BEFORE THE ARBITRATOR

In The Matter Of The Interest Arbitration Petition of THE NEW BERLIN PUBLIC SCHOOL DISTRICT To Initiate Arbitration Between Said Petitioner and THE NEW BERLIN EDUCATION ASSOCIATION	Case 24 No. 61880 INT/ARB-9810 Decision No. 31204-A

Appearances:

Quarles & Brady LLP, by Mr. Gary M. Ruesch, Mr. Michael Aldana, and Mr. Jeffrey La Valle, on behalf of the District.

Mr. Steven J. Cupery, UniServ Director, Lakewood UniServ Council, and Mr. Greg Spring, Negotiations Specialist, Wisconsin Education Association Council, on behalf of the Association.

ARBITRATION AWARD

The above-captioned parties, herein "District" and "Association", selected the undersigned to issue a final and binding award pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act ("MERA"). A hearing was held in New Berlin, Wisconsin, on May 23, 2005. The hearing was not transcribed and the parties subsequently filed briefs and reply briefs that were received by November 9, 2005.

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

BACKGROUND

The Association represents for collective bargaining purposes a unit of teaching personnel employed by the District consisting of all certified full-time and part-time non-supervisory teaching personnel including classroom teachers, substitutes working more than twenty (20) consecutive work days, librarians, special teachers, psychologists, and guidance

personnel (including school nurses when certified to teach). The parties engaged in negotiations for a successor collective bargaining agreement to replace the prior agreement which expired on June 30, 2001, and the District filed an interest arbitration petition on December 11, 2002, with the Wisconsin Employment Relations Commission ("WERC"). The WERC appointed Marshall L. Gratz to serve as an investigator and to conduct an investigation pursuant to Section 111.70 (4)(cm)6(b) of MERA. The investigation was closed on December 7, 2004, and the WERC on January 24, 2005, issued an Order appointing the undersigned to serve as the Arbitrator.

FINAL OFFERS

The District's Final Offer states:

1. Stipulation of Agreed Upon Items (attached).

2. Memorandum of Understanding pertaining to changes in the TSA contract language in the 1999-2001 agreement (as attached).

3. Language removed from the Collective Bargaining Agreement pursuant to the District's letter of March 11, 2004 (attached) and Mr. Cupery's letter of May 16, 2003.

4. ARTICLE V – CONDITIONS OF EMPLOYMENT, K.: Add a new subsection K, 6. Copies of documents, 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.

5. The remaining items will be pursuant to the 1999-2001 Collective Bargaining Agreement between the parties.

The Association's Final Offer states:

The entire 1999-2001 collective Bargaining Agreement as modified by the employer's evaporation of language attached to its correspondence of March 11, 2004 (Item A) and the Association's evaporation of language contained (sic) the its letter of May 16th, 2003 (Item B), and the following:

1. Stipulation of Agreed Upon Items attached 1 through 13.

2. The additional changes to the 99-2001 collective bargaining agreement as follows (new language appears in **bold** and deletions appear ~~struck through~~):

ARTICLE V

CONDITIONS OF EMPLOYMENT

I. Grievance Procedure
Section 3, H. In part . .

The arbitrator shall have not 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.~~ The decision of the arbitrator, if within the scope of his/her authority hereunder, shall be final and binding upon the parties. By the submission of a grievance to arbitration hereunder, the NBEA and all affected teachers consent to be bound by the decision of the arbitrator and waive any and all rights to seek redress of the grievance through any other procedure or forum.

2. Limited just cause protection. From Page 28
J. Nonrenewal, Termination, Dismissal and Suspension

1. A teacher shall receive a preliminary notice in writing that the Board is considering nonrenewal of the teacher's contract at least fifteen (15) days prior to March 15 of the school year during which a teacher holds a contract. No teacher who has been employed by the district for three (3) or more years shall be non-renewed except for just cause; such nonrenewal decision shall be subject to arbitration. Decisions on nonrenewal for a teacher who has been employed by the district for three (3) years or less shall not be subject to the grievance procedure or to binding arbitration.

No teacher shall be **disciplined, demoted, or suspended** ~~without pay~~ except for just cause.

4. ~~No teacher may be nonrenewed, terminated or dismissed except by a majority vote of the full membership of the Board.~~

Section K, new subsection K, 6. 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 and to the extent the law requires the employer to provide these documents.

STATUTORY CRITERIA

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

. . .

7. "Factor given greatest weight." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

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

7r. "Other factors considered." In making any decision under the arbitration procedures authorized in 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.

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 other employees performing similar services.

e. Comparison of the wages, hours and conditions of employment 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 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.

BACKGROUND

The parties reached their last voluntary agreement for the 1999-2001 school year. Thereafter, the District in May 2003 imposed a Qualified Economic Offer ("QEO"), for the

2001-2002 and 2002-2003 school years, and it in 2002 evaporated language in the prior agreement which provided for extra compensation for a sixth classroom assignment. This case therefore centers on what provisions should be incorporated in the 2001-2003 agreement.

The Association in 2003 filed a prohibited practices complaint with the WERC against the District wherein it charged, inter alia, that the District had acted unlawfully when it did not respond to the Association's information requests in a timely manner and when it wanted to charge the Association $3,200 as the cost of providing that information (District Exhibit 6, C). The District for a number of years has had a policy which governs how much the public must pay when it requests the District to provide information (District Exhibit 7), and it applied that policy when the Association made its information requests. That case was eventually settled when the District agreed to provide some of that information.

Randy Hawley, the District's Director of Human Resources and Operations, testified that no fee is charged to the Association under the District's policy if the total cost for reproducing documents is below $50 and that if the total costs are $50 or more, a fee is charged for the District's actual costs. He explained how much it would have cost if the District had provided all of the information requested in the Association's September 16, 2003, information request, and said that the District provided information after the Association on December 19, 2003, narrowed down its initial request. He also said that the District had never refused to provide all the data initially requested, and that there have not been any such large information requests since 2003.

Hawley added that teacher Barb Stein was suspended with pay and that the Association never appealed her suspension to arbitration (District Exhibit 8-A), and that the Association never grieved teacher Barb Abrahamson's suspension with pay. He stated that the District is

opposed to the Association's just cause language because the existing language has been in prior agreements for a "number of years"; because management has the right to discipline employees; because adoption of the Association's language could result in the grieving of everything; and because the Association has not offered a quid pro quo for the language it seeks.

He also said that the language relating to an arbitrator's authority first appeared in the 1973 agreement; that no employee since then has ever been denied back pay by an arbitrator; that the District opposes the Association's proposed change because the current language has been in all agreements for about 32 years and has never been an issue; and because the District cannot appeal an arbitration decision.

On cross-examination, Hawley testified that the District's policy on reproduction costs has never been applied to the Association, and that the Association in the past has never been charged for the District's cost in obtaining information requested by the Association. He also said that employees provided him with the costs of responding to the Association's September 16, 2003, information request which reflected a series of requests "in a fairly close period of time"; that he never broke down the costs for each individual request; and that information relating to job titles, dates of hire, and rates of pay is fairly accessible.

He added that the District in the Roberta Voss lay-off arbitration argued she should not get any back pay if the arbitrator ruled in the District's favor. He at first did not know from a "hypothetical question" whether an employee fired without just cause would be entitled to back pay, but then stated that no back pay could be awarded under those circumstances.

UniServ Director Steven W. Cupery testified that Amundson's grievance is now pending; that the District never responded to any of the information requests it filed before September 16, 2003; and that the Association's requests for e-mails did not involve any reproduction costs.

On cross-examination, Cupery stated that the District under the Association's proposal must continue the past practice of not charging the Association for the costs incurred in meeting its information requests; that if the District claims such costs are onerous, the Association will work with the District; that the Association is not claiming it is entitled to get anything it wants for free; and that the test is what the District has provided in the past and that, "It's not unlimited". He added that the burden shifts to the Association if the District claims the Association's information requests exceed past requests, and that the District must "provide the same level as you have provided in the past."

He added that the Association has made a quid pro quo for its language proposals relating to back pay and just cause when the District eliminated a sixth class assignment which formerly provided added compensation to a number of teachers.

On redirect examination, he testified that other unions among the comparable school districts are not charged for reproduction costs; that "All we are asking is a standard that preserves the status quo"; and that the Association's proposal "creates a tension, a check and balance on unreasonable requests".

Sandy Thies is the Association's president and she has served on the Association's bargaining team since 1995. She testified that about 20 teachers no longer receive the 5 ½ percent of their salary they previously received for teaching a sixth class and that the amount of such payment now would be about $7,000; that the District never told teachers before August 27, 2002, it considered that language to be permissive; and that it then assigned the sixth class without added remuneration. She also said that teachers received a $726 pay increase for the 2001-2002 school year and a zero increase for the 2002-2003 school year.

On cross-examination, Thies testified that the Association has never claimed that the District acted unlawfully when it evaporated the language relating to the sixth class assignments, and that there were no discussions at that time between the parties relating to the Association's just cause and arbitration provisions.

POSITIONS OF THE PARTIES

The District contends that the Waukesha School District ("Waukesha"), should be included in the comparables because it is contiguous to New Berlin; because it meets all the other criteria relating to comparability; because the union agreed to include Waukesha as a comparable for the clerical unit in the recently concluded interest arbitration proceeding; and it opposes the Association's request to include the Kettle Moraine School District ("Kettle Moraine"), because "it is not contiguous to New Berlin, nor is it a member of the Woodland Athletic Conference." It also claims that the Association "has not proved a legitimate need for change, nor has it offered a quid pro quo" for its language changes; that the District "has not acted arbitrarily with respect to discipline", thereby warranting a maintenance of the status quo; and that the Association's proposal on information requests should not be selected because the proposal "is not clear and is likely to lead to future disputes," thereby warranting the adoption of the District's proposal.

The District adds that "the Union is asking far too much"; that its proposal to include demotions is not supported by the external comparables; that the District's evaporation of Article IV, Section K, relating to a 6^{th} class assignment does not represent a quid pro quo for the Association's proposed changes; and that the recently issued interest arbitration award adopting the clerical unit's final offer is "inappropriate here because there are significant differences between the Union's offer in that case and the teachers' offer in this case."

The Association asserts that Waukesha should not be included as a comparable "due to its size"; that Kettle Moraine must be included because its "size is much more comparable to that of New Berlin"; and that in the alternative, neither Waukesha nor Kettle Moraine should be included within the agreed upon comparables. The Association also argues that the internal and external comparables and a quid pro quo favor its offer regarding just cause and the authority of the arbitrator, and that the internal and external comparables and status quo "favor the Union's offer as it pertains to the issue of providing information."

It also contends that there is no merit to the District's claim that there is a distinction between "just cause" and "good cause", and that the external comparables do not support the limitations on arbitral authority now found in the agreement.

DISCUSSION

As related above, the District imposed a QEO in 2003 and the only disputed proposal here which has a direct monetary cost centers on whether the District can charge the Association for its information requests, an issue which ordinarily involves a very small sum of money. The Association's remaining proposals relating to an arbitrator's authority and just cause have no direct monetary cost.

Because the overall economic cost is minor, Factors 7 and 7g. above relating to the "greatest weight" and "greater weight" do not favor either Final Offer. The same is true for Factor g. relating to the CPI, and Factor h. relating to overall compensation.

I further find that there is no question relating to the District's lawful authority; that the Stipulations of the parties do not favor either party; that the interests and welfare of the public and the financial ability of the District to meet the costs of either Final Offer do not favor either party; and that Factor f. relating to employees in private employment do not favor either party.

This case thus boils down to whether the internal and/or external comparables favor either Final Offer; whether a quid pro quo is needed for the proposals; and whether there is merit for each proposal.

As for the internal comparables, a recent interest arbitration award has been issued involving the District and the New Berlin Clerical Association which, like the Association, is affiliated with the Wisconsin Education Association Council.[1] The award adopted the latter's Final Offer which, inter alia, included the nearly identical proposals in dispute here relating to that union's information requests; relating to an arbitrator's authority to award backpay; and relating to just cause for employees who have been disciplined with pay.

The District maintains the award should be discounted because the clerical language pertaining to just cause does not cover demotions; because the clerical language regarding arbitrable authority deleted the sentence reading "Nor shall the arbitrator have any authority to reverse or interfere with any exercise of discretion permitted by this Agreement"; and because the union in that proceeding stated that the just cause language "is not of sufficient weight as to be determinative as to which offer is selected."

The District's first point regarding the absence of any demotion language is well taken and it must be considered below in weighing the merits of the Association's more expansive disciplinary language here.

I do not agree, however, that retaining the above quoted sentence here is a problem, as it merely provides that an arbitrator must defer to "any exercise of discretion permitted by this Agreement." Since that discretion is spelled out in Article VIII of the agreement, entitled

[1] New Berlin Clerical Association v. New Berlin School District, Case 26, No. 62555, INT/ARB-9975, Decision No. 31203-A (Yaeger, 10/19/05). Like here, that award covered the 2001-2003 agreement.

"Management Rights", and elsewhere, and since Article V, Section J, of the agreement, entitled "Nonrenewal, Termination, Dismissal and Suspension", limits that discretion by requiring the District to have cause for disciplining employees, the quoted sentence simply means that the arbitrator cannot pass upon the former when he/she rules upon the latter.

As for the union's statement in the clerical case that its just cause language was not determinative, the parties there also arbitrated wages which, some may argue, are much more important than the disputed just cause language in dispute. As a result, and because the Association in this proceeding has spent so much of its time and resources in trying to obtain that language here, the union's statement there cannot be given much weight.

I therefore conclude that but for the language regarding demotions, the internal comparable supports the Association's offer.

Left is Factor d. which relates to the external comparison with other teachers. In order to address this issue, it is first necessary to ascertain the proper pool of comparables.

The parties have agreed that the following school districts comprise the comparable group because they are either in the same athletic conference and/or are contiguous to New Berlin (District Exhibits 9-19; Union Exhibits 1-9):

Cudahy
Elmbrook
Greendale
Greenfield
Mukwonago
Muskego-Norway
Wauwatosa
West Allis
Whitnall

The District wants to include Waukesha within the comparable group which the Association opposes, and the Association wants to include Kettle Moraine within the comparable group which the District opposes.

The District maintains that Waukesha is a comparable because it is a contiguous school district and because the parties have agreed to include all other contiguous school districts; because the District and Waukesha "draw employees from the same labor pool and compete under the same economic conditions"; because "there is no evidence" that the District is unable to compete with Waukesha because of the difference in size; because other interest arbitration decisions have included the District and Waukesha in the same comparable group; and because the union for the clerical bargaining unit agreed to use Waukesha as a comparable.

The District contends that Kettle Moraine is not a comparable because it is not contiguous to the District and because it is not part of the same athletic conference; because there is no evidence the two school districts draw from the same labor pool or that they compete under the same economic conditions; because the similar levels of student enrollment, without more, is insufficient to make Kettle Moraine a comparable; and because the Association has not explained why it has not sought the inclusion of the Franklin, Hamilton, Menomonee Falls, or Oak Creek-Franklin school districts which are geographically as close or closer to the District and which share many of the same similarities as Kettle Moraine.

The Association counters that Waukesha should be excluded because its student enrollment of 12,718 is much larger than the District's enrollment of 4,510 (Association Exhibit A-2-12); because Waukesha's enrollment is about five times larger than Whitnall, the smallest comparable which has an enrollment of 2,346 (Association Exhibit A-2-12); because Waukesha is about twice the size of Wauwatosa and West Allis, two of the largest comparables; because

Waukesha's budget is about twice the size of the District's budget; and because the parties have never voluntarily agreed to use Waukesha as a comparable. The Association also asserts that Kettle Moraine should be included among the comparables because its enrollment of 4,510 is "very comparable" to the District's enrollment; because it is contiguous to Waukesha and immediately to its west; because it is contiguous to Mukwonago, one of the agreed-upon comparables; and because various other factors warrant its inclusion.

Waukesha does differ somewhat from the District for the reasons stated by the Association. However, there are other factors which support its inclusion as a comparable, including the fact that the union in the clerical bargaining unit agreed to include Waukesha as a comparable in the interest arbitration proceeding. That is why the award in that case found it to be a comparable.[2] That being so, it makes no sense to have different comparables for the teachers and the clerical bargaining units. I therefore find that Waukesha should be added to the above comparable group.

The union for the clerical unit did not propose Kettle Moraine as a comparable and it thus was not among the comparables in that case. In addition, Kettle Moraine is not contiguous to New Berlin and it is in a different athletic conference, thereby distinguishing it from all of the other comparables except for Waukesha. Moreover, while Kettle Moraine shares many of the same attributes as the District including size, the same also is true for the Franklin, Hamilton, Menomonee Falls, and Oak Creek-Franklin school districts which are not included in the

[2] Greenfield was not included among those comparables because its clerical employees are not represented.

Association's proposed comparables. Since there is no valid basis for differentiating Kettle Moraine from these other school districts, I conclude that Kettle Moraine should not be included within the external comparables.

Turning now to the merits of the parties' Final Offers, the District wants to charge the Association for any information requests which total $50 or more pursuant to the District's policy which covers general information requests made by the public (District Exhibit 4). That policy at Section 1.05 states in pertinent part:

> (e) A requester shall be charged a fee for the cost of copying and locating records as follows:
>
> > 1. The fee for photocopying shall be (((10))) **25** cents for each side of a page; such cost and all future costs shall not exceed the actual, necessary and direct costs of reproduction.
> >
> > 2. If the form of a written record does not permit copying, the actual and necessary cost of photographing and photographic processing shall be charged.
> >
> > 3. The actual full cost of providing a copy of other records not in printed form on paper, such as films, computer printouts and audio- or video-tapes shall be charged.
> >
> > 4. If mailing or shipping is necessary, the actual cost thereof shall also be charged.
> >
> > 5. 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 cost shall be imposed upon the requester.
> >
> > 6. The legal custodian shall estimate the cost of all applicable fees and may require a cash deposit adequate to assure payment, if such estimate exceeds $5.
> >
> > 7. Elected officials and employees of the school district shall not be required to pay for public records they may reasonably require for the proper performance of their official duties.

> 8. The legal custodian may provide copies of a record without charge or at a reduced charge where he/she determines that waiver or reduction of the fee is in the public interest.
>
> . . .

Since the District is willing to incur and not charge the Association for any costs unless they exceed $50, its proposal is more liberal than the policy it applies to the public which must pay 25 cents a page for any document it receives in addition to paying for any costs which exceed $50.

The Association's proposal calls for the District to continue to provide "at no cost to the union Xerox or electronic copies of documents consistent with its past practices with the Union and to the extent the law requires the employer to provide these documents." The Association argues that its proposal is "designed to maintain the status quo"; that it has a statutory right to receive such relevant information; that the comparables support its proposal; and that the District has not offered a quid pro quo for its proposal.

As the District correctly points out, there is a major problem with the Association's proposal because the two phrases "consistent with its past practices with the Union. . ." and "to the extent the law requires the employer to provide these documents" are fraught with ambiguity and uncertainty because they invite disagreement over what the past practice has been and what the law requires regarding payment for such information requests.

The Association has cited a plethora of cases, too many to cite, which uphold a union's right to receive relevant information relating to a union's bargaining status. But since the District realizes that it must provide such information on request, and since its proposal provides for supplying that information, the cited cases have limited applicability because the real issue centers on who is to pay for retrieving and copying such information, and not on whether such information must be supplied.

Here, the District has offered a very reasonable compromise which requires the Association to only pay for information requests whose total costs exceed $50. Any information requests which are less than $50 therefore will be provided free to the Association. As related above, the District's proposal therefore is more generous than its general policy which also calls for the payment of full reproduction costs of 25 cents a page for the general public.

The Association points to external comparables which do not have the kind of language proposed by the District. Those comparables are not determinative, however, because some of them merely state that the school districts will provide relevant requested information without specifying who will pay for it; because others do not address who will pay for the retrieval and reproduction of documents which may exceed $50; and because other comparables are unclear.

The internal comparable favors the Association's proposal because the interest arbitration award for the clerical unit provides for the language in the Association's proposal. However, that language came about only because the arbitrator selected the clerical unit's overall final offer while at the same time adopting the District's proposal on this issue.

The Association also asserts that the District has not offered a quid pro quo for its language which is true.

However, the District has established the need for this contract language because the parties several years ago litigated before the WERC whether the District had committed a prohibited practice when it wanted to charge the Association $3,200 for its multiple information requests. Since the parties have not agreed on how to handle future information requests and since the Association itself has proposed language on this issue, the District has established the need for its proposal and its proposal reasonably addresses which party should incur costs for any future information requests.

No quid pro quo thus needs to be offered because this is an issue that must be resolved in order to avoid future litigation; because the economic impact of this proposal is tiny; and because both parties have made proposals regarding this issue.

Given all the above, I conclude that the District's proposal relating to the payment for information requests should be adopted because it is so reasonable.

Turning now to the Association's proposal relating to the arbitrator's authority, the Association wants to delete the current language in Article V, Section 3, H, which prohibits an arbitrator from awarding any back pay or remedy to a successful grievant unless such pay "is properly due for services actually performed" and which allows a grievant who is ineligible for such relief to alternatively "pursue appropriate proceedings before an administrative agency or court".

The District opposes the Association's proposal on the grounds that the Association has not proved "a legitimate need for change"; that the Association has not offered a quid pro quo; and that the Association "has offered nothing in exchange for depriving the District of that benefit."

It is true that no teacher in the past ever has been denied back pay and/or other monetary relief because of the current language.

However, the current language clearly bars such relief and it leaves grievants with a Hobbson's choice: They can either proceed to arbitration because arbitration generally is speedier, less expensive, and more final than court litigation or an administrative proceeding with no hope of obtaining monetary relief, or they can proceed with litigation or an administrative proceeding in order to get full relief even though that generally is slower, more expensive, and less final than arbitration.

Moreover, while no teacher in the past has ever been denied backpay because of this provision, the District in the past has urged arbitrators to not award any back pay or other monetary relief to teachers who have grieved their status and who were seeking reinstatement or recall with a traditional back pay order before the arbitrator. The District's February 13, 2004, Brief in the Roberta Voss lay-off case at pp. 12-13, thus quoted Art. V, Sec. I, and stated that its provisions "specifically limit the scope of relief from an arbitrator. . . ." (Association Exhibit A-2), a point it reiterated in the District's Reply Brief at p. 6 (Association Exhibit A-3). Although that grievance was eventually denied, that case shows that this is not a moot issue and that it has real and concrete implications for any teachers in the future who may lose their employment and who therefore want back pay.

I therefore conclude that the Association has demonstrated a need for change because there is no point in waiting for a teacher who has been terminated and/or laid-off unjustly to forfeit the back pay and relief he/she otherwise is entitled to receive as part of a traditional make whole order when this issue can be resolved now rather than years down the road.

The parties disagree over whether the Association has made a quid pro quo for this proposal (along with its other proposal relating to just cause for discipline). The District claims no quid pro quo has been made and the Association asserts that one was made when the District unilaterally evaporated prior contract language which required the District to pay about 5½ percent of a teacher's salary for teaching a sixth class, an amount Association President Thies stated represents about $7,000 for each of the 20 or so teachers affected by the District's action.

$7,000 a year is a very large amount of money to loose and it would represent a significant quid pro quo in regular negotiations.

Here, though, the District unilaterally exercised its legal right to evaporate this part of the agreement without obtaining the Association's agreement. Since the Association's agreement was unnecessary, the Association really did not make the kind of voluntary concession needed for a meaningful quid pro quo.

The question then becomes whether the Association's proposal (and its proposal relating to just cause), should be granted absent a quid pro quo.

The District's Main Brief states on p. 10:

> "Although arbitrators must consider the need for a quid pro quo on a case-by-case basis, the general rule is that the lesser the need for change, the greater the quid pro quo." See Oconto Unified School District, Dec. No. 30295-A (Torosian, 2002).

Here, there is a great need for change because there simply is no sound policy reason why an employee must choose between going to court or an administrative proceeding versus filing a grievance over a violation of the agreement but not receiving any back pay.

Moreover, while arbitral authority generally holds that a quid pro quo must be made for economic matters, considerable arbitral authority holds that that is unnecessary for non-economic matters and/or where the need for change is exceptionally strong as shown by the comparables.

The parties have sparred over whether the comparables place limits on an arbitrator's remedial powers, with the Association asserting that no comparable supports the District's position, and with the District maintaining that comparables have one kind of restriction or another.

The District's Brief points out that some of the comparables contain the following restrictions:

1. The Greendale agreement states: "The arbitrator shall have no power to establish salary structures or change any salary except to remedy a specific violation of this contract", and that any back pay award must be offset by "any unemployment or other compensation that the employee may have received. . ." (District Exhibit 12, pp. 6-7).

2. The Muskego-Norway agreement states: "The arbitrator shall no power to arbitrate salary adjustments, except improper application thereof, not to add to (sic), subtract from, alter, or amend any term of the agreement" (District Exhibit 15, p. 23).

3. The Waukesha agreement states that the arbitrator "shall have no power to advise on salary adjustments, except the improper application thereof, nor to issue any opinion advising the parties to add to, subtract from, modify or amend any terms of this agreement" (District Exhibit 16, p. 15).

Those restrictions differ from the restriction here because none of them prohibit an arbitrator from awarding back pay subject to setoffs and the duty to mitigate damages, which is something that many arbitrators will order if even there is no express contract language to that effect. Those different restrictions therefore cover different matters which is why they cannot be given any weight.

As a result of the recent interest arbitration award, the internal comparable now supports the Association's proposal because the District's agreement with its support staff no longer includes the prohibition on the awarding of back pay found here.

The Association's proposal thus should be adopted because none of the ten external comparables have the restriction found here; because the internal comparable favors the Association's proposal; and because back pay and other needed relief should be granted to aggrieved employees whose contractual rights are violated by the District. Adoption of the Association's proposal therefore will bring this agreement up to the standards found elsewhere and it also will bring about needed equity if this issue ever arises in the future.

The District claims that the Association "is attempting to obtain through interest arbitration a change which would not have been granted at the bargaining table".

The problem with this objection is that interest arbitration is an extension of the collective bargaining process and that the statutory interest arbitration procedure set forth in Section 111.70(4)(cm) of MERA recognizes that this proceeding is the proper forum for resolving disputes that cannot be solved at the bargaining table and that a look at external and internal comparables is needed to ascertain whether the employees here are entitled to benefits found elsewhere.

The third disputed proposal herein centers on the Association's desire to extend the just cause standard to employees who are disciplined with pay and to add the word "discipline", and thereby include oral and written warnings in addition to the other forms of discipline referenced in the agreement. Under the current language, the District does not need just cause to suspend a teacher with pay and there is no reference to oral or written warnings.

The Association claims that it made a quid pro quo by agreeing to delete the following sentence from the agreement: "No teacher may be nonrenewed, terminated or dismissed except by a majority vote of the full membership of the Board."

The District maintains that the Association has not offered "proof of an actual need for change and without a sufficient quid pro quo"; that "employees are adequately protected under the current language and that the District has acted reasonably with respect to disciplining employees"; that the Association's proposal "infringes upon a core management right i.e., the right to direct the workforce through discipline"; and that the proposal also will "bring time and money costs associated with grievances, arbitration and litigation which would arise if just cause is the standard for all disciplines". The District adds that the Association's "alleged quid pro quo

is a sham because merely deleting Article V, Section j.4, which states that a majority of the full board members must vote in favor of non-renewal, termination or dismissal does nothing to alter the parties' relationship" because Wis. Stats. 118.22(2) already requires a "majority vote of the full membership of the board" to dismiss a teacher.

I agree that the Association has not offered a valid quid pro quo for this language. In addition, only three or so teachers in the past have been disciplined with pay and the District acted responsibly in dealing with them.

However, even though the parties have agreed to that in the past, it is difficult to see why, as a policy matter, teachers who are disciplined with pay should be denied the same just cause protection that is accorded to teachers who are disciplined without pay, and it is difficult to see why the District should be allowed to determine by itself whether cause is needed for an employee who is suspended without pay versus whether cause is not needed for an employee who is suspended with pay.

More importantly, the Association rightfully points out:

> Records of past discipline are almost always used and considered relevant when evaluating whether a suspension or discharge is warranted. If prior disciplines and unpaid suspensions cannot be arbitrated until a suspension without pay or termination occurs, the union and grieving employee are put at a distinct disadvantage when it comes to the gathering, use and application of what may well be stale or unavailable evidence which could place the prior discipline in proper context or question its validity. The union is attempting to prevent the employer from creating a disciplinary record on an employee that is not subject to the checks and balances of just cause and grievance – arbitration provisions. Furthermore there is the issue of the stigma of discipline. Fellow employees, students and the public may notice the absence of a suspended employee. So not to be able to erase or challenge this discipline is particularly unfair.

It is true that the Association's proposal seeks to limit management's discretion and that it may foster greater use of the grievance arbitration procedure if it is adopted. But that is the necessary price which must be paid in exchange for the just cause standard which represents one of the most important rights in any collective bargaining agreement.

The District argues that Waukesha supports it position because the language there only provides just cause for non-renewals and dismissals and that lesser forms of discipline "shall not be wholly without basis in fact, wholly unreasoned, nor wholly inappropriate." (District Ex. 6, pp. 17-18). The District also points out that Elmbrook and Waukesha do not apply just cause to all forms of lesser forms of discipline, and that only Greenfield and Whitnall apply a just cause standard to demotions. The District adds that the Association's "proposal is unclear because it does not define what constitutes a demotion and, thus, it leaves the door open for future litigation."

I agree that the external comparables are not as uniform as claimed by the Association. However, seven out of the ten comparables do extend just cause to all forms of discipline, thereby establishing that the majority of the external comparables support the Association's proposal.

The District correctly points out that the teachers here will even have more job protection because the Association's proposal extends to "demotions" even though only two external comparables have that same protection. The Association's proposal also is greater than what is found in the clerical agreement because the latter does not refer to demotions. The Association therefore has not proven that the agreement must be changed to cover demotions.

In addition, the term "demotions" is somewhat ambiguous which is why disputes may arise over what it means. However, since the Association's proposal is tied in to disciplinary provisions of the agreement, that term refers to disciplinary demotions, thereby reducing any disagreements.

Given all of the above, I would not select the Association's proposal if the only issue centered on demotions. But since it is part of other language which must be considered as a whole, I conclude that the Association's proposal, on balance, is preferable to the District's proposal which seeks to preserve the status quo even though it is not supported by the majority of the external comparables or the internal comparable.

CONCLUSION

This case boils down to weighing the need for the District's reasonable proposal relating to the cost of responding to the Association's information requests versus the need for the Association's proposals relating to a meaningful back pay remedy for employees whose rights have been violated under the agreement and the right of employees to be covered by the just cause standard when they have been disciplined with pay. Since the costs relating to the information requests is relatively minor,[3] and since the need for a meaningful back pay remedy and extension of the current just cause standard is so great, I conclude that the latter factors outweigh the former and that the Association's Final Offer should be adopted.

[3] At the hearing, Association representative Cupery testified that the Association's proposal was aimed at protecting the parties past practices; that the parties were required to negotiate if the District claims that the cost of responding to the Association's requests is onerous; that the Association is not claiming that it can get anything it requests for free; that the District's obligation is not "unlimited"; and that the District must "provide the same level as you have provided in the past". While the District's proposal is far better because it provides for much needed clarity and certainty for the reasons found above, Cupery's assurances help explain how the Association's proposal is to be applied.

It therefore is my

AWARD

1. That the Association's Final Offer is to be incorporated into the parties' 2001-2002 and 2002-2003 agreement.

2. That the joint stipulations of the parties are to be incorporated in the parties' 2001-2002 and 2002-2003 agreement.

Dated at Madison, Wisconsin, this 1st day of December, 2005.

Amedeo Greco /s/
Amedeo Greco, Arbitrator