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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE ARBITRATOR

In the Matter of the Mediation-Arbitration Between	AWARD and OPINION
LAKE HOLCOMBE SCHOOL DISTRICT	Case XVII No. 23442 MED/ARB 205 Dec. No. 16714-A
and	
NORTHWEST UNITED EDUCATORS	

APPEARANCES:

Stevens L. Riley, Esquire, Losby, Riley & Farr, S.C., Eau Claire, for the School District
Robert E. West, Executive Director, Northwest United Educators, Rice Lake, for the Association

On August 24, 1978, Northwest United Educators (referred to as NUE or the Association) filed a petition with the Wisconsin Employment Relations Commission (WERC) pursuant to Section 111.70 (4)(cm)(6) of Wisconsin's Municipal Employment Relations Act (MERA) to initiate mediation-arbitration. NUE and the Lake Holcombe School District (referred to as the School District or the Employer) had begun negotiations on April 11, 1978 for a successor contract to their 1977-78 collective bargaining agreement which was to expire on June 30, 1978 but failed to reach agreement on all issues in dispute covering this unit of approximately thirty-nine (39) regular certified teachers. On December 7, 1978, following an investigation by a WERC staff member, the WERC determined that an impasse existed within the meaning of Section 111.70(4)(cm)(6)(a) and that mediation-arbitration should be initiated. On January 4, 1979, the undersigned, after having been selected by the parties, was appointed by the WERC as mediator-arbitrator to resolve the impasse. She met with the parties on April 19, 1979 in Holcombe, Wisconsin, to mediate the dispute. (No citizens' petition pursuant to Sec. 111.70(4)(cm)(b) had been filed with the WERC and, therefore, no public hearing pursuant to that section was scheduled.) When these mediation efforts proved unsuccessful and the undersigned notified the parties of her intent to resolve the dispute by final and binding arbitration, the parties agreed that the matter should be submitted to the arbitrator by means of a written record consisting of exhibits, briefs, and reply briefs in lieu of the meeting referred to in Sec. 111.70(4)(cm)(6)(d).

ISSUES AT IMPASSE

Of all the issues which were subjected to the collective bargaining process between the parties for their 1978-79 successor agreement, three issues remain unresolved:

1. salary increments;
2. extra-curricular (or co-curricular) pay;
3. union security.

The final offers of the parties on issues #2 and #3 are clear. The Association's final offer in regard to extra-curricular or co-curricular pay is part of its final offer annexed hereto as Appendix A; the Employer's final offer on this issue is annexed hereto as Appendix B. As to issue #3, union security, the fair share proposal of the Association is part of its final offer annexed hereto as Appendix A. The Employer has proposed no new contract language on this issue. The 1977-78 collective bargaining agreement contained a section requiring the Employer to deduct dues based upon individual authorizations. (See Article II(5).)

As to issue #1 relating to salary increments, the parties' briefs and exhibits have brought to light an unusual situation. Both parties have agreed in their offers to increase the BA salary base from $8,900 to $9,500 for the 1978-79 year. However, in addition, the Employer's October 18, 1978 final offer includes the following language: "increase salary schedule increments to $315" (from the $300 increments of the 1977-78 collective bargaining agreement). The Association's October 25, 1978 final offer states: "increase the longevity increment to $325." The Association has been clear in the language of its offer and in its arguments and exhibits that its final offer refers to vertical (experience) increments only and does not refer to horizontal sections of the salary schedule which provide additional salary lanes for groupings of additional educational credits beyond a BA. However, there is some uncertainty as to the precise meaning of the Employer's offer and its reference to "salary schedule increments". On the initial page of the Employer's brief, there is an unambiguous statement as to the issues to be decided. This includes: "1. salary schedule (vertical increments only)...." On the same initial page of the Employer's brief, there is another explicit reference to the narrow nature of the salary schedule dispute at impasse: "the salary issue concerns solely the vertical increment... should each step increase by $15 or $25." During the mediation phase of this dispute, the mediator-arbitrator had understood that the parties' dispute on salary schedule was limited to vertical increments only.

Three of the Employer's exhibits (submitted as part of the School District's brief and identified as ##3, 5 and 9), however, are clearly based upon an assumption that both the Association's and the Employer's salary schedule final offers cover increases to horizontal lanes as well as to vertical increments. This unfortunate confusion as to the scope of the Employer's final offer on issue #1 was only partly cleared up when the undersigned sought written clarification from the parties by letter dated July 30,1979. The Association responded that the Employer's interpretation (that the School District's final offer includes an increase for both vertical increments and horizontal lanes) represents an "escalation" of the Employer's certified final offer. The Association concludes that this attempt by the Employer to change by interpretation its certified final offer or, at the very least, that offer's unfortunate ambiguity precludes acceptance of the School District's offer by the arbitrator in this proceeding. The Employer, of course, rejects this conclusion, responding that the parties in the past have bargained for vertical increments and then applied the agreed-upon sum to the horizontal lanes as well as to the vertical steps to construct an appropriate salary schedule. Thus, argues the Employer, the School District's position in this proceeding that the amount of the prevailing party's vertical increment will also be applied to the horizontal lanes is consistent with the parties' past practice. Resolving this question of interpretation of the Employer's salary schedule increment offer remains and must be confronted as a threshold question by the arbitrator.

Since there is no voluntary impasse procedure agreement between the parties, the undersigned is required under MERA to choose either the entire final offer of NUE or the entire final offer of the Employer.

STATUTORY CRITERIA

Under Sec. 111.70(4)(cm)(7) the mediator-arbitrator is required to 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 waves, 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 the same community and in comparable communities and in private employment in the same cormunity and 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.

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

POSITIONS OF THE PARTIES

The Association

In the view of the Association, issues #1 and #3 are more important than issue #2 because the former issues affect all members of the bargaining unit. The Association supports its proposal that longevity increments should be increased from $300 to $325 (rather than to $315 as proposed by the Employer) primarily on the basis of comparability data and secondarily upon cost of living data. Using the Lakeland Athletic Conference plus the contiguous school districts of Ladysmith and

Cornell, the Association argues that these comparables provide strong support for the NUE position. For example, the Employer's proposal places the Lake Holcombe School District $51 short of the Conference average for vertical increments while NUE's proposal places it $41 short of the conference average. Thus, contends the Association, we are dealing with an admittedly conservative Association demand, one which does not substantially change the School District's low relative position. Moreover, the Association emphasizes that no inability to pay argument has been made at any time herein by the Employer nor does the School District reject the salary increment NUE position because of a too high cost. Employer produced and distributed statistics submitted by NUE indicate that the School District (in comparison to other school districts in the Lakeland Conference) has a slightly higher than average pupil teacher ratio, a lower than average millage rate, and a lower than average cost per pupil. As for cost of living, the Association sets forth cost of living statistics to demonstrate that neither party's salary increment proposal keeps pace with cost of living increases, although NUE's proposal comes closer. For all these reasons, the Association believes that its vertical increment offer is more reasonable.

As to issue #2, extra-curricular or co-curricular pay, the Association first notes that the total dollar difference between the parties' final offers is relatively minor. In supporting its final offer, the Association believes that the normal comparability factor is impossible to apply here because emphasis on these types of duties varies enormously from school district to school district. Instead, the Association contends, the primary factor to be used in considering this issue is the basic professional hourly rate covering teachers. Thus, in view of the hours of work required, the Association's proposed hourly rates are quite modest in comparison to the usual hourly rate for regular teaching responsibilities. On a more technical level, the Association argues that the Employer's offer must be rejected because it contains a critical flaw; the Employer has not included any increases for band director and driver education instructor. For these reasons, the Association concludes the Employer's offer on this issue should be rejected.

On the last issue in dispute, union security, the Association supports its fair share proposal on the grounds that fair share is legal, fair share is desireable (since all who benefit would share in the cost of statutorily required exclusive representation), fair share is becoming the state-wide pattern in Wisconsin and has already become the predominant pattern within the Lakeland Athletic Conference, and, lastly, fair share is equitable because an overwhelming majority of bargaining unit members (in excess of 80%) currently support NUE through membership in the Association.

Finally, the Association rejects the point raised in the School District's brief that the Employer's mediation offer, particularly in regard to meeting NUE's salary schedule increment offer on issue #1, should be given special consideration and weight in this proceeding by the arbitrator. NUE argues that this School District move was a belated Employer attempt to improve its posture in anticipation of arbitration and is a recognition by the Employer of the superior nature of the Association's final offer package. The Association believes that it was justified in refusing to consent to the Employer's amendment of its final offer in the absence of a mediated settlement on all issues and urges that no consideration be given to such mediation-phase history in this arbitration context.

The School District

On issue #1, the Employer agrees that comparability data relating solely to vertical increments favor the Association's position. It notes, however, that comparisons of the entire salary schedule, particularly horizontal lanes and other School District fringe benefits favor the Employer's $315 vertical increment offer rather than the Association's $325 vertical offer. Moreover, the School District believes that some recognition should be given to its past efforts to improve salary schedule increments, the need to improve vertical increments gradually (particularly in view of the School District's limited financial resources[1]) and the Employer's long standing philosophy which rewards increased educational level skills rather than longevity alone. The Employer also contends that its salary schedule increment offer is to be preferred because during the mediation phase of mediation-arbitration, the Employer, in the interests of reaching a mediated settlement, was willing to amend its final offer to meet the Association's position on issue #1 but that this approach was unreasonably rejected by the Association when the latter refused to consent to such an amendment.

On the issue of extra-curricular or co-curricular pay, the Employer believes that its position is by far the more reasonable one since implementation of the School District's proposal places the School District at the top of its Athletic Conference.

Third, on the issue of fair share, the Employer seriously questions the desireability of the NUE involuntary fair share provision in the circumstances of this case, particularly since only about 60% of members of the bargaining unit had their membership fees deducted through the submission of voluntary authorization forms pursuant to the parties' 1977-78 collective bargaining agreement. Moreover, the Employer argues that the dissenting members of the bargaining unit (the non-members) are not free loaders; they actively disagree with the Association's policies and therefore should not be forced to pay for "services" which they do not want nor be forced to associate in any way with NUE.

For all the above reasons, the Employer concludes that its offer should be selected because it is the more reasonable one.

DISCUSSION

There are two questions which must be dealt with initially before getting into the merits of the parties' substantive dispute: 1) on issue #1, is the issue before the arbitrator only related to vertical (experience) increments or are increases to horizontal lanes before the arbitrator as well; and 2) what weight, if any, should be given to the Employer's rejected offer to amend its final offer during the mediation phase of mediation-arbitration in determining the arbitration phase of the same dispute? On the first threshold question, are increases for horizontal lanes (in addition to vertical increments) properly before the arbitrator in this proceeding, the undersigned believes that the answer is no. She reaches this conclusion because she believes that heavy weight must be given to the clear, unambiguous wording of the Employer's own submission statement (despite any different assumptions reflected in accompanying Employer exhibits), because the Association has consistently interpreted the dispute in terms reflected by the Employer's submission statement, and because the Employer's submission statement

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[1]The School District notes that according to 1975-76 Wisconsin Legislative Council figures, the Lake Holcombe District ranks at the bottom (number 14) of the Lakeland Athletic Conference in terms of total person income in the district apportioned per pupil.

reflects the arbitrator's understanding of this aspect of the dispute throughout her mediation efforts. This is not an instance of mutual mistake but is an unusual example of a unilateral mistake by the Employer. Under traditional contract law analysis, reformation of an offer is not permitted where there is a unilateral mistake. Thus, issue #1 will be analyzed in terms of vertical increments only (although it should be noted here briefly that even if the Employer's interpretation had been accepted so that its offer covered both vertical and horizontal salary schedule steps, the ultimate outcome of this proceeding would not be affected).

As to the second threshold question, should any weight be given in the arbitration phase of mediation-arbitration to the Employer's proposed amendments of its certified final offer during the mediation phase of mediation-arbitration of the controversy and to the Association's refusal at that time to consent to any changes? In this case, the arbitrator does not believe that this piece of bargaining history should be considered. First, she does not think that it should be considered because the inference to be drawn from the Employer's offer to meet the NUE demand on issue #1, if given any weight, would favor the Association's proposal as more reasonable. Surely, this is not what the Employer had in mind in raising this point. More important, however, the undersigned does not believe that the mediation phase of mediation-arbitration would be strengthened if later, during the arbitration phase, a party were permitted to utilize the opposing party's mediation stance to the disadvantage of the opposing party and for the advantage of the proposing party. The arbitrator believes that permitting evidence of such mediation behavior under the circumstances of this case could unfortunately chill or distort the mediation phase and thus would be against public policy as reflected in MERA. Accordingly, no weight will be given herein to the Employer's offer to meet the NUE final offer on issue #1 during mediation and the NUE's refusal to consent to such a change (or to other rejected offers to modify final offers).

As to the specific substantive issues before the arbitrator, it is readily apparent that the parties are very close in their positions on issues #1 and #2. The Employer has estimated that the total difference is slightly over $5000 (including approximately $1100 for differences on issue #2). However, that cost calculation must be modified downward since it was based upon increasing horizontal lanes as well as vertical increments by either $15 or $25 each (an incorrect Employer assumption). The Employer acknowledges that while it is way ahead in the horizontal lanes, there is some need to catch up as to vertical increments. Thus, the NUE proposal on vertical increments appears slightly more desirable because it does not interfere with the School District's long-standing policy emphasis rewarding additional educational credits and yet at the same time places increases where they are most needed, into the vertical increments. In any case, as was already noted, implementing either of the parties' final offers will make little overall economic difference, based upon comparability data supplied by the parties. This is particularly true if one were to consider the NUE final offer on issue #1 ($25 increase for all vertical steps) and compare it with the Employer's final offer on issue #1 interpreting the latter to include a $15 increase for all horizontal as well as vertical steps. Under this pairing of final offers, the parties are especially close in their positions. Choosing one over the other requires a fine tuning of comparability data in light of the statutory standards. This becomes unnecessary in this proceeding because of the determinative importance that the arbitrator believes must be attached to issue #3 (see discussion below).

As to issue #2, the parties appear to be further apart than they are on issue #1. However, here too they are in the same "ballpark" and are not separated by a critically different approach, despite the Association's rejection of a traditional analysis based upon comparability. Again, only a close analysis using detailed comparability data (including job descriptions, etc.) can provide a definitive answer as to which of the offers is to be preferred, using statutory factors. Such an analysis is not essential here given the comparative closeness of the parties' offers on this issue and the already noted overriding importance of issue #3.

The arbitrator believes that the outcome of this proceeding depends upon her analysis of issue #3 since, unlike their positions on issues #1 and #2, the parties are far apart on the issue of union security, a critical policy issue which is also a mandatory subject of bargaining. While the Employer seeks to continue the voluntary dues deduction provisions of the expired collective bargaining agreement, the Association seeks a full fair share agreement.[2] The differences between these parties are thus clearcut and deepseated. In analyzing this issue and determining its outcome, the arbitrator believes that the following considerations are entitled to material weight:

1) the United States Supreme Court in Abood v. Detroit Board of Education established the constitutionality of fair share (agency shop) agreements covering public employees negotiated pursuant to state law;
2) what types of union activities may be included in calculating legal fair share fees is a separate legal issue which is currently the subject matter of extended litigation before the WERC and is not an issue in this proceeding;
3) there has been a long term bargaining relationship between the Employer and NUE since 1973, a period of almost six years;
4) although there is some dispute between the parties as to the exact extent of NUE membership, there is no doubt that a substantial majority of members of the bargaining unit currently belong to NUE (according to the Association, approximately 80%); and
5) a majority of school districts in the Lakeland Athletic Conference, an acknowledged comparable for salary purposes, currently have some version of fair share (modified or full) in their collective bargaining agreements so the concept is not alien to this geographical area.

The sole choice that the arbitrator has in this proceeding is between a voluntary dues deduction arrangement and full fair share. If other union security options had been before the arbitrator, it is difficult to foresee what form of union security would have appeared most appropriate applying the statutory criteria to the circumstances of these parties. As between the final offers herein, however, the NUE fair share proposal appears to be more reasonable for the reasons stated above and in view of the policy judgment of the Wisconsin legislature when it made fair share proposals a mandatory subject of bargaining.

Based upon all these factors, the arbitrator concludes that the NUE proposal on issue #3 is to be preferred and that even had the Employer prevailed on the other two issues because of the comparative closeness of the parties' final offers on issues #1 and #2, her decision on issue #3 must necessarily determine the outcome of the proceeding on all issues before her.

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[2]Note, however, that the NUE proposal contains an indemnification clause.

AWARD

Based upon full consideration of the exhibits and written arguments presented by the parties and due weight having been given to the statutory factors set forth in Section 111.70(4)(cm)(7) of MERA, the mediator-arbitrator selects the final offer of the Association, Northwest United Educators, and orders that NUE's final offer be incorporated into a written collective bargaining agreement as required by statute.

Dated: August , 1979

Chilmark, Massachusetts

June Miller Weisberger
Mediator-Arbitrator

FINAL OFFER OF NORTHWEST UNITED EDUCATORS

SCHOOL DISTRICT OF LAKE HOLCOMBE

WERC CASE XVII NO. 23442 MED/ARB-205

The following is the final offer of Northwest United Educators. All items not mentioned in this final offer are either stipulated for change or should be continued as contained in the 1977-78 collective bargaining agreement.

1. Salary Schedule - Increase the BA base salary to $9500 and increase the longevity increment to $325.

2. Co-Curricular - Increase the head coaching positions and the yearbook advisorship by $150. Increase the assistant coaches and all other co-curricular activities by $75. Increase the drivers' education pay to $6.50 per hour.

3. Fair Share

   A. NUE, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, NUE and non-NUE, 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 NUE. No employee shall be required to join the NUE, but membership in NUE shall be made available to all employees who apply consistent with the NUE constitution and bylaws. No employee shall be denied NUE membership because of race, creed, or sex.

   B. 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 of the monthly dues certified by NUE as the current dues uniformly required of all members, and pay said amount to the treasurer of NUE 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 NUE fifteen (15) days before the effective date of the change. The employer will provide NUE with a list of employees from whom such deductions are made with each monthly remittance to NUE.

Appendix A

C. NUE and the Wisconsin Education Association Council do hereby indemnify and shall save the Lake Holcombe School District 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.

D. This provision shall become effective upon the date this Agreement is signed.

4. The Board shall grant one credit on the horizontal index for each 120 hours of work experience toward Vocational Capstone re-certification, said work to be approved by the administration and credits so earned limited to a maximum of four between each lane.

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2. EXTRA CURRICULAR DUTIES AND PAY SCHEDULE

I. EXTRA CURRICULAR DUTY	SCHEDULED PAY 1978-79
*Head Football	950.00
*Assistant Football	700.00
*Assistant Football	700.00
Junior High Football	650.00
Junior High Assistant Football	450.00
Head Volleyball	750.00
Assistant Volleyball	500.00
Girl's Basketball	900.00
Assistant Basketball (girls)	650.00
Head Basketball (boys)	950.00
J-V Basketball	700.00
Junior High Basketball	600.00
Assistant Junior High Basketball	450.00
Junior High Basketball (girls)	600.00
Head Baseball	600.00
Assistant Baseball	500.00
Head Track (Boys & Girls)	650.00
Batons	275.00
Pom-Pons	275.00
Advisor, Yearbook	275.00
Advisor, Play	275.00
Advisor, School Paper	325.00
Advisor, Forensics	425.00
Advisor, Cheerleaders	475.00
Advisor, G.A.A.	300.00
Band Director	350.00

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* Varsity and Jr. Varsity Football coaches shall hold a minimum of 10 practices prior to the first day of in-service.

II. All staff members shall be responsible for one of the following duties without compensation, as part of their contract. Performance of such duties shall be voluntary; provided, however, that if no volunteers are available, the Administration may assign teachers to these duties on a fair and equitable basis, and there shall be a minimum of three (3) days notice.

Hall Duty	$8.00	Track Starter	$8.00	
Ticket Seller	8.00	2 Volleyball Linesman	8.00	
Time Keeper	8.00	Dance Chaperone	$12.00	
Score Keeper	8.00	Bus Chaperone	$8.00	trip plu 7.5¢ per mile
Football Chains	8.00			

III. Driver Education - $6.00 per hour

Initialled: _____