an unpaid suspension harmed any of its members. Its only argument is that discipline might become a problem, but arbitrators have rejected the speculative argument and have required the party seeking the change to demonstrate an actual need for the change. Also, others have required that a quid pro quo be offered in order to achieve something in arbitration that it was unable to obtain at the bargaining table. It

cites the City of Schofield, Dec. No. 29505 (Petrie, 1999) wherein arbitrator Petrie concluded both parties proposed reasonable just cause language and that it was the least important of the impasse items. The District also asserts that the record does not support the Union's claim that just cause protection finds support in other districts. It notes that in the Elmbrook School District the teacher aides receive no just cause protection and Administrative Assistants in the Muskego-Norway District do not have proper cause protection for all types of discipline. It also argues that the majority of cause provisions in the other contracts are not as detailed as those in this bargaining unit and it shows that here the parties didn't want boiler plate language in the management rights clause. It concludes that the internal comparable, the teacher bargaining unit favors its position in this case. For these reasons it urges the arbitrator to adopt its position on this issue.

Analysis:

The effect of the Union's proposal is to expand the current scope of just cause protection for employees to all forms of discipline including verbal and written warnings as well as suspensions with pay. The current language affords employees just cause protection only in the case of termination, non-renewal, and suspensions without pay. I believe that the evidence is that just cause protection for all forms of discipline is clearly the norm among the external comparables, and in my 30 plus years of experience in the field of labor relations it has become almost universally afforded to unionized non-probationary employees under collective bargaining agreements. As such, I am persuaded this is a situation when the proponent of a change in the status quo is not required to provide a quid pro quo for the change. As I have stated in other decisions

> "Other arbitrators have also addressed the issue of the sufficiency of the *quid pro quo* being offered for proposed changes in the health insurance plan provided for in the parties' collective bargaining agreement. These arbitrators have engaged in an analysis of the adequacy and reasonableness of the proffered *quid pro quo* and not surprisingly have found it to be adequate and reasonable in one circumstance and yet not so in another. Their conclusions are clearly based upon the unique facts of each case and thus no general rule regarding what constitutes a sufficient *quid quo pro* has emerged. As I have said before, after analyzing many awards

any discussion of the sufficiency of and need for any *quid pro quo* is necessarily governed by the unique facts of each case."

Here the problem has been identified as being employees do not have just cause protection for all levels of discipline that employees in comparable districts enjoy and that is almost universally provided to unionized non-probationary employees. Clearly, the Union's proposal addresses that problem.

And, the Union's proposal on its face is very reasonable. If the employer must have just cause to terminate an employee that necessarily requires the use of progressive disciple leading up to termination except in cases of egregious misconduct. Thus, if the District were to rely on prior incidents of misconduct in support of it decision to terminate an employee they necessarily would be the subject of a just cause analysis in any arbitration of a grievance challenging the termination. Thus, it does not seem unreasonable to require that review take place, if at all, contemporaneous with imposition of the lower levels of discipline.

Also, while it may be that the District's past treatment of employees in this bargaining unit has been such that in prior bargains they were not concerned with the level of just cause protection afforded to them by the contract, and consequently did not impasse over the issue. However, after the language was amended in the 1995-97 contract the District saw fit to utilize paid suspensions that do not require just cause in lieu of using unpaid suspensions that were then subject to the just cause standard. And there is no reason to believe nor did the District assert that it would not interpret the identical language that appears in this contract differently form the interpretation it applied to the language under the teacher contract. So, what once was not perceived as a matter of such concern that the employees would impasse over the issue has obviously now risen to that level. Thus, the District's conduct since the language was last modified, albeit in the teacher bargaining unit, supports the Union's contention that it presents a situation that needs to be addressed.

For all of these reasons the undersigned is persuaded that the Union's proposed change in the language of Article IV, Section 9 A, were it the only issue in dispute, should be adopted.

To summarize, the undersigned has concluded that when standing alone the Union's proposals concerning the authority of the arbitrator and just cause are the more reasonable. On the other hand, I have also concluded that standing alone the District's proposals on wages and charges for locating and copying documents requested by the Union are preferable to the Union's proposal on those subjects. Because the undersigned must select one party's offer in its entirety rather than resolve the impasse on an issue by issue basis the undersigned selects the Union's final offer over the District's. In the undersigned opinion the wage and charging for information gathering and copying issues are less significant than the just cause and arbitrator's authority issues. And in the undersigned's opinion whichever party prevailed on the latter issues should prevail in this proceeding. That is why I have selected the Union's final offer over the District's.

In conclusion, based upon the evidence, testimony, and argument presented, and consideration and application of the statutory criteria contained in Section 111.70 (4) (cm) that are to be utilized in determining which offer to select the undersigned enters the following

## AWARD

The Union's final offer is selected and shall be incorporated into the parties' 2001-2003 collective bargaining agreement.

Entered this 19th day of October 2005.

Thomas L. Yaeger
Arbitrator