STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of PORTAGE EDUCATION ASSOCIATION To Initiate Mediation-Arbitration Between Said Petitioner and PORTAGE COMMUNITY SCHOOL DISTRICT	Case X No. 23316 MED/ARB-169 Decision No. 16608-A

Appearances:

Mr. James M. Yoder, Executive Director, South Central United Educators, appearing on behalf of Portage Education Association.

Mr. William G. Bracken, Membership Consultant, Wisconsin Association of School Boards, Inc., appearing on behalf of Portage Community Schools.

ARBITRATION AWARD:

On October 26, 1978, the Wisconsin Employment Relations Commission appointed the undersigned as Mediator-Arbitrator, pursuant to 111.70 (4)(cm) 6.b. of the Municipal Employment Relations Act, in the matter of a dispute existing between Portage Education Association, referred to herein as the Association, and Portage Community School District, referred to herein as the Employer. Pursuant to the statutory responsibilities, the undersigned, on January 15, 1979, conducted a mediation meeting between the Association and the Employer, which failed to resolve the matters in dispute between the parties. On January 16, 1979, after both the Association and the Employer had waived the provisions of the statute at 111.70 (4)(cm) 6.c., which provides for written notification to the parties of the Mediator-Arbitrator's intent to resolve the dispute by final and binding arbitration, and which provides that the Mediator-Arbitrator establish a time limit within which the parties may withdraw their final offers, the undersigned proceeded to take evidence in arbitration hearing over the matters remaining in dispute. Hearing was conducted at Portage, Wisconsin, with the parties present, and the parties were given full opportunity to present oral and written evidence and to make relevant argument. No transcript of the proceedings was made; however, briefs were filed in the matter, which were exchanged by the Arbitrator on February 20, 1979.

THE ISSUES:

Four issues remain in dispute before the Arbitrator. The disputed issues are as follows:

1. Number of make up days in school calendar.

2. Length of probationary period before the just cause standard applies for non-renewals.

3. Fair Share.

4. Assignment of teachers within certification.

The final offers of the parties with respect to the four issues are as follows:

ASSOCIATION FINAL OFFER:

1. Section VII - Work Schedule. Calendar. Add the following paragraph to the existing language: The Association agrees to make up any work days lost due to inclement weather that are required for the receipt of state aid by the school district. Those days to be made up on days provided for in the agreed upon calendar.

2. Section IX - Teacher Evaluation, E. Nonrenewal. In the third paragraph of item E, substitute "The Board will not non-renew a teacher's contract except for cause. These provisions shall not apply to teachers who are in their first year in the district." for the first sentence.

3. Section V - Benefits. 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 costs of the collective bargaining process and contract administration as certified in a sworn statement 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, sex, handicap or age.

   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 earnings of all employees in the collective bargaining unit, in equal installments from each pay check, the amount of money certified by the Association. Such deductions shall be forwarded to the Association within thirty (30) days of such deductions.

   The employer will provide the Association with a list of employees from whom deductions are made with each remittance to the Association. The Association and the WEAC do hereby indemnify and shall save the Board harmless against any forms of liability 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 form of liability shall be under the exclusive control of the WEAC and its attorneys. In no way shall this save harmless provision be read so as to exclude or prevent the Board from tendering its own defense either through its own attorneys or those of the WEAC at its own expense.

   The Association shall provide employees who are not members of the Association with an internal mechanism within the Association which allows those employees to challenge the fair share amount certified by the Association as the cost of representation and receive, where appropriate, a rebate of any monies determined to have been improperly collected by the Association pursuant to this section.

   The Fair Share Agreement shall become a part of the professional agreement provided that 51% of those eligible bargaining unit members voting cast affirmative ballots. Such referendum to be conducted by the Wisconsin Employment Relations Commission.

4. Section VI - Placement. Requirements for Appointment. Substitute the word "assignment" for the word "appointment" in both the heading and in the paragraph content. The paragraph would then read as follows: The standard for regular assignment of teachers and other professional personnel shall be a minimum training required for a Bachelor's Degree from an accredited college or university and a license issued by the Wisconsin Department of Public Instruction to teach in the subject field and grade level for which the teacher is employed.

EMPLOYER FINAL OFFER:

1. Section VII - Work Schedule. Calendar.

   Add: Make-up days will be scheduled as follows:

   (a) 1st day - Teachers only. To be scheduled by administration on same basis as equivalency time.

   (b) 2nd day - Make up by teachers and students on first scheduled make up day.

   (c) 3rd day - Make up by teachers and students on second scheduled make up day.

   (d) 4th day - No make up for teachers or students.

   (e) 5th day - Make up on Saturdays.

2. Section IX - Teacher Evaluation, E. Nonrenewal.

   Non-renewal of contract shall be in accordance with the provisions of Section 118.22 of the Wisconsin Statutes.

   It shall be the responsibility of the administration to make the teacher aware of unsatisfactory performance or other possible cause for non-renewal of contract in writing as soon as practicable after it is determined that consideration may be given to non-renewal. Reasonable effort will be made to provide administrative and supervisory assistance to the teacher to overcome identified problems.

   Teachers will serve an initial three (3) year probationary period in the Portage Community Schools. The provisions of the next paragraph will not apply until the teacher has served the three (3) year probationary period.

   The BOARD may non-renew a teacher for cause. The non-renewal shall be reasonably related to the orderly, efficient and safe operation of the Portage School District and the performance that the BOARD might properly expect of the teacher. The administration's investigation shall be conducted openly, fairly, and objectively. The administrative decisions shall be applied uniformly without discrimination to all teachers. Non-renewal procedures are not subject to the discharge provisions of this contract.

3. Fair Share.

   The Employer makes no offer on fair share.

4. Assignment of Teachers within Certification.

   The Employer proposes to continue the language of the predecessor Agreement.

DISCUSSION:

Each of the four issues in dispute between the parties will be discussed individually prior to determining which offer in its entirety is to be incorporated into the parties' Collective Bargaining Agreement. In determining each issue, and in determining which entire final offer is to be accepted, the undersigned will evaluate the offers, based on the criteria set forth in Wisconsin Statutes 111.70 (4)(cm) 7. The criteria are as follows:

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 and with other employes generally in public employment in comparable communities and 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 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.

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

THE CALENDAR ISSUE

The Association has proposed that days required for the receipt of state aid by the school district will be made up if they had been lost due to inclement weather. The thrust of the Association proposal in this district is that the first five days of school lost due to inclement weather, commonly known as snow days, will not be made up. The parties have agreed to snow day make up for April 11 and 12, 1979, in their school calendar, and the Association proposal would then provide for make up days on April 11 and 12, 1979, pursuant to the negotiated calendar for the sixth and seventh snow days lost to inclement weather. The Employer proposal would provide for student make up days on the second and third and fifth snow make up days, and would require no make up for the first snow day lost and for the fourth snow day lost for teachers.

This issue was brought to the bargaining table via an Association proposal which stemmed from a controversy which arose under the precedessor Agreement in the spring of 1978. The controversy in the spring of 1978 involved the community at large, including a number of public meetings on the question of make up days and how they conflicted with a community fund raising activity which was scheduled on what otherwise would not have been a school day had it not been for a scheduled snow make up day. As a result of the controversy the Association and the Employer agreed to conduct a survey in the form of questionnaires directed to parents residing within the school district as to how make up days should be scheduled. The Association largely grounds its case in support of its proposal of no make up of the first five snow days on the results of the survey. Additionally, the Association argues that with the adoption of Senate Bill 127, which became law on March 28, 1978, which provides in relevant part that up to five days during which school is closed by order of the district administrator because of inclement weather need not be rescheduled for the receipt of state aids. The Employer opposes the Association proposal and relies on comparisons with comparable school districts with respect to snow make up days in support of his proposal.

The undersigned has reviewed the evidence with respect to this issue, and finds that the Employer proposal on the issue of make up days should be adopted on this issue standing alone. The comparables on make up days are overwhelmingly in favor of the Employer proposal. The evidence shows that there is no other school district either in the conference or in the CESA 12 district which forgives the make up of the first five snow days. The comparables then establish the preference for the Employer offer.

The undersigned has given careful scrutiny to the results of the survey which was conducted jointly between the Association and the administration regarding make up days. There is no question that the response to the survey, which numbered approximately 1,080 questionnaires returned, is impressive. The Association has presented evidence that the parties, at the time they initiated the survey,

determined that 125 responses would represent a proper statistical average significant enough to represent the entire community. There is also no question that the record shows that of the 1,080 responses returned, 243 responses wrote comments indicating their preference that the first five snow days not be made up. The Association argues that since 125 responses were deemed by the parties to be significant, that the 243 responses favoring no make up of the first five snow days should be deemed to be representative of the community attitudes. The undersigned cannot accept the Association argument in this regard. If the community response with respect to make up of snow days were to have persuasive effect in these proceedings, then in the opinion of the undersigned a majority of the 1,080 responses would be needed to establish that the community favors the forgiveness of the first five snow days, particularly here where the Association proposal is so clearly at odds with the practices of comparable districts. While it is true that the 243 responses favoring no make up of the first five days require the initiative of the responders to write that comment under a general comment provision of the questionnaire and is, therefore, impressive, the 243 responses in favor of no make up of the first five snow days simply fails to support the Association position in this matter, since it is only a 22.5% showing in favor of the Association proposition. The undersigned, therefore, concludes that the Association has failed to establish sufficient proof in the record to support its proposal regarding snow make up days.

LENGTH OF PROBATIONARY PERIOD FOR NON-RENEWAL

Both parties in their proposals have offered a just cause standard for non-renewals of teachers. At dispute here is the length of the probationary period. The Employer has offered a just cause standard for non-renewal of teachers, which becomes effective after a three year probationary period. The Association has offered a just cause standard for non-renewal of teachers, which becomes effective after a one year probationary period.

The Association has argued that the Employer offer requires all teachers presently employed in the district to serve a three year probationary period commencing with the effective date of this Agreement. The undersigned has examined the language proposed by the Employer and concludes that the language is precise as to whether presently employed teachers will be required to serve a probationary period commencing with the effective date of this Agreement. Specifically, the Employer has proposed that teachers will serve an initial three year probationary period in the Portage Community Schools. The undersigned construes the language proposed by the Employer to mean that the three year probationary period commences to run from the time the teacher was initially employed in the district. It follows, then, that the Association objection that the Employer offer requires all teachers to commence serving a probationary period with the effective date of this Agreement is rejected.

The evidence adduced at hearing with respect to the length of probationary periods for non-renewals which are subject to a just cause standard favors the Association proposal. The evidence shows that seven of the nine school districts in the athletic conference provide for a just cause standard for non-renewals. Of the seven districts which provide for just cause for non-renewals, only two of the districts have a provision for a probationary period, and no district in the conference has a three year probationary period. Based on the comparables, the Association position would prevail.

The Employer has argued that a one year probationary period, by reason of the statutory deadlines for non-renewals, is reduced to a four month period, which would work adversely to the probationary teachers. The undersigned is inclined to agree with the Employer that a one year probationary period is too brief. However, in view of the evidence on practices with respect to probationary periods in the conference, the undersigned concludes that the Association position here is slightly preferable to that of the Employer.

FAIR SHARE

The Employer opposes the adoption of the fair share agreement, largely on a philosophical basis. Additionally, the Employer argues that the form of the fair share language with respect to the hold harmless provision and with respect to the implementation militates against the adoption of fair share in this dispute. The undersigned concludes that the Employer argument against fair share is not persuasive. The evidence with respect to fair share shows that within the community of Portage and the surrounding area, the Portage police have fair share, and four unions in Columbia County are covered by fair share agreements. It is clear to the undersigned that the electors who elect the Board of Education for Portage Community Schools are largely the same electors who have elected representatives representing them on the County Board of Columbia County, as well as the governing board of the City of Portage. It is inconceivable to the undersigned how fair share agreements can be philosophically acceptable to the electors electing the officials of the City of Portage and the officials of the Columbia County Board, and be unacceptable philosophically to those same electors who elect the School Board. For that reason the philosophical argument advanced by the Employer is rejected.

With respect to the deficiencies of the language proposed by the Association for fair share, the undersigned concludes that the language is typical of language found in fair share agreements and, therefore, the fair share proposal of the Association will not be rejected for that reason. Furthermore, the undersigned notes that there is at Section XII of the Collective Bargaining Agreement, a savings clause, and said clause negates any argument which the Employer has advanced with respect to the dilemma he is placed in over the defense of the fair share provision.

With respect to comparables the undersigned notes that in the athletic conference five of the eight districts (excluding Portage) have either a full fair share or a modified fair share.[1] Thus, 62.5% of the districts in the conference have a fair share provision. The comparables are not so persuasive when considering district schools within the CESA District. However, as the Association argues many of the districts within CESA 12 are significantly smaller than the Portage school district, and the comparability of said districts is not so sufficiently established in the mind of the undersigned so as to be persuasive.

While the comparables favor fair share, the undersigned, as previously stated in Fox Point School District No. 8,[2] holds that fair share is not a controlling issue here. There are other issues in dispute between the Employer and the Association, and fair share will be included or excluded in the Agreement based on whether the other issues in dispute lead to the conclusion that the Association or the Employer offer be adopted. It, therefore, follows that fair share will either be included or excluded from the Agreement in this matter, based on the outcome of the other disputed provisions.

ASSIGNMENT OF TEACHERS WITHIN CERTIFICATION

The Association has proposed that the language of the predecessor Agreement be modified by substituting the word assignment for the word appointment in the provision of Section V - Requirements for Appointment. The undersigned is persuaded that the word assignment more properly reflects the understanding of the parties with respect to certification requirements. While the undersigned would favor the substitution proposed by the Association, the record is clear that the present word "appointment" has been construed by the parties to apply to teacher

1) Sauk Prairie, at the time of hearing, was not settled. However, both party's final offer included fair share.
2) Fox Point Joint School District No. 8 - MED/ARB-50, WERC Case X, Decision No. 16352-A, at page 15.

assignment. The undersigned, therefore, considers the dispute with respect to the choice of word assignment versus appointment to be one of clarification rather than substance, and while the word assignment is preferred this issue will not control the dispute.

SUMMARY AND CONCLUSIONS:

As stated above on the issues standing separately the calendar issue is decided in the Employer's favor; the probationary period issue and the assignment of teachers issue are decided in favor of the Association, and the fair share issue is determined to be non-controlling. In view of the findings on the separate issues, wherein the undersigned concluded that the probationary period issue was narrowly in favor of the Association position; and in view of the finding that the teacher appointment issue was primarily one of clarification rather than substance; and in view of the finding that the snow make up day issue was overwhelmingly in favor of the Employer position; and in view of the finding that the fair share issue is not controlling in the instant dispute; and since the undersigned now finds that the snow make up day issue outweighs the importance of the probationary period issue and the teacher appointment issue; it follows that the Employer offer should be adopted in its entirety in this matter. Therefore, after considering all of the evidence, and the final offers of the parties in their entirety, and after applying the criteria which the statutes direct, the undersigned makes the following:

AWARD

The final offer of the Employer is to be incorporated into the Collective Bargaining Agreement, along with the stipulations of the parties which reflect prior agreements, for the contract year 1978-79.

Dated at Fond du Lac, Wisconsin, this 10th day of April, 1979.

Jos. B. Kerkman,
Mediator-Arbitrator

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