STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Final Offer
Interest Arbitration Between

SCHOOL DISTRICT OF MENOMONEE FALLS

and

MENOMONEE FALLS EDUCATION ASSOCIATION

Appearances:

Mulcahy & Wherry, S. C., Attorneys and Counselors at Law, by Mr. John F. Maloney, appearing on behalf of the Employer.
Mr. David C. Pfisterer, Executive Director, TriWauk UniServ Council, appearing on behalf of the Association.

ARBITRATION AWARD:

On March 6, 1980, the undersigned was advised that he had been selected by the School District of Menomonee Falls, referred to herein as the Employer, and by Menomonee Falls Education Association, referred to herein as the Association, to determine a dispute with respect to the inclusion of certain provisions in the parties' Collective Bargaining Agreement, as specified below. The undersigned's selection and the impasse resolution procedure were adopted by the Employer and the Association pursuant to their stipulation to an alternate impasse procedure as provided for in Section 111.70 (4)(cm) 5 of the Wisconsin Statutes. The stipulation of the Employer and the Association providing for the alternate impasse procedure which establishes the jurisdiction of the undersigned reads as follows:

> IT IS HEREBY STIPULATED, by and between the School District of Menomonee Falls and the Menomonee Falls Education Association that the following shall be the procedure whereby the parties mutually agree to resolve the sole remaining issue between the parties in regard to the 1979-80 and 1980-81 school years:
>
> A. School District of Menomonee Falls, defined as a "municipal employer", pursuant to Section 111.70 (1)(a), Wis. Stats.
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> The Menomonee Falls Education Association is defined as a "labor organization", pursuant to Sec. 111.70 (1)(j), Wis. Stats.
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> B. This alternate impasse procedure is agreed upon, pursuant to Sec. 111.70 (4)(cm) 6, Wis. Stats. This procedure shall become effective as of its execution by the parties, and a copy of same shall be filed by the parties with the Wisconsin Employment Relations Commission.
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> C. The parties voluntarily waive the Wisconsin Employment Relations Commission's investigation and appointment of a mediator/arbitrator provided for under Sec. 111.70 (4)(cm) 6, Wis. Stats., and voluntarily select as the mediator-arbitrator for this dispute Joseph B. Kerkman.
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> D. All powers of the mediator/arbitrator, as defined in Sec. 111.70 (4)(cm) 6, Wis. Stats., shall be available to Joseph B. Kerkman, and he shall have all powers as though he had been appointed by the Wisconsin Employment Relations Commission, as opposed to by the Stipulation of the parties.

E. The parties have previously engaged in extensive collective bargaining relative to the negotiation of a collective bargaining agreement for the 1979-80 and 1980-81 school years. As a result of such negotiations, a final agreement has been ratified, approved, and implemented in regard to all of the wages, hours, and conditions of employment with the sole exception of one (1) final language item dealing with the question of an "extracurricular lay off index factor".

F. The extracurricular lay off index factor is the sole issue in dispute for the 1979-80 and 1980-81 contract years.

G. The District and the Menomonee Falls Education Association agree that the dispute reflected above shall be processed and resolved in accordance with the following procedures:

1. The School District of Menomonee Falls has submitted its final written offer on the extracurricular lay off index factor to the mediator/arbitrator and the Menomonee Falls Education Association, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A".

2. The Menomonee Falls Education Association submits as its final written offer that there be no change to the language of the current collective bargaining agreement to the mediator/arbitrator and the School District of Menomonee Falls on or before April 25, 1980.

3. No modifications to the final offers of the parties will be permitted after the above date with the exception that the mediator/arbitrator can, in his discretion, attempt to mediate the positions expressed by the parties in such final offers.

4. In the event that a voluntary settlement is not reached as a result of such mediation, the issue shall be submitted for a hearing to be conducted in the manner prescribed by Sec. 111.70 (4)(cm), Wis. Stats., on June 4, 1980.

5. At the conclusion of the hearing, written arguments may also be submitted on a schedule mutually agreeable to the parties and to the arbitrator. The arbitrator shall adopt without further modification the final offer of one of the parties in total.

The decision of the arbitrator shall be final and binding on both parties, and shall be incorporated into the written collective bargaining agreement, which is attached hereto and whose terms are incorporated herein by reference as Exhibit "B".

The arbitrator shall provide a copy of his written decision to both parties as soon as possible after the conclusion of the mediation/arbitration hearing as the award will become effective as of the commencement of the 1980-81 school year.

6. The costs attributed to this procedure shall be divided equally between the parties; however, each party shall bear the cost for any out-of-pocket expenses, including witnesses and attorneys fees. The arbitrator shall submit a statement for his costs to both parties.

7. In making any decision under the arbitration procedures authorized by this Stipulation, the arbitrator shall give weight to the factors set forth in Sec. 111.70 (4)(cm) 7, Wis. Stats.

Dated at Milwaukee, Wisconsin, this 4th day of June, 1980.[1]

1/ Paragraphs B and C of the stipulation refer to Sec. 111.70 (4)(cm) 6. It is clear to the undersigned that the proper section of the statute should be and is Sec. 111.70 (4)(cm) 5, and the undersigned deems that paragraphs B and C are now modified to conform to the proper section of the statute.

Pursuant to the terms of the stipulation the undersigned met with the parties in mediation on June 4, 1980, however, a voluntary agreement was not reached, and consistent with prior notice, evidence was taken in arbitration on June 4, 1980, at Menomonee Falls, Wisconsin, at which time the parties were present and given full opportunity to present oral and written evidence, and to make relevant argument. The proceedings were transcribed, and briefs were filed in the matter, which were received by the Arbitrator by June 20, 1980.

THE ISSUE:

The parties were able to come to agreement on all terms of their Collective Bargaining Agreement for the contract years 1979-80 and 1980-81, except for an Employer proposal which would modify the method of calculating points which establish an index factor for lay off consideration. The Employer's final offer with respect to the modification is as follows:

EXTRACURRICULAR LAY OFF INDEX FACTOR

Extracurricular Assignment -- Section A,1,(e)

As used for purposes of this clause, extracurricular assignment refers only to those assignments listed in Sections 12, B, 1 and 2 of the contract.

Section A, 3, (e) (5)

After computation of the lay off index for the year as determined by sections (1) through (4) of this Section, teachers who were voluntary participants in an extracurricular assignment will be accorded a 10% increase in the index number as established by Sections 1 through 4 of this Section.

The Association proposes to leave in place the language of the predecessor agreement.

The parties ratified all other terms of the Collective Bargaining Agreement for the current contract term, and the Employer has implemented those terms. At issue, then, is whether the proposed modification of the lay off procedure advanced by the Employer should be included in the Collective Bargaining Agreement between the parties which is now in full force and effect.

DISCUSSION:

At Section 15, paragraph A, 3, e of their Agreement, the parties have provided for a unique method of establishing a point index to establish the number of points credited to each teacher in the system for the purpose of determining which teachers will be laid off and which teachers will be retained when staff reductions are necessary. The formula for establishing the number of points for each teacher takes into consideration the number of years employed within the District, the years taught in each teacher's specific field of certification, and the number of credits earned by each teacher. Under the formula the years in the system are weighted by a factor of 100 per year, whereas the factors of certification and credits are weighted by a factor of 60, unless a barrier is crossed, in which case the weighting factor for years of certification and credits is reduced. The thrust of the Employer offer would apply a 10% increase after all of the calculations now provided for in the Collective Bargaining Agreement are completed for those teachers who are voluntary participants in an extracurricular assignment as provided for in Section 12, B, 1 and 2 of the Collective Bargaining Agreement, resulting in improved protection against lay off for those teachers who are voluntary participants in extracurricular assignments.

The record establishes that the school district of the Employer has suffered severe enrollment declines during the period 1971 to 1978, which amounts to a decline from 8,436 to 5,626 students in the District, a drop of 33%. The enrollment decline between 1973 and 1978 was 28%, and during that period the decline in elementary enrollment was 45%; middle school enrollment decline was 36%; and high school enrollment decline only 5%. Projected enrollment

establishes that by the 1983-84 school year enrollment will decline further to approximately 3,576 students, and that the further decline will affect high school enrollment. Because of the enrollment decline between the years 1973 and 1978 a staff reduction of 106 positions, or 15% took place, however, the 15% staff reduction does not typify the drop at the elementary and middle school levels where the staff was reduced by 44% at the elementary level and 30% at the middle school level. The enrollment decline and the staff reduction experienced in the Employer school district is the most severe in the metropolitan area of Milwaukee or the State of Wisconsin.

Given the foregoing fact situation with respect to declining enrollment, the Employer argues that:

1. The situation in the Employer school district is unique and, therefore, comparability is not a meaningful criteria.

2. The Employer final offer recognizes a problem which will have a devastating impact on the educational program unless steps are initiated now to prevent it.

3. The Employer final offer is a sound approach to a difficult and uncertain situation in that, a) the District's final offer approaches the problem in a manner consistent with the present Collective Bargaining Agreement; and b) the present Collective Bargaining Agreement allows for an equitable administration of the District's final offer once it becomes part of the contract.

The Association contends that:

1. All available evidence indicates that volunteerism for co-curricular responsibilities at the high schools is so high as to obviate the necessity for the District's proposed change in the lay off clause.

2. The Employer offer is not sufficiently clear so as to establish a clear understanding of what the Employer intends to implement pursuant to its proposed language.

3. Even if the Arbitrator clarifies the intent of the language in the Award, the Employer proposal is still so flawed that it should not be adopted.

4. There is no comparable school district which provides for a clause of the type proposed by the Employer.

In their stipulation the parties provide that the Arbitrator shall give weight to the factors set forth in Wisconsin Statutes, Section 111.70 (4)(cm) 7, a through h. The Employer evidence was directed at criteria b, the stipulation of the parties; criteria c, the interest and welfare of the public; and criteria h, such factors 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 private employment. Additionally, the Employer argues that by reason of its unique situation with respect to declining enrollment and staff reduction, criteria d, which directs the Arbitrator to consider comparisons of conditions of employment in comparable communities, is not a meaningful criteria. The Association, however, relies on criteria d, the comparables, as well as criteria h, "other factors".

The undersigned has considered the evidence as it applies to criteria b, c and d, and concludes that those criteria will not control the outcome of the dispute. With respect to criteria b, the stipulations of the parties, as it applies to this dispute, establish that the factual background is principally undisputed, i.e., the declining enrollment and staff reductions in the Employer district are the most severe in the State.

With respect to criteria c, the undersigned is satisfied from the testimony of the School Board President of the Employer district, that the interests and welfare of the public as it applies to this District, place a high emphasis on

the extracurricular programs, and from said testimony, the undersigned concludes that the interests and welfare of the public in this District must necessarily afford the Employer the opportunity to provide for the coverage of extracurricular assignments. Having so concluded, however, does not establish that the Employer's final offer should be adopted. It would remain to be determined under criteria h, whether the offer proposed by the Employer would satisfactorily and equitably accomplish the ends which the Employer seeks. Whether the proposal of the Employer is necessary to meet his purposes will be considered and discussed when considering criteria h.

While the comparables clearly establish that a proposal of the type made by the Employer in the instant matter is unprecedented among comparable employers, regardless of what districts properly comprise comparable employers; the undersigned is persuaded that comparables will not determine the outcome of this dispute. The collective bargaining provisions which the Employer offer proposes to modify are already unprecedented among comparable employers. It is the conclusion of the undersigned that since the parties here already have a unique provision with respect to staff reduction; the fact that the Employer proposal is also unique when considering comparables is unpersuasive.

From the foregoing, it is clear that criteria h will control the outcome of this dispute. The Employer argues that his proposal will permit him to meet the needs of the 80's in view of the declining level at the high school level, which is anticipated. Under criteria h, then, the undersigned will consider whether the Employer has met his burden of proof to establish that his proposed contract is necessary to assure coverage of extracurricular assignments in the face of said declining enrollment. If so, the undersigned will additionally consider whether the final offer of the Employer contains sufficient flaws so that it should not be included in the Agreement.

The undersigned is unpersuaded that the Employer has made a case that his proposal is essential in order to meet his needs of the 80's for extracurricular assignments in the face of the declining enrollments anticipated at the high school level in the 1980's. Throughout his argument the Employer emphasizes that its language is essential in order to provide a sufficient pool of volunteers so as to insure that the extracurricular programs will not disintegrate for lack of volunteers; or suffer by reason of changes of personnel providing the extracurricular duties. With respect to the creation of a sufficient pool of volunteers, the undersigned is unpersuaded that the Employer's language is necessary. At hearing the Association adduced evidence to show that at present there are sufficient volunteers to adequately meet the needs of the district for its extracurricular programs. The status quo, however, with respect to the sufficiency of volunteers does not insure that there will be sufficient volunteers in the future when the enrollment decline hits the high school. The Employer proposal requires that the 10% bonus is only awarded to voluntary participants, not just to volunteers. Thus, it is required that to be eligible for the 10% bonus a teacher must not only volunteer but he must be selected for an assignment. From the foregoing, the undersigned concludes that the proposal of the Employer when it requires that a teacher must be a participant to qualify for the 10% bonus, goes beyond what is necessary to create a pool of volunteers. If the Employer proposal had included a 10% bonus for all those who volunteered, without regard to whether they eventually participated, the Employer's end of creating an assured pool of volunteers would have been met, and no teacher would have been rewarded by a 10% bonus by reason of which volunteer had been selected. Therefore, the Employer has failed to establish to the satisfaction of the undersigned that the requirement that an employee participate to be eligible for the 10% bonus is needed in order to assure a pool of volunteers.

With respect to the continuity of extracurricular programs, merely being assured of a pool of volunteers obviously will not meet that objective. The Employer, however, argues that the 10% bonus will have a de minimus effect on the teachers in the unit.[2] If the Employer is correct in his argument that the impact of the 10% bonus is de minimus, then the bonus cannot be said to assure

2/ Employer's brief, p. 16

continuity if it will not protect lower seniority teachers with extracurricular assignments from lay off. Even more significant, however, is the anticipated enrollment decline at the high school level. From its high point of enrollment in 1971 of 8,436 students, projected data shows that by the 1983-84 school year enrollment will decline to 3,576 students, which represents a decline of enrollment of 58%. The record supports that the declining enrollment from this point forward will impact primarily at the high school level and, therefore, by 1983-84 it is concluded that high school enrollments will drop by approximately 50%. Currently the Employer operates two high schools in its District. In view of the anticipated enrollment drop the next several years of 50%; it can reasonably be anticipated that one of the high schools in this District will close. Should this happen it can also be reasonably anticipated that both the high school teacher staff, as well as the numbers required for extracurricular assignments will be reduced by approximately 50%. From the foregoing, then, the supply-demand ratio for extracurricular assignments can reasonably be anticipated to remain constant in the years to come when compared to the situation now existing. Since there is no showing in this record that there has been a current problem with lack of continuity in extracurricular assignments; it can reasonably be anticipated that if the supply-demand ratio remains constant in the future by reason of an anticipated closing of a high school, no problem should be created in the future.

From all of the foregoing discussion, the undersigned concludes that the Employer has failed to establish the need for his proposed change in order to accomplish his expressed ends and, therefore, the Employer has failed to establish to the satisfaction of the undersigned that his proposal is necessary.

In view of the finding that the Employer has failed to establish the need for his proposed change; the undersigned finds it unnecessary to determine whether there is ample clarity in the Employer proposal or whether the Employer proposal is flawed to such an extent so as to cause it to be rejected for those reasons.

Based on the record in its entirety, and the discussion set forth above; and after considering the arguments of counsel, and the statutory criteria, the Arbitrator makes the following:

AWARD

The final offer of the Association, which leaves unchanged the language of the predecessor Agreement found at Section 15, A, 1 and Section 15 A, 3, e is to be included in the parties' Collective Bargaining Agreement.

Dated at Fond du Lac, Wisconsin, this 11th day of July, 1980.

Jos. B. Kerkman,
Arbitrator

JBK:rr