

STATE OF WISCONSIN  
ARBITRATION AWARD

Wisconsin Employment  
Relations Commission  
State of Wisconsin  
MADISON, WISCONSIN

FEB 8 1979

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In the Matter of the Arbitration between :  
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SCHOOL DISTRICT OF CASHTON :  
:  
and :  
:  
CASHTON EDUCATION ASSOCIATION :  
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Re: Case IV  
No. 23103  
MED/ARB-122  
Decision No. 16441-A

Introduction

This proceeding involves a petition for mediation/arbitration filed by the Cashton Education Association pursuant to the provisions of Section 111.70(4) (cm)6 of the Municipal Employment Relations Act. The petition was filed on June 6, 1978, alleging that an impasse existed between the Association, representing a unit of about 38 FTE teachers, and the School District of Cashton. Thereafter a member of the staff of the Wisconsin Employment Relations Commission conducted an investigation and attempted to mediate the dispute. On June 29, 1978, the Commission certified that the conditions precedent had been met and ordered commencement of mediation/arbitration. The parties were then furnished a panel of mediator/arbitrators by the Commission. On July 13, 1978 the Commission notified the undersigned of his selection.

The undersigned met with the parties at Cashton on the evening of September 27 to attempt to mediate the dispute. These mediation efforts were unsuccessful and the parties agreed to hold an arbitration hearing on October 25. The hearing was held in the Cashton High School, commencing at 3:00 p.m. and concluding at 11:00 p.m. The parties were given an opportunity to present evidence from witnesses and in the form of documents. No record was kept other than the arbitrator's own notes. Appearing for the Association was Mr. Thomas C. Bina, Executive Director, Coulee United Educators, 4329 Mormon Coulee Road, P.O. Box 684, La Crosse, Wisconsin 54601. Appearing on behalf of the School District of Cashton was Mr. David R. Friedman, Special Consultant, Wisconsin Association of School Boards, Ind., 122 West Washington Avenue, Madison, Wisconsin 53703.

At the conclusion of the hearing session the parties agreed to file briefs with the arbitrator on December 1. The arbitrator exchanged the briefs on December 4. Any reply briefs were to have been posted by December 11. No reply briefs were received by the arbitrator.

THE ISSUES

At the hearing the parties signed the following stipulation:

The parties agree to amend the stipulation of agreed upon items by changing the early retirement language. The parties agree to an additional stipulation by adding a time limit for recall provision to both parties' lay off clause. The Association allows the Board to amend its extra-pay proposal to include an assist. gymnastics coach's pay of \$485.

The issues and the differences between the parties can be described as follows:

1. Salary Schedule: The Association proposes a BA Base salary of \$9,300; BA plus 10 credits, \$9,600; BA plus 20 credits, \$9,900; MA Base Salary, \$10,200; MA plus 10 credits, \$10,500. Increments in the columns represented by those figures would be respectively, \$325, \$335, \$345, \$355, and \$365. There would be no change in the number of steps from the previous agreement. The District would have a BA Base salary of \$9,350; BA plus 10 credits, \$9,700; BA plus 20 credits, \$10,050; MA Base salary, \$10,400; MA plus 10 credits, \$10,750. The District would have uniform increments in the columns of \$325.

2. Salary Provisions for Extra-Curricular Activities: The Association proposes that these figures be calculated as percentages of base salaries. Head coaches in football, basketball, gymnastics, and wrestling would receive 10 per cent. Head coaches in baseball, track, and volleyball would receive 7 per cent. Assistant coaches in football, basketball, junior high basketball, wrestling, and gymnastics would receive 6 per cent, while assistant coaches in baseball and track would receive 5 per cent. Other extra-curricular payments would be as follows: School Musical, 4%; School Play Director, 3%; Forensics, 3.5%; One-Act Play, 2%; School Annual, 4%; School Newspaper, 2%; Cheerleading Advisor, 2%; Band Director 6%; Class Advisors 9 & 10, 1%; Class Advisors 11 & 12, 1.5%.

The District would continue to pay those classifications fixed dollar amounts as in the past rather than using percentages. The head coaches in the same order as described above would receive \$840 and \$485. Assistant football coaches would receive \$535; assistant basketball coaches, \$570; assistant wrestling coaches, \$485, assistant baseball and track coaches, \$280, and assistant gymnastics coach, \$485. Other figures proposed are: School Musical, \$380; School Play Director, \$265; Forensics, \$235; One-Act Play, \$470; School Annual \$370; School Newspaper, \$170; Cheerleading Advisor, \$90; Band Director, \$250; Class Advisors, 9 & 10, \$90; Class Advisors, 11 & 12, \$145.

3. Longevity Pay: The Association proposes 2.5 per cent of base salary to teachers who are beyond the 14th step for each year of service beyond the 14th step. The District would substitute \$200 for the 2.5 percent figure proposed by the Association. Previously the Agreement had called for a 2 per cent figure.

4. Layoff: The Association proposal follows:

#### ARTICLE XIX

##### LAYOFFS

If necessary to decrease the number of teachers by reason of a substantial decrease of pupil population within the school district or other good reason

the governing body of the school system or school may layoff the necessary number of teachers, but only in the inverse order of the appointment of such teachers.

Recognizing the additional problem certification adds to a seniority layoff provision, it is agreed that layoffs will be at the area the decline in student enrollment occurs. However, a teacher so affected by a decline in pupil enrollment in their assigned teaching area or school shall be transferred to any area or school for which they are certified, or certifiable on the date of the notification of possible layoff.

Thus a teacher in a non-affected school or area may be laid off if a teacher with more local seniority is certified or certifiable in that teaching area.

No teacher may be prevented from securing other employment during the period he is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. No new or substitute appointments may be made while there are laid off teachers available who are qualified to fill the vacancies.

The District proposal is as follows:

LAY-OFF CLAUSE

1. When the board in its discretion determines to eliminate or reduce a full-time teaching position or program because of insufficient enrollment, budgetary or financial limitations, educational program changes or to reduce staff for reasons other than the performance or conduct of the teacher, the administration will on an individual basis and in comparison with other teachers evaluate and recommend to the board which teacher or teachers are to be laid off in accordance with the following criteria. Part-time teachers are not covered by this article.

2. The criteria to be used are "qualifications," "time taught in their subject area" and "length of service in the district."

(a) The following standards shall be applied by the administration in making the comparative evaluation of "qualifications":

Teaching performance in the district as previously and currently evaluated by the appropriate supervisor;

Appropriateness of training, experience and certification with respect to the remaining teaching assignments which must be filled;

Academic achievements, and, where applicable;

Co-curricular assignments or activities held or to be filled.

(b) In the event two or more teachers are found to be equally qualified upon application of the above standards, then time taught in subject area shall prevail, and if equal, length of service in the district shall prevail.

3. The board will notify the teacher in the notice of layoff of the reason for lay-off and of the teacher's reemployment rights.

4. When a full or part-time teaching position is made available and a laid off teacher or teachers have recall rights and the desired qualifications established for the position, then if more than one qualified laid off teacher has recall rights, the administration shall, after applying the standard for comparing individual "qualifications" set forth in paragraph 2, recommend to the board the teacher to be recalled. If two or more teachers subject to recall are found to have equal "qualifications," then the laid off teacher having the greatest length of previous service, if any, in the subject area shall be first recalled; and, if time taught in the subject area is equal, then the teacher having the greatest length of previous service in the district shall be recalled.

5. Fair Share: The Association's proposal follows:

#### FAIR SHARE AGREEMENT

The Association, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, Association and non-Association, fairly and equally and all employees in the unit will be required to pay, as provided in this article, their fair share of the costs of representation by the Association. No employee shall be required 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 Association membership because of race, creed, color or sex.

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

Changes in the amount of dues to be deducted shall be certified by the Association thirty (30) days before the effective date of the change.

The employer will provide the Association with a list of employees from whom such such deductions are made with each monthly remittance to the Association.

## 2. SAVE HARMLESS CLAUSE

The Association and the Wisconsin Education Association Council agree to Accept full legal responsibility for any claims, demands, suits or other forms of liability which may result against the Board arising out of enforcement of the Fairshare Agreement, provided that any such claims, demands, suits or other forms of liability shall be made under the exclusive control of the Association, the Wisconsin Education Association Council and their attorneys.

The District has no proposal on Fair Share.

6. Duration: Both parties would make the new agreement effective as of July 1, 1978 and to remain in effect until June 30, 1980. The Association proposes a reopener for negotiations after January 1, 1979 on the subjects of salary items, calendar, and "two wording items." The Board proposes the same reopener date but would limit the subjects to calendar and the following items: STRS, longevity, health insurance, mileage, extra classes, salary schedule and salary provisions for the extra-curricular activities listed in the agreement.

## DISCUSSION

The difference between the parties on the salary schedule proposals is that the Association would settle for lower entrance rates but would raise the rates for teachers with greater amounts of training, with the largest differences going to those teachers who have Master's degrees and many years of experience. The Board's proposal would be more advantageous to about half of the teachers (in most case by \$50 per year), all of them in the BA column and below Step 10 in the BA plus 10 column. The difference reflects the Association's view that those teachers who have more education credits and years of service should be rewarded by larger increases and the District's view that the newer teachers and generally those with fewer credits beyond the Bachelor's degree should get greater increases. Although the Association did not cost out the difference specifically, the Board estimates in its brief that the Association's proposal on salaries would cost \$1808 more per year. In my view the differences between the parties on this issue has minor significance. My preference would be for the Association's proposal on grounds that in today's labor market there is probably little difficulty encountered in recruiting new teachers at the starting level. The ultimate effect of proposals like that of the District will be to narrow the differential between top and bottom and thereby reduce incentives for obtaining additional credits.

According to the Association's estimate, the difference between the two proposals on extra-curricular activities compensation is about \$2000 per year. The Association argues that a percentage figure is reasonable since the use of percentages would tend to remove this kind of compensation from the necessity of bargaining individual rates each year. The District, however, argues that the Association has not justified a change from the dollar figures that the parties have traditionally used. The differences come to about \$90 at the head coach level and somewhat less at the assistant coach level, although there are some marked discrepancies, such as the \$185 difference between the parties' proposals on assistant baseball

and track coaches and the \$308 difference between their Band Director proposals. Since the overall amount of difference between the parties on this issue is not large, I am inclined to agree with the Association that the use of percentages would facilitate future bargaining over this issue.

On longevity pay the difference between the two proposals also comes to about \$2,000. On this issue the District is proposing a shift from the present 2 per cent of base salary to a dollar figure. The \$200 figure proposed would represent a \$14 increase over the figure that would be obtained by applying 2 per cent to the new base. From the standpoint of future negotiations, however, it would probably require additional negotiations, whereas the parties might otherwise be satisfied with the application of the fixed percentage to the rising base. On this issue, however, the Association is proposing a change in the percentage to 2½ per cent. Although my preference is for a percentage figure, the Association has not explained to my satisfaction why the figure should be raised. The percentage increase amounts to 25 per cent more in dollars than the former figure. Although there may be some justification for this, I am skeptical about increasing a percentage figure without an explanation of the rationale for the simple reason that application of a uniform percentage to a rising base will automatically increase the dollar amount of longevity payments. My inclination is in favor of a percentage figure on this issue. The increase in the percentage in the Association's proposal conforms with its general position on salaries in that it is aimed at proportionately greater increases for longer term employees. I will discuss this further below in terms of applying the criteria in the statute.

On the layoff issue the Association would follow a strict seniority rule applicable to the area in which the decline in student population occurs. There appears to be no significant difference between the position of the Association and the position of the District on the reasons for decreasing the number of teachers. Although the District is more specific in its wording so as to include "insufficient enrollment, budgetary or financial limitations, educational program changes or to reduce staff for reasons other than the performance or conduct of the teacher," the Association seems to recognize in its proposal that there are reasons other than merely a decrease in pupil population for laying off teachers. To this reason has been added in longhand on the final offer the words "or other good reason." The Association recognizes in its proposal the need to retain certified or certifiable teachers in the area of layoff so that the teacher to be laid off under the application of seniority may be in a non-affected school or area" if a teacher with more local seniority is certified or certifiable in that teaching area." Under the Association proposal recalls would also be governed strictly by seniority, that is, inverse order of layoff, of those qualified to fill vacancies. The District's proposal differs substantially from that of the Association since it would put two criteria ahead of seniority in the district. These would be "qualifications" and "time taught in the subject area." The word "qualifications" would include several factors: teaching performance in the district as evaluated by the supervisor, appropriateness of training, experience and certification with respect to the remaining teaching assignments, academic achievements, and where applicable, co-curricular assignments or activities. Only if two or more teachers were found to be equally qualified would time taught in the subject area be considered. If these were also equal, then length of service in the district would prevail.

On this issue I am ordinarily skeptical about departing from a strict seniority rule at a time of layoff. The problem

is in applying the criteria subsumed under the term "qualifications." Although I would agree that the best qualified people ought to be retained, the question is whether application of subjective judgments can be excluded at a time such as that. The Association objects particularly to the inclusion of a judgment by the District administrators on the subject of extra-curricular and other outside activities. Although I have great sympathy for the Association's point of view on the subject of layoff, I would like to note that the parties have in their basic agreement a fairly elaborate provision on teacher evaluation. This is a procedure to which the Association has agreed and which would be applicable to the District administrator's qualifications assessment at the time of layoff. In my opinion this creates a situation very different from one where the administrators are not required to follow a specific procedure in making such evaluations.

This brings me to the fair share issue. On this issue both parties have expended more time and space than on any other single issue. The Association makes all the well-known arguments to support its position. These arguments have been covered very capably in the awards of James L. Stern in the Manitowoc Public School District case (WERC Case XVII, No. 22639, MED/ARB-46) and Milo G. Flaten in the Fond du Lac School District case (WERC Case XVII, No. 22816, MED/ARB-72), both of which were introduced into evidence at the hearing. I need not repeat all those points here. In the testimony at the hearing it was brought out that only four or five of the teachers in the unit are not already members of the Association. Thus, the addition of a fair share agreement would affect only a small minority of the teachers employed by the District. On its side the District makes all the arguments and perhaps more than were given to Milo Flaten in the Fond du Lac case in an effort to convince the arbitrator that, since portions of the Association's dues are expended on activities that have been found not to relate to collective bargaining in a recent Wisconsin Supreme Court case (Brown, et al vs. Milwaukee Board of School Directors, et al, 83 Wis. 2d 316 (1978)), the adoption of the Association's position by the arbitrator would constitute grounds for a prohibited practice charge against the District. Therefore, the District argues, it would be improper for the arbitrator to choose the Association's proposal. The District also argues philosophically against forcing teachers who are not now members to pay dues to the Association since they are all said to have expressed their resistance to the idea of joining or supporting the Association.

Without taking the time and space to go into any detail on the subject, I would like to say here that I am generally in agreement with the analyses of Messrs. Stern and Flaten on the subject of fair share. There are distinct differences between this dispute and the cases cited in Manitowoc and Fond du Lac, however, on the criterion of comparability. The District also argued that there is very little precedent for fair share agreements among comparable school districts in the area of Cashton, and I will discuss that argument below.

The remaining issue is the duration clause. Here the Association is arguing for flexibility in what can be taken up in a reopener, and the District argues for specificity. Presumably several of the specific items listed by the District, such as STRS, longevity, health insurance, mileage, extra classes are subsumed under the category of "salary items" in the Association's proposal. Both parties would include the subject of calendar. The Association also includes "two wording items." The Association argues that this wording will allow the parties to negotiate on items that "deal with some particular problem either side feels exists." It is not clear to

me what kind of problems this wording might present to the parties at the time of a reopener. If this were the only issue, I would be inclined to choose certainty over uncertainty on what is appropriate for negotiations.

APPLICATION OF THE CRITERIA IN THE STATUTE

The statute states that in reaching a decision the arbitrator/mediator shall give weight to the following factors:

- (a) The lawful authority of the employer.
- (b) Stipulations of the parties.
- (c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
- (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
  - 1. In public employment in comparable communities.
  - 2. In private employment in comparable communities.
- (e) The average consumer prices for goods and services, commonly known as the cost of living.
- (f) The overall compensation presently received by the 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.
- (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Although the District has raised the issue of whether an award in favor of a fair share clause would constitute an invitation to a prohibited practice charge, I do not think that it is within the province of an arbitrator to make such decisions on issues of law and therefore I do not believe that any factor involving the lawful authority of the District is involved in this proceeding.

I have covered the stipulation of the parties above.

Although the award below is necessarily based upon my interpretation of the interests and welfare of the public, I do not find that the proposals of the parties in this dispute raises any question of the ability of the District to meet the costs should I make an award in favor of the Association. The cost difference between the two proposals is not great enough to influence this factor, nor has the District raised the issue of ability to pay.

I am concerned about the factor of comparability as expressed in subparagraph (d) above. The parties disagree as to what is the proper area of comparability and indeed on the importance of comparability in reaching a decision on which proposal to choose. The Association has taken the position



that both the Northern section of the Scenic Central Athletic Conference and the New Athletic Conference to which Cashton belonged (or belongs) constitutes a comparable group of schools. The District, however, would use the entire Scenic Central Athletic Conference as the comparables.

Following are the comparable school districts that the Association would use, along with enrollment figures where available to me from the materials presented at the hearing:

Scenic Central Athletic Conference (Northern)

	<u>Enrollment</u>
Bangor	657
Cashton	663
Weston	562
New Lisbon	826
Norwalk-Ontario	557
Wonewoc	572
Hillsboro	707

New Athletic Conference

Elroy-Kendall-Wilton	NA
Bangor	657
Cashton	663
New Lisbon	826
Norwalk-Ontario	557
Wonewoc	572
Hillsboro	707

Essentially then the Association would include seven nearby communities as comparables.

The District would use the Scenic Central Conference school districts for its comparables. These include many of the same communities as those above, but total fourteen in all. They are:

Bangor	657
Cashton	663
DeSoto	848
Hillsboro	707
Ithaca	462
Kickapoo	619
LaFarge	371
New Lisbon	826
North Crawford	831
Norwalk-Ontario	557
Seneca	517
Wauzeka	395
Weston	562
Wonewoc	572

The districts used by the Association are all within about a thirty mile radius of Cashton while all but one of those used by the District are within a forty mile radius. The average enrollment of the Association's comparable districts is 649, the District's 613. Both parties also refer to CESA #11 school districts as comparables on some issues, and the Association makes some comparisons with other schools elsewhere in the state of Wisconsin with similar enrollment figures. On one of the items, the layoff clause, the Association makes a comparison of all schools within a 35 mile radius of Cashton. On fair share the Association uses both the CESA #11 school districts and the districts in the Scenic Central Conference (northern) and the New Athletic Conference.

In all these comparisons there are mixed results. On the salary schedule the District's proposal would maintain Cashton's rank among its own comparables when base salaries are compared while the Association's proposal would move Cashton up in the rankings when maximums are compared and when longevity and extra-curricular activity payments are compared. Judging from the time and attention devoted to them by both parties, however, it seems clear that the key issues in this proceeding are the layoff and fair share proposals. On these latter issues the comparables are against the Association's positions. The Association uses a listing of schools within a thirty-five mile radius of Cashton to show that nine of nineteen schools have layoff clauses based on seniority. But only one of these is in the Scenic Central Athletic Conference (Northern) or the New Athletic Conference. Although the District did not present an exhibit on this issue, it might be surmised that the number of such clauses in the fourteen districts in the Scenic Central Conference is a small proportion of the total. Nor was evidence presented by either party to show the incidence of layoff clauses based on seniority among the CESA #11 districts.

On fair share both parties made comparisons. According to the Association eight of twenty-six districts in CESA #11 have fair share while two districts have it in the combined list of Scenic Central Athletic Conference (Northern) and the New Athletic Conference. According to the District only four districts have fair share among the twenty-four districts in CESA #11 with which the District presented comparisons. Only two districts were said to have it among the fourteen districts in the Scenic Central Conference. One of the districts said by the Association to have fair share was New Lisbon. The District agrees that New Lisbon has such a provision, but a letter was introduced from the New Lisbon superintendent quoting what appeared to the arbitrator to be ambiguous wording and which could be interpreted as allowing teachers to opt out from the checkoff.

The Association also introduced a comparison of duration clauses for a listing of CESA #11 schools. This did not include information on the important issue here of whether the reopener clause proposed by the Association, providing for two language items, has any precedent in other agreements among districts deemed to be comparable by the parties.

Let me return now to the individual issues. On the salary schedule there is little difference between the parties. Neither proposal is unreasonable when compared with other districts in the area, whether one uses the districts the Association prefers or the districts preferred by the District. My preference would be for the Association's proposal for the reasons explained above.

On the salary provisions for extra-curricular activities the Association's proposals would make Cashton somewhat higher than most of the districts with which either party would compare it and would move these salaries up so as to compare favorably

with much larger districts in CESA #11. I would view this issue as a toss-up. Although I favor the use of percentages in these calculations, I would have to agree with the District that some of the increases appear to be inordinately large.

For reasons discussed above I also view the longevity issue as a toss-up. I favor the continuation of a percentage figure, but the 2½ per cent proposed by the Association has little precedence among the districts used by either party as comparables.

It is on the other three issues, layoff clause, fair share, and duration, that I am unable to find substantial support for the Association's positions among the comparable districts. As I have indicated in the opinion expressed above, I do not view either layoff by seniority or fair share clauses as undesirable. In this case my instinctive preference for seniority as a means of avoiding subjective decisions at time of layoff is tempered by the existence of a system of evaluation that the Association itself has agreed to include in the labor agreement. Therefore, since a majority of the comparable districts do not have layoff clauses governed by seniority, I am not uncomfortable in opting for the District's position.

On fair share I would be willing to disregard all the District's argument about legalities. I think that it is also significant in arriving at an award that nearly all the teachers are already members of the Association. My reservation, which in the end is persuasive to me, concerns my reluctance, as an outsider, to impose a fair share clause on the District in this labor agreement when there is so little precedent for it in the area among comparable school districts. It is trite to repeat what has been said so often, that fair share ought to be adopted as a result of negotiations between the parties. I agree with what Professor Stern said in his Manitowoc decision, that fair share is spreading from the largest school districts to medium sized districts and eventually will cover most districts. To some extent this will happen as a result of arbitrators' decisions. I am not saying that arbitration awards under Section 111.70(4) should always be governed by the comparability standard. There may be circumstances where fair share should be awarded even though it is not the prevalent practice in the area. In this case, however, it is my view that fair share is so far from being the prevailing practice in the Cashton area that I cannot make such an award in this proceeding.

I have expressed my view of the duration issue above. I did not find any support in comparable districts for the kind of clause proposed by the Association. Although I think that it is a minor item in this dispute, I would favor the District's proposal.

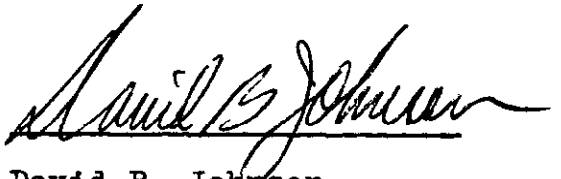
I have also considered the factors listed in subparagraphs (e), (f), (g), and (h) quoted above from the statute. In my opinion there is not enough difference between the proposals of the Association and the District on the issues of salary schedule, extra-curricular activities, and longevity to distinguish between them in terms of the award on the basis of any of those factors.

#### Award

Having considered all the evidence and arguments presented by the parties in terms of the factors listed in the statute for the arbitrator to consider, I select the final offer of

the District as the award in this proceeding.

Dated: February 7, 1979

Signed:   
David B. Johnson  
Mediator/Arbitrator