STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Stipulation of APPLETON AREA SCHOOL DISTRICT and APPLETON EDUCATION ASSOCIATION, WESC, WEAC, NEA To Initiate Mediation-Arbitration	Case XXVIII No. 24838 MED/ARB-461 Decision No. 17202-A

Appearances:

For the Appleton Education Association:
Mr. Richard DeBroux, Negotiations Chairperson and Chief Spokesperson for the Appleton Education Association.
Mr. Henry V. Krokosky, Jr., Executive Director, Winnebagoland Educational Staff Council.

For the Appleton Area School District:
Mr. Bartley L. Munson, School Board President.
Dr. Kenneth Johnston, Director of Administrative Services, Appleton Area School District.
Nash, Spindler, Dean and Grimstad, Attorneys at Law, by Mr. John M. Spindler.

ARBITRATION AWARD:

On August 22, 1979, the Wisconsin Employment Relations Commission appointed the undersigned as Mediator-Arbitrator, pursuant to Section 111.70 (4)(cm) 6.b. of the Municipal Employment Relations Act, in the matter of a dispute existing between Appleton Area School District, referred to herein as the Employer, and Appleton Education Association, WESC, WEAC, NEA, referred to herein as the Association. Pursuant to the statutory responsibilities, and upon receipt of a timely filed petition from a sufficient number of citizens of the jurisdiction served by the Employer, the undersigned on October 23, 1979, conducted public hearing at Appleton, Wisconsin, during which the Employer and the Association explained their final offers and presented supporting arguments for their respective positions to the public. At public hearing members of the public were afforded the opportunity to, and did present, their comments and suggestions with respect to said dispute. At the conclusion of public hearing on October 23, 1979, the undersigned conducted a mediation meeting between the Employer and the Association which did not resolve the dispute. On October 24, 1979, consistent with prior notice to the parties that arbitration would be conducted on said date in the event the parties were unable to resolve the dispute in mediation, the Employer and the Association waived the statutory provisions of Section 111.70 (4)(cm) 6.c. which require the Mediator-Arbitrator to provide written notification to the parties and the Commission of his intent to arbitrate, and to establish a time limit within which either party may withdraw its final offer. Arbitration proceedings were conducted on October 24, 1979, 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 not transcribed, however, briefs were filed in the matter which were exchanged by the Arbitrator on December 3, 1979.

THE ISSUES:

The final offers of the parties filed with the Wisconsin Employment Relations Commission contain two issues: Union Security - Fair Share, and Appendix A, Salary Schedule. The final offers of both parties are as follows:

EMPLOYER FINAL OFFER:

ISSUE 1 - Union Security. No change in its former position is felt to be called for by the Board of Education. The issues have been reviewed many times over the past several years, and further discussion would only be repetitive. No new reasons have been presented by the Association to justify a change in the position of the Board. The request for a new clause in this regard is therefore denied.

ISSUE 2 - Salary Schedule. The Board will modify its last position by an offer to increase the base salary to $11,275. The offer for those who had reached the last step of the applicable Classification prior to the close of the prior school year would still be $300 beyond their Class and Step salary.

ASSOCIATION FINAL OFFER:

1. Union Security

A. All employees in the bargaining unit shall 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 available to all employees who apply, consistent with the Association's Constitution and By-laws.

B. Effective thirty (30) days after the date of initial employment of a teacher or thirty (30) days after the opening of school in the fall semester, the District shall deduct from the monthly earnings of all employees, in the collective bargaining unit, except exempt employees, their fair share of the costs of representation by the Association, as provided in Section 111.70 (1) (h) Wis. Stats., and as certified to the District by the Association, and pay said amount to the treasurer of the Association on or before the end of the month following the month in which such deduction was made. The District will provide the Association with a list of employees from whom deductions are made with each monthly remittance to the Association.

1. For purposes of this Article, exempt employees are those employees who are members of the Association and whose dues are deducted and remitted to the Association by the District pursuant to Part II-5-A (Dues Check Off), (or paid to the Association in some other manner authorized by the Association.) The Association shall notify the District of those employees who are exempt from the provisions of this Article by the first day of September of each year, and shall notify the District of any changes in its membership affecting the operation of the provisions of this Article thirty (30) days before the effective date of such change.

2. The Association shall notify the District of the amount certified by the Association to be the fair share of the costs of representation by the Association, referred to above, thirty (30) days prior to any required fair share deduction.

C. The Association agrees to certify to the District only such fair share costs as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in this regard. The Association agrees to inform the District of any change in the amount of such fair share costs thirty (30) days before the effective date of the change.

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

E. INDEMNIFICATION CLAUSE
The Association and the Wisconsin Education Association Council do hereby indemnify and shall save the District harmless against any and all claims, suits, demands or other forms of liability, including court costs, that shall arise out of or by reason of action taken or not taken by the District, which District action or non-action in in compliance with the provisions of this Article (fair share agreement) and in reliance on any lists or certificates which have been furnished to the District pursuant to this Article; provided that the defense of any such claims, demands, suits or other forms of liability shall be under the control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challenging the application or interpretation of this Article (fair share agreement) through representatives of its own choosing and at its own expense.

2. APPENDIX A^1 - SALARY SCHEDULE

A. Retaining the current salary schedule index, set Step I of Class I.

Bachelors Degree at $11,350. This salary schedule shall then be effective for the 1979-80 school year.

B. Longevity--Professional staff members who had reached the last step of the applicable classification prior to the close of the prior school year will be given a longevity stipend as follows:

Class I	$325	
Class II	$350	
Class III	$375	
Class IV	$400	This stipend will be paid with the December 15th check each year.
Class V	$425	

DISCUSSION:

The instant dispute arose as a result of negotiations entered into between the Association and the Employer during the term of the Collective Bargaining Agreement, which became effective September 1, 1978, and remains in effect through August 31, 1980, pursuant to the agreement of the parties to reopen negotiations for the second year of their Agreement (September 1, 1979 - August 31, 1980) as found in an addendum to the 1978-80 Collective Bargaining Agreement. The addendum reads:

"The parties will re-open negotiations for the second year (September 1, 1979-August 31, 1980) of this contract as to the following matters only:

1) Part IV 6 - Salary Schedule
2) Appendix A^1
3) Appendix A^2
4) Appendix A^3
5) Calendar for the 1979-80 school year
6) Union Security
7) All insurances

Negotiations will commence no later than March 1, 1979."

Of the seven issues subject to negotiations by reason of the reopener Agreement, the parties were able to resolve all issues, with the exception of the Salary Schedule and Union Security. This Award, then, will determine whether the final offer of the Association or the final offer of the Employer dealing with the two remaining issues should be incorporated into the Collective Bargaining Agreement of the parties for the period September 1, 1979, through August 31, 1980. This Award is based on the evidence of record in the proceedings of October 24, 1979, after consideration of the arguments of the parties, and after applying the statutory criteria found at Section 111.70 (4)(cm) 7, sub-paragraphs a through h of the Municipal Employment Relations Act.

Each of the issues disputed by the parties will be analyzed and discussed separately below. The Arbitrator in his prior mediation-arbitration decisions which involved a fair share issue has consistently held that the inclusion or exclusion of the fair share provision in a collective bargaining agreement, where other issues are also disputed between the parties, will be determined by the decision with respect to the other disputed issues.[1] The Arbitrator continues to be of the opinion that the inclusion or exclusion of fair share provisions in a collective bargaining agreement should be determined by the outcome of other disputed provisions, providing there is clear and convincing evidence supporting the final offer of one or the other party with respect to the remaining issues. Given the foregoing it is essential to first consider the salary schedule dispute.

SALARY SCHEDULE

Neither party to the dispute proposes to change the form or structure of the salary schedule itself. At issue here is whether the base salary should be $11,275.00 as proposed by the Employer, or $11,350.00 as proposed by the Association. Additionally, there is disputed the amount of longevity payable to those who have reached the last step of their applicable classification prior to the close of the prior school year. The dispute with respect to base salary represents a difference of $75.00 on the base, which results in a cost differential between the offers of the parties of $76,131.00. (From Association Exhibit 58)

With respect to longevity, the provisions of the current Collective Bargaining Agreement, for the first year provided a longevity payment of $250.00 to all teachers beyond their classification and step of the salary schedule. The Employer final offer for 1979-80 proposes $300.00 longevity for all teachers beyond the last step of their classification. The Association proposes that the longevity amounts be progressively increased in $25.00 amounts beginning with $325.00 for Class I (the Bachelor's lane) to $425.00 for Class V (Masters + 15 lane). The cost differential between the two proposals dealing with longevity amounts to $18,645.00. (From Association Exhibit 58)

The cost impact of the parties' proposals on salary schedule and longevity represents a cost difference of $94,776.00. The total difference between the final offers, however, is $111,990.00 after roll-up factors for STRS and Social Security are applied. Given the total Employer budget of $23,859,817 the cost difference of the parties' final offers represents .47% of the total District budget. Furthermore, the differences in the amount of percentage increase attributable to the parties' final offers is .85%, the Employer offer being 8.42% and the Association offer being 9.27% based on the assumption that there are 655 teachers. (1978-79 full time equivalency) If the impact of the reduction of approximately seven teachers were taken into account the cost of the Association offer would be 8.48%, and the Employer offer 7.63%. Regardless of whether the reduction of teachers is taken into account the difference between the final offers continues to be .85% under either method. From the foregoing data it is clear that the cost differences of the two offers are not great; and since there is no issue raised herein with respect to the Employer's ability to pay; and since the cost of the Association offer does not exceed the patterns of cost in

1) See Fox Point Joint School District No. 8, Case X, No. 22657, Decision No. 16352-A, MED/ARB-50; Portage Community School District, Case X, No. 23316, Decision No. 16608-A, MED/ARB-169

other settlements with which this Arbitrator is familiar, it follows that the cost of either party's proposal cannot be said to be determinative of the salary schedule issue.

Turning to the comparables, the undersigned concludes that the proper comparables in this matter are the athletic conference schools, comprised of Appleton, Kaukauna, Kimberly, Menasha, Neenah and Oshkosh. The evidence with respect to comparables for salaries paid at certain steps of the schedule, ranks the Employer in the following order among conference schools at various steps of the schedule for the years shown as follows:

School Year	Schedule Base	BA-Fifth Step	BA-10th Step	BA Maximum	Highest Max BA Lanes
77-78	2	1	1	2	4
78-79	2	1	2	2	4
79-80 (Asso. Offer)	1	1	1	2	4
79-80 (Empl. Offer)	1	1	1	2	4

The same ranking comparison for the master's section of the salary schedule is set forth as follows:

School Year	MA Minimum	MA + 5	MA + 10	MA Maximum	Highest Maximum MA Lanes	
77-78	2	2	1	1	4	
78-79	2	1	1	2	4	
79-80 (Asso. Offer)	2	2	1	1	4	
79-80 (Empl. Offer)	2	2	2	3	4	F.N. 2

From the foregoing tables the undersigned concludes that regardless of which salary schedule final offer is selected, the rank order among conference schools will not be materially affected. It is obvious that this Employer has been a wage leader among the conference schools, and it is equally obvious that regardless of which offer is selected the Employer will continue to maintain almost exactly the same rank order among conference schools. While the rank order among conference schools is not materially affected by either final offer, the mere raw ranking does not totally answer the question as to whether one of the final offers preserves the leadership position heretofore enjoyed by the employees of this Employer. The data set forth at Association Exhibit 47 convinces the undersigned that the Association offer most nearly preserves the leadership position on wages which had been established by the parties in their bargaining process prior to the term of the present Collective Bargaining Agreement. Association Exhibit 47 establishes that the composite average salary paid to teachers in this District compared to the composite average salary paid in the athletic conference, established a ratio of 104.03 above the composite average salary in the athletic conference for the 1978-79 school year. The same calculation performed for the 1979-80 salaries paid shows that under the Employer's offer the ratio drops to 102.56 and under the Association offer the ratio drops to 103.24. From the foregoing the undersigned can only conclude that adopting the Employer's final offer would erode the leadership position established prior to the term of the instant Contract; and since there is no showing in the record as to why erosion should occur; and though the Association offer also reflects an erosion of its leadership position on wages; it is obvious that the Association offer more nearly maintains the relative position on wages for teachers involved in this District compared to the balance of the athletic conference. It, therefore, would follow

2) The data contained in these tables has been compiled from Association Exhibits 40 through 44, Employer Exhibit II-F, and Appendix A of the current Collective Bargaining Agreement. No longevity is included in these comparisons, since the maximum shown on the schedule is the basis for the comparison made here. Longevity comparisons will be made later in this discussion.

that based on the foregoing the Association offer on salary schedule should be adopted.

While the wage leadership question favors the Association proposal on salary schedule, there are still other considerations which bear on this issue: patterns of settlement, the longevity question, and cost of living.

Turning first to patterns of settlement, the undersigned, from Association Exhibit 48, concludes that a preference for a final offer cannot be determined based on the patterns of settlements among conference schools. Association Exhibit 48 compares the percentage of increase on salary schedule alone, disregarding other economic items, and shows that the Association offer here represents 7.08%, while the Employer offer represents 6.37% when considering the entire salary schedule. The composite percentages for the other conference schools are:

Kaukauna	7.35%
Oshkosh	7.69%
Menasha	6.82%
Kimberly	6.44%
Neenah	5.48%

It is clear that the patterns of settlement with respect to salary schedules among conference schools for the year 1979-80 reflect two districts with a higher percentage settlement and three districts with a lower percentage settlement than that proposed by the Association. The undersigned concludes that the proximity of the data when considering patterns of settlement is sufficiently close so as to be unpersuasive when considering which salary offer should be adopted. The Employer has submitted evidence with respect to the patterns of settlement established internal to its school district, as well as settlements entered into with the City of Appleton and its organized employees. (Employer Exhibit II-N) While patterns of settlement internal to the school district and patterns established within the same community are often given significant weight, the evidence in the instant matter is not persuasive, because no other settlements contained in Employer Exhibit II-N are for teacher units. Given the unique salary structures over which parties bargain in teacher disputes compared to salary structures found in non-teacher disputes; and given the disparity in methods of costing utilized by parties for non-teacher units vis a vis teacher units; there is insufficient evidence in this record for the undersigned to conclude that the patterns of settlement with non-teaching units constitute accurate comparisons. Consequently, the evidence contained in Employer Exhibit II-N will be given no weight in the instant dispute.

With respect to the cost of living, little discussion is needed. It is obvious that in the present era of double digit inflation neither offer approximates the increase in cost of living. The undersigned is unwilling to find that the Association offer should be preferred because it is closer to the increase in the cost of living index, because the data clearly shows that no other comparable employer and union entered into settlements approximating the rise in the cost of living in the current round of bargaining.

With respect to the longevity issue, the undersigned has carefully reviewed the evidence of record, which shows the industry practice among comparable districts (the athletic conference) with respect to longevity. The Employer has proposed a flat $300.00 longevity for all teachers who reach the maximum of their lane in the prior school year. The Association proposes a range of longevity payments from $325.00 to $425.00 in the five lanes contained in the salary schedule. Association Exhibit 53 sets forth the comparables with respect to longevity among conference schools and clearly establishes that of the conference schools only Menasha has a longevity provision comparable to that proposed by the Employer in the instant case. All of the other conference schools make longevity payments which not only exceed the Employer offer but exceed the maximum longevity proposed by the Association. It is clear, then, that the Association proposal with respect to longevity more nearly approximates the practice of other conference schools and, therefore, the comparables favor the Association longevity proposal.

The record is clear that the longevity which has previously been paid under the terms of the parties' Agreement has been paid on a pro rata basis and included in the teacher's check each payday. The Employer argues that a lump sum longevity payment at mid year as proposed by the Association represents the equivalent of a salary advance which could have an adverse effect on the Employer in the event a teacher terminated his employment prior to the end of the school year. The Employer argument has merit, given the prior method of pro ration of longevity payments, and because the record is barren of any evidence to support the change in timing of payment of longevity proposed by the Association. If the Arbitrator had discretion to determine the timing of longevity payments as a separate issue, he would favor the Employer position on timing. The timing of payment, however, is not a sufficiently serious flaw in the Association offer so as to cause the Association offer to be rejected in totality with respect to longevity.

All of the foregoing discussion leads to the conclusion that the Association offer on salary is narrowly preferred. The very proximity of the preference for the Association offer causes the undersigned to conclude that in the instant dispute it would be improper to rule that the fair share issue is not a controlling issue in this dispute. The undersigned has not changed his opinion that where issues of a final offer other than fair share clearly favor one party or another, the fair share issue should not be controlling. However, here the other issues or issue only narrowly favor the position of one party over the other; and where, as the record reveals in this case, the parties themselves place great importance on the fair share issue; it would be an abuse of the Arbitrator's discretion to decide this close a dispute solely on the salary schedule issue. Consequently, the decision in the instant matter will turn on the fair share issue.

FAIR SHARE

The Employer final offer proposes to continue in force the provision of the Collective Bargaining Agreement found at Part II, 5, C of the Agreement, which provides that Association dues will be deducted from payroll checks upon appropriate authorization and paid directly to the treasurer of the Association. The Association proposes the fair share clause set forth in its final offer, supra. The undersigned has reviewed the fair share proposal of the Association and finds it to be typical fair share language. Consequently, no further attention will be given to the form or content of the language contained in the Association proposal for fair share.

The Employer opposition to the Association fair share proposal is primarily ideological, and he argues that the public hearing which was conducted in the instant matter prior to the mediation phase of these proceedings should be considered by the undersigned as reflecting the interests and welfare of the public as set forth in the criteria found in the statute at (c). It is true that the statutory criteria directs the Arbitrator to consider the interests and welfare of the public in arriving at his award. The undersigned, however, rejects the Employer contention that the expressions made by the public at public hearing in the instant proceedings accurately portray the interests of the public in this matter. At public hearing ten members of the public spoke and all opposed fair share in their public expressions. Even if one assumes that the expressions made by the public at public hearing should properly be included in the evidence of record in the arbitration proceedings, the expressions of ten people made at public hearing, in a school district as large as this district, can hardly be said to be a convincing reflection of the interest of the public with respect to this issue. The weight of the evidence is simply insufficient to conclude that the expressions of ten members of the public accurately reflect the interest of the entire public contained within the parameters of the District of the Employer. Having determined that the weight of the evidence is insufficient so as to accurately reflect the interest of the public it is unnecessary to determine whether the expressions of the public should have any standing in the evidence of record in the arbitration proceedings, and consequently, no further attention will be given to that issue.

The Employer urges that the decision on fair share not be based upon criteria (d), the comparables, contending that when the comparables did not

favor inclusion of fair share arbitrators ignored the comparables and awarded for fair share, notwithstanding the comparability considerations. There is no question that if comparables are considered, the comparables favor inclusion of fair share. The evidence, as well as the positions of the parties, clearly demonstrate that among school districts in the athletic conference, as well as the general geographic area, if one were to include the geographic area mong the comparables, would favor fair share. Given the criteria found at (d) of the statute which directs the Arbitrator to consider a comparison of conditions of employment among comparable employers, comparability can hardly be ignored. However, comparabilities are not the totality of the criteria, and consequently, while the comparables do favor the inclusion of fair share the other Employer arguments with respect to fair share must necessarily be considered.

As stated previously the Employer's opposition to fair share is largely ideological. Contained under the general heading of ideological opposition are Employer positions which point to the absence of fair share agreements in certain of the collective bargaining agreements in force between the City of Appleton and certain of its bargaining units. The evidence satisfies the undersigned that there are indeed certain units who bargain with the City of Appleton which do not have fair share provisions in their collective bargaining agreements. The evidence, however, does establish that there are fair share agreements in four units bargaining with the City of Appleton. (Police, Fire, Water Department, Waste Water Department) Furthermore, all bargaining agreements in force with Outagamie County contain fair share agreements. The same electors elect representatives to the governing body of the City of Appleton and to the Board of Education of this Employer. Furthermore, large population segments within Outagamie County elect representatives to the County Board of Outagamie County as elect members of the School Board of this District. Since there are in existence fair share agreements which have been ratified by representatives elected by the same electors as elect the representatives to this School Board, a conclusion can be drawn that the electorate from whom this Board draws its power to act cannot be said to be philosophically or ideologically opposed to the fair share concept. The undersigned, therefore, rejects the Employer argument that fair share should be rejected because of the Employer's ideological opposition to the fair share concept.

The Employer advances further argument that in bargaining he made efforts to resolve the fair share issue with offers that would require nonmembers to pay only the cost of representation and bargaining, which were rejected by the Association. The specific offers advanced by the Employer in bargaining are not a matter of record in the arbitration phase of these proceedings. Furthermore, the final offer of the Employer as certified to the Wisconsin Employment Relations Commission contains no modified fair share in it. Consequently, the fact that the Employer would have been willing to settle with a modified fair share provision is immaterial. There is, however, evidence of record in the testimony of the President of the Board of Education which the undersigned considers to be persuasive. At hearing he testified:

> 9. The Board repeatedly has offered to negotiate a provision which would require all teachers to pay a truly "fair share" and that which is prescribed by statute--the amount for contract bargaining and contract administration. That offer has just as repeatedly been rejected by the union. Clearly many dollars are not used for this statutory definition of what is "fair," yet the union repeatedly has been unwilling to admit that, let alone to helpfully attempt to determine that amount.

Later in his testimony he again testified:

> 6. It is not true that the Board has offered no form of "fair share," as the union alleges. We have, on several occasions. Specifically, we have been willing to require all teachers to pay the full costs of what the statutes describe--the costs of negotiating and maintaining the contract. That is a position the union has rejected; but that doesn't make that offer by the Board any less real or sincere.

From the foregoing signed testimony of the President of the Board of the Employer, the undersigned is unable to distinguish between the fair share proposal of the Association in the instant matter and what the President of the Board testifies as to a form of fair share that was offered and/or would be acceptable to the Employer. The position of the Employer with respect to fair share as outlined in the testimony cited above clearly indicates that the Employer does not oppose fair share if the amount to be paid by nonmembers under a fair share provision is restricted solely to the costs of contract bargaining and contract administration, and not 100% of the dues assessed on members of the Association. The Employer position, then, squares precisely with the holding of the Wisconsin Supreme Court in Browne vs. Milwaukee Board of School Directors, (83 Wis. 2d 316, 1978), where the Court held that the appropriate payment for nonmembers covered by fair share is limited to the cost of the collective bargaining process and contract administration. Since the courts have determined limitations on fair shared amounts that reflect precisely the position of the Employer in this case, the Employer opposition to the fair share proposed by the Association evaporates.

From the foregoing discussion on the fair share issue it follows that the final offer of the Association, which includes fair share, should be adopted. The foregoing conclusion is buttressed further by the fact that the parties themselves, when they negotiated the current Agreement, which became effective September 1, 1978, and remains in force through August 31, 1980, agreed to reopen bargaining on the issue of Union Security. In the opinion of the undersigned, when the Employer agreed to bargain over Union Security, there is a presumption created that something other than the status quo of "check-off" would result. The Employer final offer merely maintaining the check-off provision also militates against finding for the Employer on the fair share issue.

SUMMARY AND CONCLUSIONS:

While the salary issue narrowly favors the Association offer, the decision here turns on the Union Security issue which is decided in favor of the Association offer. It, therefore, follows that the Association final offer in its totality is to be adopted. Based, then, on the record in its entirety, the argument of counsel, the discussion set forth above, and after applying the statutory criteria, the undersigned makes the following:

AWARD

The final offer of the Association, along with the stipulations of the parties which reflect prior agreements in bargaining, are to be incorporated into the Collective Bargaining Agreement of the parties effective September 1, 1979, pursuant to the reopener provision found in the Addendum of the Collective Bargaining Agreement which became effective September 1, 1978, and remains in effect through August 31, 1980.

Dated at Fond du Lac, Wisconsin, this 17th day of January, 1980.

Jos. B. Kerkman,
Mediator-Arbitrator

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