EDWARD B. KRINSKY, ARBITRATOR

In the matter of the Petition of	:	
	:	
Nicolet Area Technical College Faculty Association:		
	:	
	:	Case 22
	:	No. 66437 INT/ARB-10823
To Initiate Arbitration		Decision No. 32064-A
Between Said Petitioner and	:	
	:	
Nicolet Area Technical College Board	:	

Appearances: Northern Tier UniServ-Central by Mr. Gene Degner, Executive Director, and Mr. Michael J. Burke, Negotiations Specialist, Wisconsin Education Association Council, for the Association

Michael, Best & Friedrich LLP by Mr. Robert W. Mulcahy, for the Board

By its Order of April 19, 2007 the Wisconsin Employment Relations Commission appointed Edward B. Krinsky as the arbitrator "to issue a final and binding award, pursuant to Sec. 111.70(4)(cm)6. and 7. of the Municipal Employment Relations Act," to resolve the impasse between the above-captioned parties "...by selecting either the total final offer of the [Association] or the total final offer of the [Board].

A hearing was held at Rhinelander, Wisconsin on May 30 and 31, 2007. A transcript of the proceeding was made. The parties had the opportunity to present evidence, testimony and arguments. The record was completed on July 23, 2007 with receipt by the arbitrator of the parties' reply briefs.

The parties' final offers for a 2006-2008 Agreement reflect disagreements in the areas of wages and insurance. They agree that salaries should increase 3.0% per cell on July 1, 2006 and 3.0% per cell on July 1, 2007

In addition, the Board's final offer includes the following language with respect to wages:

> In addition to the foregoing increases, as a *quid pro quo* for the change to Security Health plan, increase the appropriate schedules as follows:
>
> If the change in carrier occurs before July 1, 2007: on the effective date of the change in carrier to Security health plan increase the schedules in effect at the end of 2005-06 by an additional 1% and, on July 1, 2007, increase the schedules

> in effect at the end of 2006-07 by an additional 1%. The total schedule "lift" will be 4% in 2006-07 and 4% in 2007-08.
>
> If the change in carrier occurs on or after July 1, 2007, on the effective date of the change in carrier to Security Health plan increase the schedules in effect at the end of 2006-07 by an additional 1% and, on June 30, 2008, increase the schedules in effect at the end of 2006-07 by an additional 1%. The total schedule "lift" will be 5% in 2007-08.

With respect to health insurance, the Association's final offer includes:

> Effective July 1, 2006 (or as soon as the District implements such a change), the District will offer two WEA Insurance Trust plans - a-point-of-service plan (11) and an indemnity plan. Both plans will have a $5/$10/$25 drug card. The District will pay ninety-three percent (93%) of the premium of the lowest cost plan (currently the point of service plan). Bargaining unit employees electing to remain with the indemnity plan may do so by paying the difference in premium costs between that plan and 93% of the point of service plan.

The Board's final offer includes the following with respect to health insurance:

> Effective as soon as administratively feasible following the receipt of the arbitrator's award, the District shall provide a group hospital and surgical insurance policy from Security Health Plan (Point of Service and indemnity plans currently offered to other eligible employees of the College per the documents provided to the Association on January 17, 2007) to all eligible bargaining unit employees. The District will offer two plans - a point of service plan and an indemnity plan. Both plans will have a $0/$5/$20 three tier drug card. The District will pay ninety-three percent (93%) of the premium of the lowest cost plan (currently the point-of-service plan). Bargaining unit employees selecting to enroll in the indemnity plan may do so by paying the difference in premium costs between that plan and 93% of the point-in-service plan.

The Board's final offer includes the following language with respect to Long Term Disability:

> In the event an employee is on Long Term Disability (LTD), the employer agrees to pay the full health insurance

> premium for that employee as long as the employee remains on LTD, up to a maximum of 30 months.

The Board's final offer adds the following "new paragraph...as an additional *quid pro quo* for the change to Security health plan:"

> The College and the employees shall participate in a Union/Administration Committee on Health Insurance. The Committee shall meet as needed at the request of the Union or Administration to explore and discuss issues and options regarding health insurance. The Committee may utilize relevant information and reports from consultants, insurance carriers, and third party administrators subject to relevant privacy requirements under State and Federal Statutes.

The Board's final offer includes the following language with respect to Dental Insurance:

> Effective as soon as administratively feasible following the change to Security Health Plan, the dental plan shall be improved as follows: Increase annual maximum for each eligible participant from $,1000 to $ 1,5000, and increase the lifetime orthodontia maximum for each eligible participant from $1,500 to $2,000 as a *quid pro quo* for the change to Security Health plan.

The arbitrator is required by statute to decide in favor of one final offer or the other in its entirety. In making the decision, the arbitrator is required to consider the factors enumerated in the statute. Each of these will be discussed in turn:

Faction 7. is the "factor given greatest weight." The arbitrator is required to "give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer." The arbitrator is persuaded based on the evidence presented by the parties and by their arguments that the "factor given greatest weight" does not favor one final offer more than the other.

Factor 7g. is the "factor given greater weight." The arbitrator is required to "give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r." The arbitrator is persuaded based on the evidence presented by the parties and by their arguments that the "factor given greater weight" does not favor one final offer more than the other.

Several of the other statutory factors are either not in controversy or, after a study of the evidence and testimony presented, do not favor one final offer more than the other: (a). lawful authority of the...employer; (b). stipulations of the parties; (c) the interests and welfare of the public and the financial ability of the unit of government to meet the

costs of any proposed settlement.; (f) comparison of the wages, hours and conditions of employment...with [those] of other employees in private employment in the same community and in comparable communities; (h) the overall compensation received by the employees.

In factor d. the arbitrator must consider comparisons of wages, hours and conditions of employment with those of other employees performing similar services. The parties differ about which are the relevant comparisons. The Board views as the primary comparables, the 12 of the 16 Wisconsin Technical Colleges "which are less urban and smaller." The Board notes that Nicolet is the smallest of the colleges in terms of both FTE students and bargaining unit staff. It argues that Gateway, Madison, Milwaukee and Waukesha technical colleges have been excluded as comparisons by many interest arbitrators based on geography, demographics and economics, and that when arbitrations have taken place in those districts, "Nicolet has never been utilized as a primary comparable..."

It is undisputed that in 1990 there was an interest award by Arbitrator Zeidler involving these parties and he used all 16 technical colleges as comparisons. The Association urges this arbitrator to do so as well. The Board argues that the Zeidler decision "does not engage in any analysis of the demographics of these colleges necessary to determine comparability which compels slavish adherence to a comparable grouping in light of the demographics at Nicolet and the weight of arbitral authority." While the Board is correct that Zeidler did not do the sort of analysis which the Board now thinks is appropriate, there was no reason for him to do so. As Zeidler stated in his decision, "Both parties use as comparable districts the 16 Vocational, Technical and Adult Education Districts in the State of Wisconsin." At the time of the Zeidler award the parties had no dispute about which comparables to use.

Given the issues involved in this case, the external comparables are not determinative of the outcome of the case (as discussed below), and the results are not different if one set of comparables or the other is used. The arbitrator does not view it as necessary for him to do a careful analysis of the external comparables to determine whether the Zeidler comparables should be maintained or whether they should be replaced by the Employer's preferred comparables or some other grouping. The parties can save that debate for bargaining or a subsequent arbitration. For purposes of this decision, there is no compelling reason to alter the list of comparables which were used by Arbitrator Zeidler.

The parties' exhibits make clear that the total premium paid at Nicolet for both single and family premiums is significantly higher than the premiums paid at all of the other comparables, with the exception of Gateway and Waukesha. The Board is correct in arguing that under these circumstances it is reasonable for the Board to want to reduce its premium costs. With the change to SHP the premium costs will still be considerably greater than what is paid by the comparables, but not as much as would be the case if the WEAIT plans offered by the Association were implemented. The Board notes that had this change been made in 2006-07, for the faculty bargaining unit alone the

College would have saved $ 222,698, and the savings will be an estimated $ 165,576 in 2007-08 if the arbitrator selects the Board's final offer.

The Association notes that the modifications to the WEAIT plan included in its final offer will reduce the increase in premiums. It is undisputed, however, that the much smaller premium increase resulting from the change to SHP will far outweigh the savings from the modified WEAIT plan. The Board notes correctly, that the premium costs to employees under its final offer will be reduced accordingly, since employees pay 7% of the total premium.

The Association argues that the arbitrator should not place great weight on the external comparisons because the Board, in presenting them, has not demonstrated how the premium payments at other colleges "have been reflected on settlement patterns, past and present," and does not take account of any *quid pro quo* given in arriving at those settlements. The Association makes the same argument with reference to the Board's exhibits which show that many municipal employers and unions in central and northern Wisconsin have switched from WEAIT coverage to SHP.

While the Association is correct that the Board has not analyzed the past and present bargains at the comparable colleges and area municipalities in terms of the give and take which produced their bargains, the Association has not done so either. The arbitrator would expect the Association, as the proponent of that argument, to document the nature of tradeoffs which it viewed to be of particular significance and to argue why those tradeoffs should be distinguished from the ones proposed by the Board. It is sufficient for the arbitrator's analysis to look at the premium costs which exist at those colleges and municipalities, since it is the issue of premiums and increasing premium costs which underlies the Board's desire to reduce its premium costs.

The parties also presented data for the comparables showing increases in wages and other compensation. These matters are not in dispute and are not relevant in the current proceeding whose focus is on the issue of the insurance carrier. Neither party relies on these data in support of their arguments about whether there should be a change in the insurance carrier.

The Association notes that the parties' Agreement names WEAIT as the carrier, an arrangement which was the result of voluntary bargaining in their initial Agreement many years ago. The Association argues also that it is the case that in none of the comparables has interest arbitration been used to accomplish a change in insurance carrier. This is an argument which, in the arbitrator's view, might be considered further under discussion of factor (j) but it is not an argument which affects the weight to be given to the external comparables.

Tthe arbitrator has concluded that factor (d) favors the Board's final offer more than the Association's final offer.

With respect to factor (e) the arbitrator must consider the comparison of wages, hours and conditions of employment with those of "other employees generally in public employment in the same community and in comparable communities. The usual focus when considering this factor is consideration of what has been put in place for other of the Board's employees. At Nicolet, there are nonrepresented employees [32], a support staff bargaining unit [61] represented by the Wisconsin Education Association Council, and a maintenance bargaining unit [7] represented by the Wisconsin Education Association Council, and the faculty bargaining unit [80] which is involved in this proceeding. In November, 2006 the Board changed the health insurance carrier for its nonrepresented employees from WEAIT to Security Health Plan [SHP]. Also, the Board reached voluntary bargains with both the Support Staff and the Maintenance bargaining units in December, 2006 which bargains included a change from WEAIT to SHP.

The Board argues at length about the desirability of its having a single health insurance carrier for all of its employee groups, and it cites a large number of arbitration decisions in which arbitrators have supported that view. It asserts that "the college has always had one insurance plan, one insurance carrier and the same required premium contributions for all of the bargaining units and all of the non-represented employees."

The Association argues that under the circumstances of this case, the arbitrator should not give great or controlling weight to this factor. At the heart of the Association's argument is its objection to the Board's tactics in bargaining, and what it views as the Board's unwillingness to bargain a voluntary resolution of this issue. The parties have a history of reaching voluntary agreements, and they did so again in May, 2006 but the Board rejected the tentative agreement. In the Association's view, the Board should not be able to impose its will on the Association by insisting on an insurance change which subject was not even on the bargaining table when the tentative agreement was reached [this argument will be discussed at length in consideration of factor (j) below].

Factor (g) is the cost of living. The percentage change of the final offers of both parties exceed the change in the cost of living during the relevant period. Since, according to the costing figures provided by the Board, the cost of the Board's final offer is higher than the cost of the Association's offer (by approximately $52000 over the two years of the Agreement), the Association's final offer is closer to the change in the cost of living. Therefore, the cost of living factor favors the Association's final offer more than the Board's final offer.

Factor (j) is "such other factors...which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation...arbitration..." Both parties cite this factor in support of their final offers.

The Association argues that the Board is using the arbitration procedure in an attempt to achieve a change of insurance carrier where the Board did not bargain about such change, and instead rejected a bargained tentative agreement and then issued an ultimatum that there would have to be a change in the insurance carrier. The record

only partially bears out the Association's assertions. It is true that in May, 2006 the parties reached a tentative three year agreement. It is undisputed that in the past, the parties' tentative agreements were ratified first by the Board, and then by the Association. On May 25, 2006 the Board considered the tentative agreement. At that same meeting the Board was informed that WEAIT had given notice that the health insurance increase for the following year would be 18.4%. According to College President Lorbetske, the Board viewed these cost increases as unacceptable, and rejected the tentative agreement. The Association was so informed the following day.

Thereafter, there was no return to the bargaining table. The Association asserts that this was because the Board gave it an ultimatum that there had to be a change in the health insurance carrier if there were to be a new Agreement. The Board denies that there was such an ultimatum. There is nothing in the record to support the Association's claim that an ultimatum was given by the Board.

During Summer, 2006 the Board informed the Association that it wanted to investigate the possibility of obtaining another health insurance carrier. In September, 2006 the Board sought bids from other health insurance carriers, and received one from SHP. The Board contacted representatives of SHP and on several occasions requested that the Association review the information obtained by SHP. While the Association indicated that it would do so, in fact it did not. On October 2nd the Board requested that the Association's team "listen to the presentation on the [SHP]." It informed the Association that the "Board is making the following options available contingent upon the faculty membership electing to change health insurance providers by December 1, 2006. This change could be to the [SHP], or to a health insurance carrier that would respond to an RFP that could provide comparable level of benefits to our current carrier at costs equal to, or less than the SHP..." On October 13th the Association informed the Board that the Association's membership had voted to ratify the tentative agreement which had been reached in May, 2006. On November 1, 2006, the Association informed the Board that if the Board invited faculty members to meetings to review the SHP plan, it would file a grievance or a prohibited practice charge.On November 3rd the Association filed a petition to initiate interest arbitration.

This history does not evidence either an ultimatum, or a refusal by the Board to discuss or bargain with the Association about the health insurance carrier. There is nothing in the record to substantiate a claim by the Association that it was forced to go to arbitration, or that it was the intent of the Board to substitute arbitration for the bargaining process. This was evident as late as October 27, 2006 in a memo sent to the Association which included: "...what is the Faculty Association's response to the Board's and the Administration bargaining team's expressed interest that we return to the bargaining table soon and proceed toward a negotiated settlement?...while we are prepared to go to mediation and arbitration if necessary, we reiterate our strong preference to reach a voluntary and fair agreement. To this end, we again request the faculty members hear the SHP presentation and that we get back to the bargaining and negotiating table soon..."

It is the case, as the Association asserts, that up to the time that arbitration was initiated, the Board had not offered in bargaining to change the health insurance carrier. It is also the case, however, that bargaining may continue after an arbitration petition has been initiated, as the parties may continue to exchange offers until final offers are certified by a representative of the Wisconsin Employment Relations Commission. The final offers were not certified until April, 2007. As noted above, in November and December 2006, SHP was implemented for the nonrepresented employees, and voluntary agreements were reached with the other two bargaining units incorporating SHP as the new health insurance carrier.

Through May, 2006 the Association faced a very different situation than it did at the time it initiated arbitration, but what occurred after May, 2006 was within the rules of the game. (It should be noted that factor (i) requires the arbitrator to give weight to changes during the pendency of the arbitration, which would include the developments in November and December, 2006 described above). The result was that by the time final offers were certified by the WERC, there was a clear pattern of internal comparables favoring a change of carrier to SHP. The Association told the Board that if it wanted to change to a different insurance carrier, it should bring that issue to the next round of bargaining, and that the issue didn't belong in the current bargaining. The Board did not agree to defer the issue to the next round of bargaining and it was not obligated to do so.

It is the arbitrator's view that in light of the chronology described above, it was appropriate for the Board to raise the issue in the current bargaining, particularly after learning that the current carrier would increase the premiums by 18.4%. It is understandable that the Association was opposed to continuing to bargain after having the Board reject a tentative agreement, which tentative agreement was viewed by the Association as having met the Board's stated objectives. By not being willing to bargain further and take into account the new issue, however, the Association took its chances on prevailing in interest arbitration. However much the Association objected to the Board's tactics, the Board was within its rights to introduce the insurance carrier change into its final offer(s) and additional bargaining could have taken place, but it did not.

The arbitrator has concluded that the internal comparbility factor (factor e) clearly favors the Board's final offer.

The Association argues that the Board did not offer an adequate *quid pro quo* for a change in the health insurance carrier. It has at least two bases for this argument. First, it argues, the Board gave a large *quid pro quo* to the two other bargaining units, in the form of greatly increased post-retirement benefits, in order to get agreement on SHP. Second, it argues, in their initial Agreement in 1987 the parties agreed to name WEAIT as the health insurance carrier, and in exchange the Association agreed that employees would pay 7% of the premium, and the Association argues that the Board should not be able to simply change the carrier without providing a meaningful *quid pro quo.*

The Board denies that it gave the post-retirement benefits to the other units as a *quid pro quo* for SHP. The Board argues also that a significant *quid pro quo* is not necessary in a situation such as the current one, where all of its other employee groups already have SHP. Moreover, the Board argues, it has offered the Association a *quid pro quo* in the form of " a substantial wage increase and improved dental benefits during the terms of this contract." It argues that even though no offer of a *quid pro quo* was necessary, "... in the interest of good employee relations the College has offered an additional one percent in recognition of the savings to the College in year one of such a transition as well as an additional one percent in the second year of the agreement." The Board notes also that at no time after the Board rejected the tentative agreement in May, 2006 until final offers were certified in April, 2007 did the Association engage in dialogue and identify what it might have viewed as a sufficient *quid pro quo* for a change in the insurance carrier.

With respect to the improved post-retirement benefits, the Board denies that these were given as a *quid pro quo* and it presented testimony that these benefits were offered early in the bargaining, prior to any agreement about SHP. The Board argues that it has always maintained consistent post retirement health benefits for employees. The improvement in those benefits was given to the faculty as part of the 2003 Agreement, but were not included in the agreements which had been reached with the two other bargaining units. Thus, the Board argues, in the 2006 bargaining it gave these improvements to the other bargaining units in order to maintain consistency by giving them the same benefits which had been given previously to the faculty unit.

As previously noted, the Association argues that the other bargaining units were given increased retirement benefits as a *quid pro quo* for the change in insurance carrier, and it argues further that in the present round of bargaining the faculty was not given anything akin to that as incentive to change the insurance carrier. The Association notes also that when the faculty received the increased post retirement benefits in 2003, it was done in exchange for a considerable *quid pro quo.* That being so, it is difficult for the Association to believe that in 2006 the Board would simply give these benefits, which have considerable cost, to the other bargaining units without asking for a *quid pro quo* as the Board maintains is the case. Even though there is logic to the Association's arguments, the testimony of witnesses presented by both parties made clear that the improved post retirement benefits given to the two other bargaining units were not offered by the Board as a *quid pro quo* for the change to SHP.

With respect to the Association's arguments that in its initial bargain, when WEAIT was instituted as the carrier, there was a *quid pro quo* of a 7% employee contribution, the arbitrator cannot evaluate the accuracy of that assertion. The Agreement did contain WEAIT and a 7% employee contribution, but there was no testimony or documentation about the initial bargain which shed light on the discussions between the bargainers, or whether anything was offered specifically as a *quid pro quo*.

The Association argues also that in the present dispute there was no compelling reason for the Board to insist on changing the health insurance carrier, and that such change will not resolve the Board's financial problems. In this regard, the Association notes that the Board has exacerbated its financial problems by extending to the other bargaining units the improved retiree health benefits.

The Association is correct that the change to SHP will not solve the Board's larger financial problems. However, the Board does not need to show additional compelling reasons for including the change in its final offer. Receiving notice from WEAIT of a premium increase in excess of 18% was sufficient reason for the Board to be concerned about increasing health insurance costs, and to then try to do something about it. Prior to making its final offer, the Board persuaded the two other bargaining units, as part of voluntarily bargained settlements, to switch to SHP. Having done that, the Board then had additional reasons to include the change to SHP in its final offer, in order to attempt to achieve consistency of health insurance benefits among all of its employees.
The Association argues in addition that the Board is seeking to impose a change of insurance which is not substantially equal to or better than the WEAIT insurance which it will replace. The Board disagrees, arguing that "... the benefits remain substantially the same and are better in several areas while at the same time the cost to the employee and the employer goes down."

There are two aspects of this argument in the record which are worth noting. First is that both of the other bargaining units are affiliated with the Wisconsin Education Association Council, and both agreed to change from WEAIT to SHP. In the arbitrator's experience, there would be very little likelihood that this development would have occurred if WEAC representatives had viewed the SHP insurance as significantly less desirable than the WEAIT insurance.

Second, the Association offered testimony from an employee of WEAIT, and the Board offered testimony from an employee of SHP. Neither party, in exhibits or in testimony, offered a side by side comparison of the benefits of the two plans. The Association did so in its brief, and the Board made counter arguments in its reply brief, but there was no opportunity to question the expert witnesses about plan comparisons for the items which were raised for the first time in the briefs and reply briefs. Association witness Kuelz testified about approximately five primary differences which he thought existed between the WEAIT plan and SHP based on his reading of the SHP plan. Board witness Preuss addressed those differences in his testimony. Based on the parties' presentations, it is very difficult for the arbitrator to analyze with confidence the significance of all of the differences in the plans, but he is not persuaded that the plan differences are such as to be a decisive factor in the outcome of this case.

The parties' Agreement does not address the issue of how, or under what circumstances, the health insurance carrier may be changed. The interest arbitration statute also does not address what the standard should or must be. Given the absence of such standards, the arbitrator views the Board's proposed change to SHP as one which the Board should not be precluded from making. The SHP plan appears to be

substantially the same as WEAIT in most respects while perhaps being better in some respects and not as good in other respects.

The arbitrator has concluded that factor (j) favors the Board's final offer more than it does the Association's offer.

As previously noted, the statute requires the arbitrator to select one final offer in its entirety.

Based on the above facts and discussion, the arbitrator hereby makes the following AWARD:

The Board's final offer is selected.

Dated this 7th day of August [2007] at Madison, Wisconsin

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Edward B. Krinsky
Arbitrator