WISCONSIN EMPLOYMENT RELATIONS COMMISSION
BEFORE ARBITRATOR WILLIAM EICH

IN THE MATTER OF:
INTEREST ARBITRATION BETWEEN:

GREEN BAY AREA SCHOOL DISTRICT

AND

GREEN BAY BOARD OF EDUCATION (NOON HOUR SUPERVISORS) EMPLOYEES UNION, LOCAL 3055, AFSCME, AFL-CIO

DECISION & AWARD

DECISION NO. 31255-C

CASE 218
NO. 62189
INT/ARB-9907

APPEARANCES

For the Union: Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME
For the District: William G. Bracken, Davis & Kuelthau, S.C.

INTRODUCTION & PRELIMINARY CONSIDERATIONS

The District and the Union began negotiating their initial agreement in July, 2002. In March, 2003, when it became apparent that no voluntary agreement could be reached, the Union petitioned the Commission for interest arbitration. On February 24, 2005, the Commission confirmed the bargaining impasse, certified the parties' Final Offers, and entered an order for arbitration. I was appointed to arbitrate the dispute on May 17, 2005. Hearings were held in Green Bay on October 24, 2005, and the final post-hearing brief was filed on January 21, 2006.

The parties' final offers differ in several respects and, at the hearing in Green Bay, and in roughly three hundred pages of post-hearing briefs, they raise a dozen substantive

issues[1] and several others relating to the nature of the arbitration process in initial-contract cases as well as to the propriety and accuracy of the District's costing approach and the makeup of, and the weight to be accorded to, both the internal and external comparables. Some preliminary discussion of those issues is appropriate.

1. Initial Contract Arbitration

The central issue in this arbitration relates to employee contributions to health and dental insurance premiums. The members of the bargaining unit are all part time employees, most of them working two to three hours a day for a total of 177 days in the ten-month school year; and, prior to their organization in 2002, the only fringe benefit available to them was participation in the Wisconsin Retirement Fund.

Both final offers contemplate health, dental and life insurance coverage for the employees, but they differ with respect to implementation and structure. Essentially, the District proposes to phase the employees into the insurance programs over a three-year period—offering it to one-third of the group (by seniority) each year. Additionally, the District would pay the premiums only for months in which the employees actually work—ten months a year. The Union proposes full participation as of the signing of the contract, and twelve-month premium payments by the District.[2]

The District, arguing that the expense involved in immediate implementation of these insurance benefits for the unit's 117 employees would be huge—so large as to carry the potential of compromising the District's educational mission. And it says that, when considering an initial contract, arbitrators should take a more gradual approach: that it is unrealistic for the Union to expect to receive—all at once—a group of highly expensive

[1] As will be seen, these issues include employee contributions to health, dental and life insurance premiums, probationary employment status, holidays, hours of work, seniority, and several others, some of high importance to the parties, and others less so.

[2] A similar impasse exists with respect to holidays. The Union proposes eight paid holidays for the members, effective with the signing of the contract; and the District would, as with insurance, phase the holidays in over a three year period.

benefits that other unions took thirty or more years to negotiate in a series of successive collective bargaining agreements. The District puts it this way:

> In the initial contract between the parties, it is unreasonable for the Union to expect the same contract it took other internal bargaining units up to 35 years to obtain….
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> In this case, the Union's final offer is essentially a duplicate of the other AFSCME bargaining units' contracts that have taken 30 or more years to evolve through collective bargaining. The Union has simply … incorporated the other internal bargaining units' language in its final offer…
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> The District believes that it is unreasonable for this Union to expect to adopt the same contract that has taken up to 35 years to evolve in the other internal contacts. It is unreasonable to expect the District to match the wages, hours and working conditions earned among other support staff employees in the District in the initial contract. [District Brief, at 4]

Because the parties are, in the District's words, "exploring a new formal relationship," the District advocates a "go slow" approach, citing ***Butternut School Dist. (Support Staff),*** Dec. No. 27313-A, March 16, 1993, where Arbitrator Briggs, evaluating a Union's initial-contract proposal for, among other things, three and one-half paid holidays, stated:

> Conventionally, unions obtain advances for employees in piecemeal fashion, making modest wage and benefit gains in successive rounds of bargaining. It is extremely rare for a union in bargaining a first contract for employees whose wages have been at the bottom historically to achieve compete wage parity in one round of bargaining…
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> [I emphasize] again that this is a dispute over the first contract and that Rome wasn't built in a day. In free collective bargaining unions negotiating the fist contract generally expect to make modest inroads; they do not normally have the bargaining power to achieve blockbuster gains overnight. And … moving non-12-month employees from no paid holidays to 3 ½ in one round of bargaining does not seem to be a modest inroad. [I am] therefore unwilling to adopt the Union's final offer on this issue.

Other arbitrators agree. In ***City of Shell Lake (DPW)***, Dec. No., 28486-A, February 9, 1996, Arbitrator Vernon, quoting the above language from ***Butternut School Dist.***, stated: "Typically in free collective bargaining, the best of contracts were not achieved overnight. Competitive wages, benefits and working conditions are generally achieved over time." And, in ***Holmen Sch. Dist. (Custodians)***, Dec. No. 28411, April 25, 1996, Arbitrator Vernon said:

> It has often been stated that for a first-time contract, employees cannot reasonably expect a "Cadillac" contract. For instances, the Union might have the La Crosse contract as its goal, but collective bargaining gains are usually incremental.

I agree with many of these thoughts; I believe initial-contract status is a factor worthy of consideration when assessing the reasonableness of the parties' offers.[3] This is not a case, like ***Nekoosa Educational Support Personnel***, Dec. No. 26636-A, May 28, 1991, where Arbitrator Rice discounted the "go slow" proposition when the evidence showed that the employer had, prior to union certification, allowed serious "[i]nternal inequities" in wages and working conditions to develop between the unit in question and other units in the district. No such evidence has been offered or argued here, and I consider the fact that this is an initial contract between the parties to be relevant in assessing the offers under the cited arbitral authority and also the "other factors" criteria of § 111.70(4) (cm) (7) 7r (j), *Stats.*

There is another aspect of initial-contract arbitration that deserves discussion: whether it is appropriate to employ the traditional *status quo* analysis. The District argues at some length that because the Union's offer departs from the *status quo*, it may not be accepted unless the Union establishes that: [a] a compelling need for change

[3] The District has suggested that many of the other AFSCME units' initial contracts were relatively modest, and the Union disputes that assertion, stating that a similar District unit, the Monitors, "received all of the major provisions that the Union is seeking in this case." [Union Reply Brief, at 7] But the exhibit referred to (Union Exhibit 18b) indicates that, insofar as health insurance was concerned, the employee premium contributions were pro-rated based on hours worked per week, with the employees' contributions ranging from 0 to 75% of the premium costs. I consider the evidence inconclusive on the point.

exists; [b] its offer solves the alleged problem; and [c] it has offered the District an acceptable *quid pro quo*.[4] The Union, disagreeing, argues that the *status quo* analysis is inappropriate when considering an initial contract because there is no history—no prior contract from which a *stratus quo* may be derived. And the view finds support. In ***Town of Lisbon***, Dec. No. 30123-B, April 19, 2002, Arbitrator Engmann, noting that, in the typical situation, the *status quo* is embodied in the parties' existing collective bargaining agreements, and that it is appropriate for a party wishing to change that *status quo* to carry the heavy burden of persuasion imposed by the *status quo* rule, concluded that that was not the situation with respect to an initial contract:

> To require the moving party to carry a heavy burden when it wishes to change something the parties have agreed to in the past makes good policy sense, for one party to a collective bargaining agreement should not be able to easily change that agreement without the consent of the other party.
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> [I]n the common use of the phrase "status quo," [there is a] status quo in the sense that … wages, hours and conditions of employment [were in existence for] these [unrepresented] employees. But in the labor relations sense, there is no status quo
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> [T]o put that burden on the parties in an initial collective bargaining agreement does not make sense…. Because it is an initial … agreement, the union is not attempting to change something previously agreed to by the parties. ….
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> In sum, … as this is an initial collective bargaining agreement, and as there is no previous agreement which the parties are trying to change …the labor relations concept of status quo, with its accompanying burden of proof, will not apply….

Arbitrator Engmann also noted that, although "in the common use of the phrase 'status quo,'" a *status quo* existed in that the employees' handbook provided by the employer set

[4] The District's position is that, because, under the parties' prior "no contract" status, they had no benefits other than retirement—no probation or seniority provisions, no family leave or leaves of absence, and no "just cause" termination provisions—and because the initial contract contains such provisions, it amounts to a change in the *status quo*, and places the burden on the Union to prove the three cited elements.

forth wages, hours and employment conditions, "in the labor relations sense, there is no status quo." ***Id.***

To a similar effect, *see* ***Benton School District***, Dec. No. 24812-A, February 16, 1988, where Arbitrator Baron stated:

> The [*status quo*] standard … is more properly applied to a desired change in contract language, which, after application during the term of the contract, has proven unsatisfactory to one of the parties. This is not the situation in the instant case, which is one of a first contract between the parties. There is no status quo because there are no collectively bargained conditions of employment; any benefits previously received by the employees in the newly created and represented bargaining unit [were] the result of unilateral employer largesse or goodwill.

The underlying rationale for rejecting the *status quo* analysis in initial contract cases has also been expressed as follows:

> In the case of an initial agreement, the terms or conditions of employment, whether written or known to have existed previously, should not carry through into the newly developed contract, because these term and conditions may be the very reason the parties sought to formalize their working relationship.

Crivitz School District, Dec. No. 24217-A, July 14, 19878 (Chatman).

The District's response to the argument (and the decisions) is a quote form a 1973 Award stating that, during an "organizational campaign," the employer "must neither improve nor lower wage rates and other conditions of employment except as it would have done had no campaign been in effect," ***School Dist. of Wisconsin Rapids***, Dec. No. 11622-A, October, 1973 (Honeyman); and another, ***Village of Stoddard***, Dec. No. 27970-B, November 15, 1984, citing ***Wisconsin Rapids*** for the proposition that, "[w]hen bargaining a first contract … the employer's duty to bargain requires that it maintain the *status quo* as to all … mandatory subjects of bargaining." And while there are a few

recent cases in which arbitrators have, without detailed discussion, employed a *status quo* analysis when considering an initial contract,[5] the District's response has not satisfied me that, on this record at least, a *status quo* analysis is appropriate.

Again, as I have indicated above, I believe consideration of the initial-contract status of the parties' negotiations is appropriate—as is the recognition that, as one arbitrator put it, "Rome wasn't built in a day;" but I am not persuaded that, on the record and submissions before me, the "heavy burden" of the *status quo* analysis may be justifiably placed on the Union's shoulders.

2. Inclusion of Non-Represented Units in the Comparables

The parties appear to agree on the internal comparables: the District's Clerical, Food Service, Monitor, Maintenance, Carpenter/Electrical/Plumbing/Pipefitting, Teacher and Paraprofessional bargaining units.[6] They differ on the external comparables.

The District has proposed the districts comprising the Fox River Valley and Fox Valley Association Athletic Conference schools: Appleton, Fond du Lac, Kaukauna, Kimberly, Manitowoc, Menasha, Neenah, Oshkosh and Sheboygan. The Union essentially relies on only one: Manitowoc; and it appears that only Manitowoc has a contract with its noon-hour workers. [District Brief, at 17][7]

The Union argues that non-represented comparables are unacceptable—that they are not relevant for purposes of comparison. The view finds arbitral support.

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[5] *See*, for example: ***Oconto Unified School District***, Dec. No. 30295-A, October 9, 2002 (Torosian); ***Monroe County***, Dec. No. 30292-A, July 21, 2002 (Zeidler); and ***Stevens Point School District***, Dec. No. 30461-A, July 18, 2003 (Tyson).

[6] As will be seen, the parties differ significantly—and strenuously—as to the weight to be accorded the internal (and external) comparables in this arbitration.

[7] In its Reply Brief, the district Suggests that Kaukauna is also represented. [Reply Brief, 18] To add to the confusion, the Union says that "all but Kaukauna" are unrepresented. [Brief, at 20] Whatever the case, the parties' arguments on the point deserve consideration.

> The prevalent view … is that only unionized groups of employees should be considered as appropriate comparables, because the non-union employees do not have the right to negotiate their wages, hours and working conditions. ***Ashwaubenon School District***, Dec. No. 30399-A, November 14, 2002 (Roberts).

Several years earlier, Arbitrator Malamud offered the following reasons as underlying such a view:

> It is difficult to establish the wages and benefits provided by an employer in a situation where there is no collective bargaining agreement and where the benefits are not published in such an agreement. … [T]he establishment of wages, hours and conditions of employment through an administrative process of unilateral action of the employer provides little insight as to the pull and tug occurring at the bargaining table … [which is] … an important consideration in the MED/ARB process… The use of groupings of employees who are unorganized provides information which is tangential at best to the statutory MED/ARB analysis mandated by the statutory factors… ***West Allis-West Milwaukee School District***, Dec. No 21700-A, January 30, 1985.[8]

The Union acknowledges, however, that "arbitrators … sometimes give limited weight to unrepresented units..," but it maintains that "they do not give weight to a comparability pool made … almost entirely of unrepresented employees," as it says the District's pool does in this case. [Brief, at 21]

The District points out that, while there is a "split" among interest arbitrators with respect to inclusion of unrepresented employees in a comparable pool, in cases where the issue is not one such as fair share definitions or other "security-type" issues, arbitrators have included unrepresented employee units in the pool of external comparables. Indeed, some have found such consideration mandated by the statutory criteria—specifically §111.70(4)(cm)(7r)d, *Stats.*

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[8] The view is also grounded in the notion that interest arbitration seeks to reach a "result the parties themselves may have reached if they had not run out of time and/or patience to reach voluntary settlement." ***Cochrane-Fountain City School District***, Dec. No. 27234-A, October 18, 1992 (Flagler).

> The Statute merely sets forth for comparison the employment conditions of "other employees performing similar services" and "other employees generally" in the same and comparable communities. There is no specification regarding the exclusion of non-union employment. The Arbitrator therefore concludes that union status should not be imposed as a criterion for selecting comparables. ***Montello School District (Auxiliary Personnel)***, Dec. No. 19955-A, June 9, 1983 (Briggs).

To a similar effect, *see* the analysis in ***Shiocton School District (Support Staff)***, Dec. No. 27635-A, December 31, 1993, where Arbitrator Petrie, after noting that § 111.70(4)(cm)(7)d, *Stats*., directs comparison with "employees performing similar services without any reference to either the organized or to the unorganized status of such employees," concluded that, as a result:

> … there is no appropriate basis under the statutory criteria to, on a blanket basis, include or exclude Districts on the basis of union representation.[9]

And, as the District points out, at least one arbitrator has concluded that the statute *requires* consideration of "non-unionized units." ***Kewaskum School District (Auxiliary Personnel)***, Dec. No. 26484-A, December 31, 1990 (Johnson).

Finally, in ***Cameron School District (Support Staff)***, Dec. No. 27562-A, August 25, 1993, Arbitrator Gundermann noted:

> [W]hether organized or unorganized units should be considered in determining the appropriate comparables has been addressed in a number of … decisions. A review of those decisions leads to the conclusion that arbitral authority supports the proposition that the statute does not contemplate selecting comparables based on union representation. The undersigned shares the view held by a number of arbitrators and believes both represented and non-represented

[9] Arbitrator Petrie also noted that, in some cases, "union representation or lack of same may control the weight to be placed on certain types of comparisons."

> districts within the conference should be included in the comparables.

All else being equal, the argument for not considering non-represented units/employees is probably the more compelling; and I agree that the applicable statutory criterion—§ 111.70(4)(cm)7r(e), *Stats*—does not expressly address the question: It doesn't say one way or the other. But I do not believe that omission necessarily mandates consideration of non-represented employees, as do some of the arbitration Awards just referred to. I believe, rather, that the import of that omission *permits* consideration of non-represented employees when warranted by the circumstances of the case. In this regard, I agree with Arbitrator Torosian, who commented as follows in ***Rio School District (Support Staff)***, Dec. No. 31029-A, October 30, 2001:

> In arriving at [the] set of comparables, [I] was not influenced by the organizational status of the employees of the District's proposal. [I] recognize[], as argued by the Association, that from a bargaining relationship standpoint, the organizational status of unit employees makes a difference. Employers of organized employees are duty bound to the give and take of good faith collective bargaining and, if impasse is reached, to the statutory criteria applied by arbitrators in determining the outcome. In contrast, in non-unionized relationships employers, in the extreme, may unilaterally establish wage rates and increases and conditions of employment with no input from employees. However, from a labor market viewpoint, non-union comparisons are as relevant as unionized, because regardless of organizational status employers are competing for the same employees. The market place is he market place, regardless of how determined. Thus, .. in determining the appropriate comparables [I] did not automatically disregard unonunionized employers if otherwise comparable. The weight given to said groups, however, may vary depending on the issue.[10]

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[10] Geographic proximity is also at play here. The District's comparables are primarily located in the Fox River Valley and the evidence shows that they compare in several respects. *See*, District Exhibit 28. Arbitrators generally emphasize matters such as geographic proximity and size in determining external comparables. *See*, for example, ***Montello School District***, Dec. No. 19955-A, June, 1983 (Briggs); ***Sun Prairie School District (Support Staff)***, Dec. No. 21286-A, May 30, 1984 (Zeidler); ***Richland School District (Support Staff)***, Dec. No. 24064-A, April 17, 1987). Arbitrator Torosian, again in ***Rio School District***, *supra*, agreed, stating:

Arbitrator Bellman makes the point succinctly:

> [R]recognizing that other arbitrators have concluded otherwise, [I] continue[] to believe that the appropriate universe of comparison is that which more closely approximates the labor market in which the employer and employees exist; and that labor markets may include both represented and unrepresented employees ***Frederic School District***, Dec. No. 31361, December 29, 2005.

Beyond that, the NHS employees constitute a unique group. They are, according to John Wilson, Assistant Superintendent for Human Resources, primarily responsible for supervising elementary school lunchrooms, and, as occasional secondary duties, undertake some playground supervision and sometimes provide support to kindergarten and first-grade teachers and to school office personnel. [Tr. 88] They work about three hours a day for 177 days out of the year. [Tr. 92] Other districts use teacher aides or paraprofessionals to perform these duties,[11] while the Green Bay School District has a separate classification of Noon Hour Supervisors.

In my judgment, all these factors—geographical proximity and other demographic and size characteristics, together with the unique nature of the NHS unit, warrant inclusion of unrepresented units and employees in the group of external comparables—and also warrant acceptance of a smaller external comparable pool than may otherwise be desirable.

3. Costing of the Offers

A. *Claimed Deficiencies in the District's Evidence*

> [T]ypically, the princip[al] factors considered are school districts of geographic proximity and size. Here, the Association relies primarily on geographic proximity of unionized districts, and the District on size as well as geographic proximity of all units. Proximity reflects the Employer's relative ability to compete. [I am] of the opinion that both factors are important and, in this case, a blend of the two should determine the appropriate comparables.

[11] As indicated above, of the comparables only Manitowoc appears to have an organized NHS unit.

The District, in presenting evidence on the cost of the competing proposals, used a cast-forward costing methodology based on the total-package costs of the offers. The Union argues: [1] the District's data is of no value because it has not also offered costing data for the internal and external comparables; [2] the cast-forward methodology is "flawed" because, by failing to include "cost savings [occurring] through turnover," it "overstates the cost of proposals;" and [3] the underlying costing data for the NHS unit is inaccurate.

As to the failure to provide costing data for the comparables, the Union cites two arbitral decisions[12] suggesting that, where neither side presented evidence on the overall compensation in the comparables, no comparison could be made The argument is not explained further, and I am not persuaded. As the District states, it is impossible to evaluate economic items in an arbitration without knowing their cost—and the cost of the proposals is relevant evidence under several of the statutory criteria—overall compensation, public interest, and others.

Nor am I persuaded that the cast-forward methodology may not be used in these proceedings because it is "flawed." The Union's point is that the methodology results in inflated costs "due to its disregard of cost savings through turnover and the resulting 'ghost' employees who have retired, been terminated or left for another job and who are included in the calculation." [Brief, at 14] And it cites ***Hustisford School District***, Dec. No. 23138-A, may 20, 1986, where Arbitrator Haferbecker indicated that, in the costing of competing offers, "some consideration should be given to the actual cost of both offers, taking turnover into account." The Union also quotes Arbitrator Torosian as indicating that actual costs are "more helpful" than the cast-forward method. ***Richland School District***, Dec. No. 29596-A, January 28, 2000. In both cases, however, considering the quotations in context, it appears that the arbitrators were considering the district's "ability to pay"—which even the Union acknowledges is not an issue in these

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[12] ***City of Rhinelander***, Dec. No. 27371-A, February 1, 1993 (Oestreicher); and ***City of Platteville***, Dec. No. 27911-A, July 21, 1994 (Zeidler).

proceedings. *See*, Union Brief, at 13. *See*, also, ***Kenosha Service Employees***, Dec. No. 19882-A, May, 1983, where Arbitrator Yaffe stated:

> The undersigned does not believe that … changes in the size of the work force are relevant to costing determinations absent the existence of an inability to pay argument by the employer …. [W]hat counts most and what is most relevant is the value of improvements actually received by affected employees.

To a similar end, Arbitrator Zeidler has remarked:

> Actual-to-actual costs do not reflect the percentage increases to returning teachers or new hires. If there are substantial layoffs, the cost to the Employer might show a drop even if the salaries of returning teachers rises in a high percentage gain. Therefore, the schedule-to-schedule approach in one of its variations, either that of moving the previous year's cohort of teachers forward one year or moving the current staff back one year, gives the fairest estimate of percentage changes in cost. ***Watertown School District***, Dec. No. 20212-A, June, 1983.

Finally, the District points to § 111.70(4)(cm)8(s), *Stats*., which designates the cast-forward costing methodology as the appropriate way to determine costs in teacher bargaining. For all these reasons, the Union has not satisfied me that the manner in which the District determined the comparative costs of the competing offers was inappropriate.[13]

Much the same may be said for the Union's argument that the District's costing evidence must be disregarded because [a] it fails to take employee turnover into account; and [b] it includes holiday pay in the "wages" column. First, while the Union characterizes turnover in the NHS unit as "considerable" [Brief, at 16], the figures are essentially neutral on the point. As the District observes:

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[13] Indeed, as the District notes, the Union presented no costing evidence at the hearing; and, in the normal course of events, that fact alone can create a presumption that the other party's figures "must be the best evidence in th[e] case." ***Greenwood School District***, Dec. No. 20350-A, July, 1983 (Miller).

> The Union notes that 53 percent of the bargaining unit has less than five years experience. The inverse is also true. Nearly half, or 47 percent, have more than five years experience. This really says nothing of the turnover rte in the bargaining unit. Turnover data is based on how many employees quit the labor force and for what reasons. The Union did not submit any data from other bargaining units to make a judgment as to whether this figure is high or low. [Reply Brief, at 10]

It is a "is the glass half full or is it half empty?" situation.

With respect to holiday District says:

> Holidays reflect paid time off. The District could have created a separate line for holidays … but merely included it in wages for simplicity purposes. It is a form of compensation no matter which way you cut it. [Reply Brief, at 11]

I agree. I see nothing inappropriate or inaccurate in the manner in the methodology employed by the District in costing the offers.

B. *The Costing Evidence*

The District presented evidence that, on a total package basis (embodying the wage and fringe benefit increases being bargained by the parties), its offer contemplates annual increases of 4.6%, 5.0% and 3.8%—amounting to an annual average increase of 4.5%—as compared to the Union's proposed increases of 8.4%, 3.4% and 3.6%, for an annual average of 5.1%. [District Exhibits 8 and 9] Additionally, Wagner, Assistant Superintendent for Business and Finance, using a cast-forward costing method, estimated the 2005-2008 dollar and percentage increases in salaries, fringes and total compensation as represented by the two offers to be as follows:

District Offer	2005-2006	2006-2007	2007-2008
Salaries	$735,668 [0%]	$735,668 [0%]	$735,668 [0%]
Fringes	$156,510 [48.6%]	$323,621 [107.0%]	$459,664 [42.0%]
Total	$892.178 [6.1%]	$1,059,289 [18.7%]	$1,195,332 [12.8%]

Union Offer			
Salaries	$750,176 [0.2%]	$751.376 [0.2%]	$752,576 [0.2%]
Fringes	$257,923 [141.6%]	$497,683 [93.0%]	$531,301 [6.8%]
Total	$1,008,099 [17.8%]	$1,249,059 [23.9%]	$1,263,877 [2.7%]

[District Exhibits 10, 11, 12][14]

Based on these figures, the District calculates the "additional cost" of the Union's offer over its own at approximately $389,000 over the three-year term, exclusive of wage increases; and he said the difference is significant because the District knows it will be facing a $10 million deficit in the second year of the current state budget. [Tr. 46; 48]

In addition to the arguments discussed in the preceding section, the Union contends that the District's cost figures are inflated. It is particularly critical of the underlying projections regarding the noon hour workers' participation in the family health insurance plan. In preparing the costing exhibits, Wagner looked to family plan participation by members of the Monitors' unit. [Tr. 76-77] The Union says the comparison doesn't work because, while the monitors have similar job duties, they receive "significantly higher" wages and, on the average, work more hours. According to the Union, monitors earn $12.31 per hour and work an average of 1357 hours per year, while the NHS workers earn $11.17 (under the Union's proposal), and average only 530 hours per year. [Reply Brief, at 1-2, citing District Exhibit 25] Because of the lower income and the resulting higher premium contributions, the Union says the comparison is inappropriate and that, "to be frank, both the District and the Union are guessing at the level of participation for this unit." [Reply Brief, at 3]

The Union may have a point here, but it goes primarily to the weight of the evidence. There is nothing in the record that would warrant disregarding the District's costing evidence in its entirety. As indicated, the Union presented no evidence of its own, and the fact that there are commonsense factors which may be characterized as casting some doubt on the precision of some of the District's figures in this regard, there

[14] The figures shown are from a chart at p. 14 of the District's brief. The figures in the actual exhibits upon which the chart is based vary slightly in some instances, but the dollar difference is marginal at best.

is little doubt that adding the insurance benefits—to say nothing of the other benefits at issue—in a "lump sum," as the Union proposes, will result in substantial cost increases to the District over the three-year life of the contract. That fact seems to me to be unassailable even if Wagner has overestimated the NHS workers' participation in the family health insurance plan in his projections. It is a matter of degree—part of the balance to be struck; and while it may affect the weight to be accorded the District's costing evidence, it does not warrant outright rejection.

APPLICATION OF THE STATUTORY CRITERIA

1. Introduction

Interest arbitrators are required by statute, after hearing, to "adopt without further modification the final offer of one of the parties on all disputed issues submitted for arbitration." Section 111.70(4)(cm)6d, *Stats*. The statutory factors governing the decision—and the manner in which they are to be applied—are set forth in § 111.70(4)(cm)(7), *Stats.*:

> 7. "Factor given greatest weight." In making a decision under the arbitration procedures authorized by this paragraph, the arbitrator … shall consider and shall give the greatest weight to any state law or directive … which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer….
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> 7g. "Factor given greater weight." In making any decision … the arbitrator … 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.
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> 7r. "Other factors considered." In making any decision … the arbitrator … shall also give weight to the following factors:
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> a. The lawful authority of the municipal employer.
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> b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.

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

f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.

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

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

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

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

2. Discussion

[A] *Greatest Weight/Great Weight Criteria*

The parties agree that the "greater weight" criterion is not relevant to the outcome of this arbitration.

The "greatest weight" factor is, in sum, a "revenue cap" criterion—looking to the reasonableness of the competing offers in light of state controls over school district revenues. The Union argues that there is insufficient evidence in the record to reach any conclusion in this regard. It says that, like other districts, the Green Bay School District has "adjusted" to state revenue controls, and "is doing as well as any other school district in the area and is comfortably within the limitations of state levy and/or revenue caps." [Brief, at 36]. It states that the District is "experiencing an increase in enrollment and [is] predicting dramatic increases in student enrollments in the future … [and] … is planning to build a new high school to accommodate this growth."[15] ***Id***. It also states that all of the NHS employees are part-time and, as a result their wages and benefits make up only "a fraction of the district's budget." ***Id***., at 37

The District, arguing that its offer is clearly preferred under the greatest-weight criterion, points to the testimony of the District Superintendent, Daniel Nerad, that the District's annual expenses are increasing at the rate of 5%, while revenues are increasing by only 3%. [Tr. 36] Nerad testified that, in the past year, the District was able to absorb that difference—and to maintain "existing program commitments within the district"—only by moving $6 million from the undesignated reserve fund into the operating budget. [Tr. 37] And he predicted that—considering the District's estimated difference in overall cost of the two offers of approximately $450,000—the revenue gap will grow to as much as $10 million in the very near future, most likely requiring the District to begin making cuts and "tradeoffs" with respect to its educational programs. [Tr. 38; 46]

To me, the difficulty with the greatest-weight language in § 111.70(4)(cm)7, *Stats*., is that it implies ending the analysis right there, should there be evidence of

[15] The argument here is based on the fact, as Administrator Nerad testified, that, "in terms of the revenue control formula, the more students you have in your increasing enrollment, the more money the district would receive." [Tr. 40-41]

revenue/levy caps. As Arbitrator Weisberger noted in ***Manitowoc School District***, Dec. No. 29491-A, May 6, 1999, a case cited by the Union: "If these [greatest-weight] arguments were to prevail in this proceeding, they would determine the outcome herein without consideration of any other arguments made by the parties." Responding to that problem, Weisberger concluded:

> Although [I am] able to conceive of circumstances in which there is unmistakable evidence of some specific facts which would direct such a result, [I do] not believe that the evidence and the arguments in this proceeding are sufficient to require such a summary result. State imposed school district cost controls are applicable to all school districts. There is no specific state law … which limits implementation of the Union's final offer by the District. While the state revenue controls must be considered in this proceeding, [I] conclude[] that their existence is insufficient by itself to mandate adoption of the Employer's final offer at this state in [the] analysis of the statutory factors. ***Id***.

The District appears to take a similar position, referring to a similar analysis by Arbitrator Vernon:

> Certainly a District … can almost always "afford" a raise for its employees. However, it seems more reasonable that the relevant question under the "Greatest Weight" factor seems to be "if the District can afford a salary increase, at what cost to the educational mission will this increase come?" [I] believe[] that the "Greatest Weight" factor as related to revenue limitations was meant to have arbitrators, in individual cases and in appropriate circumstances, take into account the financial and budgetary influence, impact and pressures that come to bear under legislative revenue limitations (wise or as unwise as they be). ***Tomahawk School District***, Dec. No. 30024-A, September 28, 2001.

I agree that, on this record, it would make little sense to end the statutory inquiry here and now. Levy/revenue limits are bound to have an effect on the district in a time of acknowledged expenditure increases—health insurance being a major, but still only one, example. And in this case that effect is exacerbated by the fact that, because this is an initial contract, virtually all of the "new" expenses are going to be immediate—in a "lump sum," under the Union's proposal. Plainly, the existence of the controls cannot be

ignored and should be taken into account. But neither should they, in and of themselves, determine the outcome of the proceedings. To me, they constitute a part of the overall analysis mandated by the statute and will be given due consideration.

Finally, I don't believe the Union's statements that the District's enrollment is rising rapidly is accurate. Nerad did state that they are experiencing "increasing enrollments *on the east side of the district*," but he also noted that, when that increase is considered with sharp decreases in other areas of the district, enrollment is "basically flat." [Tr. 39 (emphasis added)][16] The evidence is that, because of flat enrollment, mounting costs and decreasing revenues, the revenue caps have constrained, and will continue to constrain, the Green Bay School District's program abilities,[17] And that is a factor which, while not determinative, favors the District's offer.

[B] *The Public Interest and the District's Ability to Meet Costs*

I agree with the parties that this is not an "inability-to-pay" situation; and the District does not argue that it is. As I have discussed above, the District acknowledges that it can meet the offer—but, pointing to increasing estimated budget shortfalls, asks: "at what cost to our educational mission?"

The Union, pointing to language in ***Sheboygan County Institutions***, Dec. No. 28422-A, January, 1996 (Baron), to the effect that, under this criterion, "a mere assertion of a burden, without a showing … of an inability to pay is not persuasive." The Union says that that is precisely the case here. According to the Union, the problem is that the District can, but simply doesn't want to, pay the costs necessary to meet the Union's proposal. But the arbitral decisions do not, in my reading, require an absolute inability to pay to achieve favored status under the "public interest" criterion. Arbitrator Baron went

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[16] Nerad added: "And while people understand that we're going to be growing rapidly on the east side of the district, I don't believe, at least in the short term, meaning the next couple of years, there's gong to be immediate benefit under the revenue cap because of the decreases on the west side." [Tr. 39-40]

[17] I discuss the costs and fiscal impacts of the competing offers in other sections of this decision.

on to state in ***Sheboygan County Institutions***, for example, that the criterion weighed against the employer in that case because it had not shown a "compelling need" to minimize its costs. Arbitrator Petrie, in ***Shiocton School District***, Dec. No. 27635-A, December, 1993), stated that "adverse economic conditions are normally given determinative weight … under the [public interest criterion]" in two potential sets of circumstances:

> [F]irst, where there is an absolute inability to pay on the part of the employer; and second, where the selection of one final offer would entail a significantly disproportional or unreasonable effort on the part of the employer.

He went on to note:

> While the current economic situation … demands fiscal restraint on the part of virtually all elements of government, the situation at hand involves no claim of inability to pay, and the record simply does not persuasively indicate that the Board must be shielded from entering into an otherwise justified labor agreement by economic circumstances peculiar to the Shiocton School District.

In this case, as I have noted, the evidence, while not without its flaws, establishes quite clearly, I think, that the District has serious and growing financial problems. Its expenses are rising at a significantly greater rate than its revenues each year, and it has had to resort to accounting transfers to make up the shortfall—a shortfall that will be much larger next year. These circumstances may not be wholly unique to the Green Bay School District, but I believe they are compelling and deserve consideration when assessing the reasonableness of the parties' competing offers.

There is another element to the analysis. As I have said, the most significant issue in these proceedings—the gorilla in the room, so to speak—is payment of employee health insurance premiums. It is plain that providing health insurance to the unit's employees is a matter of substantial and significant expense. The District has not suggested dropping health insurance; indeed, the parties have agreed that these benefits

should be provided. It asks only that, like the proposed holidays, its premium payments be phased-in over a three-year period (and be limited to months in which the individual employee works) in order to allow the District to plan for and absorb these significant cost increases wit the least damage to its educational mission. And it seems to me that the interests of the public—including those of the unit members—are served by such a plan. The benefits to the public—the people who pay the bills, and who reap the benefits of a healthy school system—are plain; and the benefits to the workers of a financially sound employer are equally so.

In justification of its proposal, the District points not only to the sharp increases in premium costs, but also to the fact that the great majority of the noon-hour supervisors work less than half-time, with the result that, under the Union's proposal, the District would be paying, for many of NHS employees, health insurance premiums amounting to more than double their wages. And I am satisfied that there are public-interest implications to any such proposal. The other side, of course, is that employees working so few hours, are ill-equipped to be paying full premiums for even two months a year. But the real question is whether it is realistic, in today's times, to expect the municipal employer to be paying fringe benefits—actually only one of several benefits—that an amount to more than double the employee's wages, and to begin full payment immediately. Mindful of the difficulties to the employee, it seems to me that it is not.

As stated here, and elsewhere in this decision, I consider that the public interest factor strongly favors the District's offer.

[C] *The Internal Comparables*

[1] *In General*

The Union states first that, in two prior Green Bay School District interest arbitrations, the arbitrators gave the internal comparables "crucial weight," stating that they were "of paramount importance." [Brief, at 18, 19] The Union first quotes from

Green Bay Area Public Schools, Dec. No. 20478-A, August, 1983, a case involving the District's clerical unit, where Arbitrator Fleischli stated that the internal comparisons were "more reflective of the labor market [and] employment conditions generally for purposes of the … secretarial staff" than were the external comparables. It appears from a reading of the Award, however, that Arbitrator Fleischli *did* consider the external comparables, but gave them little weight because he questioned the methodology used to determine the employees' "average wages" in the comparable districts. [Id.] Read in context, Fleischli's discussion was as follows (with the portion quoted by the Union emphasized):

> Although the undersigned is willing, as noted at the hearing, to assume that the duties of secretaries in the contiguous and athletic conference schools relied upon by the District are roughly comparable, the stated methodology for determining what constitutes an "average" wage in the agreements in those districts would appear to be very questionable. Basically, the "average" figures utilized reflect a simple arithmetic average based on various wage rates set out in the agreements in question. There is no backup data in this record which would establish whether such methodology resulted in comparable figures. *More importantly, the undersigned is of the opinion that Internal* c*omparisons and comparisons in the Green Bay metropolitan area (which includes a few of the districts identified by the Board) are more reflective of labor market conditions and employment conditions generally for purposes of the Green Bay school system's secretarial staff.*

The other case cited by the Union, ***Green Bay Area Public Schools***, Dec. No. 21480, August 1984 (Imes), involving the District's maintenance employees, was somewhat similar. Here, too, the arbitrator did not, as the Union suggests, determine, as a matter of arbitral policy, that internal comparables should be given "paramount importance" over external comparables in Green Bay School District (or other) arbitrations. She simply concluded that she was constrained to use the internal comparables as "the primary basis of comparison" because there was there was "insufficient backup data" in the record to substantiate the information regarding the external comparables. Indeed, the only thing she appears to have said about the intrinsic

value of internal settlements was that "[i]nternal settlements in themselves are not an improper basis of comparison."[18]

The Union has not persuaded me that the internal settlements are, as a matter of arbitral precedent, to be given "paramount" or "crucial" weight. The question remains, on this record, what weight they should be accorded. I will first consider the parties' positions on the internal comparables *vis-à-vis* the several issues raised in these proceedings, and then the weight to which I believe they are entitled proceedings. .

[2] *Comparisons*

As indicated, the parties have raised nearly a dozen issues, several of which are argued to be either consistent, or inconsistent, with the internal comparables. They will be considered *seriatim*.

[a] Probation

The Union has proposed a new-employee probationary period of 180 days, as opposed to the District's proposal of 180 *work* days. The Union, noting no other internal comparable defines probation in terms of work days, argues that its proposal is favored. The District concedes that its proposal is, in essence, a year-long probationary period, and it states that it finds support in at least two comparable districts, each of which has a one-

[18] The full excerpt is as follows:

> A number of the parties' arguments relate to the selection of comparables, the method of comparison and the accuracy of the data presented. Since there is not sufficient backup data provided in the record to determine which party is correct, it has been decided that the only data which is not challenged by the parties and upon which they are in agreement, the internal settlements, will be used as the primary basis of comparison in determining the reasonableness of the wage offers. Internal settlements in themselves are not an improper basis of comparison, particularly when the comparisons relate to support staff. They do provide a general basis for reflecting the market and employment conditions among employees who could be employed in similar positions within the community and they are an indication of what the District and its employees feel fairly reflects the cost of living.

year probationary period. It also notes that, while most of the internal comparables have 90 to 180 day periods, one, the paraprofessionals, has a one-year period. It also maintains that the extra time is necessary to properly evaluate a new employee's performance—citing the testimony of Assistant Superintendent John Wilson that "[i]if an employee starts in May those [180] days are over, with relatively few work days by virtue of the summer break." [Tr. 97] And it says that the longer probationary period is a fair trade-off for the just-cause termination provisions in the new contract.

The fact remains, however, that, with only one exception, the internal comparables have a maximum probationary period of 180 cays, as opposed to the one-year period the District is proposing here. And that fact favors the Union's proposal.

[b] Seniority

The parties agree that this is a "minor issue." The Union has proposed language defining seniority as consisting of "the total calendar time elapsed since the date of one's employment," while the District phrases it as follows: "an employee's length of continuous service employed by the district commencing with the employee's most recent date of hire." Additionally, the District's proposal provides a lottery-type method of "breaking the tie" where two or more employees of equal seniority are facing a layoff. The Union's offer has no such tie-breaking procedure.

The District contends that its definition of seniority makes more sense because it commences with the employee's most recent date of hire, thus recognizing the fact that "employees from time to time may leave the employment of the District and then return." [Brief, at 74] And it says that the Union's definition is ambiguous with respect to the starting date: "Is it the total length of employment in the district or is it from the employee's most recent date of hire?" [Id.]

It is true, as the Union asserts, that its language is consistent with the internal comparables; but this is, as the parties indicate, a minor issue, and I see no reason why

common sense should be discarded for that reason alone. The only effect of the District's language is to clarify, and to avoid problems where seniority determinations must be made involving employees with equal longevity. The Union has made no persuasive substantive arguments against that language, and it seems to me that the District's proposal is the more reasonable.

[c] Job Description

The Union has proposed contract language requiring that "[a] job description … be established for the position of Noon Hour Supervisor," and the District's offer is silent on the point. The Union says the issue is important because, as unrepresented employees, NHS workers had, in the past, been assigned a variety of tasks unrelated to their noon-hour supervisory duties. The District is correct in noting, however, that there is no evidence of record supporting that assertion. The Union also maintains that the NHS position is similar to that of school monitors, and "it is important to have a clear delineation between what those duties are." [Brief, at 53] And it notes that most of the internal comparables have job descriptions.

The District states simply that it has not prepared a job description; it offers no reason why the Union's proposal is unreasonable. As presented, I consider this a minor issue, and while the Union's proposal makes sense, and is favored under this criterion, it is far from determinative.

[d] Authorized Absences

Three considerations are at play here: sick leave, paid holidays, and leaves of absence without pay.

As to the first, sick leave, the Union's final offer would allow use of up to five days' sick leave for absences necessitated by the illness of the employee's spouse, child, sibling, parent, grandparent, spouse's grandparent, and all levels of in-laws (brother-,

sister-, mother- and father-in-law). The District's offer provides for up to five days leave for the illness of a minor child, which could be extended at the Superintendent's discretion. For other family members, the leave would be "pursuant to the qualifications of the FMLA." The Union says that, of the six internal comparables, only one, the craft unit, has the FMLA qualifier.

The District, acknowledging that fact, states that it is trying to move away from the *status quo* in this area [Reply Brief, at 42]. And it refers to the testimony of Assistant Superintendent Wilson for justification;

> We recognize that employees need to use sick leave for minor children's illnesses and that they do not need to be serious illnesses. Serious illness language in existing contracts through the years has been diminished to meaning any illness for the categories of individuals listed. What we are trying to do as a district is to say that we understand that minor children need to have a parent with them when they are ill but other individuals do not, and, if it falls under the FMLA, then we are very willing to recognize those illnesses also, but we want some type of control over the use of sick leave. [Tr. 99]

It is a goal that makes sense, but, as the District has emphasized throughout these proceedings, this is an initial contract between the parties—one fraught with issues, as may be seen in the length of the parties' submissions (and of this Award). And in these circumstances, however reasonable the goal, initial contract bargaining may not be the best place to introduce significant changes in established bargaining practices with other internal units.

The parties' dispute over leaves of absence without pay is, again, one of language. The Union's proposal would limit such leaves to those that "do not seriously hamper system operation." The District's standard allows for leaves that do not "adversely affect the operations of the district." I tend to agree that the difference is more in form than substance, and affords no basis for preference.

The parties have agreed on eight paid holidays per year. Here, too, hey differ as to implementation. The District would "phase in" the holidays over a three-year period, and the Union would have them all included from the start. Opposing the District's argument based on the "bunched-up" expense of starting out with all eight, the Union says it has been bargaining this contract with the District for three years, and the effect of the District's proposal would be to "reward[] employers for drawing out and delaying resolution of negotiations…" [Brief, at 55] There is, however, no evidence that the District has unreasonably "drawn out" the negotiations. Additionally, as this is an initial-contract arbitration, established bargaining units with a multi-year history of bargaining contracts with the District, may carry lesser weight in the ultimate assessment of the reasonableness of the offers than they might in other cases.

Taking all three aspects of the "authorized absence" proposals, I conclude that the internal comparables shed little light on the parties' differences. The District's proposal is more reasonable in terms of leaves of absence and the phasing-in of holidays, though these points find no real support in the comparables. All in all, this factor minimally favors the Union.

[e] Insurance

The parties acknowledge that this is the heart of the dispute—as it is in bargaining between virtually all municipal employers and established unions. The parties have agreed that the District will pay 100% of the dental insurance premiums for all full- and part-time employees electing single or family coverage. For health insurance, they have agreed that the District will pay 100% of the premium cost for full-time employees electing single coverage, and 94% for those electing family coverage. Part-time employees would pay "a portion of the insurance premium cost according to the schedule." The basic difference is in the District's proposal to add language limiting the payment of premiums to months in which the employee actually works—leaving it to the employees to "pay the full premium during the months he/she is not scheduled to work,"

and, as discussed above, the District would phase-in the coverage over a three-year period.

The Union begins by pointing out that all of the other internal comparables have full-year premium payments—for both full and part-time employees. Indeed, says the Union, "over one-third of the employees of the District are part time," yet the District pays their health and dental insurance premiums for the full year. It assets that its proposal is consistent with what the District has bargained with the other internal units, and that the District's proposal would impose an undue burden on the NHS workers—that their annual premium expense would be as much as $2000 more than part-time workers in some of the other internal units.[19] The District, acknowledging that its proposal differs from that found in other units' contracts, states that seriously escalating premium costs it is experiencing—ranging between 100% and 200+% since 1998-99[20]—justifies deviation form the comparables. The District's argument is, essentially, that it makes no sense—and the District cannot afford—to pay full, year-round health insurance premiums for a unit in which 83% of the employees work less than half-time. The result, says the District, would be that its premium contributions for many of these employees would be essentially double their gross annual wage.

As to implementation of the premium-payment provision, the Union would have it become effective 30 days from the effective date of the contract, and the District would phase the payments in over three years, making the most senior one-third of the workforce eligible the first year, the middle one-third the second year and the rest the third year. The Union acknowledges that this is "not a question of internal comparables, as no similar provisions are found in any of the other District contacts."

[19] According to the Union, a NHS employee would have to work nearly 300 hours a year just to pay the premium contributions for those two months. I agree that that is a burden, but it also is evidence of the costs associated with providing free (or nearly so) health insurance coverage to a less-than-half-time worker.

[20] *See*, District Exhibit 16.

Plainly, the internal comparables support the Union's offer with respect to both the full-payment and immediate-benefit issues. I have concluded above, however, that that support should not be determinative of the proceedings, but rather constitute one factor in the balance.

[f] Job Postings

The principal dispute here is over the manner in which seniority is to be applied in filling NHS vacancies in particular schools. The Union's offer proposes that vacancies be filled by the most senior employee in the District; while the District proposes that district-wide seniority be first applied to those employees at the school where the posted position exists, and then to all District employees..

The Union, emphasizing the importance of seniority to organized employees, notes that, under the District's plan, an employee with only one year of service to the District could be preferred over a thirty-year employee. Beyond that, says the Union, all of the internal comparables have district-wide seniority in this area.

The District doesn't argue comparables. Its position is that, due to the "unique nature" of the NHS positions, it is best to give preference to employees already working in a particular school. Specifically, it refers to Assistant Superintendent Wilson's testimony that:

> Noon hour supervisors historically have been hired by the school, and for a number of years all applications and all hiring decisions for noon hour supervisors were made at the specific elementary school [where] the opening existed….
>
> They [the principals] primarily hired parents or neighbors … people who lived in the school's enrollment area. [Tr. 91]

Because of this, says the District, its proposal supports "the neighborhood school concept that has built up with the employees primarily selected from that … enrollment area," and

that the Union's final offer "disturbs" that balance, to the detriment of the District's educational program. [Brief, at 70]

The Union, stating at one point that "no evidence was presented indicating that this unit is currently made up of more parents and neighborhood residents than any other … bargaining unit…," acknowledges at another that there are members of the NHS unit "[who] would like to change schools so they can work closer to home or work in the same school as a grandchild…" [Brief, at 69, 68] It does appear, however, that any evidence on the point is anecdotal rather than substantive; and it is also true, as the Union asserts, that no similar language exists in the internal comparables' contracts. This factor riterion favors the Union.

[g] Hours of Work/School Closings

The Union's offer provides that: [a] the present schedule of hours for NHS workers shall remain in effect; [b] changes may be made on notice to the union, but workers can have their hours adjusted only "once per contract;" and [c] any change in scheduled hours grater than fifteen minutes "will be made through the negotiation process." The District proposes that: [a] the schedule of hours of NHS workers "for the duration of the school year," shall remain as scheduled "at the end of the third week of the school year;" [b] changes may be made, but workers' hours can be adjusted "only once per school year after the third week after the school year;" and [c] changes grater than fifteen minutes are to be made "through the posting process."

Aside from pointing out that the language proposed by the District is not found in other units' contracts, the Union's argument is that the language of its own offer tracks that found in the Monitors' unit (and the Food Service and Clerical Units), and that it is language "that has stood the test of time." [Brief, at 71] The District asserts that its proposal is based on the "inevitable changes that occur during the first three weeks of school." [Brief, at 72] It is based on Assistant Superintendent Wilson's testimony that:

> What we see at elementary schools .. .is that there is a great chance of changes in enrollment during the first three weeks of school, and especially with the influx of … individuals into this community, they do not register their children. So what we are looking at maybe on the first day of school is substantially fewer students than we have at the end of the third week of school. Our proposal would simply give us the ability to adjust those hours based upon an enrollment changes for the first three weeks of that period of flux. [Tr. 103-104]

Wilson went on to state that the Union's proposal "may cause some problems," and the District maintains that its offer "balances the need of the district to have flexibility in setting the employee's schedule for the whole year while still giving the employee the certainty of a specific schedule." [Tr. 104; Brief, at 72]

Again, while the Union's offer in this regard is in line with several of the internal comparables, that is a factor for consideration; it is not determinative. Here, too, the District's offer makes more sense—to the degree that renders this factor a "wash" at best.

[h] Longevity

The Union has proposed a schedule of longevity pay: $150 for years 8 through 11, $250 for years 12 through 15, and $350 for years 16 and above. The District has no longevity proposal.

The Union correctly notes that all of the internal comparables have some sort of longevity pay. The District opposes longevity—both "philosophically" (it maintains that employees should be "paid for the job they do, not reward[ed] … for additional years of experience"[21]) and substantively. On the latter point, it says that there is not excessive turnover in the NHS worker ranks, and that there is thus no need to reward long-term employees. And it says that longevity pay should be bargained by the parties, not imposed by an arbitrator. The appropriateness of that remark is highlighted by the

[21] Brief, at 67.

District's statement in its Reply Brief that it is not proposing longevity because "this is the [way] the district would like to move … to eliminate longevity from all of the other bargaining units." [Reply Brief, at 53] The internal comparables plainly favor the Union's proposal on this point, and I agree with the Union that this is a matter better suited to bargaining, rather than imposed in an initial-contract arbitration.

[i] Salary Schedule

The difference here is only in the third year of the contract. In that year, the Union proposes a wage of $11.17 per hour, and the District $11.12. Again, I agree with the parties that this is not a major issue. The difference appears to be *de minimis*—less than one-half of one percent. And while some of the internal comparables settled for a larger increase, the difference between the $11.17 proposed by the Union and the District's offer of $11.12 is not enough, in my judgment, to make any substantive difference in the outcome of this proceeding.

[j] Retroactivity

The District proposes that the "language provisions" of Agreement "be effective prospectively" from the date of ratification (or the date of any interest arbitration award).[22] The Union's offer includes a "retroactivity" provision that would preserve disciplinary grievances filed by two employees. This is not a matter of internal comparables, although the parties have addressed the issue under that heading.

The District says the Union's proposal is unreasonable because it has the effect of "retroactively applying the just cause provision in the contract" to events occurring during a period when no contract was in force (and when the employees did not have "just-cause" rights). It says:

[22] The "economic provisions" are to be generally retroactive to July 1, 2002.

> The Union's offer subjects the District to a standard of review that did not exist because no contract existed at the time the discharges occurred. Once a contract exists, then the parties are clear as to the new rules of the game. However, it is patently unfair for the Union to implement a just cause standard retroactively when no contract was in effect. [Brief, at 60]

The Union cites to several arbitral decisions appearing to accept the retroactive application of various contract provisions: ***City of Monroe***, Dec. No. 26942-A, February, 1992 (Miller); ***Shawano-Gresham School District***, Dec. No. 27726-A, September, 1994 (Miller); ***City of Tomah***, Dec. No. 31083-A, February, 2005 (Yaeger), and ***Town of Caledonia Fire Department***, Dec. No. 30252-A, July, 2002 (Bellman). The Union does not indicate for any case whether it involved an initial contract. The two cases I have been able to access, ***City of Tomah*** and ***Town of Caledonia***, apparently were not. The quotation from ***Shawano-Grisham School District*** indicates that, while the arbitrator felt the issue was important, he disregarded the District's allegations that the union's proposal that several contract provisions be retroactive "could result" in back payment for grievances on grounds that there was no evidence to support those allegations. And the unexplained quotation from ***City of Monroe*** is only that "whether a discharge is arbitrable … should be decided by an arbitrator."

I do not consider the citations persuasive. Certainly none of them addresses the point made by the District here: that where an *initial contract* contains provisions applying the newly-created just-cause and grievance provisions to actions of the employer prior to the existence of any contractual relationship, serious questions of fair play and due process arise. In the District's words: "The Union's offer is unreasonable because it subjects the district to a just cause standard that did not exist since no contract was in effect [at the time the challenged actions occurred]." [Reply Brief, at 54][23]

I have indicated that this really is not a matter of internal comparability. Considering the Union's proposal under the more general provisions of §

[23] The Union suggests that, at the time of the acts in question, the parties, who were then in the middle of negotiating the initial contract, had an understanding, or tentative agreement, about the grievances, but, as the District points out, no evidence was brought forth to substantiate any such agreement.

111.70(4)(cm)(7)j, *Stats.*, however, I consider the District's proposal to be the more reasonable.

[3] *Weight to Be Accorded the Internal Comparisons*

It is true, as the Union asserts, that when considering fringe benefits—most notably health insurance—internal comparables can, and sometimes do, play a significant role. *See*, for example, ***Rio Community School District (Educational Support Team)***, Dec. No. 30092-A, October 30, 2001 (Torosian); ***City of Sturgeon Bay (Police Department)***, Dec. No. 31080-A, July 18, 2005 (Eich). And the Union, stating that its offer more closely tracks the terms found in the other AFSCME units in the District—terms that, in the Union's words, have been "time-tested"—argues that the internal comparables should carry the day. The District points out, however, that where the internal units sought to be compared involve positions with differing duties and responsibilities—in other words, positions that are not fully comparable—they are considered, but not given controlling weight. *See*, for example, ***Boyceville school District***, Dec. No. 27773-A, February 21, 1994, where Arbitrator Baron noted that while "substantial arbitral precedent" supports the view that a determination of wages and employment conditions of a particular bargaining unit, "is best accomplished by a comparison of that unit to other municipal employees *performing similar services*," but In cases where the primary job responsibilities are not shared—where the "community of interest" between the units differed—arbitrators will "decline[] to place weight on such an internal comparison." [***Id.***, at 6-8. Emphasis added.] Arbitrator McAlpin reached a similar conclusion in ***New Richmond School District***, Dec. No. 30549-A, November 8, 2003), stating:

> The question before the Arbitrator is: Is a teacher, teacher assistant or secretary bargaining unit comparable to a custodial unit, particularly where there is no historical pattern of identical settlements? All in all, the Arbitrator finds that while the settlements for the other three bargaining units should b considered n the overall decision this case, this comparison in and of itself would not be determinative under the same reasoning that police and

> firefighter units are sufficiently different than other bargaining units within a city as to make comparisons difficult at best.

The District acknowledges that the Union's offer—particularly on the most hotly-contested issues—more closely tracks the internal settlements reached by the other AFSCME units within the district. It contends, however, that because the NHS workers are so "significantly different from the other employee groups," that a "different view" is warranted. [Reply Brief, at 4] It points out:

> Noon Hour Supervisors are part-tine employees working approximately two to three hours per day over the 177 day school year. Only 19 of 117 Noon Hour Supervisor employees, or 16 percent, are greater than 0.5 full-time equivalency. There are *no* full-time employees according to the District's data. Most employees work less than the minimum annual threshold necessary to qualify for state retirement benefits – 600 hours. Thus, the extreme part-time nature of Noon Hour Supervisor employees alone renders them not comparable to the other internal bargaining units.[24] [***Id***., at 4-5]

I conclude that the internal comparables, while favoring the Union, should not be considered controlling—not only because of the differences in many of the other units' job responsibilities, wages and hours, but also because of the significance of some of the public interest factors and various other criteria.

D. *The External Comparables*

[1] In general

The Union maintains that none of the District's external comparables (Except Manitowoc) have a separate unit of noon hour supervisors—that the tasks are done in several of the districts by teachers, teachers' aides and "non-represented employees." It

[24] The Union, arguing against use of the Monitors' unit as a comparable on another point (family-plan health insurance participation), also recognized that, while there are some similarities between the NHS workers and the Monitors' unit with respect to job duties, the latter "have a significantly higher wage than the Noon Hour Supervisors and work more hours on average." [Reply Brief, at 2]

asserts that these employees are just not comparable to the Green Bay NHS workers And it says that using Manitowoc alone results in too narrow a sample.

The formation of comparables, whether internal or external, is difficult in this case because of the uniqueness of the NHS positions. While they are similar in some degree to the hallway and playground monitors in the Green Bay District, there still are, as I have noted above, important differences—not only wages and hours, but also the ages and grades of the students the monitors and NHS employees work with.[25] As for the external comparables, the Union, as just indicated, agrees that Manitowoc is an appropriate benchmark. The District also refers to Kaukauna and one or two others. While, as indicated, in many of the other districts teachers double as noon hour supervisors, Manitowoc and Kaukauna use teachers' aides. The Union, accepting Manitowoc as a comparable, does not explain why Kaukauna is not equally appropriate, other than, perhaps, its argument that un-represented units are not appropriate for consideration—an argument I have rejected.

Placing principal reliance on two districts as external comparables is perhaps not the most desirable situation. Considering the uniqueness of the positions at issue, however, it would be difficult to expand that list. I agree with the Union, for example, that districts using teachers as lunchroom monitors do not present a close enough connection to the Green Bay NHS workers to warrant substantial reliance. There are differences between teacher aides and the NHS workers as well, but I am satisfied that the similarities are adequate for them to constitute an appropriate reference.[26] Beyond that, while two is less than a perfect pool, the Union has not persuaded me that this alone renders the proposed comparables unusable.

[2] *Comparisons*

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[25] Assistant Superintendent Wilson testified that the monitors work in secondary schools and are responsible for student behavior, parking lots, lunch rooms, and study halls—and, to a degree, building security. [Tr. 89] While there are many similarities, Wilson stated that the two positions are as different as secondary and elementary teachers—dealing with students of different ages, "who relate differently to adults" and thus require "different strategies." [Tr. 90]

[26] I note in this regard that the Green Bay NHS workers are also frequently assigned to assist teachers and front office staff in a variety of non-NHS tasks.

[a] Probation/Seniority/Job Description/Authorized Absence

Both Manitowoc and Kaukauna have one-year probationary terms (Manitowoc's is actually two six-month periods). The District's 180-work day proposal compares favorably.

Kaukauna defines seniority as commencing the first day of full-time work, and Manitowoc defines it based on the number of hours worked. The districts are split on "tie-break" provisions. As I have discussed above, the District's proposal—with its tie-breaking provision, is the more reasonable

The two districts are also split on language relating to job descriptions. Again, like the parties, I do not consider this a significant issue.

As to absences, Manitowoc allows three days per school year due to illness in the immediate family, while Kaukauna has no specific language in this regard; and the District's proposal compares favorably here as well. Neither, apparently, has an FMLA qualifier such as that proposed by the District in this case, however. All in all, the comparables are neutral with respect to this aspect of the District's proposal. As for holidays, Manitowoc has phased in six new holidays over a two-year period, and Kaukauna has seven holidays and I agree with the District that this favors its proposal. Finally, with respect to extended leaves, the Manitowoc contract is silent, while Kaukauna requires Board approval for leaves extending beyond thirty days. Here, too, the District's offer receives some slight support. Taking the three provisions together, I do not consider the Manitowoc and Kaukauna comparisons as favoring either party's proposals with respect to authorized absences.

[b] Insurance

The Union asserts that the District's ten-month premium-payment limitation would effectively reduce the NHS workers' dental insurance premium coverage to 84%. Manitowoc's dental insurance contributions amount to 92% for employees working seven or more hours a day, and they are prorated for those working more than 600 hours per year, but less than seven hours a day. Kaukauna provides 90% payment, limited to full-

time employees with eight years of service. The District appears to be correct that most Green Bay NHS workers, given their limited annual hours, would not be eligible for dental coverage in either Kaukauna or Manitowoc. I also agree that the District's dental insurance offer compares favorably with the two comparable districts.

As for health insurance, full-time Kaukauna employees are eligible for single insurance after three years of equivalent full-time service; and the district pays 90% for the single premium for ten months per year. In Manitowoc, full-time employees are covered at 95 percent, while part-time employees are prorated based on seven hours per day. To be eligible, however, part-time employees must work 600 hours per year. Since Kaukauna offers only single health insurance, the district's offer, which provides for family coverage is preferred. Additionally, Kaukauna pays premiums for only ten months a year. The District's offer is also superior to Manitowoc since it provides coverage for employees working less than 600 hours per year (the District's proposal has a 500 hour cutoff).[27]

[c] Job Posting//Longevity/ Work Hours

Neither Kaukauna nor Manitowoc use seniority in selecting candidates for vacant positions. The Union says that, as a result, this factor favors neither side. The District argues that because it is providing a seniority benefit not found in the comparables, this factor favors its offer. Marginally so, perhaps; but here, too, I do not consider this fact as bearing significantly on the issues before me.

The same is true for the Union's longevity proposal. Neither Kaukauna nor Manitowoc have longevity programs, and the District says that, as a result, the Union's proposal is not favored. The Union does not argue to the contrary.

As for hours of work, the Union says that Manitowoc's contract language makes any comparison difficult, and the District says that because neither Kaukauna nor

[27] Since none of the external comparables involve initial agreements, the phase-in components of the District's proposal, which I have discussed in connection with the internal comparables, are not discussed here.

Manitowoc have any "locked in" set hourly schedule, its offer should be considered the more reasonable. Here, too, there may be a marginal plus for the District in this category (in its provision for some limitations on the administration's authority to alter employee work hours), but I do not consider it determinative.

[d] Salary Schedule

The District asserts that its offer of $11.12 for the third contract year compares favorably to Manitowoc and Kaukauna. The Union says that Manitowoc's hourly rate is $11.82—considerably more than the District's offer here. The District points out, however, that the $11.82 wage rate kicks in Manitowoc only after thirteen years of experience, and that the starting rate is only $8.29—while its $11.12 rate is available after one year. Whatever the case, the District notes that Manitowoc's complicated thirteen-step salary scale makes comparisons to Green Bay's two-step plan "very difficult." Kaukauna, too, has a multi-step scale beginning at $8.35 and rising to $11.06—after four or more years.

I agree that the District's salary schedule offer compares favorably with the comparables, but, as I indicated above, the parties' offers are so close that little weight should be accorded this factor.

[e] Retroactivity

As discussed above, this is really not a "comparison" question: it is a matter of fairness and due process.

[D] *Cost of Living*

The District presented evidence tending to show that its offer compares favorably to the Consumer Price Index. Using total package costs, the District projects wage increases of 4.6%, 5.0% and 3.8% for the three-year period 2002-03, 2003-04 and 2004-05. [District Exhibit 7] For salary alone, the increases are 4.5%, 4.7% and 3.6%. [Id.] The CPI figures for 2002, 2003 and 2004 are 1.6%, 2.3% and 2.7% [District Exhibit 15]

Again, taking total package costs, the District says its offer will give workers an aggregate 13.4% increase over the period, as compared to the Union's 15.4%.

The Union argues that arbitral decisions—including one authored by the undersigned—have concluded that total package costing is not appropriate for a CPI analysis. *See*, ***Manitowoc School District***, Dec. No. 30473-A, May, 2003 (Eich); ***Whitewater School District***, Dec. No. 30740-A, September, 2004 (Yaeger). There is authority the other way. *See*, for example, ***School District of Sturgeon Bay***, Dec. No. 30884-B, December 24, 2004 (Greco).

Whatever the case, while the Union's offer is higher, whether measured in terms of total compensation, *or by wages alone*, the District's offer is comfortably above the CPI, and I believe that, consistent with both lines of arbitral authority, this is a factor that favors the District's offer.

[E] *Overall Compensation*

As indicated, sec. 111.70 (4)(cm)(7g)h, *Stats*., requires consideration of "the overall compensation presently received by the … employees…."—essentially wages and all benefits. The District says it bargains on a total-package basis and always has done so with its bargaining units, and offers arbitral authority for the proposition that total-package costs—including health insurance premiums—are valid considerations in interest arbitration. ***Marion School District***, Dec. No. 19418-A, July 29, 1983 (Vernon). *See*, also, ***Kenosha Service Employees***, Dec. No. 19882-A, May 13, 1983 (Yaffe).

The Union does not counter that authority; it simply says that because this is an initial contract, and the employees received no benefits prior to organization, there was no "overall compensation" in prior years. It offers no supporting authority, and its argument, in its entirety, is as follows:

> The District may argue that the only way to view this factor is through a total package approach and accuse the Union of taking a "wage rate only" approach. The irony of this argument is that the parties agreed on the first and second year wage rate and are $0.05/hour apart in the third year and these increases will still result

> in this unit being the lowest paid in the District. With an initial contract and a group that previously had received wages and nothing more, the overall compensation cirteri[on] is of little value. The test of the better final offer will be through the comparison to the comparable units. The arbitrator should not buy into the District's view that cast-forward costing is the only way to view this criterion regardless of all its flaws. Inaccurate, faulty data is of no value, regardless of how much the District argues for its consideration." (Reply Brief, at 36]

I have considered the Union's arguments with respect to the applicability and accuracy of the District's total-package costing data. And the arguments advanced by the Union under this heading do not change my earlier determinations.

As indicated, the District has offered total package increases of 4.6%, 5.0% and 3.8% over the three-year contract, and the Union has proposed total package increases of 8.4%, 3.4% and 3.6%. And the District says:

> [W]hen viewing the entire contact, the District has agreed to provide employees in the first contract with an enviable list of benefits including job protection features such as a standards clause, workday and work year definitions, full retirement, anti-subcontracting clause, suspension and discharge for cause, progressive disciplinary procedure, a grievance procedure that culminates in binding arbitration, dues deduction and fair share. In addition, the parties are in agreement to institute life insurance, dental insurance and health insurance. the Union does it at one time; the employer phases in health insurance over three years. [District Brief, at 38]

I agree with the district that these benefits have a cost, and that cost is reasonably captured by a total-package comparison which recognizes the inherent trade-off between salaries and benefits. Considering overall compensation as directed by the statute, I conclude that the District's offer best meets this criterion.

SUMMARY AND CONCLUSIONS

Starting with the issue the parties both considerer paramount in these proceedings—the implementation and phasing-in of health insurance and other benefits—the "greatest weight" criterion, while somewhat favoring the District's offer, is not one I believe should be determinative. I have concluded also that the "public interest" factor also favors the District's offer—and to me, this is the most significant of all. As discussed in detail above, because this is an initial contract with a unit whose only prior benefit was participation in the Wisconsin Retirement Fund, all of the negotiated benefits—holidays, health, dental and life insurance, and all the rest—would kick in almost immediately under the Union's offer; and the evidence shows that, while it may be able to find the money to pay the price, the cost to the District and the people it represents, may carry costs well beyond its cash value. The District had to move $6 million from its undesignated account into general operations just to meet expenses last year; and it predicts a $10 million shortfall next year. It is, as its evidence showed, experiencing annual expenditure increases of 5% and annual revenue increases of only 3%. Its enrollment is flat, at best.

In this setting, the result of the Union's proposal to begin full health and other insurance benefits immediately, and continued on a year-round basis for this group of less than-half-time employees who work ten months a year, would have the District paying at or in excess of double the employees' gross annual salaries in health insurance premium benefits alone. Given the economics of the situation, and considering the testimony of District administrators reflecting serious doubt as to their ability to continue their educational mission at existing levels in the future, I have concluded that the interests of the public favor the District's proposal to: [a] phase-in the insurance over a three-year period; and [b] pay its contribution to premiums only in the months in which the employees are scheduled to work.

It is true that the internal comparables favor the Union's position.[28] As indicated, however, I do not consider them to be controlling—or even of significant weight—due not only to the differences in the NHS workers' hours, wages and job responsibilities, but primarily in light of the public interest factors discussed throughout this decision. The external comparables—few, if any, of which provide anywhere near the type of benefits the parties have negotiated in this case—plainly favor the District. Indeed, in at least one of them—Manitowoc—the insurance and many other costs are being phased-in just as the District has proposed in this case.

In sum, I believe that the public interest criterion strongly favors the District's offer as the one most closely balancing the interests and needs of the employees with those of the District, its constituents and taxpayers.[29]

Interest arbitration, because of its all-or-nothing nature, is an inherently difficult process. In most cases, the competing offers differ in millimeters, not feet or yards; and choosing between them is often as much a matter of nuance as it is one of deductive reasoning. In this case, applying the statutory criteria to the parties' offers, tempered somewhat by what I believe to be an appropriate recognition that, because contract negotiation and bargaining is an ongoing,, developing process, the arbitrator considering an initial contract should not always direct that Rome be built in a single day, I have concluded that the District's Final Offer is preferred under the applicable statutory

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[28] I have mentioned that the internal comparables support the Union's offer, but only very narrowly. In terms of the individual components of the offers, the Union's proposal is favored in terms of the Probationary, Job Description and Job Posting issues, while the District's is favored with respect to Seniority, Absences, Hours and Retroactivity. The wage differences are, as I have indicated, a wash in terms of the closeness of the two proposals. As for insurance, as I have also indicated, the Union's offer would be preferred because of the uniqueness of the full-payment and immediate-benefit questions. As I have also indicated, however, that that factor cannot overcome the other factors favoring the District's offer—especially the public interest considerations.

Much the same may be said for the external comparables. The difference is, however, that they almost entirely favor the District's offer, and, as I have indicated, one of them, Manitowoc, has bargained similar insurance and holiday phase-ins with one of its AFSCME unions. So, while not in and of themselves controlling, when considered with the matters discussed under the public-interest criterion, they take on at least some persuasive value.

[29] I have also determined that the Cost of Living and Overall Compensation criteria favor the District's offer.

criteria—most notably, as I have stressed throughout this decision, those relating to the interests of the public.

AWARD

For the above reasons, and in consideration the applicable statutory criteria, together with the evidence, exhibits and arguments put forth by the parties, I conclude that the Final Offer of the District, Dated December 23, 2004, more closely adheres to the statutory criteria than that of the Union, and I therefore direct that that offer be incorporated into the parties' Collective Bargaining Agreement in resolution of this dispute.

Dated at Madison, Wisconsin, this 14th day of March, 2006

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William Eich, Arbitrator