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In the Matter of a Mediation-Arbitration Proceeding Between MARKESAN DISTRICT EDUCATION ASSOCIATION

-and-

SCHOOL DISTRICT OF MARKESAN

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Case IV
No. 24696
MED/ARB-416
Decision No. 17902

INTRODUCTION

The Markesan Education Association (hereafter Association) and the School District of Markesan (hereafter Board) reached impasse in their negotiations for a collective bargaining agreement covering the years 1979-81. The Association petitioned the Wisconsin Employment Relations Commission (WERC) for the appointment of a mediator-arbitrator and Arlen Christenson of Madison, Wisconsin, was appointed. An appropriate petition for a public hearing was filed and a public hearing was held in Markeson on August 18, 1980. After an unsuccessful attempt to mediate a settlement on September 12, 1980, an arbitration hearing was held on that same day in Markesan. At that hearing both parties had the opportunity to present evidence and argument. It was agreed that post hearing briefs would be filed and a briefing schedule was agreed upon. Briefs were received by the Arbitrator by October 20, 1980.

APPEARANCES

James M. Yoder, Executive Director, South Central United Educators appeared for the Association.

James K. Ruhly, Melli, Shiels, Walker & Pease, S.C., Attorneys at Law and David Friedman, Staff Counsel, Wisconsin Association of School Boards appeared on behalf of the Board.

FINAL OFFERS

MARKESAN SCHOOL DISTRICT
BOARD OF EDUCATION

FINAL OFFER, May 30, 1980

1. Continuation of all provisions of 1978-79 master contract (referred to herein as "current" contract) EXCEPT as tentatively otherwise agreed, see STIPULATIONS (Amended) and Supplement to Amended Stipulation dated April 11 and May 27, and/or proposed herein.

2. Revise current 5.2, as attached 5.2 Dismissal.

3. Revise 13.3 as attached.

   (NOTE: Current sections 13.1 and 13.2 continue as per "Amended Stipulation" item #6; 1979-80 School Calendar per "Amended Stipulation" item #6; 1980-81 School Calendar per Supplement to Amended Stipulation.)

4. Renumber current Article XIV, Certification of Agreement, to Article XV.

5. Create new Article XIV, Dues Deducation, as attached.

5.2 Dismissal. Nothing in this Agreement shall preclude immediate dismissal (termination during the term of an individual contract) of a teacher by the Board for just cause.

13.3 Not later than February 1, the Board will submit a calendar proposal to the MDEA for Association consideration. The Board will consult with and seek MDEA input regarding the calendar, after which the Board will determine the calendar. The decision on the calendar has to be made by May 1 or at the conclusion of negotiations, whichever occurs first. A copy of the calendar shall be attached to the Master Agreement.

Article XIV; Dues Deduction

Deductions for payment of MDEA and affiliate dues may be withheld from employee members' salary payments in accordance with the following:

(a) A written request must be submitted each year to the Superintendent on an individual basis on an appropriate form prior to September 1 of the school year in question.

(b) Dues will be deducted in twelve (12) equal monthly installments beginning with the September payment.

(c) This article shall become effective with the commencement of the 1980-81 school year.

FINAL OFFER

MARKESAN EDUCATION ASSOCIATION

Following is the amended final offer of the Markesan Education Association with resepct to a contract for the 1979-81 school years. All existing contractual provisions remain intack except as modified by the Stipulation of Tentative Agreements and the proposed amendments.

1. Article V - Employment, Section 5.1

   a. Contract Renewal - Provisions of the state law regarding renewal (and nonrenewal of) teacher contracts shall be followed in the employment of teachers. Reasons for nonrenewal will be submitted to the teacher in writing.

   b. No teacher shall be nonrenewed or disciplined without cause. This provision shall not apply to teachers who are in their first two years of employment in the Markesan School District.

2. Article IX - Absences, Section 9.2, Emergency Leave and Urgent Personal Leave.

   Teachers will be granted emergency leave, and the granting of the leave and the length of the leave shall be determined by the administration. Emergency is defined as serious illness or injury to a member of an employe's immediate family. Immediate family is defined in Section 9.3(1).

   Teachers will be granted urgent personal leave. Urgent personal leave is to be used for matters that require immediate attention that cannot be attended to except during the school day. Urgent personal leave will be limited to one day per year, but may be extended at the discretion of the administration.

   a. The leave shall be with pay, and the number of days of the leave shall be deducted from the number of sick leave days possessed by the employe.

   b. In no case shall the paid leave exceed the employee's total number of accumulated sick leave days.

   c. In all cases, the employe is expected to make whatever arrangements are necessary to enable him to return to work as quickly as possible.

   d. If at all possible, requests for urgent personal leave shall be made in advance to the administration.

Abuse of "Urgent Personal Leave" will result in loss of pay for the date missed.

3. Article XIII - School Calendar, Section 13.3

Delete Section 13.3

4. Article XV - Fair Share Agreement

The Association, as the exclusive representative of all the employes in the bargaining unit, will represent all such employes, Association and non-Association, fairly and equally, and all employes 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 employe shall be required to join the Association, but membership in the Association shall be made available to all employes who apply consistent with the Association constitution and bylaws. No employe 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 employes 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 deduction.

The employer will provide the Association with a list of employes 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 of 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 employes who are not members of the Association with an internal mechanism within the Association which allows those employes 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.

Teachers who were not members of the Markesan District Education Association during the 1978-79 school year shall be exempt from the fair share provision until such time as they chose to join.

DISCUSSION

The parties have raised three issues which relate generally to all of the matters in dispute and which should be considered at the outset. The first is which communities should be considered "comparable" as that term is used in Wis. Stat. Sec. 111.70(4)(cm)7.h and, therefore, qualified to be used in comparison with Markesan in deciding which of the final offers to choose. The Board has submitted a group of nine contiguous districts which it contends should be the only comparables considered. The Association has submitted information concerning seven districts associated with Markesan in the Flyway athletic conference, 16 that are part of the CESA District 13, 11 located within a 30 mile radius of Markesan and 10 that are members of the Dual County athletic conference to which Markesan formerly belonged.

111.70 provides that arbitrators in proceedings such as this one shall give weight to various criteria, including a comparison of the wages, hours and conditions of employment of the employees involved in the arbitration with those of "employes performing similar services . . . in comparable communities . . ." This has become one of the most commonly relied upon of the statutory criteria, probably because it appears to be one of the few relatively "objective" criteria available. In almost every case, however, the parties disagree on which communities are comparable. I find comparability to be a matter of degree. All of the communities for which data were provided in this proceeding are in substantial degree comparable. I cannot accept the Board's contention that only those school districts contiguous to Markesan are comparable enough to be taken into account in the decision in

this case. Differences in size and resources exist among the contiguous districts just as they do among those within 30 miles, in the same CESA District, or in the same athletic conference. Nevertheless, despite these and other differences, all of the districts cited have enough in common to be included in a consideration of the criterion referred to as "comparability."

The Board also argues that because of the nature of the issues in dispute in this arbitration, comparables should not play a significant role. Instead the Board would stress "the interest and welfare of the public, the stipulations of the parties, and other factors traditionally taken into consideration in the determination of wages, hours and conditions of employment achieved through the voluntary bargaining process." In my view all of these factors are important. Comparability tends to dominate the discussion in most interest arbitration awards because it provides one of the few relatively objective standards by which an arbitrator can evaluate the offers of the parties. That is no less true in this case than in cases where other matters such as wages, dental insurance, extra-curricular duties and the like are at issue. I find the external comparisons provided by both parties to be useful and important in the analysis of the issues in this case. I see no compelling reason why they should not play an important role in resolving those issues.

Finally the Board argues that the Association should be required to carry the burden of persuasion in support of the proposals contained in its final offer. The basis for this argument is that the Association's proposals seek "to change the intent and structure of the master contract." Because the factors arbitrators are to consider include factors "normally taken into consideration in . . . voluntary collective bargaining" the argument is that interest arbitration awards should not take away benefits the parties have won in negotiations. I find this tenet to be essentially sound. It does not necessarily

apply to all of the issues placed in dispute by the final offers, however. There is no provision in the collective bargaining agreement regarding fair share. It is difficult to justify the position that silence on a subject means that to include a provision on that subject would be to take away a benefit previously negotiated. On the other hand the agreement contains explicit language regarding the grounds for non-renewal and dismissal; establishment of the calendar; and, personal leave. The principle advanced by the Board would suggest that the Association would have to make a case for changing these provisions.

The Association has established, with respect to each issue in dispute, that a substantial majority of collective bargaining agreements in comparable school districts contain the provision for which the Association contends. If all of the communities cited by either party are included, the record contains data regarding 26 school districts. Of these either 19 or 20 have a contractual requirement requiring cause or some variation of cause for non-renewal. (Princeton's limitation on management rights may or may not be functionally equivalent to a just cause requirement. In my view it probably is.) Eighteen of the 26 districts have some provision for personal leave days without a requirement that reasons be given. Only 4 districts have contractual provisions waiving the right to bargain the school calendar. Twenty of 26 districts have collective bargaining agreements containing a "fair share" provision. If the sample is limited to the districts cited by the Board as comparable, the picture does not change significantly. Seven of 9 require cause for non-renewal; 6 of 9 allow personal leave without reasons; only 1 precludes bargaining on the school calendar; and 6 have a fair share agreement. With numbers such as this, I conclude that the Association has carried its initial burden of persuasion requiring the Board to come forward with evidence that the

circumstances of this particular collective bargaining relationship require a different conclusion.

The Board argues that requiring cause for non-renewal is unjustified because there is no evidence of the need for such a provision. There has been only one non-renewal in 10 years and that was uncontested. Moreover, the Board contends, the Association's proposal is flawed because it also includes a requirement that cause be shown for any "discipline" and because it fails to change the existing contract language which appears to permit the Board to dismiss a teacher any time the Board deems it in the best interests of the school district. The Association responds that the lack of non-renewal disputes is because the lack of a "cause" provision leads teachers to resign or to accept non-renewal rather than engage in a fruitless challenge. The Association also perceives no problem with the term "discipline" pointing out that it is a well recognized and understood concept in labor relations. Finally the Association argues that dismissal during a contract term is either covered by the cause for "discipline" language or by the common law which appears to require a showing of something like cause for dismissals during the term of a contract.

I am not persuaded that the need for a just cause standard for non-renewal is different in the Markesan school district than in other comparable districts. The Association makes a compelling point that the lack of non-renewal challenges is at best an ambiguous circumstance and probably is explainable on grounds that challenges, given present contract provisions, would be considered fruitless. The Association's proposal could be more artfully drafted. The application of the language to concrete cases, however, seems to me to be unlikely to create serious problems. The term "discipline" does have a reasonably well accepted content and it seems highly unlikely

that the terms of the agreement would be read to permit dismissal within the contract term without cause.

After stripping away the confusion caused by the procedural history of the fight over calendar negotiation it seems clear that the question is simply whether or not the collective bargaining agreement should contain a provision permitting the Board to set the school calendar unilaterally after consultation with the Association. Without any provision in the agreement about calendar negotiation the Board would be required to negotiate the calendar. There are many reasons why it would be more convenient not to do so. The calendar is, however, a mandatory subject of bargaining and it is negotiated in most school districts. The Board's arguments have not persuaded me that the Markesan circumstances justify a difference.

The premise of the Association's proposal for personal leave seems to be that it is appropriate and generally accepted in other comparable districts that teachers should be able to take a day or two of personal leave each year without having to explain why to anyone. The Board raises some legitimate concerns about the Association proposal. First is the concern that because there is no limit on the number of teachers who could exercise their right to take an unexplained day off at any one time, the ability of the schools to function might be compromised or the right might be abused as part of a concerted work action. The fear of abuse is enhanced by the fact that the use of personal leave, even with administrative review of the reasons, has increased substantially in recent years. The Board also points out that the Association's proposal seems to limit the discipline that could be imposed for abuse of the leave provision to mere loss of pay for the time missed from work. Finally, the Board criticizes the Association's proposal on the ground that it takes away the

Superintendent's power to grant uncompensated leave in appropriate cases.

The Association's position that teachers should be able to take some time off for confidential personal reasons is legitimate and supported by the data on comparable communities. This portion of the Association's offer does, however, present some problems identified by the Board. In one respect, however, the Board overstates the case. I do not believe the Association's proposal takes away the Superintendent's discretion to grant uncompensated leaves. I do not understand it to be the law that the Superintendent has only the discretion granted him by the collective bargaining agreement. In general the Board and the Superintendent have the discretion necessary to manage the enterprise unless it is limited by the agreement, by law or perhaps by customs or practice. On balance, however, I believe the Board has the better of the argument regarding this aspect of the final offers.

The Board objects to the Association's "union security" or "fair share" proposal on several grounds. Twenty one of 65 teachers in the bargainging unit do not now belong to the Association. Given this large minority of non-members, a fair share provision, the Board argues, will force these people to "support an organization which has not earned their voluntary support." The Board is also dissatisfied with the Association's proposed "hold harmless" language designed to protect the Board against liability in case of litigation by a disgruntled non-member forced to contribute to the Union. The Board objects as well to the failure of the Association to include, as part of its proposal, the details of a constitutionally required procedure for challenging the fair share amount deducted from employees' pay checks. Finally the Board foresees problems in implementation, largely based on the ambiguity of the effective date of the proposal.

I do not find the Board's objections persuasive. Because of the provision in the Association's proposal excluding teachers who were not members prior to the current contract, almost all of the non-members would be exempt from fair share. The implementation date seems to be settled by the stipulation that Section 10.1 of the agreement provide that such provisions are effective upon resolution of all contract terms. The "hold harmless" provisions seems about as effective as is necessary and feasible in a contract between these parties. Finally, it does not seem necessary to require a detailed statement of the Association's internal rebate procedure in the collective bargaining agreement.

CONCLUSION

Taking each issue posed by the two final offers separately, the Association has the better of the argument on at least three of the four. At the same time the Board argues persuasively that the package taken as a whole constitutes a very substantial alteration in the collective bargaining relationship of the parties. I am uneasy about imposing such a significant change. The Association, on the other hand, makes a persuasive argument that the Markesan district stands alone in providing for none of these benefits in its collective bargaining agreement. The data show that the Markesan collective bargaining agreement is the only one cited by either party which contains not a single one of the contractual provisions at issue here. Thus I am faced with a choice of selecing a final offer which will continue a situation where Markesan is minority of one with respect to the issues in dispute and one which in a single long stride will add to the collective agreement all of the contested provisions. I am not comfortable with either result. In the end, however, we return to the comparables. If the Association's offer is adopted the Markesan district will move from being the only district

providing none of the benefits at issue to being one of nine (of the 26 for which data have been presented) with all four of them. Given that choice the Association's offer is preferable.

AWARD

It is my Award that the final offer of the Markesan Education Association should be and is hereby adopted and shall be made a part of the collective bargaining agreement between the parties.

Dated at Madison, Wisconsin this 19th day of December, 1980.

Arlen Christenson, Arbitrator