

BEFORE THE ARBITRATOR

In the Matter of the Final and Binding Interest Arbitration Dispute between

IOWA-GRANT SCHOOL DISTRICT

and

IOWA-GRANT EDUCATION ASSOCIATION OF PROFESSIONAL STAFF AND SUPPORT  
PERSONNEL

WERC Case No. 30, Int/Arb - 11293  
Decision No. 32684-A

Appearances:

Lathrop & Clark LLP, 740 Regent St., Suite 400, P.O. Box 1507, Madison, WI 53701-1507,  
by Shana R. Lewis, Esq. and Richard F. Verstegen, Esq., appearing on behalf of of the  
District.

Mr. Thomas Fineran, Executive Director, South West Education Association, 960  
Washington St., Platteville, WI 53818-1169, appearing on behalf of the Association.

ARBITRATION AWARD

The Association has represented a bargaining unit of support staff employees for a number  
of years. On January 8, 2009, the District filed a petition with the Wisconsin Employment  
Relations Commission requesting arbitration with respect to the replacement for the parties'  
collective bargaining agreement expiring June 30, 2008.

Following mediation by a member of the Commission's staff, the Commission determined by  
order dated February 20, 2009 that arbitration was required. The undersigned was  
appointed by Commission order dated April 2, 2009.

A hearing was held in Livingston, Wisconsin on May 14, 2009, at which time the parties  
were given full opportunity to present their evidence and arguments. A transcript was made,  
briefs and reply briefs were filed by both parties, and the record was closed on July 29,  
2009.

**Statutory Criteria to be Considered by Arbitrator<sup>1</sup>**

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<sup>1</sup> The statutory criteria as shown here were in effect as of the date of hearing.  
Certain subsequent changes are noted in the Discussion section below.

Section 111.70 (4) (cm) 7

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

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

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

- a. The lawful authority of the municipal employer.
- b. Stipulations of the parties.
- c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
- d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.
- e. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities.
- f. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes in private employment in the same community and in comparable communities.
- g. The average consumer prices for goods and services, commonly known as the cost of living.
- h. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

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

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

### **The Employer's Final Offer**

A. Modify Article XIV Compensation, C. Salary Rates 2008-2009, and 2009-2010 as follows (and reflected on the attached sheet):

1. The hourly salary increases for 2008-2009 are hereby attached to and made a part of this contract. The District is offering a seventy-five cent (\$0.75) per cell increase over the 2007-2008 per cell wage rates for aides, secretary, cooks, custodians and bus driver extra trips.

2. The hourly salary increases for 2009-2010 are hereby attached to and made a part of this contract. The District is offering a fifty cent (\$0.50) per cell increase over the 2008-2009 per cell wage rates for aides, secretary, cooks, custodians, and bus driver extra trips.

3. Effective July 1, 2008, bus drivers shall receive a one dollar and twenty-five cents (\$1.13) (sic) per route increase over the 2007-2008 route rates. This rate would be established as \$25.45 per AM & PM route.

4. Effective July 1, 2009, bus drivers shall receive a one dollar (\$.75) (sic) per route increase over the 2008-2009 route rates. This rate would be established as \$26.20 per AM & PM route.

B. Effective July 1, 2009, or as soon as possible after the interest arbitrator's decision is issued, the District will provide health insurance coverage under the Dean Health Insurance Plan as described in the attached Summary Plan Description.

(Attachments and items not in dispute are not shown here. The Dean plan at issue is generally described as its "Point of Service Plan.")

### **The Union's Final Offer**

A. Modify Article XIV COMPENSATION, C. Salary Rates 2008-2009, 2009-2010, and 2010-2011 (sic), as follows:

1. Effective July 31, 2008, the total compensation adjustments for the 2008-2009 school year shall be a thirty-two cent (\$0.32) per hour increase over the 2007-2008 per cell wage rates for aides, secretary, cooks and custodians.
2. Effective July 1, 2009, the total compensation adjustments for the 2009-2010 school year shall be a fifty-three cent (\$0.53) per hour increase over the 2008-2009 per cell rates for aides, secretary, cooks and custodians.
3. Effective July 1, 2008, bus drivers shall receive a sixty-four cent per route increase over the 2007-2008 route rates. This rate would be established as \$24.96 per AM & PM route.
4. Effective July 1, 2009, bus drivers shall receive a one dollar and six cent (\$1.06) per route increase over the 2008-2009 route rates. This rate would be established as \$26.02 per AM & PM route.
5. Effective July 1, 2008, extra trips will be paid at \$11.13 per hour.
6. Effective July 1, 2009, extra trips will be paid at \$11.66 per hour.

B. Effective July 1, 2009, or as soon as possible after the interest arbitrator's decision is issued, the District will provide health insurance coverage under the WEA Trust Preferred Plan as described in the attached Summary Plan Description.

(Attachment and items not in dispute are not shown here.)

### **The Employer's Position**

The District begins by arguing in detail that the "greatest weight" factor applies here and that revenue limits have had a significant and deleterious effect on the District. Arguing that to prevail under the "greatest weight" factor a district must demonstrate concrete deleterious effects on the overall operations of the district from a selection of one offer rather than the other, along with current financial difficulties that are being addressed by the elimination of jobs are programs and that, third, the district will need to take additional such steps in future if its offer is rejected, the District contends that the present situation demonstrates all three factors. The District costs the two-year total difference between the offers at \$61,974. But, the District notes, this is on top of the District's offer, which accumulates to \$59,084 over the same period. Furthermore, the District argues, the reasonable assumption of an 8% annual increase in future health insurance premiums means that if the Association's offer is accepted, over the following five years the accumulating costs will continue to rise at a disproportionate rate, because the Association's proposed plan is not much less expensive than the very expensive current one.

The District argues that testimony at the hearing showed that the District was anticipating a \$450,000 deficit for 2009-10, and has taken a number of steps to cut costs, including closing five satellite schools upon consolidating the elementary and middle school levels in a single

building, reducing transportation costs by reducing the number of bus routes, selling its entire fleet of buses, and subcontracting bus driver jobs as they become vacant through attrition, and asking teaching staff to be extremely conservative with classroom budgets. The District has set a salary freeze for administrators for 2009-10 and is seeking a partnership with other CESA 3 school districts to find a more cost-effective health plan that would initially cover administrators and non-represented support staff. The District has also negotiated with the teachers to move to a slightly less expensive health insurance plan in this last bargaining cycle, along with phasing out and expensive early retirement provision.

The District cites testimony as to a series of deferred maintenance projects on its physical plant. The nearly 50-year-old high school is overdue for asbestos tile abatement, but the District cannot afford to do the job all at once; boilers that are almost half a century old need replacement, but the District cannot afford to replace them; roofing repairs are overdue; carpet replacement is overdue; and in general, the only maintenance projects which are being performed are the least expensive ones. The District also put forth a referendum to raise \$500,000 in each of the two years of the proposed collective bargaining agreement, which passed. The District notes that it does not have authority to renew these funds beyond mid-2010 and will have to go back for a new referendum unless other economic factors change by much more than is expected. The referendum passed because the board president credibly explained to the public that without the referendum there would have to be cuts in athletics, support staff positions, and elective offerings at the high school, as well as increases in class size. This takes place against the background of declining enrollment, of 23% between 1999 and 2007. The District argues that it has the second-highest percentage decrease of all schools in a 35 mile radius. Based on population projections for the area, the District sees no likelihood that this trend will be reversed in the foreseeable future, though the District hopes that it will at least stabilize. The District notes that its revenue limits, partly as a result, has not increased significantly in almost 10 years. The District anticipates that even assuming its own final offer is selected, it will be forced to cut student programs or portions of these, lay off teachers, use up part of its fund balance, and take other steps to reduce costs. The District predicts that if the Associations offer is accepted, the effect will be further deterioration of a bleak financial condition.

The District argues that the mere fact that it has a 17% fund balance does not mean it would be responsible to use it up on wages and benefits, because it is no higher than the statewide average for school districts and is significantly less now than in the past, in turn because the District has used some of the previous fund balance to avoid professional and support staff layoffs. The District argues that in a small district, a fund balance can easily be eroded by ordinary expenses such as maintenance problems.

The District also offers a detailed argument that the “greater weight” factor continues to apply here and strongly supports the District’s final offer. The District argues that economic conditions in both Grant County and Iowa County are anything but prosperous, based on a variety of economic statistics, and that while unemployment was stable or declining slightly and in the 4 to 5% range for both counties from 2003 to 2007, by March 2009 the unemployment rates had increased dramatically, to 10% for Iowa County and 8.7% for Grant County. Surrounding counties are consistent with this trend. The District points to a 49% increase over two years in the number of people signed up for the government’s replacement for the former Food Stamp program, a higher poverty rate in the area than in

the state as a whole, a median household income that is lower in the area than in the state as a whole, and in particular, an average adjusted gross income which in this District is 7% below the average for the comparable 35 mile radius group. The percentage of students taking free and reduced lunch has gone up in recent years from about 20% to close to one-third. The District cites a series of private sector indicia (job losses, low construction and property value per student rates, and agricultural industry problems) as all indicating that the poor economy is particularly harsh in the immediate area around this District. Mill rates have fluctuated based on immediate circumstances, but the District increased its mill rate in 2008 from \$8.25, a recent low, to \$11.03. But the mill rate in any recent year, in any event, reflects a maximum effort to collect taxes within State revenue limits.

The District argues that while the lawful authority of the District would not be violated by implementing the Association's final offer, the failure of that offer to make an appreciable difference in health insurance costs means that the cost for health insurance premiums would continue to increase beyond the District's ability to pay. As to stipulations of the parties, the District notes that the parties agreed to increase severance pay, shift differentials and other economic benefits including vacations. The interests and welfare of the public and financial ability of the District to meet the costs, the District argues, are essentially parallel to the "greatest weight" and "greater weight" factors, and support the District's proposal for the reasons already stated. The District adds that evidence as to private sector health insurance costs in the District suggest that since the public is suffering very poor economic conditions and private employees are paying far more out of their own pockets for less coverage, when they are even able to get health insurance, this factor too favors the District's proposal.

The District argues for three different comparability pools — first and foremost, all school districts within a 35 mile radius. The District argues that this is within commuting distance, and includes a fair selection of 16 districts, including some both larger and smaller than the District. The District also argues for the athletic conference grouping of seven other districts, including Fennimore, which the Association would exclude because its support staff is not unionized. Finally, the District argues in favor of including all districts within CESA 3, on the grounds that many of them are looking currently towards forming a consortium on health insurance.

The District notes that the Association has been under the WEA Trust Point of Service Plan since 2004-2005; previously, this bargaining unit was under the WEA Trust Front End Deductible Plan. The District notes that the change in 2004 followed a series of very high increases, which raised the family premium from \$751.60 in 2000 to \$1309.96 by 2003. The change to the Point of Service plan reduced the premium for families to \$1193.76 in 2004, but this has now risen to \$1656.26 for 2008-09, and even the slight reduction resulting from the Association's offer to modify the plan still represents an increase for 2009-2010, to \$1707.87, while the District's proposed switch to Dean would cost \$1365.87 for families, 20% less than the prior year. Savings for single plans are similar. The District argues that within the 35 mile radius, the balance of plans in other school districts demonstrates that the District's proposal is both reasonable and part of a current trend, calculating that three other districts in the area have Dean, one has the State Plan which includes Dean as an option, and one has WPS. The District argues that there is no dominant carrier in these districts but

that the District stands in contrast to other districts because only two others have a higher premium, while a different two districts have a higher premium contribution. Within the athletic conference, the District argues, only three other districts remain with WEA Trust, while two have Dean, one has the State Plan, and one is self-funded. In these terms, again, the District argues that its proposal is consistent with a trend toward more affordable health insurance.

Predicting an Association argument that Dean has both benefits and service inferior to those offered by the current plan, the District argues that there is little support in the record for this assertion, noting that Dean is a prominent provider which serves 1,600 employers in the area and is one of the largest multi-specialty clinics in the nation, with an increasing number of school districts in south central and southwestern Wisconsin among its clients. The District argues that most of the health providers used by District employees are also signed up with Dean, promising little disruption for employees, while the 290,000 members served by Dean in general are predominantly in south-central Wisconsin, resulting in very good bargains because of its buying power. The District also contends that Dean has received highly favorable rankings in health insurance quality studies. The District points to testimony by the Dean director of sales to the effect that Dean began providing services to school districts at their request rather than as part of a sales strategy, and that the coverage of the modified Trust plan proposed by the Association is highly similar to the modified plan proposed by the District. Where there are differences, the District argues, some are more favorable to the employees under the WEA Trust Preferred plan (such as a zero dollar payment for office visits in-network versus a \$10 payment at Dean, while others are more favorable to employees under Dean, such as a \$5 million maximum aggregate benefit versus a \$2 million maximum under the WEA Trust preferred plan. The testimony was to the effect that both plans were "very rich" compared to health plans in general. The testimony also was to the effect that retirees will receive coverage consistent with the collective bargaining agreement, although the initial plan documents did not show this feature. The District calculates that there are employees whose particular circumstances are such that their out-of-pocket costs will drop significantly if the Dean plan is selected.

As to wage increases, the District argues that the support staff of the District are at or near the top among the comparables in every classification. The District contends that the only reason for its wage offer, which is higher overall than the Association's, is as a quid pro quo for the health insurance change it seeks, while the Association's higher second-year proposal is completely unsupported; the District points to wage increases over the past 10 years which have generally been in the \$.24-\$.36 range, except for a \$.60 increase in 2005, "when the Association actually made a significant change in health insurance." The District calculates that the wage increases in the 35 mile radius comparable pool averaged \$.40 per hour in 2008-09, and that those settlements that are in place for 2009-10 average a little less.

As to other public employees, the District notes that the evidence adduced relates to District teachers, administrators and non-represented staff, and that the non-represented employees and administrators have typically led other groups in the District in making health insurance plan changes to keep costs under control. The teachers have generally changed last, resulting in a situation where there have frequently been different health plans in effect

for different employee groups despite the small size of the District. The District argues that the support staff has received wage increases that have often been higher than the non-represented employees or administrators, and that in five of the past 10 years, their percentage wage increases have been higher than the teachers too. The District notes that with respect to other public employers, health insurance plans vary, but that all of the area counties have less expensive premiums than the Dean plan would impose, let alone the WEA Trust Preferred plan. The District argues that all of these factors together make it reasonable to expect the Association to switch to a comparable but lower-cost health plan and that a higher than average wage increase is a reasonable quid pro quo. The District also compares to private sector employers, citing three in particular, and notes that all three have much less generous health plans and yet require much higher employee contributions than the District offers. In wage terms as well, the District's wage proposal is higher than the two year average of the private firms.

The District argues that total package cost is the appropriate measure by which to compare to the cost of living, and that the CPI trend began relatively high early during the period covered by this collective bargaining agreement, but then radically shifted downwards, such that the District's offer is more in line with the CPI than the Association's. The District argues that the overall compensation factor supports its final offer because of generous wage levels, full-year insurance coverage that includes health, dental, life and long-term disability coverage, and a vacation provision which most support staff units do not have, and that in all, the wages and benefits provided to the support staff are comparable or even generous in relation to other similar employers in the area.

Changes during the pendency of the proceedings have been major, and are primarily discussed below. In its initial brief, however, the District argues that fringe benefit costs have become known, including a .6% increase in retirement contributions required by the WRS effective January 1, 2010, and a 7.9% increase in the family premium of the Association's proposed health plan, effective September 1, 2009. The single plan would increase 7.6%. Other financial factors include the high cost of the teachers' early retirement provision, which is currently \$500,000 per year and will continue at that rate for the next two school years, and out-of-District special education services, which reached \$60,000 for the first time in 2008-2009.

In its reply brief, the District takes issue with an informal opinion by WERC General Counsel Peter Davis to the effect that the "greatest weight" and "greater weight" factors, as modified by the recent budget bill, took effect, including for pending cases, immediately upon the governor's signature, i.e. during the pendency of this proceeding. The District argues that 2009 Wisconsin Act 28, the statute making the change, specifies that the new language "first applies to collective bargaining agreements entered into, extended, modified, or renewed, whichever occurs first, on the effective date of this subsection." The date of publication of Act 28 was June 29, 2009; the District argues that based on Wis. Stat. 991.11, "every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its publication as designated" and that this leaves it unclear whether the Legislature intended to apply the amendments to currently pending actions. The District argues that the collective bargaining agreement at issue will have a starting date of July 1,



2008; accordingly, that is the date it would be “entered into”, not June 29, 2009 (or after.) The District cites decisions holding that Wisconsin legislation “is presumed to be prospective unless it clearly reveals by express language or necessary implication an intent that it apply retroactively”<sup>2</sup> and that a statute “takes effect only from its passage, and will not be construed as retroactive, or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied.”<sup>3</sup>

The District argues that under these and other cited cases, since there was no express language or necessary implication that the changes would apply to pending actions, they do not. In the alternative, the District argues that the same economic factors that govern under the “greatest weight” and “greater weight” factors should still be considered, under “other factors” and/or under the factor of interests and welfare of the public/financial ability. The District argues that the Association has failed to provide any significant analysis on many of the statutory factors, including the employer’s lawful authority, stipulations of the parties, interests and welfare of the public, cost of living, “other factors”, internal comparables and external comparisons to other types of public employers, as well as to private employers. The District contends that all of these factors should be weighed in its favor based on its prior argument.

With respect to District revenue, the District argues that the Association provided no evidence that the community is harmed by a change to Dean Health Plan, while the Association has relied for its calculations on total allowable revenues, thus sweeping in a temporary referendum’s proceeds along with more permanent revenue. Similarly, the District argues that the Association’s calculation of the effects of the national fiscal stimulus is misplaced, because this too is temporary money, and in addition has restrictions at least implied for its use which direct it toward increasing employment, such as by the District’s intended use of enlarging the number of classroom aides, rather than toward wages or benefits to existing employees. Also similarly, the District argues that it is an inappropriate use of the District’s fund balance to use it to meet increased obligations on health insurance and wages, while the District’s fund balance similarity to the statewide average is offset by its being second to the lowest in the athletic conference and among the lowest in the 35 mile radius comparable group. At the same time, the District argues that the Association has misread the federal and state categorical aid data, arguing that in fact the District’s comparative revenue is not third in its comparable group, but only slightly higher than average.

As to that comparability group, the District argues that the Association’s pool is too narrow, consisting of only six school districts. The District argues that eliminating Fennimore is unjustified as it is the only excluded group in the athletic conference, and there are recent

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<sup>2</sup> State v. DILHR, 101 Wis 2d 396, 304 N.W. 2d 758 (1981).

<sup>3</sup> Dallman v. Dallman, 159 Wis. 480, 149 N.W. 137 (1915).

arbitration decisions supporting the inclusion of unrepresented groups, while the Association's choice of focus would exclude a number of districts that are in close proximity to the District but have much less expensive health plans, including not only Fennimore but Dodgeville, River Valley, Highland, Potosi and Platteville. The District argues that there is no existing comparability pool for the support staff unit and that this matter should not be based solely on a 1983 decision in the teacher bargaining unit, but should be based primarily on proximity, i.e. the 35 mile radius, for the primary pool. In support of this, the District points out that recent case law clearly supports the use of broader groups than the athletic conference, especially for support staff comparisons, noting also that athletic conferences are not as stable as they once were.

The District takes issue with the reasonableness of the Association's asserted flexibility in changing to a different health insurance plan, because the 2009-10 Association plan cost is actually higher than the existing 2008-09 plan cost. The District calculates a savings from the change proposed by the Association of only \$15,626 in 2009-10, while the Association includes a higher than average wage increase for that year, reducing the savings further. The District contends that it cannot continue to revive a high-cost insurance plan when a lower-cost plan with similar benefits can be provided with little effect on employees. The District also argues that the Association's reliance on the fact that its proposal is for the same plan as the teachers currently have ignores the history of frequent differences between its employee groups as to health insurance, and also ignores the fact that the teachers have been contributing 7.5% of their family plan premium, while the support staff only contributes 5%. Furthermore, the administrators have yet a third plan administered by WEA Trust, which however they are moving away from.

As to external comparables and health insurance, the District argues that the Association has not shown predominant support for the Association's proposal to stay with the Trust, because the proposed change is still a high cost plan while there is a trend toward less expensive providers. At the same time, the District contends that the differences between the District's proposed plan and the Association's proposed plan are not only small, but in some cases favor Dean. The District argues that the Association has provided no credible and comprehensive cross-comparison, because the evidence submitted by the Association assumes that anything not explicitly spelled out in the Dean policy does not exist, while anything not spelled out in the Trust plan can be assumed to exist based on collateral evidence.

Finally, the District argues that its wage proposal includes a substantial quid pro quo for the insurance provider change, including making the wage increase larger in the first year while the insurance change would take effect only in the second year. Even though such wage increases merely cement the District's existing wage position as a leader among the comparables, the District argues, it will obtain better dollar value in the insurance plan as a result, which will offset budget deficits into the future. The Association's final offer, meanwhile, does not address any of the District's financial problems, adding an excessive second year wage increase to an insurance plan which actually raises the District's premiums further.

In summary, the District contends that the change in health insurance proposed by the Association is too modest to generate real savings and that the Association's wage increase in the second year is unsupported.

### **The Association's Position**

The Association begins by pointing out that the "greatest weight" and "greater weight" factors were in the process of repeal during the pendency of this proceeding, at least with respect to their effect on school district employees, and notes that on the date the initial brief was filed, the budget bill with these changes was signed by the governor. The Association argues that the changes were in effect immediately with respect to pending proceedings.

The Association makes no argument with respect to lawful authority or stipulations of the parties. With respect to interests and welfare of the public/financial ability of the unit of government to meet the costs, the Association calculates that Iowa-Grant received more new revenue under the existing laws than all but two districts in the comparable group (of six districts that are unionized and are in the same athletic conference.) The Association includes the referendum proceeds in its calculation of a "healthy" 10% increase in new money in 2008-09. Similarly, the Association calculates that the District has more revenue per member than the average of both the comparable group and the statewide average. Conceding that Iowa-Grant ranked seventh out of eight in reserve funds among the comparables, the Association notes that the District's 17% is the same as the statewide average. The Association argues that \$245,000 in additional revenue from federal stimulus funds are directed to be used to "save and create jobs", such that use of these funds to preserve employment within the bargaining unit is entirely appropriate.

At the same time, the Association points out, the combination of revenue controls and increased state aid has resulted in statewide reductions in tax rates since 1993, of major proportions. In Iowa-Grant, there has been a 52% reduction over that time in the rate of school taxation, which matches the statewide average. Furthermore, residents pay less in actual dollars to run the schools than they did in 1992 and 1994, demonstrating that schools have not been driving up local property taxes over a very long run.

The Association makes no comparisons with respect to private employment or internal comparables, or to external public sector comparables in dissimilar work. The Association contends that cost of living was never given any particular consideration by the District during negotiations and that the District's higher wage proposal than the Association's negates the importance of this criterion. The Association makes no argument with respect to changes during the pendency of the proceeding or "other factors."

With respect to comparables, the Association argues firmly for a comparable list consisting of the six unionized support staff units in the same athletic conference as the District. Association points to a 1983 award involving the teachers in this District as giving primacy to the athletic conference, and justifies the exclusion of Fennimore on the basis of several cited decisions in which various arbitrators concluded that "it is inequitable to compare collectively bargained conditions with those that have been established unilaterally by employers", or

similar language. The Association notes that there are a number of awards which have found that six comparables is enough to allow for accurate comparisons.

The Association argues that the appropriate response to the recognized cost of the current plan is its proposal for a lower-cost plan administered by the same carrier. The Association calculates that the majority of districts in its comparable group currently have the WEA Trust, and the District's premiums were third out of seven for single premiums and fourth out of seven for family premiums in 2007-08. In 2008-09, if the Association's new plan had been in effect, the District would have gone from fourth highest to fifth for single plans and would have moved from third-highest to fifth for family plans. The Association argues that there are significant differences between the plans proposed by the parties, in several areas. For retirees, the Association argues that Dean limits retirees to COBRA rights under the law, while the Trust allows retirees to remain on the insurance plan indefinitely so long as the premium is paid, including surviving spouse and dependents. The Association contends that as of the date of the hearing, Dean only allowed a \$2 million maximum aggregate benefit, while the Trust Preferred Plan allowed a maximum at the same figure, but renewable in every year ending in a zero or a five provided that the member had not reached the maximum benefit. The Trust also has an out-of-area coverage provision including approximately 1,000,000 providers nationwide; a zero dollar copayment for in network office visits and a \$10 out of network copayment for office visits or urgent care, and a \$25 copayment for emergency room care, while the Dean plan has higher payments for in-network office visits, \$100 emergency room copayments, and co-pays for MRI and CAT scans at \$50 each. A number of other benefits cited by the Association also differ, for specific illnesses or needs such as durable medical equipment, and the Association cites the Trust Preferred Plan as superior on each of these. With respect to quality of service, the Association cites a "standardized and rigorous" customer satisfaction survey called the Consumer Assessment of Health Care Providers and Systems Studies, finding that the overall rating for the Trust was 87.9 compared to a national average of 60.9, arguing that this is a major reason why bargaining unit members prefer to remain with the Trust, and noting testimony that one district had chosen to leave Dean recently, assertedly based on concerns about its business practices. The Association characterizes the Dean representative's testimony as being vague as to what was covered and what was not. The Association argues that its proposal would drop the premium cost among the comparables to the third lowest, and that it also matches the internal comparable with the teachers.

With respect to salary, the Association contends that as an aspect of the overall package, the District's increase is not warranted because the support staff is already at the high end of the comparability pool in salaries, contending also that the District has inappropriately offered its major increase in the first year while the health-insurance proposal takes effect in the second. The Association calculates that with the exception of custodians, Iowa-Grant is already the leader in wage rates in the athletic conference, and that the District's proposal is large enough that it would put the custodians at the top and put other employees between \$1.58 and \$1.75 an hour ahead of the next highest district, based on starting wage levels. The Association contends that its first year wage proposal is more reasonable because it is lower. With respect to the second year, the Association argues that its \$.53 per hour wage increase proposal is more reasonable than the District's offer of \$.50 because the Association is proposing to change to a lower-cost health-insurance plan, and has applied

50% of its calculation of the savings on top of a base wage increase of \$.30, adding another \$.23 per hour. The Association argues that this is clearly a more reasonable approach to sharing the savings from a health-insurance change where there is no overriding demonstrated need to change the carrier.

In its reply brief, the Association stresses the statutory change which in its view has taken effect already, and argues that the remaining effect of the District's ability to pay argument is "frail and generic", arguing that the public interest includes having employees treated fairly and thus ensuring that schools have the best qualified and most experienced employees; it is not purely an interest in economy.

The Association contends that the monetary difference between the two offers is significant, and that the Association's proposal includes actual costs of \$1,079,738 for 2008-2009, which is allegedly \$64,739 less than the base year, 2007-08. Even for 2009-2010, the Association contends, its proposal costs a total budget of \$1,132,740, still approximately \$12,000 less than the base year. The Association contends that the cost reduction demonstrates that it has been entirely reasonable in its approach to health insurance, and that the District's proposal to change carriers is unnecessary. The Association also questions why the District is describing as a success its ability "to get the teachers to move from the WEA Trust Front-End Deductible plan to the WEA Trust Preferred plan, which included some modifications in their health benefits" when the Association now proposes to move to the same plan and the District is not satisfied. The Association answers the District's claim that it has no ability to increase taxes to deal with increased costs for wages and health insurance by pointing out that its final offer decreases costs over the two year period the contract covers.

With respect to comparables, the Association takes issue with the District's use of CESA 3, arguing that no District has signed on to the alleged "consortium" beyond the planning stages, and objects to the District's use of three non-represented groups among its comparables (Barneveld and Belmont, in addition to Fennimore.) The Association contends that what is on offer as a maximum of \$5 million aggregate benefit from Dean can be characterized as an intention, not an accomplished fact, and should be valued differently than evidence of an actual benefit.

On wages, the Association argues that its final offer for the first year was the median settlement wage among comparables, while its offer for the second year is the median settlement wage among the comparables plus \$.23, half the savings per hour from moving to the Trust Preferred Plan. The Association argues that splitting the savings with the District is entirely appropriate. With respect to the District's argument that the teachers pay more of the premium for health insurance under the same plan the Association proposes to move to, the Association argues that the administrators pay nothing toward their premium, even though they are the highest paid employees of the District. Finally, the Association takes issue with the District's calculation that the support staff "have enjoyed packages that are above the average wage increase of the other groups in the District", calculating that in most of the last 10 years the non-represented support staff, the administrators, or both have received higher wage increases in percentage terms than this bargaining unit.

The Association, in summary, contends that the District has not set forth any conclusive evidence as to why its proposal, including a change in health insurance carrier, should be more reasonable than the Association's.

## **Discussion**

### ***The Statutory Criteria***

It is not entirely clear whether the 2009 revisions to Wis. Stat. 111.70, the Municipal Employment Relations Act, which in pertinent part have the effect of changing the "greatest weight" and "greater weight" criteria such as to remove them from consideration for bargaining units of school district employees, apply to proceedings such as this one, which were already pending at the time the budget bill containing the revisions was passed.

In an informal and advisory note, WERC General Counsel Peter Davis advised the parties and me that his reading of the statute was that it was in effect as of the governor's signature on the bill and the bill's publication, and that it did apply to pending proceedings; but this was clearly not intended as a definitive ruling from the WERC. As of the date of this writing, the Legislative Reference Bureau has posted apparently somewhat contradictory notations in different places. Its cover webpage "The Updated Wisconsin Statutes & Annotations"<sup>4</sup> states "2007-08 Statutes updated through 2009 Wisconsin Act 39 and August 17, 2009. Statutory changes effective on or prior to September 1, 2009 are reproduced as if currently in effect." The subpage for section 111.70(4)(cm)7 appears unchanged from its 2008 language. This appears to imply that the relevant changes were not yet in effect at least as of September 1. On separate web pages linked to the heading "Statutes Sections Affected by 2009 Acts" on the footnoted page, however, are paragraphs individually reproduced from 2009 Act 28, i.e. the budget bill. The separate pages referring to the "greatest weight" and "greater weight" factors both now include the added language that they apply to any decision under the arbitration procedures authorized "except for any decision involving a collective bargaining unit consisting of school district employees". For the "greatest weight" factor, the header page accompanying that language contains the phrase "111.70(4)(cm)7. am. effec. 7-1-2009". For the "greater weight" factor, the equivalent header page contains the same phrase, except that "7" is replaced by "7g". This appears to suggest that these changes were in effect as of July 1, 2009.

None of the applicable language I have seen, however, expressly addresses the question of proceedings which are pending as of the date the changes go into effect, and as noted above, the parties dispute whether existing law favors retroactive application of such changed provisions or not. An arbitrator's reading of such a purely legal question would be entitled to no deference. For purposes of clarity, however, I will apply an assumption that the cited changes were in effect, including with respect to pending proceedings, as of

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<sup>4</sup> <http://www.legis.state.wi.us/RSB/STATS.HTML> (last visited September 24, 2009, along with subpages referred to herein.)

publication of the budget bill, and apply the new language accordingly. This is because I have concluded that even using the revised statutory standards, the balance of all remaining criteria is such that the District's offer prevails. The "greatest weight" and "greater weight" factors, if they should still apply under the circumstances of this case, would clearly not weigh in favor of the Association's proposal, because of all the economic data discussed below under other headings. It therefore makes no difference for purposes of the present case whether or not the new language is to be applied retroactively. The specifics of how the District's economics affect the reasonableness of the respective offers will be discussed under "The Statute's Weighing" below.

### ***Comparables***

The Association correctly points out that there is no evidence in the record that the envisioned multi-district agreement to seek joint health insurance plans through CESA 3 has progressed beyond a talking stage. Accordingly, since the District offers no other rationale for that particular grouping, there is nothing in the record that favors adoption of all schools within CESA 3 as a comparable group, and it is rejected. I note that the District proposed as its primary comparable grouping for the 1983 teachers arbitration case the same 35-mile radius grouping as it seeks now, and that Arbitrator Sharon Imes preferred the athletic conference as "primary" comparables, while not expressly rejecting the larger grouping outright. Despite the long passage of time in between cases and the fact that this is a different bargaining unit, I believe there remains some value in stability of expectations as to comparables, while at the same time no compelling reason has been presented for a new list. The cases cited by the Association in support of excluding districts that are not organized were issued within a few years after the burst of collective bargaining organization which followed the passage of the original mediation-arbitration law. In a later era, when employee groups who wish to be represented have had plenty of time to organize collectively, the fact that some school district units here and there and have employment conditions that are set without collective bargaining can no longer be regarded as a matter over which the employees have had no effective choice. The logic of excluding unrepresented support staff units from comparison is therefore weaker than it once was. Accordingly, I will treat the athletic conference as the primary comparable, while also paying some attention to the 35-mile radius group.

### ***Health insurance***

Within both the athletic conference and the larger 35-mile radius group, it is clear that there is no overwhelming pattern of dominance by a single carrier. A list of school districts which have Dean health insurance, organized by date of contract, supports the other evidence in the form of tables of which comparable districts have which carrier to create the impression that Dean has been making inroads. But it is not the only competitor to the WEA Trust to have some share of the market among school district support staffs in the area. The fact that the other districts which have WEA Trust plans are all toward the top end of the cost scale, meanwhile, suggests that the Dean proposal which forms the basis of the District's final offer is not a one-time "lowball" bid to get the business. There is clearly a major difference in cost between the plan proposed by the District and the slightly revised plan proposed by the Association, and based on all the evidence in the record, it seems likely to endure.

Cost of health insurance is never irrelevant, and it is particularly relevant when it absorbs so much of the labor cost budget that for some employees in this bargaining unit, the aggregate cost of what used to be called “fringe” benefits actually exceeds wages on a per employee basis. Health insurance is by far the largest contributor to a picture here that is far out of balance with traditional expectations.

This might not support the District’s final offer enough, if there were a major and conspicuous difference between the plans in qualitative, coverage and/or out-of-pocket costs to the employees. But upon review of the voluminous documentation provided by the parties, I conclude that these plans are broadly comparable on all three criteria. That is not to say they are identical. The Association has pointed out several areas in which the Dean plan has particular items which either cost more or deliver less in benefits than the Trust. But the District has also identified several which go the other way. And some are impossible to determine, without a specific employee case, as to whether they are better in one plan or the other. For example, contrary to the Association’s argument, I find that the sworn testimony of a Dean representative should be accepted as to the proposition that a \$5 million maximum aggregate benefit per employee is in effect as of September 1, 2009, even though it did not appear on the written plan documents prepared earlier. But as to whether this is more valuable to any given employee than the Trust’s \$2 million cap, renewable in any year ending in zero or 5 provided that the employee has not already hit the \$2 million maximum, is imponderable. I also see no reason not to accept the Dean representatives sworn testimony to the effect that Dean crafts a plan for a school district specifically to match any retiree benefits which may have been negotiated in a collective bargaining agreement, even though these may not appear in the original plan documents. (If it did not, under generally accepted principles, the employer would “stand in the shoes” of the insurer for any shortfall.)

The basics of both plans, meanwhile, are highly similar (in-network deductible of \$100 individual/\$200 family with a maximum out-of-pocket per year at the same figures; out-of-network deductibles of \$200 single/\$400 family with a maximum out-of-pocket of \$1450 single/\$2900 family; no co-pays within network (except for a Dean \$10 office visit co-pay) but 20% co-pays for out of network services after the deductible; and drug co-pays of \$5, \$10 and \$25 for tier 1, 2 or 3 respectively when provided by a plan provider.)

The Association did not seek to rebut testimony to the effect that with 290,000 Dean members concentrated in south-central Wisconsin, there are not many medical providers likely to be used by District employees under the Trust plan which do not also have contracts with Dean. This largely answers the point of service questions as to relative quality. As to quality of service by the insurance company itself, the Association introduced evidence (beyond its self-evident preferences) that users have rated the Trust at the top end of the range of a dozen competing Wisconsin insurance providers. The District introduced a State of Wisconsin survey prepared for its own employees which compared Dean against 15 providers on as many as three dozen criteria. On all of them taken together, few if any providers appear to outperform Dean by any significant margin. This is clearly not a case where the employer proposes to replace a solid health insurance option with a shaky one.



In consequence, there is little if anything in the record of a qualitative nature favoring the WEA Trust plan which would offset the very large cost advantage offered by Dean. If cost were not a major factor, the preferences of the bargaining unit and the value of stability would favor the Association's desire to remain with the same carrier. But here, the qualitative differences appear both close and debatable, and the cost difference is not close and is really not debatable.

### *Wages*

The Association here finds itself in the awkward position of arguing against paying its members more. The District notes that compared to other bargaining units of support staff in the athletic conference, Iowa-Grant employees enjoy wages which for almost all classifications are at the top of the range, with custodians almost at the top throughout the experience scale. The District's offer, as well as the Association's offer, will improve this position still further, but the District does so sooner and by a larger margin. The District makes so generous a wage offer in the face of its economic difficulties as an unambiguous quid pro quo for the major savings to be had if its health insurance proposal is accepted. The Association's rationale is more complicated.

The Association has blamelessly computed the average wage increases for 2008-09, and the likely range for 2009-10 in the face of incomplete settlements. It unambiguously states that a proposal of \$.32 per hour for the first year and \$.30 per hour for the second year would be adequate to keep the employees at or near the top of the rankings for each classification if there were no change in health insurance, and this appears accurate based on the record. But the Association then adds \$.23 an hour in the second year, on the grounds that its proposal to change to a different Trust plan saves the District money, such that the employees should be entitled to half the savings. The District has pointed out, logically enough, that even though the Association is proposing to move to a slightly less expensive Trust plan, this hardly represents a significant savings for the District, such that the premium still goes up from the preceding year under that plan.

Under more ordinary circumstances, the Association's logic might make more sense. In general, where a union offers to meet an employer's desire for a less expensive benefit partway, it may logically expect something in return. But the present circumstances of this District, as well as the circumstances governing the reasonableness of health insurance costs generally, are currently anything but ordinary. It is not merely that the national debate concerning how to address extraordinarily high health insurance costs has reached a crescendo; the assumption of what constitutes a reasonable baseline expectation is a local matter as much as a national one. Here, that assumption has been thrown into doubt by the availability of a generally well-regarded alternative to the expensive plan on offer by the Association, at markedly lower costs. At the same time, many arbitrators have noted over the years since the escalation in health costs began in earnest that the concept of "status quo" is itself challenged by such cost increases, which necessarily change the parties' economic expectations even without any change in contract language. The Association also relies in its briefs in part on calculations which I find inexplicable. The Association argues, and presents its exhibits 1-7 and 1-8 to support, that its final offer actually reduces the support staff budget from 2007-08 to 2008-09 in total cost terms, and that even in the second year of the contract, total costs are below those of 2007-08. Total costs as

projected, however, reflect employee attrition (e.g. bus drivers who leave are not being replaced, but the subcontracted drivers who take over still have to be paid for.) In the face of credible evidence that the widely accepted “cast forward” budget used by the District reflects premiums of the existing plan which went up in 2008-2009 and that the Association’s health insurance proposal is more expensive in 2009-10 than the 2008-09 premiums, and in view of the fact that wages go up in both years, the “cast forward” numbers add up to a significant increase. On the face of the cited exhibits, moreover, it is apparent that there is no wage increase costed in, at least for 2008-09 (the equivalent sheet for the second year is not in the record.) I conclude that the District’s calculations are more reliable.

In this particular bargaining unit, other factors add to these considerations. While the District is solvent for the moment, there is nothing in the record to rebut the evidence presented that but for the passage of a half million dollar per year referendum effective for two years, the District’s annual budget would be in the red already by about that amount. This arises in the context of the known failure of a significant percentage of the referenda which have been put forward around the state. There is no basis on which to assume that the District will be successful in arguing for another such referendum, if one is proposed in 2011. If the public were to learn that maintenance of a high-cost insurance plan was part of the reason for a second referendum, even though an essentially equal one was available at notably lower cost, it is difficult to see how that would improve the chances of passage. The referendum proceeds cannot therefore be regarded as a continuing source of funds.

Similarly, I agree with the District that the federal stimulus monies cannot be regarded as a continuing source of funds, and that it is therefore inappropriate to address the District’s finances as if either of these current sources of funding would necessarily continue. The evidence in the record clearly identified many needs other than wages and benefits which have had to be deferred. Yet the District is paying highly adequate wages, by even the Association’s calculations. And the upward march of the health insurance costs under the existing plan has been durable. I conclude that the Association’s expectation that wages should be further augmented because of its modest move toward a slightly less expensive health insurance plan, under all of these circumstances, is not reasonable.

### **The Statute’s Weighing:**

Assuming that the “greatest weight” and “greater weight” factors no longer apply to this bargaining unit, even though this proceeding was pending at the time the factors were legislatively modified, several other factors still require an evaluation of the particular finances of a municipal employer and of their relationship to the local economy. First, however, I will note that the lawful authority of the municipal employer is not challenged by either offer. The stipulations of the parties include several improvements in minor benefits and an increase in shift premium, adding to what is by any standard a substantial wage proposal from either party.

As the Association has argued, the interests and welfare of the public are not a simple “economy above all” criterion, but also include more qualitative factors that bear on the likelihood of attracting and retaining good employees. Here, it is extremely unlikely that

adoption of either offer would encourage turnover among employees in an area and an era of high unemployment, when wages are at the top of the comparables and health insurance even under the Employer's proposal is notably better than the private insurance arrangements that are in the record for local employers (few, admittedly; but including the dominant one as noted below.)

But the economic effects of switching to a different health plan with a different carrier, in this instance, are nontrivial. They shave approximately a quarter of the immediate bill compared to continuing on the existing plan, and almost as much compared to the Association's slightly modified plan. And they do so without any major effect on employees' health care options or out-of-pocket costs, based on the record before me.<sup>5</sup> Given the evidence that the District's current improvement in its financial posture is more likely a "breather" than long-term relief from the adverse effects of the economy and of declining enrollment combined with being at the top of its taxing ability, this factor must be held to favor the District's proposal.

External comparables present a more complicated picture. Among the primary comparables, the District's health insurance plan is not the most expensive, but there is no getting around the sharp difference between those districts with WEA Trust plans and the others. All other things being equal, there is a clear preference under interest arbitration for the status quo. But the District has made a strong showing of financial adversity; has proposed an alternate health insurance plan which saves a great deal of money without any major loss to employees in either coverage, continuation with the same providers, or quality of service; and has offered a large wage quid pro quo. At the same time, the Association's wage proposal contains an unjustified extra increment in the second year, given that the employees were already well-off in wage terms compared to other districts. I conclude that under these circumstances, external comparability favors the District.

Other comparability measures are mixed. For internal comparability purposes, the fact that the plan the Association seeks to switch to is the same one the teachers currently have is a point in the Association's favor. The Association's second year wage proposal, however, is unjustified under the circumstances, potentially influencing the other bargaining unit to demand more, while the District's wage generosity has the explicit purpose of a quid pro quo. I conclude that internal comparability is neutral. The evidence of health insurance plans of other types of public employer (specifically, the contiguous counties) that is in the record favors the District's proposal, and while the private sector evidence of comparability is sparse, it includes the single largest employer in the area (Lands End) and there is no reason in light of general experience with labor relations to believe that the significantly lower benefits shown in the private sector plans are atypical.

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<sup>5</sup> The \$.40 per hour wage difference between the District's proposal and the Association's would pay for more \$10 office visit co-pays, and other such minor cost differences, than one would hope any employee would have to endure.

The CPI, after a relatively high burst of inflation for a few months about the start of the period covered by the contract in question, has notably abated, such that both offers comfortably exceed it. But in view of the unusual situation, in which the Association's wage proposal is closer to the CPI but partly unjustified, while the District's reflects a quid pro quo, it makes no sense to find either significantly proposal advantaged by the CPI.

The overall compensation factor is key, because of the interlinking of the health insurance and wage proposals. Nothing in these employees' wages or working conditions suggests inadequacy in any element compared to the comparables, and their wages, in general, are at the top. Under either proposal, their health insurance will continue to be one of the better packages available, and the actual providers and coverage levels are so similar that the sharp difference in cost between the health insurance proposals, combined with the District's quid pro quo wage offer, clearly amounts to a package that leaves employees relatively well-off, and at lower cost. I conclude that this factor also favors the District.

Changes in the circumstances during this proceeding have included a significant statutory change, which favors the Association's proposal, but not by enough to make a difference. They also include, of course, the effects of a severe recession, though arguably these were already predictable by the time the order requiring arbitration was issued, and affect the comparables as well. And the relevant other factors include the extraordinary cost of health insurance on a broader level than just this employer, particularly the cost of family plans for employees whose wages, even if they are well-paid compared to the comparables, are relatively modest compared to professional employees. These factors favor the District's proposal to increase wages further, as a quid pro quo for a health insurance change which saves large amounts of money at no conspicuous likely cost to employees' actual health care or insurance coverage.

**Summary**

Because the District has been suffering severe financial conditions on an ongoing basis, while the proceeds of its recent referendum and its share of federal stimulus funds are temporary, its proposal to replace a very expensive health insurance program with one essentially comparable to the Association's proposal, but much less expensive, is more reasonable than the Association's proposal for a much more modest change in health insurance. This is particularly so in light of the District's offer of a generous wage quid pro quo in comparison to the Association's proposal to harvest, in effect, half of the modest health insurance savings under its proposal.

**AWARD**

That the final offer of the District shall be included in the 2008-2010 collective bargaining agreement.

Dated at Madison, Wisconsin this 25th day of September, 2009

By \_\_\_\_\_  
Christopher Honeyman, Arbitrator