Arbitration of

FOND DU LAC SCHOOL DISTRICT

and

FOND DU LAC EDUCATION ASSOCIATION

ARBITRATOR'S DECISION AND AWARD

WERC Case XVII, No. 22816 MED/ARB-72
Decision No. 16345-A

Milo G. Flaten, Arbitrator

GENERAL

This dispute and consequent arbitration arises under the authority given the parties by Section 111.70(4)(cm) of the Wisconsin Statutes known as the Municipal Employment Relations Act.

On May 3, 1978, the Wisconsin Employment Relations Commission issued an Order requiring that mediation-arbitration be initiated for the purpose of resolving the impasse arising in collective bargaining between the Fond du Lac School District (hereafter, "the Board") and the Fond du Lac Education Association (hereafter, "the Union") on matters affecting wages and conditions for employment of all professional personnel employed by the Board including full or part-time certified classroom teachers.

At the same time the Wisconsin Employment Relations Commission furnished the parties a panel of prospective mediator-arbitrators for the purpose of selecting a single one to resolve the impasse.

On May 15, 1978, the Commission was advised that the parties had selected Attorney Milo G. Flaten, of Madison, Wisconsin as the mediator-arbitrator.

After consultation, a mutually satisfactory time and place was selected for the mediation-arbitration session and, on August 2, 1978, at 9 A.M., the proceedings began at the Board of Education Building in Fond du Lac, Wisconsin.

The mediation session lasted until 10:10 A.M. that day whereupon it became apparent that further mediation effort would be fruitless. The parties immediately commenced the arbitration hearing in keeping with the provisions of Wisconsin Law.

The arbitration hearing lasted until 10 P.M. The proceedings were transcribed by a court reporter and resulted in 263 pages of typewritten pages of testimony. Eight witnesses testified and 54 exhibits were introduced into the record. Both sides submitted post-hearing briefs in accordance with an agreed-to schedule.

Appearing for the Union were Attorney Bruce Meredith, Staff Counsel, Wisconsin Education Council, Suzanne Flores, Uniserv Director, Winnebagoland Uniserv Unit South and Armin Blaufuss, Uniserv Director, Winnebagoland Uniserv Unit South. Appearing for the Board was Attorney Gary J. Okey of Foley and Lardner, Milwaukee, Wisconsin.

ISSUE

Although the ultimate issue in matters under the Municipal Employment Relations Act is always, "Which final offer shall the Arbitrator select without further modification?", there were intermediate issues that had to be decided first. They were the question of "Fair Share" and the question of which proposal was the more reasonable regarding the base salary for teachers belonging to the Union for the period January 1, 1978, through July 31, 1978.

FINAL OFFERS OF THE PARTIES

Fair Share

As its final offer, the Union submitted the following proposal concerning "Fair Share":

"1. The Association has proposed the following fair share proposal:

"A. The Association, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, members and non-members fairly and equally, and all employees in the unit will be required to pay, as set forth in this section, their fair share of the costs of representation by the Association.

No employee shall be compelled to join the Association, but membership in the Association shall be made available to all employees who apply consistent with the Association Constitution and Bylaws. No employee shall be denied membership because of race, creed, color, sex, handicap or age.

B. The employer will, effective thirty (30) days after the date of initial employment or thirty (30) days after the opening of school, deduct from the monthly earnings of employees in the bargaining unit an amount of money equal to the monthly dues uniformly required of all members as certified by the Association, and pay said amount to the Treasurer of the Association on or before the end of the month following the month in which such deduction was made.

*1. See Below

C. The Association shall inform the employer of the amount of dues established by the Association prior to the first pay period of the school year.

D. The Employer shall provide the Association with the names of the employees who are members of the bargaining unit and other related information which will allow the Association to determine the amount of dues to be deducted from the wages of each employee.

E. In the event a teacher terminates employment before the total amount is deducted the Board is under no obligation to the Association for the balance owing.

F. As individuals subject to this section leave or enter the employment of the district during the school term, the employer will provide the Association with a list of such changes as soon as practicable.

G. Bargaining unit members who are paying Fair Share shall be excused from any fees, assessments, or other charges required of members of the Association where such amounts are intended for use in national, state, UniServ, or local political campaign activities.

H. Nothing in the foregoing shall prevent Association members, or those subject to fair share payments, from transmitting dues/payments directly to the Association treasurer in a lump sum payment. In the event a lump sum payment is made, the Association will promptly inform the district.

I. The Fond du Lac Education Association and the Wisconsin Education Association Council do hereby indemnify and shall save the Fond du Lac Board of Education harmless against any and all claims, demands, suits or other forms of liability including court costs that shall arise out of or by reason of action taken or not taken by the Board, which Board action or non-action is in compliance with the provisions of this Agreement, and in reliance on any list or certificates which have been furnished to the Board pursuant to this article, provided that any such claims, demands, suits or other forms of liability shall be under the exclusive control of the Wisconsin Education Association Council and its attorneys.

J. The Fair Share provision of this Section shall take effect for the 1978-79 school year subject to a referendum to be held among members of the bargaining unit. Unless a majority of teachers eligible to vote vote in favor of the fair share agreement, the fair share agreement shall not be implemented during the term of this contract. This referendum shall be conducted by the Wisconsin Employment Relations Commission on a joint petition of the parties hereto.

*1. If a referendum pursuant to Section J of this Article is not conducted so as to permit application and implementation of the effective date as provided above, the employer will, effective thirty (30) days after the successful referendum, deduct from the subsequent monthly earnings of all'non-Association member' employees in the bargaining unit an amount of money equal to the monthly dues uniformily required of all members as certified by the Association"

For its final offer, the Board proposed that no "Fair Share" provision be included in the Collective Bargaining Agreement.

Wages

2. As a final offer, the Union proposed that the teachers in its bargaining unit be paid a base salary of $10,000 for the period January 1, 1978, through July 31, 1978.

The Board in its final offer proposed a base salary of $9,900 for that same period. (The salary schedule for the balance of the Contract, through July 31, 1979, has been mutually agreed to by the parties.)

Fair Share

Legal Issue and the Board's Subpoenas

The State of Wisconsin has enacted legislation authorizing a system for union representation of local government employees including teachers. In such an arrangement a union and municipality are specifically permitted to agree to an "agency shop" whereby every employee represented by the union, even though not a union member must pay to the union, as a condition of employment, a service fee equal in amount to union dues. (Sec. 111.70 (1)(h), Wis. Stats.)

In the instant case, the Union has proposed this now-lawful scheme as part of its final offer to the Board and it has been denoted by the parties as the "Fair Share" issue.

The U.S. Supreme Court has affirmed the constitutionality of the Fair Share contract in Abood vs Detroit Board of Education, 431 US 209 (1978) and the Wisconsin Supreme Court has similarly affirmed it in Browne, et al vs Milwaukee Board of School Directors, et al, 83 Wis. 2d 316 (1978). Additionally, in the Browne case (supra) the Wisconsin Supreme Court affirmed the Wisconsin Statute which provided that the deductions from teachers' salaries should be used only to cover the cost of contract administration and collective bargaining. As part of the Browne proceedings, the Supreme Court remanded the factual question of what precisely constitutes those expenses to the Wisconsin Employment Relations Commission.

Claiming a basis founded on the Browne case, the Board, prior to the hearing, served subpoenas on the Union commanding its officers to produce certain financial records disclosing where its dues money is spent. The precise foundation for the subpoenas was claimed by the Board to be that it, the Board, would be committing a practice prohibited by law if it deducted money from the teachers' salaries for Union dues which subsequently went to pay for expenses other than those involved in the administration of the contract and collective bargaining.

The Union refused to obey the subpoenas and moved to quash them on various grounds and particularly on the ground that the Board had no right to examine the manner in which Union dues had been used in the past or how they were to be used in the future as such matters are of concern only to individual Union members and the Union, not to the employer and the union.

The Board argued that if the Arbitrator were to select the Union's final offer with the unrestricted Fair Share proposal, it might subject the Board to a claim that it committed a prohibited practice assuming that the monies collected were authorized for non-bargaining purposes. Therefore, rather than being caught possibly performing a prohibited practice, the Board felt it should find out from the union precisely how the dues money is being spent ahead of time; hence, the subpoenas requesting the information.

At the hearing the Arbitrator took the matter of the validity of the subpoenas under advisement to be dealt with on the issuance of his Decision and Award.

If this Arbitrator were to sustain the validity of the Board's subpoenas, a multitude of Union financial facts and records would presumably be brought into the record. The Arbitrator would then be forced into a position where he would have to make a factual determination as to which, if any, of the dues money was being expended for non-permissable purposes. In the Browne case this factual determination was expressly remanded to the WERC. Presumably, once this determination is made by the WERC, it will uniformly guide future cases of this nature.

While nothing in the Browne decision forbids an Arbitrator to make such a decision, it would be logical to delay it at this time with the WERC ruling in the offing. For this reason, the Arbitrator will leave that determination to the expertise of the WERC.

To rule otherwise might result in the parties in other municipal employee disputes under this Statute being subject to a wide disparity of interpretations and conclusions from the various arbitrators throughout the state. These uneven interpretations and conclusions could very well lead to protracted litigation in the Courts which certainly is not the goal of the Municipal Employment Relations Act. It is important to note that not all of the WERC Arbitrators are lawyers and could be unschooled in the rules of contractual or legislative interpretation. Moreover, the variety of disputants in this state usually present widely differing supporting data which could further result in differing conclusions even amongst law-trained Arbitrators.

Thus, until the Commission and ultimately the Courts, determine with some peculiarity, what is or is not related to collective bargaining, this Arbitrator will not attempt to determine whether expenditures are potentially impermissable (or permissable for that matter) under Sec. 111.70 of the Wis. Stats.

The preliminary ruling to quash the subpoenas, made earlier pending further study is therefore sustained and the Arbitration moves onto the merits of the question of Fair Share as proffered in the Union's final offer.(Tr. p. 30)

CONCEPT OF FAIR SHARE

The Board argues that it is morally wrong to force an individual to pay a fee to support causes and programs which he or she does not favor.

To this, the Union replies that it is morally right for a majority to force individuals in the minority to pay a proporionate share of the costs of representation and bargaining.

The Arbitrator notes that a public employee who believes that a Union representing him is urging an unwise course as a matter of public policy is not barred in any way from expressing his viewpoint. Every public employee is free to speak his mind, in public or private, orally or in writing. Specifically, the right of a public school teacher to oppose a position advanced by his teacher's union at a public school board meeting has been upheld in Madison School District vs Wisconsin Employment Relations Commission, 429 US 167. Thus, the principle of exclusivity under Fair Share cannot constitutionaly be used to muzzle a teacher who, like any other citizen, might wish to express his or her views about governmental decisions concerning labor relations.

In this case there are present three possibilities available to Fond du Lac teachers. He or she may opt to join the majority Union, namely, the Fond du Lac Education Association, to join the minority union, namely, the Fond du Lac Federation of Teachers, or for non-affiliation. It is this Arbitrator's opinion that the district would be better served if there were not such a proliferation of

opportunities and consequent diversity of employee leadership with which the Board must contend. As was stated in Abood vs Detroit Board of Education (supra) p. 277,

> "The confusion and conflict that could arise if rival teachers' Unions holding quite different views as to proper class hours, class sizes, holidays, tenure provisions and grievance procedures are no different in kind from the evils that the exclusivity that the Railway Labor Act was designed to avoid...the desirability of labor peace is no less important in the public sector, nor is the risk of "free riders" any smaller."

The question of whether a teacher should be forced to contribute to a cause he or she does not espouse has been at least recognized by the Wisconsin Legislature through the passage of the Statute which declares such Fair Share practices permissable. Indeed, the Wisconsin law provides that a Fair Share agreement may be executed between an employer and a union even if the majority of the membership of that Union did not sanction it or without the referendum which is part of the Union's final offer in this case. To put it another way, it is not legally necessary to poll the membership of a Union in order for a Fair Share agreement to be executed by a municipal employer and its union. Yet, in this case, the Union's final offer includes a referendum by the membership before Fair Share would go into effect.

Weighing the good which would result to both the Union and to the district from a uniform voice coming from the bargaining unit against the possible distaste that a dissident from the bargaining unit might feel when his Union acts in opposition to his views, this Arbitrator is constrained to favor the uniform voice. The very concept of cooperative and coordinated employee representation is founded on the principle of collectivism. It certainly is not founded on the principle of individual bargaining. Once a labor representation election is held and the results are known, individual rights should be made subservient to the principle of majority rule. The Legislature of the State of Wisconsin has made it clear that it favors collective bargaining as a means of resolving problems in municipal employment disputes and has provided means of regulating the labor relations policies of employers and Unions in such disputes. This pattern has held true in Wisconsin since 1959. As long as the Wisconsin Legislature has adopted public policy in establishing bargaining units and exclusive representation by a certified bargaining agent, the rights of employees as individuals is not by law as important as the rights of the collective bargaining unit. An individual employee cannot have it both ways. By accepting the benefits of collectivism he must surrender his individual taste and expectations to that of the majority in the bargaining unit.

Once a work unit adopts the collective bargaining route, it is clear that some workers in that unit might have to give up individual rights in order to gain objectives through collective bargaining which they cannot achieve by individual action. Thus, though this Arbitrator has sympathy with individual rights and liberties, he is of the opinion that a Fair Share agreement for the majority is more beneficial than a splintered group of employees would be each operating under fractional power.

COMPARABILITY

On the question of Fair Share comparability, this Arbitrator is convinced that a good case could be made for either side. While statistical manipulation could point to figures favoring either side, I am most impressed that the six very similar neighboring communities, Manitowoc, Oshkosh, Sheboygan, Appleton, Green Bay and Neenah are evenly divided in their adoption of Fair Share at present. Though no clear concensus is revealed, a definite pattern seems to be developing.

As Arbitrator James Stern stated in the recent Manitowoc School District case, (WERC Case XVII, No. 22639, MED/ARB-46):

> "It seems that the prevailing pattern is one in which the largest school districts in Wisconsin have adopted Fair Share and it is spreading to medium sized districts and will eventually cover most districts."

State wide, it appears that a majority of the districts do not have Fair Share while a larger percentage of the actual teacher population does.

While the Statute directs that Arbitrators consider the comparison with employees performing similar services in public employment in comparable communities in the state, such similarities or dissimilarities should not be the sole criteron upon which to base a decision. Instead, this Arbitrator will rely on the ideological principles espoused above.

WAGES

As in the issue of "Fair Share", the parties have ably presented extended statistics and other factual data supporting their respective positions.

The only thing that is undisputed is that the sum of $35,000 will be required of the Board to pay the demand which constitutes the final offer of the Union.

An overview of the various arguments does not reveal a definite pattern compelling a decision one way or the other. That is, both sides presented forceful contentions, comparisons and statistics demonstrating Fond du Lac's position compared with other school districts and with the past but neither seems to convince the Arbitrator to adopt its particular argument and, again, neither seems to establish a clear picture of dominance.

It is unfortunate that the parties did not by the rules have an opportunity to analyze and rebut each others' specific claims and statistics. For instance, the District claims that its offer will mean an increase in wages of over 9% which it argues would more than maintain teacher purchasing power. However, the Union did not really treat that subject. Again, while the Union's argument on comparables is sufficient as far as it goes, it does meet the Board's argument head-on with a comparison on facts, point by point.

While the sum of money involved is considerable, a decision on its payment does nothing to portend the future course of events. That is, wages and salaries for the balance of the contract have already been agreed to and the rate of pay involved does not establish a basis for future pay scales that has not already been established for the balance of the contract.

Overall, the Board probably has the more convincing line-up of facts to support its claims concerning wages. Nevertheless, the Arbitrator distinctly got the impression from both sides that the wages issue was not the one which the parties were most interested in.

DECISION

Though I tend to favor the case set forth by the Board on the issue of wages, I am constrained to feel that the issue of Fair Share is the more compelling one to the parties. On that issue, I feel the Union's final offer to allow the teachers to hold a referendum on "Fair Share" and to indemnify the Board against claims or liability for instituting such salary deductions is the more reasonable.

AWARD

Based on the foregoing facts and discussion and the criteria listed in the statute, the Arbitrator hereby makes his award in favor of the Fond du Lac Education Association's final offer.

Dated this 23d day of September, 1978.

Milo G. Flaten /s/
Milo G. Flaten, Arbitrator