BEFORE THE ARBITRATOR

In the Matter of the Final and Binding Interest Arbitration of a Dispute Between

NEENAH JOINT SCHOOL DISTRICT

and

NEENAH EDUCATIONAL SUPPORT STAFF ASSOCIATION

Case 15
No. 68104
INT/ARB-11199
Decision No. 32643-A

Arbitrator: James W. Engmann

Appearances:

Mr. James R. Macy, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54903-1278, appearing on behalf of the Neenah Joint School District.

Ms. Terri Trimbell, Executive Director, WEAC-Fox Valley, 921 W. Association Dr, Appleton, WI 54914, and Mr. Greg Spring, Negotiations Specialist, Wisconsin Education Association Council, 33 Nob Hill Road, Madison, WI 53708-8003, appearing on behalf of the Neenah Educational Support Staff Association.

ARBITRATION AWARD

Neenah Joint School District (District or Employer) is a municipal employer which maintains its offices at 410 Commercial Street, Neenah, Wisconsin. The Neenah Educational Support Staff Association (Association or NESPA) is a labor organization which maintains its offices at 921 West Association Drive, Appleton, Wisconsin. At all times material herein, the Association has been the exclusive collective bargaining representative for all regular full-time and regular part-time classified employees of the District, excluding supervisory, managerial, confidential, craft and professional employees.

The District and the Association exchanged their initial proposals to be included in a collective bargaining agreement. On June 23, 2008, the District filed the petition requesting the Wisconsin Employment Relations Commission (Commission or WERC) to initiate arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act (MERA). On September 15, 2008, a member of the Commission's staff conducted an investigation which found that the parties were deadlocked in their negotiations. On or before January 7, 2009, the parties submitted their final offers, after which the Investigator notified the parties that the investigation was closed. The Investigator also advised the Commission that the parties remained at impasse. On January 12, 2009, the Commission certified that the conditions precedent to the initiation of arbitration as required by statute

had been met and ordered the parties to select an arbitrator from a panel of arbitrators submitted by the Commission.

The parties selected the undersigned to serve as the impartial arbitrator in this matter and advised the Commission of its selection. On March 12, 2009, the Commission appointed the undersigned as arbitrator to issue a final and binding award, pursuant to sec. 111.70(4)(cm)6. and 7. of MERA, to resolve said impasse by selecting either the total final offer of the District or the total final offer of the Association. Hearing was held on May 12, 2009, in Neenah, WI, at which time the parties were afforded the opportunity to present evidence and make arguments as they wished. The hearing was transcribed, a copy of which was received on or about June 1, 2008. The parties filed briefs and reply briefs, the last of which was received on July 27, 2009, after which the record was closed. Full consideration has been given to all of the testimony, exhibits and arguments of the parties in issuing this Award.

FINAL OFFERS

DISTRICT

Note: All provisions of the previous Agreement shall continue in the successor Agreement except for any tentative agreements included[1] and the Final Offer below:

1. ARTICLE X — SHIFT DIFFERENTIAL

Whenever 50% or more of an employee's scheduled work time fall between 3:00 p.m. and 11:00 p.m., that employee will receive a shift differential of ~~$45~~ $.50 hour for those hours worked after 3:00 p.m. Whenever 50% or more of an employee's scheduled work time falls between 11:00 p.m. and 7:00 a.m., that employee will receive a shift differential of ~~$,55~~ $.60 per hour for those hours worked after 11:00 p.m.

2. ARTICLE XVII — ABSENCES/LEAVES

G. 5. Vacations will be approved in blocks of less than five (5) days. Less than full day vacation (i.e. half-day, ~~quarter-clay~~) ~~will generally not~~ may be approved at the discretion of the employee's supervisor.

3. ARTICLE XIX - INSURANCE AND OTHER FRINGE BENEFITS

A. The School District shall not provide insurance benefits outlined in

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[1] In actuality, the District includes the Tentative Agreements in its Final Offer.

paragraph B for those employed less than 600 hours.

Effective 1/1/09, NESPA employees working less than 20 hours per week will not be eligible for insurance benefits outlined in paragraph B.

Effective 1/1/09, NESPA employees working 20 hours per week or more but less than full time as defined by Article XXIII(A) Definitions of Employment will be eligible to receive insurance benefits on a prorated basis compared to full time.

B. The School District shall provide insurance benefits for those employed 600 hours or more as outlined below.

Effective 1/1/09, NESPA employees working less than 20 hours per week will not be eligible for insurance benefits outlined in paragraph B.

Effective 1/1/09, NESPA employees working 20 hours per week or more but less than full time as defined by Article XXIII(A) Definitions of Employment will be eligible to receive insurance benefits on a prorated basis compared to full time.

1. Group Life Insurance

   The School District shall pay 100% of the premium for group life insurance (2 times annual salary).

2. Hospital and Medical Insurance

   a. All classified personnel who wish to become members of the Group Insurance Plan must enroll at the time of employment, or sign a waiver.

   b. ~~Effective October 1, 2002~~ the Board will ~~switch to~~ offer a fully funded dual Choice-Point of Service health plan. The plan provides major medical, hospitalization, and prescription drug coverage. All employees covered under the district health sponsored health care program ~~as of September 20, 2002~~ shall be eligible to enroll in the Dual Choice health plan.

   c. The School District shall pay 100% of the family premium, and 100% of the single premium for medical insurance (including major medical and prescription

drug).

Effective 7/1/09, the School District will pay 95% of the family premium and 95% of the single premium for medical insurance (Including major medical and prescription drug) for full time employees as defined by Article XXIII(A) Definitions of Employment.

(Although not to become contract language, the plan will change as follows: Effective 7/1/2009, the prescription drug card will change from a $5/$15 deductible to a $10/$25/$50 deductible per prescription and the emergency room co-pay shall increase from $50 to $100.)

NOTE: Refer to employee benefit booklet for details of coverage. The employee benefit booklet reflects the coverage and is incorporated by reference into this agreement.

d. For employees hired after July 1, 2005, the school district will pay a prorated share of the monthly health insurance premiums for those employees who are employed for more than 600 hours per year and working at least four (4) hours but less than seven and a half (7.5) hours per day.

Effective 1/1/09, employees working 20 hours per week or more but less than full time as defined by Article XXIII(A) Definitions of Employment will be eligible to receive insurance benefits on a prorated basis compared to full time.

3. Dental Insurance

a. A dental insurance plan is available and the School District shall pay 100% of the family premium, and 100% of the single premium for all full-time 12–month employees. Effective July 1, 2009 the School District will pay 95% of the family premium, and 95% of the single premium for dental insurance for full-time 12 month employees as defined by Article XXIII(A) Definitions of Employment.

~~Effective July 1, 2005,~~ The plan will be the equivalent of

the 2004-2005 Blue Cross/Blue Shield Dental Plan, but will be administered by the Delta Dental. The Delta Plan includes a one thousand five hundred ($1,500) dollar individual annual maximum and a one thousand five hundred ($1,500) dollar individual lifetime maximum for orthodontics.

b. The School District will pay a prorated share of the premium for those employed 600 hours or more but less than twelve months.

Effective 1/1/09, employees working 20 hours per week or more but less than full time as defined by Article XXIII(A) Definitions of Employment will be eligible to receive insurance benefits on a prorated basis compared to full time.

The employee's portion of the premium, if any, shall be prorated and deducted over the employee's entire pay year.

c. For employees hired after July 1, 2005, the school district will pay a prorated share of the monthly dental insurance premiums for those employees who are employed for more than 600 hours per year and working at least four (4) hours, but less than seven and a half (7.5) hours per day.

Effective 1/1/09, employees working 20 hours per week or more but less than full time as defined by Article XXIII(A) Definitions of Employment will be eligible to receive insurance benefits on a prorated basis compared to full time.

4. **ARTICLE XXVI - DURATION**

The Agreement shall be effective ~~on the date of ratification by both parties~~ July 1, 2008 and shall remain in full force and effect until and including June 30, ~~2005~~ 2010.

APPENDIX A - Wages

2.75% per cell effective July 1, 2008

3.00% per cell effective July 1, 2009

Memorandum of Understandings

The memorandum of understanding regarding the reclass procedure will remain expired.

The memorandum of understanding regarding food service program will remain expired.

The memorandum of understanding regarding retirement will continue from 7/1/08 to 6/30/10 as written, but by adding that the agreement shall only apply to those employees hired prior to 6/30/08.

MEMORANDUM OF UNDERSTANDING

Regarding the Negotiations for the Agreement Between the
Neenah joint School District Board of Education
And the
Neenah Educational Support Personnel Association
For the Period July 1, ~~2005~~ 2008 - June 30, ~~2008~~ 2010

This Memorandum of Understanding is entered into between the Neenah Joint School District, hereinafter "District", and the Neenah Educational Support Personnel Association, hereinafter "NESPA", and in exchange for mutual consideration is agreed to as follows:

Retirement

This Agreement shall only apply to those employees hired prior to June 30, 2008. Employees with at least 25 years of service in the district shall be eligible to retire at age 59.

Effective July 1, 2005, employees who qualify for retirement will receive a lump sum payment of $300 per year of service, to a one time maximum of $7,500, to be paid out at the time of retirement.

Employees who qualify for retirement shall be eligible to continue participation in the group health/dental/drug program until they reach eligibility for Medicare.

Effective July 1, 2005, the Board shall pay the premiums based upon the value of 95% of a Single Plan for health/dental/drug and an additional $100.00/month toward

the cost of the employee elects a Family Plan.

[Remove "Classification" provision of MOU – Agreement between the parties].

ASSOCIATION

Note: Continue the terms of the 2005-2008 agreement except as modified by the Tentative Agreements and the following:

1. ARTICLE VIII – NEW POSITIONS, VACANCIES

A. Definition

A vacancy shall be defined as:

1. A job opening not previously existing in the list of Job Classifications shown in Appendix A.

2. A job opening created by termination, promotion or transfer of existing personnel. Prior to the time when the job does not continues to exist as a position in the District, qualified bargaining unit members may apply for the position when it is posted. Thereafter, if the contract terms permit, the remaining bargaining unit vacant position(s) may be contracted out when there is no qualified bargaining unit member who posts for the vacancy.

   Example: A full time cook quits who worked 7 hours a day. A 6 hour per day cook is permitted to post for the 7 hour a day position. If no other qualified employee posts for the then vacant 6 hour per day position, then the District may either fill the 6 hour position with a new hire, or if permitted by other terms of this contract, contract out the work.

2. ARTICLE XIX – INSURANCE AND OTHER FRINGE BENEFITS

A. The School District shall not provide insurance benefits outlined in paragraph B for those employed less than 600 hours per year.

B. The School District shall provide insurance benefits for those employed 600 hours or more as outlined below.

1. Group Life Insurance

The School District shall pay 100% of the premium for group life insurance (2 times annual salary).

2. Hospital and Medical Insurance

a. All classified personnel who wish to become members of the Group Insurance Plan must enroll at the time of employment, or sign a waiver.

b. ~~Effective October 1, 2002~~ the Board School District will ~~switch to~~ offer a fully funded dual Choice-Point of Service health plan. The plan provides major medical, hospitalization, and prescription drug coverage. All employees covered under the district health sponsored health care program ~~as of September 20, 2002~~ shall be eligible to enroll in the Dual Choice health plan.

c. Effective July 1, 2009, ~~T~~the School District shall pay ~~100%~~ 95% of the family premium and ~~100%~~ 95% of the single premium for medical insurance (including major medical and prescription drug).

The prescription drug card has a $5/$15/$30 deductible per prescription. However, the District will discontinue the past practice of reimbursing employees for the difference between the Tier 3 and the Tier 2 cost ($15) incurred on July 1, 2009.

NOTE: Refer to employee benefit booklet for details of coverage. The employee benefit booklet reflects the coverage and is incorporated by reference into this agreement.

B. For employees hired after July 1, 2005, the school district will pay a prorated share of the monthly health insurance premiums for those employees who are employed for more than 600 hours per year and working at least four (4) hours but less than seven and a half (7.5) hours per day.

3. Dental Insurance

1. A dental insurance plan is available and the School District shall pay 100% of the family premium and 100% of the single premium for all 12–month employees. ~~Effective July 1, 2005,~~ The plan will be the equivalent of the 2004-2005 Blue Cross/Blue Shield Dental Plan, but will be administered by the Delta Dental. The Delta Plan includes a one thousand five hundred ($1,500) dollar individual annual maximum and a one thousand five hundred ($1,500) dollar individual lifetime maximum for orthodontics.

2. The School District will pay a prorated share of the premium for those employed 600 hours or more but less than twelve months.

   The employee's portion of the premium, if any, shall be prorated and deducted over the employee's entire pay year.

3. For employees hired after July 1, 2005, the school district will pay a prorated share of the monthly dental insurance premiums for those employees who are employed for more than 600 hours per year and working at least four (4) hours, but less than seven and a half (7.5) hours per day.

3. ARTICLE XX – RETIREMENT

F. Severance Benefit

Employees with at least 25 years of service in the district shall be eligible to retire at age 59.

Effective July 1, 2005, Employees who qualify for retirement will receive a lump sum ~~payment~~ non-elective TSA payment paid to the WEA TSA (unless the employee directs the payment to another approved vendor) in the amount of $300 per year of service, to a one time maximum of $7,500, to be paid out at the time of retirementt.

Employees who qualify for retirement shall be eligible to continue participation in the group health/dental/drug program until they reach eligibility for Medicare.

~~Effective July 1, 2005,~~ The Board shall pay the premiums based upon the value of 95% of a Single Plan for health/dental/drug and an additional $100.00/month toward the cost if the employee elects a Family Plan.

4. APPENDIX A(1) AND A(2)

2008-09	Increase all cells by 2.75%
2009-10	Increase all cells by 3.00%

TENTATIVE AGREEMENT STIPULATIONS

1. ARTICLE X - SHIFT DIFFERENTIAL

Whenever 50% or more of an employee's scheduled work time falls between 3:00 p.m. and 11:00 p.m., that employee will receive a shift differential of ~~$.45~~ $.50 hour for those hours worked after 3:00 p.m. Whenever 50% or more of an employee's scheduled work time falls between 11:00 p.m. and 7:00 a.m., that employee will receive a shift differential of ~~$.55~~ $.60 per hour for those hours worked after 11:00 p.m.

2. ARTICLE XVII - ABSENCES/LEAVES

G. Vacation

5. Vacations will be approved in blocks of less than five (5) days. Less than full-day vacations (i.e. half-day, ~~quarter-day) will generally not~~ may be approved at the discretion of the employee's supervisor.

3. ARTICLE XXVI – DURATION

The Agreement shall be effective ~~on the date of ratification by both parties~~ July 1, 2008 and shall remain in full force and effect until and including June 30, ~~2005~~ 2010.

Delete Classification language.[2]

~~MEMORANDUM OF UNDERSTANDING~~[3]

~~Regarding the Negotiations for the Agreement Between~~
~~the Neenah Joint School District Board of Education~~
~~and the Neenah Educational Support Personnel Association.~~
~~For the Period July 1, 2008 – June 30, 2010~~

~~Food Service Program~~

~~In the event that the Neenah Joint School District Board of Education elects to outsource the Food Service Program.~~

~~1) Neenah Education Support Personnel Association Food Service Employees employed by the Neenah Joint School District as of May 16, 2006 will continue to work as food service employees of the Neenah Joint School District, receiving the same wages, benefits and hours of employment.~~

~~2) Food Service Employee Evaluations will be conducted by a management team which will include a Neenah Joint School District administrator.~~

~~3) Postings for any vacancies within the Food Service Program that existed as of May 16, 2006, will be posted internally within the Neenah Joint School District. Only interest from employees employed by the Neenah Joint School District as a Food Service Employee on the date of May 16, 2006 will be considered. If there is no internal interest in the posted vacancy, the position will no longer be considered a Neenah Joint School District position, but a~~

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[2] The Association included the language of the Classification section that the parties have agreed to delete in its final offer with the appropriate strikeout showing the deletion. As the Classification section takes two pages and as the parties agree this language should be struck from the contract and as nobody wants to read two pages of language with lines through it, I just note the deletion.

[3] The District asserts that this clause expired and the District chose not to renew it and, therefore, it is not a part of its final offer. The Association deletes the Memorandum and adds language to the contract it considers comparable. Even though both parties agree that the Memorandum is deleted, though for different reasons, I choose to include it here so comparisons can be made with the language that the Association seeks to add that it says is comparable. See Page 7.

~~position with the out sourced Food Service Company.~~

~~4) The out sourced food vendor may increase the hours for any position. Both parties recognize that the Neenah Joint School District will not be adding any additional hours to any position beyond May 16, 2006. Any additional hours added to a position after May 16, 2006 will be the result of hours provided by the out sourced food vendor.~~

ARBITRAL CRITERIA

Section 111.70(4)(cm), MERA, states in part:

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

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

7r. 'Other factors considered.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

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

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

wages, hours and conditions of employment of other employees performing similar services.

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

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

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

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

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

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

POSITIONS OF THE PARTIES

District on Brief

The District argues that the arbitrator is required to look to the statutory criteria in analyzing the evidence and ultimately make a decision as to which offer is the more reasonable of the two; that since 1993, the District has been subject to revenue limits legislation under section 121.90, Wis. Stats., which remain in force as of the date of this arbitration hearing;

that the bulk of the District's income stems from the tax levy and state aids, both of which are dependent on student enrollment; and that the District's enrollment has declined since the 1998-99 school year.

The District also argues that its fund balance does not represent available cash; that the District's financial shortcomings have forced it to spend down its fund balance; that under the greatest weight criteria, the arbitrator is to consider the District's Other Post Employment Benefit (OPEB) liabilities; that the District's post-employment medical, drug and dental benefit liabilities and stipend costs increased 8.24 percent from 2007 to 2009; that the District's 2009 present value OPEB liabilities exceed the District's on year $85 million budget; that this clearly contradicts the Association's assertion that the District is in "excellent financial shape;" and that the District pays not only a very competitive salary but even more for benefits.

In addition, the District's offer is more than fair, providing employees with a generous wage offer while continuing the exceptional benefits of health and dental coverage; that, in return, the District's offer requires full-time employees to pay five percent toward the cost of health insurance premiums effective January 1, 2009, and dental premiums effective July 1, 2009, and part-time employees working 20 hours or more per week to pay a pro-rata share of the premium effective January 1, 2009; that under the Association's offer, the District will be forced to pay an additional $570 or $967 per employee to the insurance companies for plan design changes that are reflective of the current market; and that this is not in the taxpayers' interest and welfare.

In terms of outsourcing the food service program, the District argues that the Association's offer is completely unreasonable and without support; that the Memorandum of Understanding between the parties expired on June 30, 2008; that the Association's proposal significantly changes the status quo right of the District to contract out for services; that the Association offers no quid pro quo for this change; and that the District's offer of early retirement benefits grandfathers current staff.

Finally, the District argues that its offer emerges as clearly the most reasonable when measured against the statutory criteria; and that the arbitrator should select its offer.

Association on Brief

The Association argues that the economic conditions of the District and Winnebago County clearly establish that the District has the ability to meet the costs of the Association's proposed settlement; that the "Greatest Weight" and the "Greater Weight" factors no longer exist; and that, even if they did, neither the "Greatest Weight" nor the "Greater Weight" criterium is determinative in selecting the most reasonable final offer.

The Association also argues that its final offer to maintain the intent of the Food Service Memorandum of Understanding (MOU) and the District's past practice for posting vacancies prior to subcontracting is reasonable; that the Food Service MOU is a part of the Agreement; that it was not intended to expire; that the District has established a long-time practice of posting vacancies prior to subcontracting; that the Association's offer for posting vacancies is reasonable; and that it does not prohibit the District from subcontracting.

In addition, the Association argues that its insurance final offer is to be preferred over the District's final offer; that the Association's health insurance proposal includes concessions both in the past and present; that the Association's health insurance concessions are consistent with the external and internal comparables; that the District's final offer requiring additional health and dental insurance concessions is excessive; that the District's final offer does not provide a sufficient *quid pro quo* to justify requiring bargaining unit members to pay more than the Association's proposal for insurance benefits; that the District's final offer is extreme by proposing to increase the emergency room co-pay from $50 to $100; that this is not supported by the comparables; that bargaining unit employees working less than 12 months already contribute to their dental premiums; that the District's offer would prorate those employees so they pay even more; that the District's final offer imposes a substantial financial burden on the part-time employees by establishing proration of health and dental premiums effective January 1, 2009; that the Employer's health and dental premiums are among the lowest in the bargaining units in the comparable group; and that the Association's proposal on health and dental insurance benefits is more reasonable than the District's proposal.

Continuing, the Association argues that its final offer regarding the post retirement benefit preserves the status quo with one minor language revision for the distribution of funds to a tax-sheltered annuity; that the Association's proposal to maintain a post retirement benefit is supported by the comparables and by bargaining history; and that its proposal to maintain the post-retirement benefit has the least impact on the District' Other Post Retirement Benefits (OPEB) liability.

In conclusion, the Association argues than an examination of each party's offer in light of the pertinent facts, statutory criteria, and analysis of the evidence in the records supports the Association's final offer; that the Association's final offer is simply more rational than the District's; and that the arbitrator should select its final offer.

District on Reply Brief

The District argues that the "Greatest Weight" and "Greater Weight" criteria are still relevant; that the Association's offer expands posting rights; that it diminishes the District's management right to post at a most critical economic time; that its offer on insurance

concessions is reasonable in the light of the District's current and future obligations; that its offer on insurance concessions is reasonable in light of the state of the economy; that the District's prescription drug co-pay proposal is reasonable; that the District's health and dental insurance proposal is not excessive; that the emergency room co-pay will generate cost awareness; that employees in surrounding districts pay for insurance; that the evidence supports the District's proposal requiring employees to contribute toward the cost of health insurance premiums; that the Association's date with respect to comparable insurance premiums is portrayed in a limited light; that the District's final offer is the more reasonable of the two offers; and that the District's offer emerges as clearly the most reasonable when measured against the statutory criteria.

Association on Reply Brief

The Association argues that the District's offer is an overreach for this bargain; that the District has not provided a sufficient *quid pro quo*; that the District has the ability to pay; that the interests and welfare of the public are better served by the Association's offer; that the Association's Health and Dental Insurance final offer is more reasonable than the District's offer; that the Association's proposal to maintain the intent of the recently bargained food service Memorandum of Understanding is more reasonable than the District's final offer; that the Association's proposal to maintain the retirement Memorandum of Understanding is more reasonable than the District's offer; and that the District unreasonably goes too far in its demand for concessions from the bargaining unit.

DISCUSSION

Introduction

This is one of those cases that cause this arbitrator to question his choice of profession. Both parties are seeking things in final offer binding arbitration that they would not have achieved in negotiation, at least not in this round. The victor will win things it could never have achieved voluntarily, at least in this round of negotiations, and it will do so without a quid pro quo. Both sides have put a lot on the line in this arbitration. Each side has much to lose and much to gain.

And the amazing thing is that the usual suspects in cases that get to arbitration – wages, health insurance contribution and comparable pool – have been agreed upon. The parties agree that the wage increase should be 2.75% the first year and 3.00% the second year. The parties also agree that the unit members will begin contributing 5.00% of the health insurance premium. In addition, the parties agree that the appropriate external comparable pool consists of like employees in the other six school districts of the Fox Valley Association athletic conference which includes a total 16 bargaining units.

So what is the fight all about? Let's move on.

Factors Given "Greatest" and "Greater" Weight

MERA at the time of hearing in this matter stated that the arbitrator shall give the greatest weight to any state law lawfully issued by the state legislative which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer, that the arbitrator shall give an accounting of the consideration of this factor in the arbitrator's decision, and that 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 MERA.

On June 29, 2009, post hearing but prior to the submission of briefs, Governor Jim Doyle signed the 2009-2011 State Budget which repealed the requirement that the arbitrator give "greatest weight" to revenue controls and "greater weight" to local economic conditions when resolving contract disputes. The Association argues briefly that this change to the collective bargaining law should apply to this case. The District disagrees, arguing that, based upon the record, both parties referenced the criteria in their exhibits in one form or another, that the record was closed, and that there was no agreement to now change the process and criteria set forth by the parties at hearing and in the record in this case. The Association then argues that even if those criteria still apply, its offer is the more reasonable of the two offers.

Convincing arguments can be made both ways. I choose to include these criteria in making my decision in this matter.

In terms of the greatest weight criteria, the District, as all other school districts in Wisconsin, has been subject to revenue limit legislation which does, indeed, limit the District's ability to generate money. The District notes that its tax levy and state aids are dependent on student enrollment. The District points out that it has had declining enrollment since the 1998-99 school year, when the enrollment was 6,476 students to the 2008-09 school year when the enrollment was 6,163. Of course, the District could exceed the revenue caps with voter approval at a referendum, but the District asserts that in these hard economic times, such a referendum would have little chance to pass.

The District notes that it receives the lowest percentage of State funding among the comparables, that it ranks fifth out of the seven comparables when looking at Comparative Revenue Per Member, and that it has already tapped into its Fund Balance to meet operating needs. In addition, the District notes its other post employment pension (OPEB) liabilities increased 8.24% from 2007 to 2009, that $4.6 million of the District's $85 million budget is spent on early retirement benefits, and that the District's 2009 present value

OPEB liabilities exceed the District on year $85 million budget.

In sum, the District argues that the stark reality is that its expenses far exceed its ability to raise revenues and that it has made significant cuts and adjustments in a variety of areas but is still unable to meet expenses.

And, of course, the Association sees the situation entirely differently. The Association asserts that the comparable group's total allowable revenue shows that the District received the third greatest increase in funding with new money increasing a full 10 percent in the two year period, that the District ranked in the middle of the comparables for revenue, receiving $48 more per pupil than the group average, that the District will receive $1.9 million in additional revenue over the next two years from Federal economic stimulus program, and that the District showed an increase in K-5 enrollment from 2007-08 to 2008-09.

There is no doubt that revenue caps limit and sometimes severely limit a school district's ability to fund its budget without cuts. But every school district is faced with the same revenue caps, though it impacts different districts in different ways. In this case, the District is not saying the Association is seeking money above and beyond the present agreement via new benefits or a wage increase which the District cannot afford to add; indeed, the parties have agreed upon the new money that should flow into the agreement via their settlement on the wage increases; instead, the District is asserting that money previously agreed upon by the parties needs to be altered. in other words, the District wants to change the status quo (i.e., 600 hour eligibility requirement to receive benefits and100% payment of certain benefits) in some areas, most of which impact part-time employees only. Certainly funding the status quo which, in most instances, is reflected in the Association's final offer, is within reason and can certainly be accomplished, even considering the revenue caps. So the "Greatest Weight" criterion will not be the deciding factor in this case.

In relation to the criterion given "Greater Weight," not much argument was given to it, though the District noted that the economic recession has impacted Winnebago County and the Neenah School District, though it is unable to distinguish itself from any other school district at this time. Indeed, the money that is added to the budget, specifically wage increases, have been agreed upon. The other major agreement, requiring employees to contribute 5% of the health insurance premium, begins to help reduce the District's financial liabilities. So it, too, will not be a controlling influence in this case.

Memorandums of Understanding

There are two Memorandums of Agreement in contention in this case. The District wants to terminate one and modify the other. The Association wants to terminate one in its present form and recreate it differently in the collective bargaining agreement. As for the

second one, the Association wants to modify it and incorporate it into the body of the contract.

Retirement Memorandum of Understanding

Contentions involving retirement benefits have a long history with these parties. The Association asserts that a unilateral change in retirement benefits in the late 1980s was the driving force that caused this bargaining unit to organize. The initial contract between these parties included Article XX Retirement. The language remained the same in the 1990-92 and the 1992-95 agreements.

In the 1995-97 agreement, the parties maintained Article XX Retirement as it was but added a Memorandum of Understanding for those retiring during the agreement's term. A sunset clause at the expiration of the contract term was also added. In the 1997-99 and the 1999-2002 agreements, the Memorandum of Understanding was continued with the sunset language and other dates modified to reflect the new contract term.

In the 2002-05 agreement, the parties made more changes to the retirement benefit which was incorporated in the Memorandum of Understanding. They also agreed to remove the sunset clause. In the 2005-08 contract, the parties made further changes to the retirement benefits in the Memorandum of Understanding, but the MOU continued without a sunset clause.

The District's final offer updates the Retirement MOU and adds the following clause: "This Agreement shall only apply to those employees hired prior to June 30, 2008." As such, this language will have no impact on current employees who are, by its very terms, grand fathered. But any benefit to the District will not come to fruition for 25 years, the minimum number of years to qualify for the retirement benefits.

The Association's offer moves the Retirement MOU to Article XX Retirement as a new paragraph F. The record has little bargaining history as to why the parties created the benefits in a Memorandum of Understanding. Certainly there is a benefit to having the Retirement MOU moved into the contract, though the Association offers nothing as a quid pro quo to do so. The Association's final offer also adds language that Employees who qualify for retirement will receive a lump sum "non-elective TSA payment paid to the WEA TSA (unless the employee directs the payment to another approved vendor)... ."

The differences between these two positions do not seem to address the District's OPEB liabilities, at least in the short run. The external comparables supports the Association's position of including retirement language in the collective bargaining agreement so, overall, its final offer is slightly favored on this issue, though this is a minor issue in this case and

will not carry much weight in the final decision making.

Memorandum of Understanding for the Food Service Program

The Food Service MOU, on the other hand, is a huge issue. The District asserts that the Association's offer is completely unreasonable and without support; that the MOU expired on June 30, 2008; that the Association's proposal significantly changes the status quo right of the District to contract out for services; that the Association offers no quid pro quo for this change; and that the District's offer of early retirement benefits grandfathers current staff.

In terms of the expiration of the MOU on June 30, 2008, the District points to the language of the Food Service MOU itself, noting that it specifically states that the MOU is "For the Period July 1, 2006 - June 30, 2008." There was significant testimony that the District's understanding was that the MOU would expire on June 30, 2008, and that it was meant to be a temporary process to subcontract the food service. But this is the same language used to specify the term of the Retirement MOU and the collective bargaining agreement itself. The Food Service MOU does not have a stated sunset clause as the Retirement MOU has had in the past.

The District also points to paragraph 3 of the MOU which states,

> Postings for any vacancies with the Food Service Program that existed as of May 16, 2006, will be posted internally within the Neenah Joint School District. Only interest from employees employed by the Neenah Joint School District as a Food Service Employee on the date of May 16, 2006 will be considered. If there is no internal interest in the posted vacancy, the position will no longer be considered a Neenah Joint School District position, but a position with the out sourced Food Service Company. (Emphasis added).

The District argues long and hard that this language sets specific limitations on the right of employees to post to these positions: that it only applies to Food Service Program vacancies "that existed as of May 16, 2006" and that only Food Service Employees employed on May 16, 2006, could be considered. I agree. The Association tries to dance around this language but it is clear on its face.

But the record shows that the District continued to post Food Service Program vacancies that were created after May 16, 2006, which, the Association argues, establishes a binding past practice. There was other litigation around this issue so while it is clear on its face, it is unclear in practice what this language means to the parties.

But the Association's final offer goes beyond clarifying the issue and, seemingly, changes

it. The Association's final offer deletes the Food Service Program MOU and redefines the definition of vacancy and the process of posting. It states in part as follows:

> A job opening created by termination, promotion or transfer of existing personnel. Prior to the time when the job does not continues to exist as a position in the District, qualified bargaining unit members may apply for the position when it is posted. Thereafter, if the contract terms permit, the remaining bargaining unit vacant position(s) may be contracted out when there is no qualified bargaining unit member who posts for the vacancy.

This appears to open up Food Service Program vacancies to the entire bargaining unit, whereas the MOU limited it to Food Service Employees. The District argues that this proposal significantly changes the status quo right of the District to contract out for services. But the Association states specifically, "The Association's offer for posting vacancies is reasonable and does not prohibit the District from subcontracting."[4]

But it does seem to change the posting and filling of not only Food Service Program vacancies but vacancies through out the bargaining unit. The Association offers no quid pro quo for this, saying it does not need to do so. I disagree.

This is one of the two big issues in this case. If the Association has crafted its language to replicate the Food Service Program MOU and limited the language to Food Service employees, its ability to persuade would have been greatly enhanced. As it is, even accepting the Association's statement that nothing in its changes prohibits the District from subcontracting, there is no doubt that the District's proposal on this issue is strongly favored.

Health and Dental Insurance

The Food Service MOU is one of the two big issues. The other involves health and dental insurance and is made up of multiple issues. In each case, the District's final offer changes the collective bargaining agreement. In each case but one, the Association's continues the status quo. On that one issue, the Association's final offer is different, at least in application, than the status quo.

Emergency Room Co-Pay

To get to the specifics, the District proposes increasing the Emergency Room co-pay from

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[4] Association Brief in chief at page 12.

$50 to $100 while the Association maintains the status quo. By their very nature emergency rooms costs are far greater than clinic costs for treating illness and injuries which are not life threatening. So encouraging people to use clinics for non-life threatening illness and injury, as opposed to the more expensive emergency room, is good financial policy and a better use of medical facilities. One way to do so is to increase the emergency room co-pay so that one will think twice before using the emergency room instead of a clinic.

But in this case the external comparables do not support the District's position. The comparables are a somewhat mixed bag in the sense that in Fond du Lac, for example, the clerical unit has a $25 co-pay while the custodial/maintenance unit has a $100 co-pay. Of the sixteen units in the six comparables, six pay $25, six pay $50, two pay $75, and two pay $100. The District's expert witness stated that the standard fee employees are charged in the Fox River Valley is between $100 and $150. This was found to be inconsistent with the most important comparables. The Association's offer of retaining the status quo is favored.

Dental Premium Contribution

The status quo defended by the Association has the District paying 100% of the Single and Family Dental Plans for full-time employees. In support of its position, the Association notes that it is 12th among the comparables in terms of the full dental premium for family and ninth for single coverage. The District notes that the comparables have an average of 97% contribution for single plans and 91% for family plans such that the District's offer is more consistent with the comparables. Putting aside for now the issue of a quid pro quo, the District's offer is preferred.

Prescription Drug Plan

Presently, the District provides a three-tier prescription drug co-pay plan in the amounts of $5/$15/$30; however, the District reimburses the employees $15 for drugs in the third tier $30 category such that, in practicality, it is a $5/$15/$15 drug co-pay plan. The District proposes modifying the three-tier plan to a $10/$25/$50 deductible per prescription and eliminating the $15 reimbursement for third tier drugs. This would lower the insurance premium which would save the District money, as well as those employees taking insurance who will now contribute 5% of the premium.

But the comparables do not support such a change. For the first tier, the comparables are either $0 or $5, compared to the District's proposal of $10. For the medium tier, the comparables range from $5 to $15 with the District's proposal at $25. And for the third tier, the comparables are as follows: three at $20, five at $25, five at $30 and three at $50. Out of the 16 comparables, the employer's offer was matched by only three.

The Association's final offer proposes the status quo, in a sense, of $5/$15/$30, but it eliminates the District's reimbursement of $15 for third tier drugs so that it truly is a $5/$15/$30 co-pay plan. Among the possible 16 categories, the Association's proposal is the same as or more than 13 of them. The Association's offer is preferred.

Wage Increase and Health Insurance Contribution Change

In the midst of this battle and to offer some perspective, let us look at some agreements of the parties. The parties agree on the wages with a 2.75% per cell increase effective July 1, 2008. The parties agree on a 3.00% per cell increase effective July 1, 2009. In addition, the parties agree that full-time employees will begin paying 5% of the health insurance premium for both single and family coverage effective July 1, 2009.

Eligibility for Insurance Benefits and Proration of Insurance Premiums

The following three issues are interconnected. First, the District proposes that the threshold for receiving insurance benefits be increased from 600 hours per year to 20 hours per week. Second, the District proposes that employees working 20 hours per week or more but less than full-time pay the insurance premiums on a prorated basis. Third, the District proposed eliminating the grandfather clauses which exclude employees hired prior to July 1, 2005, from the proration of premium requirement.

The reasoning is simple: the District wants to lower its insurance costs.[5] That is completely understandable. All of us who are not connected to the insurance industry want to lower insurance costs. The District has chosen two ways to do that. First, it wants to limit those part-time employees who receive health insurance benefits to those who work 20 hours or more. Second, the District wants to prorate the premium contribution for those employees who work 20 hour or more but less than full-time, including those employees who are currently grand-fathered from making such a contribution.

The District has much financial data to back this proposal up: increased health insurance premiums and the ratio of salary to fringe benefits for some employees such that the employee is paid more in fringe benefits, 100% paid health insurance premium being the main benefit, than in salary. Perhaps this is what attracted many of the District's part-time employees to seek employment with the District in the first place. Perhaps this is what caused the District to agree to this in the first place.

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[5] This of course also applies to the Emergency Room Co-Pay and Dental Premium contribution discussed above.

And what the District is proposing is, when viewed separately, within the realm of reason. The comparables show that most employees who work less than full-time receive less than 100% payment of insurance premiums by the employer.

The Association notes that in a previous contract negotiation when the District brought its concern about health insurance costs to the table, it was the first of the District's bargaining units to agree to the District's proposal to change insurance carriers from Blue Cross/Blue Shield to the current dual choice and lower cost options, United Healthcare and Network. And in this round of negotiations, the Association and the District were able to agree to lower the District's contribution rate from 100% to 95% and to eliminate the District's $15 reimbursement for third tier drugs.[6] So this is not an Association that fights tooth and nail to keep the status quo at all costs. Twice, it has recognized the District's concerns about the high cost of insurance benefits and it has been willing to modify the status quo to some extent to give the District some financial relief with its insurance costs

But the District is asking for more, much more. First, the District is asking the arbitrator to eliminate the possibility of health and dental insurance coverage for employees who work more than 600 hours per year but less than 20 hours per week, employees who are currently eligible for such coverage by contract language negotiated and agreed upon in the past by the parties.[7] Second, the District is asking the arbitrator to eliminate the exemption from proration of health and dental insurance premiums for those part-time employees hired prior to July 1, 2005, an exemption negotiated and agreed to in the past by the parties.

Can the District show a need for a change in the amount it pays for health insurance for its employees? Yes, but so can most public employers. Some of that need is, of course, being taken care of by the changes the parties to which the parties have agreed: 95% District – 5% Employee contribution for health insurance premium and an addition $15 co-pay on third-tier drugs. Do the changes proposed by the District solve the problem? Now it gets a bit iffy because how much money does the District want to pay for employee health insurance? Probably none, if it could. But do the changes help to alleviate the insurance premium burden for the District? Yes, of course they do.

But do the changes address the rising health care costs in as limited a manner as possible? There I run into a problem. These changes do save the District money but at what cost?

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[6] Though the parties are in disagreement about the amount for third tier drugs, both offers eliminate the current $15 reimbursement.

[7] It is not discussed in the briefs but a literal reading of the District's final offer appears to apply this change to Life Insurance, as well.

The employees that experience the greatest impact by these changes are the part-time employees, the very employees least able to absorb the cost of the changes. Indeed, most if not all part-time employees who take health and dental insurance will find that their wage increase for the 2009-10 year will be less than the 5% contribution they will make starting July 1, 2009 toward their insurance premium. They will have less take home pay than they did prior to the 3% increase in wages and the 5% contribution to the health insurance premium. This is before any additional prorating takes place, as desired by the District.

In a sense, what we have here is the reverse of the 'catch-up' argument sometimes used by employees who say they need a larger than average wage increase or whatever because they are behind the comparables. The standard arbitral response is that it took more than one contract negotiations to put the employees in the position they are in, and that it will take more than one contract negotiation to achieve "catch-up." So it is with the District in this case. In this bargain, the District achieved some financial relief in terms of the prescription drug co-pay and the health insurance premium. The relief achieved by the District were costs that were shifted to the Association members.

The District asks too much in this bargain. Arbitrators are loath to make such changes in previously negotiated provisions, believing they what is agreed to at the bargaining table should be changed at the bargaining table. That is especially true in a case such as this where the parties have a history of moving difficult issues, that being health insurance, without the use of an arbitrator.

Compounding the District's problem is that it offers no quid pro quo for the insurance changes it wants: changing eligibility, prorating premium payment and eliminating grand father clauses. The District has some arbitral support for its proposition that it does not need to provide a quid pro quo in these circumstances. But, in this case, the impact of the District's proposals have so great an impact on its part-time employees who take health insurance, a benefit negotiated in the past such that a quid pro quo for these employees seems appropriate.

Other Statutory Criteria

There is no argument about the lawful authority of the District in this matter. The stipulations of the parties, especially in terms of wages and health insurance premium change, certainly impact the decision as mentioned above. Both sides, as usual, argue that the interests and welfare of the public favors its final offer, and the answer to that is not clear cut and does not impact the final decision. While the District argues financial difficulties, it does not argue that it cannot meet the costs of the Association's offer. The parties agree on the wage increase so no cost-of-living argument can be made for that, though both sides argue that its total package is more consistent with the cost of living and,

in this case the District may be right in the first year and the Association in the second. The overall compensation these employees received and, absent those issues in dispute, did not come into play in this matter.

In sum, the factors given "Greatest Weight" and "Greater Weight" were reviewed and found to have little impact on the decision in this matter. The Association's final offer in terms of the Retirement Memorandum of Understanding was preferred, though this issue does not have the importance of some of the others in dispute. The District's final offer which eliminated the Food Service Memorandum of Agreement was preferred over the Association's elimination of the MOU and the changes it proposed in the definition of vacancy and the process of posting and would have been strongly preferred but for the Association's assurance that its language does not prohibit the District from subcontracting. The Association's proposal to maintain the status quo regarding emergency room co-pay was found to be supported by the comparables and, therefore, preferred over the District's proposal to change the emergency room co-pay to $100. The District's proposal to have employee's contribute 5% toward the dental insurance premium was preferred over the Association's status quo position since the comparables support it. The Association's proposals to stand by the status quo in terms of insurance eligibility, part-time employee proration of premium and elimination of the grand father clauses was preferred over the District's proposed changes, partly because the District had achieved some relief in these areas, partly because the impact on part-time employees would be so extreme, and partly because the District offered no quid pro quo; and that the Association's prescription drug co-pay was supported by the comparable and, therefore, found to be preferred.

So based upon a reading and review of the record, a reading and review of the briefs-in-chief and reply briefs, application of the arbitral criteria, and for the reasoning stated above, this arbitrator issues the following

AWARD

> That the final offer of the Association is the more reasonable of the two offers and shall be incorporated into the parties' 2008-10 collective bargaining agreement.

Dated at Madison, Wisconsin, this day of September 24, 2009.

By James W. Engmann
James W. Engmann, Arbitrator