WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE ROBERT J. MUELLER, MEDIATOR/ARBITRATOR

In the Matter of the Mediation/ Arbitration Between	
KEWASKUM SCHOOL DISTRICT	
and	AWARD AND OPINION
KEWASKUM EDUCATION ASSOCIATION	Decision No. 17981-A

Case No. MED/ARB #685

Hearing Dates:

Mediation October 1, 1980
Arbitration November 17, 1980

Appearances:

For the School District MR. KENNETH COLE, Director, Employe Relations

For the Union MR. DENNIS G. EISENBERG, Executive UniServ Director

Mediator/Arbitrator MR. ROBERT J. MUELLER

Date of Award February 5, 1981

BACKGROUND

On April 24, 1980, the Association filed a Petition with the Wisconsin Employment Relations Commission alleging that an impasse existed between it and the District in negotiations for the terms and conditions of a labor agreement to succeed the agreement which expired on June 30, 1980. Subsequent thereto, the Wisconsin Employment Relations Commission assigned an investigator, who determined that an impasse did in fact exist. The parties subsequently selected the undersigned to then serve as mediator/arbitrator to attempt to resolve the impasse. Under date of August 25, 1980, the Wisconsin Employment Relations Commission appointed the undersigned to so serve.

No public hearing was requested or held. On October 1, 1980, mediation was conducted between the parties at which time a strong effort was made to resolve the remaining issues on which the parties did not have agreement. Voluntary resolution through mediation was not successful. Both parties were afforded an opportunity to modify their final offers or to withdraw their final offers. Both parties indicated no desire to either modify or withdraw and the matter then came on for hearing in arbitration on November 17, 1980. The parties were present at such hearing and were afforded full opportunity to present such evidence, testimony and arguments as they deemed relevant. Post-hearing briefs were exchanged through the mediator/arbitrator.

ISSUES AND FINAL OFFERS

1. DENTAL INSURANCE ISSUE

District Offer:

"The school district will pay up to $150.00 annually toward the cost of a dental insurance program."

Association Offer:

"The school district will provide and pay the full cost for single and family Dental Insurance as described by WEA Insurance Trust Plan 704H-1A effective January 1, 1981 or as soon thereafter as administratively possible following the issurance of a binding award."

2. DEFINITION OF A GRIEVANCE

District Offer:

The District proposed to retain the language of the present contract which states as follows:

"A 'grievance' is limited specifically to interpretations of this agreement. A grievant may be a teacher or group of teachers."

Association Offer:

"A 'grievance' is limited specifically to interpretation of the agreement. A grievant may be a teacher, group of teachers, or the Association."

3. SALARY SCHEDULE

District Offer:

"1980-81 Salary Schedule with Base of $11,320

	A	B	C	D	E	F	G
0	11320	11569	11818	12067	12316	12565	12814
1	11784	12055	12326	12598	12870	13143	13416
2	12248	12541	12834	13129	13429	12721	14018
3	12712	13027	13342	13660	13978	14299	14620
4	13176	13513	13850	14191	14582	14877	15222
5	13640	13999	14358	14722	15086	15455	15824
6	14115	14496	14878	15265	15653	16046	16439
7	14590	14993	15398	15808	16220	16637	17054
8	15065	15490	15918	16351	16787	17228	17669
9	15540	15987	16438	16894	17354	17819	18284
10	16015	16484	16958	17437	17921	18410	18899
11		16981	17478	17980	18488	19001	19514
12			17998	18523	19055	19592	20129
13				19066	19622	20183	20744
14					20189	20774	21359
15						21365	21974

BASE AT "B" - 102.2% of "A"

"C" - 104.4% of "A"

STEPS AT "A" - 5 increments at 4.1% of A remaining at 4.2% of A

STEPS AT "B" - 5 increments at 4.2% of B remaining at 4.3% of B

"D" - 106.6% of "A"
"E" - 108.8% of "A"
"F" - 111.0% of "A"
"G" - 113.2% of "A"

STEPS AT "C" - 5 increments at 4.3% of C remaining at 4.4% of C
STEPS AT "D" - 5 increments at 4.4% of D remaining at 4.5% of D
STEPS AT "E" - 5 increments at 4.5% of E remaining at 4.6% of E
STEPS AT "F" - 5 increments at 4.6% of F remaining at 4.7% of F
STEPS AT "G" - 5 increments at 4.7% of F remaining at 4.8% of F"

Association Offer:

"KEWASKUM $11100 4.5% FOR 5 STEPS THEREAFTER 5% OF COLUMN 2.75% ACROSS.

STEP	B.A.	BA+6	BA+15	BA+21	M.A.	MA+ 10	MA+30
1	11,100	11,405	11,710	12,015	12,320	12,625	12,930
2	11,600	11,918	12,237	12,556	12,874	13,193	13,512
3	12,100	12,431	12,764	13,097	13,428	13,761	14,094
4	12,600	12,944	13,291	13,638	13,982	14,329	14,676
5	13,100	13,457	13,818	14,179	14,536	14,897	15,258
6	13,600	13,970	14,345	14,720	15,090	15,465	15,840
7	14,155	14,540	14,931	15,321	15,706	16,096	16,487
8	14,710	15,110	15,517	15,922	16,322	16,727	17,134
9	15,265	15,680	16,103	16,523	16,938	17,358	17,781
10	15,820	16,250	16,689	17,124	17,554	17,989	18,428
11	16,375	16,820	17,275	17,725	18,170	18,620	19,075
12	16,375	17,390	17,861	18,326	18,786	19,251	19,722
13	16,375	17,390	18,447	18,927	19,402	19,882	20,369
14	16,375	17,390	18,447	19,528	20,018	20,513	21,016
15	16,375	17,390	18,447	19,528	20,634	21,144	21,663
16	16,375	17,390	18,447	19,528	20,634	21,775	22,309"

4. FAIR SHARE

District Offer:

The District proposes to retain the current provision of the labor agreement which provides in relevant part as follows:

> "A 2/3 vote of all eligible employees in favor of the deduction is necessary each year for this section to be in effect. The vote will be held during the fall teacher-in-service days prior to school beginning, and both the KEA and the Kewaskum Board of Education will supervise the election and prepare information to the teachers concerning the meaning of this section."

Association Offer:

The Association proposes to delete said paragraph which would then retain the fair share provision without the requirements of an annual two-thirds vote.

5. INDIVIDUAL TEACHER CONTRACT TERMINATION AND LIQUIDATED DAMAGES

District Offer:

> "Delete the liquidated damages from the existing agreement. (Section XVIII, page 28)"

Association Offer:

"Section XVIII, Contract Termination and Liquidated Damages is amended in its entirety as follows:

"'In the event that a teacher breaches his/her individual contract with the district by termination of services during the term of the contract, but after July 1, the sum of $200 is determined to be reasonable liquidated damages which the Board and the KEA reasonable anticipate will follow from such a breach and the board may, at its option, demand and recover from the teacher up to such amount as liquidated damages.'"

6. JUST CAUSE

District Offer:

"Section XII - Nonrenewals and Dismissals

(The existing provision is deleted)

"Dismissal or suspension without pay during the term of the individual teacher contract shall be for cause. No non-probationary teacher shall be nonrenewed without just cause. A teacher shall be considered to be on probation for the first two years and the gaining of the third contract."

Association Offer:

"Article XII, Non Renewals and Dismissals, Shall be amended in its entirety as follows:

"'No teacher shall be discharged, non renewed, suspended, disciplined, reprimanded or reduced in rank or compensation without just cause. Teachers may be non renewed during their first two (2) years of employment if the reasons for the non-renewal are not arbitrary or capricious.'"

7. REPLACEMENT TEACHERS

District Offer:

"Replacement Teachers

"Any teacher who works for 95 consecutive days in a position will be considered included in the bargaining unit."

Association Offer:

"Section VII, Leaves of Absence, is amended by addition as follows:

"1. A replacement teacher shall be defined as a teacher who is replacing a contracted teacher who is on a leave of absence which will exceed twenty (20) consecutive work (calendar) days. It is understood that the return of the contracted teacher on a leave of absence or the end of the school shall result in the termination of the replacement teacher's job (ie. just cause).

"A replacement teacher shall be paid in accordance with district policy for the first twenty (20) workdays. Thereafter the replacement teacher shall be placed on the salary schedule in accordance with Section VI of this agreement.

All other provisions of this agreement shall like wise apply to replacement teachers."

ISSUE

The arbitrator is charged with choosing the total final offer of one or the other parties on the basis of determining which offer is the more reasonable within the application and consideration of the factors specified in Section 111.70(4)(cn) 6 of the Wisconsin Statutes.

ARGUMENTS OF THE PARTIES AND DISCUSSION

1. DENTAL INSURANCE

The evidence revealed that the family dental insurance plan referred to in the Union's proposal identified as Plan 704H-1A, would call for a monthly premium payment of $23.07 for family coverage and $7.83 per month for single coverage. Under the Union's proposal, such plan would become effective as soon as possible following issuance of the subject arbitration award. The coverage therefore to be afforded employees under either offer in this case, would therefore seem to cover the period from approximately February 1 through June 30, the end of the labor contract term and also the end of the District's fiscal year.

The District indicated in its brief that it did not consider the dental insurance issue to be of major significance in this arbitration because of the fact that under the offer of either party, the full cost of such insurance would be paid by the District for this particular contract year.

The Association made a comparison to the School Districts of Germantown, Slinger, Hartford Union High School, Hartford Elementary School, Pewaukee, Hartland Elementary School, West Bend and Grafton. They contended that of those districts, all paid the full cost of dental insurance with the exception of Slinger. Slinger pays 90% of the plan in effect at such district, which plan is a better plan than the one proposed in this case and the 90% of the premium which Slinger thus pays would fund the plan offered in this district at 100%.

The Association further contends that the Association proposal should be awarded because it is specific in identifying the plan and is not ambiguous. They contend that the District's proposed language is ambiguous and leaves open for dispute as to the plan to be implemented and whether or not the Association would have input into the type of plan to be obtained under the District's proposed language.

The District entered into evidence an exhibit showing the treatment of dental insurance by those schools in the same athletic conference as Kewaskum and such exhibit reveals that of the five schools named, Chilton, Kiel and New Holstein provide full payment of dental insurance premiums, Plymouth pays $20.00 per month as a maximum contribution and Two Rivers pays 90% of the premium.

On the basis of reviewing and considering the evidence and arguments on this issue, the arbitrator is of the judgment that the Association's proposal is entitled to a slight preference on the basis of a comparative analysis to both Association identified school districts and the Districts identified school districts and on the basis of the Association's proposed language being slightly

more definitive and therefore not subject to potential disputes.

2. DEFINITION OF A GRIEVANCE

The District contends that the Association has the right to grieve violations of the agreement as a matter of law and that the proposed amendment to such provision, as proposed by the Association, is therefore not necessary. In addition, the District pointed out that they interpret the law in that manner and that the District has, in fact, demonstrated that interpretation by the fact that it has processed grievances submitted by the Association in the past.

The Association contends that the present contract provision could afford a basis for a dispute being raised at some future date despite the District's past actions in not raising an issue on such point. The Association differs with the interpretation of the District of the WERC decision referred to by both parties of Plum City Joint School District No. 3, Decision No. 15626-A (42778) whereby the Association read into such decision a possibility that under certain contract language, an association could be held to be foreclosed from being a party to grieve certain matters under the contract.

In the considered judgment of the undersigned, where the district expresses the conclusion that the association does have the right to grieve matters under the contract as a matter of law, it then should have no basis upon which to object to the association's proposal to conform to that understanding of the law and to specifically provide in the labor agreement the name of the association as a party who may file a grievance. The arbitrator is of the judgment that the Association's proposal is the proper and the more reasonable on such issue.

3. SALARY SCHEDULE

The approximate difference between the final offers of the two parties, which was calculated on the basis of taking into consideration all cost items including dental insurance, is an approximate 1% or $20,000.00 difference. The District computed the percentage cost of each proposal as being a total percentage cost of 11.4% under the District's final offer and 12.4% under the Association's final offer. The Association computed the total cost using a returning teacher formula and arrived at a total cost of 11.31% for the District's final offer and 12.25% for the Association's final offer.

The basic matter in dispute on this issue, concerns primarily the change in the salary schedule itself. While the Association's proposal would result in an approximate 1% greater cost, the major dispute concerns the Association's proposed change in the salary schedule.

Under the District's offer the spread between the respective lanes is 2.2%. Under the Association's proposal, the base rate of each lane would be 2.75%.

The second major difference involves that of the percentage application to the steps within each lane. As can be seen from the District's final proposal, the step increments range from 4.1% to a top of 4.8%. The Association's proposal would utilize a 4.5% step increment in but a few of the earlier steps in the first three or four lanes and then apply 5% to the vast majority of steps. In

addition, under the Association's proposal, one additional step appears to have been added to each of the lanes.

An evaluation of the exhibits introduced by both parties showing the placement of the present teachers in the salary structure of the District, reveals that were the present salary schedule to be maintained, as it would be under the District's final offer, 31 of the 112 listed employees would receive no step increment for the reason that they were at the top step of their respective pay range at the end of the 1979-80 contract. The result of such status would then result in such 31 employees receiving an increase of 8.3% under the District's proposal whereas the remaining employees by virtue of receiving the general increase along with a step increment, would receive increases averaging slightly in excess of 12%.

Under the Association's final offer and salary schedule format, every employee would receive an increase in the double digit percentage range with the majority being in the 10 to 12% range and a select few in the 13% range. It is obvious to the arbitrator that the major reason for the Association's proposed format change to the salary structure is for the purpose of securing a somewhat greater increase for those 31 teachers who otherwise would receive less because of their placement at the top of the current salary schedule and thus their not being entitled to any step increment.

Each party presented exhibits which employed different formats and approaches to the considerations that must be considered in making a determination. Because of their use of different formats and approaches, the arbitrator has been required to recalculate the information presented by each so as to place such information into a single format that will then be subject to a comparative analysis. Complete data is not present in the exhibits for some of the Districts cited by the parties as claimed comparables. The arbitrator has, however, utilized the data that is contained in the record to the extent possible in compiling a single format upon which to arrive at a comparison.

One of the first determinations to be made concerns that of which districts should be given the greater weight in making comparative analyses. In applying the contiguous criteria as modified by the pupil enrollment and size of the respective districts, the arbitrator arrives at the following district groupings which shall be considered in descending order of priority. As a first priority, the arbitrator is of the judgment that the districts of Slinger, Hartford Union High School, and Campbellsport are the most comparable. The second group which is entitled to somewhat less consideration consists of Fredonia, Lomira, Mayville and Random Lake. The undersigned would next consider the group utilized by the Association as being of slightly less relevance from the Group 2 districts and in order to simplify the computation and to be able to utilize many of the computations set forth on the various exhibits, the arbitrator has utilized as such third group the districts of Germantown, Grafton, Hartford Elementary, Hartford Union High School, Pewaukee, Hartland Elementary, Slinger and West Bend.

Having made and arrived at such groupings, the arbitrator then calculated and determined how the District and Association final offers compared to the average of such other groups at selected places on their respective salary schedules.

In examining and comparing the BA maximum lane level of compensation, it is found that the Group 1 and 2 average at the BA maximum lane, is $17,056.00. The average of the group of districts utilized by the Association and identified as the Group 3 group,

revealed an average of $17,754.00. Under the District's final offer, the BA lane maximum amount would be $16,015.00 while the Association's final offer would yield a maximum rate of $16,375.00. It is therefore clear that under any and all of the above comparables, that the District's final offer is substantially below that of the comparables at the BA lane maximum step amount.

Utilizing the same format, the arbitrator has arrived at the maximum rate under the BA+ 15 lane, which shows that the comparables cited by the District which comprised the Group 1 and Group 2 districts above identified, yields an average top rate in such lane of $18,553.00, whereas the Group 3 districts yeild an average top rate of $19,075.00. Compared to those averages are the District's final proposal of $17,998.00 and the Association's final proposal at that step which would yield $18,447.00. Again, at such comparison, the Board's offer again appears to be somewhat deficient and below both of such average calculations.

Utilizing the same format on the MA lane, one finds that the maximum shown by the Group 1 and 2 districts would yield an average of $20,129.00 whereas the Association's Group 3 average would yield a top rate of $21,113.00. As to such lane comparison, it appears that either offer is somewhat closer to the averages of the comparables. Under the District's final offer, such amount would be $20,189.00, while the Association's offer would yield $20,634.00.

The undersigned also made a comparative analysis of the groups at step 6 of each salary schedule of the various districts and found that of the Group 1 and 2 districts where such information was available, that the step 6 rate at BA +15 was $14,582.00 as compared to the average rate for the Group 3 districts of $15,026.00. Such averages compared to the District's final offer which would yield $14,878.00 at such step and the Association's offer which would yield $14,345.00. At such comparative level, it is clear that the Board's final offer is closer to the comparable averages.

Using the same format in determining the step 6 level at the MA lane, the average of the Group 1 and Group 2 schools indicated an average rate of $15,756.00, the Group 3 districts carried an average of $15,945.00 and that such averages compared to the District's offer of $15,653.00 and the Association's offer of $15,090.00. From such comparison, it is clear that the Board's proposal is more closely comparable to such other comparables at step 6 of the salary schedule.

What such comparison reveals, is that the Association by its revised salary schedule, has devised a schedule that results in a lesser increase at the lower levels of the schedule but which then places more money at the upper strata of the schedule so as to afford a more comparable increase for the contract year to those 31 employees who otherwise would not have received a step increment.

The undersigned has also undertaken a comparative analysis of the various salary schedules from a standpoint of determining the average increment percentages that prevail from one step to the other within the lanes and from one lane to another. The average ratio of increase from the BA minimum to the MA minimum utilizing the Group 3 districts, yielded an average percentage increase of 1.12%. Of those districts cited by the Board where such computation is possible from the exhibits, the arbitrator found that at Random Lake the percentage was 1.13%, at Mayville, 113.5%, at Slinger, 1.10%,

and at Hartford Union High School, 1.125%. Such spread from the BA to the MA lane under the District's final offer would be 1.09%, whereas under the Association's final offer, the spread would be 1.11%.

The second ratio area to which the undersigned made comparison was between the BA base rate to the top scheduled rate. The average percentage ratio relationship from the BA minimum to the schedule maximum in the Group 3 districts was 2.01%. The percentage increase at Slinger was 1.19% whereas at Hartford Union High School the percentage was 1.90%. In comparison thereto, the District's final offer would yield a ratio of 1.94%, whereas the Association's final offer would yield a ration of $2.00%.

The third line of comparison which also is closely related to the above lane ratio comparison, concerns that percentage spread between the steps within each lane. On the basis of the data available in the record, it appears that the average percentage spread in the Group 3 districts if 4.79%. Such average is made up of several districts which employ a 4% spread throughout part of the salary schedule and then apply a 5% spread throughout the remainder. Two of such districts employ a straight 5% spread throughout the schedule.

The only data available for comparison as found in the Board exhibits, involves that of those schools in the athletic conference and the average of such schools appears to be one of 4.63%. Against those average percentage figures one finds that the Board's final proposal ranges from 4.1% to 4.8% yielding an average increment of 4.45% whereas the Association's proposal ranges from 4.5% in only a small portion of the schedule and applies a 5% increment to the majority of the steps which on its face while yielding a 4.75%, realistically would yield a higher percent more appropriately estimated at 4.85% because of the 5% application to the greater portion of the salary schedule.

The comparisons engaged in one this issue have to a large extent involved a comparison of apples to oranges to a great extent. The salary schedules vary considerably in each district. It is very difficult to establish a common ground on which to make comparisons from one district to another. Averages in many cases, are somewhat misleading and do not lead to ready conclusions. As can be seen from the above analysis, the differing approaches result in different conclusions, one favoring one party's final proposal and the other favoring the others final proposal. The final result from such analysis, is that it factually does not yield a clear conclusion that would tend to favor the final offer of one party over that of the other. If there be a factor that would tend to lend favorability of one offer over that of another, it would be that consideration which would recognize the factual and practical recognition of collective bargaining to the effect that generally a settlement should be structured in a way so as to reasonably afford relatively equal treatment to all employees affected. That consideration, of course, gives way at times in the interest of correcting clear deficiencies or inequities within a particular salary structure. Stated simply, it would seem that the Association proposal would be subject to slight preference for the reason that it does provide for a more equal distribution of the moneys applied to salary increases to the greatest number of employees in the bargaining unit. As such, it then would reasonably be viewed as being the more equitable distribution of the moneys applied to salary increases. Were there

to exist some areas of the salary structure that were clearly shown to be deficient, it then would be more appropriate by application of such equitable type principle, to apply a somewhat greater portion of the total salary moneys to first correct such deficient areas and then apply the remaining moneys in a reasonably equal and equitable manner.

From an overall evaluation and comparative analysis, it does not appear that there exists any clearly disparate area within the salary structure of either proposal, with the possible exception that the Association's proposal does leave the lower areas of the schedule somewhat deficient. It would seem that a more equitable distribution would have been to provide a somewhat greater allocation to the lower portion of the salary structure and to have extended the salary structure to a somewhat lesser degree but one that was at the same time, designed to give some greater increase to those 31 employees presently at the top of the structure.

In the final analysis, it would appear that the proposal of either party is lacking to some extent in meeting those purely equitable type considerations. For that reason, the undersigned is unable to conclude that either party's final offer on this issue is to be favored over that of the other.

The final evaluation and matter considered in evaluating the respective final offers involves that of comparing the percentage settlements attributable to the districts to which comparison has been made. There exists some dispute between the parties concerning the accuracy of the percentage amounts attributed to some of the various settlements. For example, the percentage attributable to the settlement at Slinger was shown by supplemental data to be .44% greater than the amount shown in the exhibits presented at hearing. As to such other districts where dispute was voiced, no contrary evidence has been presented to indicate that an amount other than that shown on the original exhibits should be utilized, and the arbitrator has therefore utilized such amounts except where subsequent evidence has specifically shown that it is other than therein shown, such as at Slinger.

If one then takes the percentage increases attributed to those districts included in the Group 3 group, with the exception of West Bend, which final percentage figure was unavailable, one finds that the average percentage increase for the 80-81 contract settlements was 12.22%. If one takes the average of the percentage settlements for the schools in the athletic conference as shown on the District's exhibit, the average is shown to be 10.86%. When one takes the three schools for which data was available as shown on the District's exhibit of contiguous school districts, the average is 9.67%. When one further takes the three schools that the undersigned initially placed in Group 1 as being the first most comparable, of Slinger, Hartford Union High School and Campbellsport, one finds that the average settlement involving those three schools was 11.21%.

From such evaluation, it therefore would appear that the District's proposal is the most comparable on the basis of a settlement percentage comparison.

4. FAIR SHARE

The Association contends that the two-thirds vote provision is a dinosaurean provision left over from the early '70's and that it is obsolete and should be discarded. They contend that during the last several years, the vote percentage was substantially in

excess of such two-thirds requirement and that the need for such provision no longer exists. Additionally, the Association contends that such type provision is found in no other labor agreement of any comparable school district.

The District points out that the vote required by the current provision is one that is conducted on school district time during the in-service period while all teaching employees are present. They state at page 7 of their brief as follows:

> "It is the Board's position that the existing referendum requirement does not inconveience either party to the agreement. The Board would also point out that it was willing to go along with the fair share concept many years ago (1971-72), but the referendum was the quid pro quo. Now that the Union has achieved what it wants, it wishes to eliminate that portion of the arrangement that it does not like or finds inconvenient. The Union has described this provision as dinosaurian. It is not. It is merely a concept unique to the Kewaskum School District that allows the employer and individual employes to retain a good deal of confidence in the fair share agreement as an expression of the desires of the employes."

The arguments of each party does contain certain valid merits. While it is true,as the Association alleges, that such type provision is not found in any other district contract, the fact remains that such provision was negotiated by the parties at a very early time when fair share was first available as a bargainable issue. The District pointed out that it was granted by the District at that time as a quid pro quo to a referendum vote. It does not appear that such vote has inconvenienced or done harm to either party over the years. There appears to be no good reason why it should either not continue nor be removed from the contract. The undersigned thereby finds no persuasive reasons to favor one party's position over that of the other on this issue. It is a matter that at some future time during negotiations the parties should properly resolve on the basis of the give and take of free and open negotiations.

5. INDIVIDUAL TEACHER CONTRACT TERMINATION AND LIQUIDATED DAMAGES

Both parties appeared to have placed somewhat greater emphasis on this issue as opposed to some of the other issues. The District stated its argument and reasons for desiring the subject change in its brief as follows:

> "Ordinarily it is the employer that insists that the agreement contain a provision for liquidated damages as the result of a breach of a contract by a teacher. It is the Board's position that such provisions merely allow for teachers to ignore their individual contracts for the payment of a token fee to the Board. The teachers are not required to provide any advance notice to the employer and can resign at any time. The Board believes that such conduct not only is damaging to the continuity of the educational program, but many times the district must enter the job market at times when the availability of exceptional candidates or even teachers of specialized subject matter are very low or non-existent. The Board recognizes that it cannot hold a teacher to the individual contract if the teacher wishes to breach the contract, however, the Board believes that it should not make circumstances readily available.

"Current state law provides that, '...No such (school) board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under contract of employment with another board.' (Section 118.22(2)) Thus, one school district cannot raid the staff of another district once contracts have been signed. This provision discourages teachers from signing contracts with one district and continuing to seek employment with other school districts. However, if a teacher can void a teaching contract by the payment of $200, he can in fact get around the statutory provision and seek employment in other districts at any time."

The Association contended that during the 1977-78 negotiations the District proposed a liquidated damage provision with the amount proposed of $200.00. The parties did negotiate and settle on a liquidated damage provision with an amount of $100.00. The Association stated as follows in its brief:

"...In examining the Superintendent on this matter, he stated that the District's insistence on removing the provision came about due to a 'raid' by the Port Washington School District on one of the former Kewaskum special ed teachers. He indicated he was advised that the current wording in the collective bargaining agreement meant that other districts could hire employes by having and employe tender the liquidated damages amount and move to the next district. The KEA submits that this problem is an employer-employer problem. If a wooing school district is unscrupulous enough to offer such things as a more competitive salary and fringe benefit package, a better leave provision, better working conditions or whatever the reason and wishes to hire an employe of the School District of Kewaskum, then the District should see the problem as exactly one which they and other employers have control over. Either offer appropriate working conditions, etc., or the employers should agree they will no longer raid other school districts."

The Association contends that under the District's proposal, in the event a teacher reaches a contract and takes employment with another district, that the parties avenue for resolution of the matter would be a court of law. They address such situation in their brief as follows:

"...Who benefits from such a suit? It will take months, if not years, to collect costs and then the fee of the attorney would likely be more than the amount collected. The KEA, as the bargaining agent may also have to incur legal fees to say nothing of the costs (time, legal fees, etc.) to the prior employe. With thousands of teachers unemployed their real needs are better met by the Association's offer."

Both parties presented into evidence data concerning the type of liquidated damage provision that is contained in other school districts. The Association objected to the data presented by the District on the basis that some of it was inaccurate, and such data was not supported by the present contractual provisions of the districts cited from which a comparison or analysis could be made to judge whether or not the District's conclusions drawn therefrom were accurate.

The District's exhibit concerning the six schools in the athletic conference indicate that three of the districts provide for a dollar amount of liquidated damages ranging from $100.00 to $400.00 and that three of the districts contain no liquidated damage amount. Of the seven contiguous school districts, the District's exhibit was corrected by the Union through rebuttal evidence showing that one of the districts listed as having no liquidated damage provision, did in fact have a 2% or approximately $220.50 liquidated damage provision and with such correction that of the seven schools listed, three provided a liquidated damage amount of $200.00 and $220.50 as indicated for the one so corrected, and that four contained no liquidated damage provision.

The Association presented an exhibit showing eight school districts, which included Slinger and Hartford Union High School which was also listed within the District's exhibits wherein five of the seven provided liquidated damages in the amount of $200.00, one provided for replacement costs, and in the case of Slinger, such district contained no liquidated damage provision.

On the basis of reviewing the comparables, it would appear that the Association's offer is the more comparable to the majority of the school districts cited and referred to by both parties. Further, in view of the bargaining history concerning such provision, the undersigned is of the judgment that the Association offer is to be preferred on this issue.

6. JUST CAUSE

The District contends that the Association's proposal constitutes a one-sided arrangement and creates amgibuities that could expose the parties to dispute over a number of possible areas. They address such issue in their brief as follows:

> "First, the District would argue that a true probationary period should exist. A probationary period, during which the employing district has a great deal of latitude to deal with new employes and insure that they measure up to the standards of the District and that failing to do so will result in termination without long and extensive litigation in the courts or in an arbitration setting. The District does recognize that even probationary teachers are afforded the statutory protections of Section 118.22. However, after completing the probationary period, the teacher is afforded job security that could be equated with tenure.
>
> "The Association wishes the best of both worlds, the protection of tenure without the inconvenience of a probationary period. Surely, the Union will argue that they have included a probationary period, however, the Union has added a standard for nonrenewal during the probationary period of 'just cause' itself. What the Union gives with one hand it takes away with the other. Furthermore, none of the districts in the Board's comparables have chosen to fall victim to such an arrangement. (Board Exhibits 51-74)
>
> "Finally, the District is distressed at the breadth of the application of the standard of just cause as proposed by the Union. Even the Union representative, Dennis Eisenberg, was unable at the hearing to clearly and concisely identify what was involved as part of the phrases dealing with reductions in rank or compensation. Furthermore, the Union provision provides that every reprimand, whether written or verbal is subject to the standard of just cause. Finally,

the Union is unable to identify what other types of discipline are contemplated other than those already specified. If the Union proposal is accepted, any action taken by the Board and/or Administration could be regarded as discipline by a teacher from routine transfers and teaching assignments to the denial of purchases that a teacher has requested from the District. The District would be placed in the position of continually proving that a particular action was not disciplinary or possibly that the action was taken for just cause."

The Association viewed the subject dispute as involving three relevant areas and is stated in their brief as follows:

"1. Should there be an arbitrary and capricious standard for nonrenewal of employes during the first two work years or should there be no standard,

"2. Should discipline, including reprimands and suspensions with pay be covered by a cause standard, and

"3. Should a reduction in rank or compensation be covered by a cause standard?"

The Association further addresses this issue in its brief as follows:

"In consideration of the appropriate standard for a reduction in rank and compensation, i.e., the removal of an employe as a head coach to a lesser or no position, one must look at the District's practice to also determine the appropriateness of the standard which should be present in Kewaskum. There is considerable testimony and exhibits by the Association to show that many employes had been contracted to do extra duty work, but were not free to abstain from such duty work in the future, i.e., the district argues that the extra duty work is tied directly into the teachers individual contract.

"Apparently, the District wishes to have it both ways. First, the District says that an employe may not, under any circumstances, have just cause to remove his or her self from an extra duty without voiding his or her individual contract, and then, wishes to take the position that there should be no standard placed on the employer for the removal of any extra duties. Such a standard is unfair to the employes and has created considerable ill will among members of the bargaining unit....

"There is also testimony in the record that a grievance arose during the prior school year where an employe was summarily dismissed from her volleyball position without cause or without even so much as notice. The Association grieved the matter and the reduction of the employe's volleyball position was resolved to the satisfaction of both parties. However, during the processing of the grievance, the District took the position that they could remove any employe for any reason that they deemed appropriate without even so much as evaluating an employe's performance. Once again, Mr. Arbitrator, there is clearly a need in this District for language which requires the employer to meet some test other than 'any reason or no reason'.

"The employer's proposal in this area is also regressive for the probationary period and standard that was applicable to new employes. The District made a weak argument that the inclusion of just cause, which had not been in the previous labor agreement, allows the District to propose a standard of no standard for new employes during the first two years. This logic should be rejected by the Arbitrator. Exhibit A-9 shows that nonrenewals could not take place for new employes to the District unless the following conditions were met by the employer:

"1. To be evaluated in the classroom at least three times for a total time of 1 1/2 hours,

"2. Have specific deficiencies along with suggestion for improvement called to the teacher's attention in writing, and

"3. Have supervisory help provided in an effort to correct the teaching deficiencies.

"The employer proposes to remove these provisions from the contract. The KEA likewise proposes to remove this specific language but replaces it with the language of arbitrary and capriciousness as a standard. The KEA believes that the three tests outlined above in the prior labor agreement do, in fact, meet and probably exceed a standard of arbitrary and capriciousness for nonrenewals. The employer, on the other hand, agrued that Exhibit A-11a, Teacher Evaluation Language, provided necessary and needed protection in lieu of the language which the District proposes. A close review of the language shows there is substantially no standard whatsoever. Teachers will be evaluated regularly 'as deemed appropriate by the administrator'. The evaluation language only requires the employer to determine if an evaluation is appropriate and if so, to follow it with a conference and give the teacher a copy. This is a substantial degredation of the prior contractual language and the major reason why the KEA proposes an arbitrary and capricious standard during the first two work years."

The differences in the two proposals of the parties concerns basically two different areas of dispute. First, the District's proposal addresses only those disciplinary actions that consist of dismissal or suspension without pay. The Union's proposal on the other hand, covers a more broad spectrum of, "discharge, nonrenewed, suspended, disciplined, reprimanded or reduced in rank or compensation."

There is no question about the fact that there are certain available actions which an employer may and does on occasion take against an employee which does, in fact, constitute a form of discipline other than dismissal or suspension without pay. Clearly, an oral or written reprimand or warning that is placed in a teacher's personnel file, constitutes a form of discipline. Similarly, a nonrenewal of a teacher's contract while arguably could be construed as a dismissal, is an action that is generally treated as distinct from a discharge during a term of an individual teacher's contract in the teaching profession. It therefore is a form of discipline different than that normally recognized as a discharge during the term of an individual teacher contract such as is referred to in the District's proposal. The undersigned likewise could visualize a situation where a teacher may be reduced in rank or pay for some justifiable reason. Where such type action might

be invoked where a good and sound reason did not exist, such action very well could in fact be a disciplinary action.

In reviewing the comparables presented by both parties, it appears that the majority of school districts to which reference was made by both parties, do apply a just cause, or cause, or arbitrary and capricious standard to actions other than discharge and suspension without pay, which other actions reasonably qualify and are construed as disciplinary type actions. Even under the District's Exhibit No. 50, it appears that a number of the District's comparable school districts surveyed provide for application of some standard to such other potential disciplinary type actions. In the considered judgment of the undersigned, the District's proposal is more restrictive than most other District comparables and that by virtue thereof, other disciplinary type actions could be imposed thereunder and the employee and/or union would be foreclosed from challenging such action under any standard. As to such portion of this issue, the undersigned is of the opinion that the Association's proposal is the more reasonable and the one that is more comparable to the majority of other districts.

The second aspect of this issue which requires consideration and resolution concerns that of whether or not any standard of review should be afforded probationary teachers concerning any disciplinary type actions that may be imposed upon them.

In reviewing the exhibits of the two parties on such issue, the undersigned notes that some contracts specifically provide for a specific probationary period. Of those type contracts, some provide for a review of an employer's action which may be disciplinary or that of dismissal or nonrenewal by application of an arbitrary and capricious standard. Some provide no standard of review, but where no standard is so provided in either the just cause or capricious and arbitrary lexicon, the contracts generally appear to contain fairly detailed review and consultation procedures and steps which appear to go more to a due process concept. Some of the stated procedural steps, however, do appear to invoke some form of standard, such as in Plymouth where it provides that discipline shall be appropriate to the offense of the employee. A similar type provision is contained in the Sheboygan Falls labor agreement.

In reviewing the districts referred to by the Association in its exhibits, it appears that in a number of such districts, the parties have distinguished between a just cause standard and a standard of "arbitrary and capricious." In a number of such districts, the contracts provide for a just cause standard to be applied in reviewing discipline imposed on a non probationary teacher and provide for an arbitrary or capricious review to be applied to discipline imposed on a probationary teacher.

Based on a review and consideration of the record evidence presented by both parties on such issue, the arbitrator is of the judgment that the Association's proposal is the more appropriate on the basis of a comparative analysis and of it being more consistent and similar to the application of a majority of other districts to which comparison was made.

7. REPLACEMENT TEACHERS

Both parties placed considerable importance on this issue. The District's argument on this issue is stated in its brief as follows:

"The Board's position with respect to replacement teachers is no different than the position that employers in the private sector take with respect to those persons they employ on a limited term or casual basis. The question is not whether or not these teachers do the same work and perform all of the same functions of a regular employe, but rather whether they are or are not a regular employe. The answer is that they are not regular employes. These persons teach in place of a regularly employed and contracted teacher that is expected to return to regular employment with the district. The duration of their employment is uncertain. They do not participate in the regular evaluation systems. They are not expected to participate in curriculum development and even the budgetary functions may be handled by the teacher on leave or the principal. For these reasons alone, the district would contend that they are not regular employes to be covered under the terms of the agreement.

"If the Union's proposal is accepted then on the twenty-first day of employment, these temporary or replacement teachers must begin making fair share contributions, and the District must make the full range of contributions for all fringe benefit programs even if the replacement teacher is to remain only a few more days. This results in increased costs for the District, however, the most disastrous aspect of this proposal is confronted if the teacher on leave decides not to return to employment with the district. At this point, the district has acquired a new regular employe. This is indeed a poor way to select or obtain regular employes.

"This district would also contend that the Union cannot waive the statutory rights of a teacher as they have attempted to do so in their proposals. The Wisconsin Supreme Court has decided '...that it would be contrary to public policy to permit a waiver of the provisions of Sec. 118.22, Stats.' Furthermore, the Court stated that Section 118.22 of the Wisconsin Statutes '...establishes a comprehensive and orderly procedure governing the renewal or nonrenewal of teacher contracts...' Faust v. Ladysmith-Hawkins School System, 88 Wis. 2d 537, 281 N.W. 2d 611 (1979).

"It is for these reasons that the Board believes that if the Union proposal is implemented any person employed as a teacher beyond 20 days must be dealt with in accordance with the statutes and the agreement even though the statutes would specifically exclude such replacement teachers as being part time teachers. The Board also believes that given its proposal of ninety-five days that the district can make the necessary adjustments and effectively plan for whatever situation ultimately exists.

"Finally, the Board would point that this difficulty regarding replacement teachers has arisen because of the negotiated leave provisions. The Board recognized as it negotiated the extended leave provisions that from time to time there might be various problems with persons hired on a temporary basis. However, now the Union wishes to make a difficult arrangement doubly difficult. Furthermore, none of the districts identified by the Board as comparable have replacement teacher provisions. (Exhibits #77-78)"

The Union contends that this issue should be decided on the basis of giving greater weight to the equity of the arguments rather than to comparables. They contend that replacement teacher provisions are not found in a number of school district contracts because of the fact that in many districts, the Board has a Board policy which definitively and equitably deals with that subject matter. They contend that where such acceptable type policies exist, that employees have not found it necessary to seek negotiated language in the labor agreement.

As to their claimed need for contract language covering this subject matter, the Association states in its brief as follows:

> "The fact of the matter is that in Kewaskum we have a genuine problem which continues to need redress. The record amply demonstrates that a grievance was filed during the 79-80 bargaining year and was resolved in a non-precedential manner. This issue was bound over for a decision through the interest arbitration process. The Superintendent's testimony stated there would be at least two replacement teachers this year and that a third replacement teacher position was pending before the Board. The Association introduced two witnesses, one of which was a regular teacher for the 79-80 school year and the other who was the replacement or limited term employe. Testimony given by the replacement teacher was that she assumed virtually each and every duty, responsibility, and requirement of her predecessor almost immediately.
>
> "The Superintendent stated that he agreed that replacement teachers did do substantially all of the duties of a regular teacher from day one. The only exception noted in the record was curriculum work and in cross examination the Superintendent indicated that such work would be done only if the Board chose to review a curriculum area and generally would be assigned to a more experienced teacher. The KEA must ask the rhetorical question, if all duties and assignments, including extra-curricular supervision, bus duty, chaperoning, lesson books, grading, lesson plans, etc., are performed by a bargaining unit employe, then should not such employe be paid at the bargaining unit scale?
>
> "The KEA believes the answer to the above question should be yes. It has proposed a most reasonable standard where an employe would not become a member of the bargaining unit until they performed work for twenty consecutive workdays (approximately one month). The Association's language clarifies the rights of replacement employes and without equivocation indicates that limited term employes receive all contractual rights, obligations and benefits after the 20th workday until the prior teacher returns to his or her job assignment. At that time, the employe's work terminates and the employer has just cause to non-renew or terminate the employe on that date.
>
> "In contrast, the employer's language proposes that the implementation take place only after 1/2 year of workdays. It conceivably allows for two employes to be in the same position under the current non-renewal statute. The replacement employe would become a members of the bargaining unit on or about January 25th if the person were hired at the beginning of the school year; if the returning teacher returned after the Wisconsin Statute 118.22 timeline, then the first employe would have to go through a non-renewal hearing for termination of the ensuing contract. See the Wisconsin Supreme Court Decision, Faust, Aug, 1978 Term, No. 76-241.

"The KEA would argue that the assignment of all of the duties of a teacher to any employe obligates that replacing employe, if certified, be compensated in accordance with the collective bargaining agreement."

From a comparability standpoint of whether or not such subject matter is covered by specific provisions in labor agreements in other districts, it is clear that on such consideration, the District's offer would be consistent with the majority. It appeared from the testimony presented at the hearing, that the District does have a fairly definite Board policy with respect to the treatment of replacement teachers. It appears, however, that such policy is somewhat flexible so as to deal with what may be a short-term replacement as opposed to a known longer term replacement teacher. It appears that under the Board policy, that after 20 working days, a replacement teacher is paid pursuant to the salary schedule. In some cases replacement teachers have received a portion of the fringe benefits provided and have not received other portions.

This is an extremely difficult matter for a mediator/arbitrator to resolve. It is a relatively new subject matter for coverage in labor agreements as is shown by the comparability data. On the basis of the information shown by Association Exhibit 71, and Board Exhibits 77 and 78, it would appear that where detailed treatment of replacement teachers is provided, that it is done primarily through Board policy.

If one were to draw a parallel from the teaching employment area to that of the private sector, the conclusion would be to favor the Association proposal. In the private sector, provisions are frequently found which require that any employee performing specific duties in a classification, receive the pay attributable to such classification. Likewise, any such type employee normally becomes fully covered by all fringe benefits of a contract upon successfully completing their probationary period which frequently ranges from 30 to 60 days. Because of the difference in probationary periods in the private sector to the teaching sector, one cannot utilize the probationary period on that same basis. Again, in the private sector, contracts frequently contain provisions concerning temporary transfers where an employee temporarily transferred to perform all the duties of a particular classification, after a short period of time, is entitled to the rate of pay for such classification. It seems to the undersigned, however, that the teaching profession is unique unto itself and that it is not possible to draw a meaningful comparison on this type issue from one to the other. The replacement teacher details and arrangements should more properly be detailed through mutual negotiations and agreement of the parties so as to afford some degree of certainty either through inclusion in the labor agreement or through a Board policy. In this case, the parties have placedsuch dispute before the arbitrator. The argument advanced by both parties contain merit unto themselves. It would appear that 20 working days may be an unreasonably short period and could cause undue administrative work particularly in replacement teacher situations that are of relatively short duration of possibly two or three months. On the other hand, the District's proposal of 95 consecutive days constitutes approximately a one semester time period and where the replacement teachers are in fact retained for a time period of four months to a full year, there is very little reason for such employees not being paid the appropriate rate of the salary structure and in addition being entitled to and receiving all benefits as provided under the contract.

As to this issue, neither party has fully persuaded the

undersigned that their particular proposal is more reasonable and appropriate than the other. In the opinion of the undersigned, this particular issue should more properly be the subject of additional negotiations directed at meeting the concerns of both parties through some form of modification of each of their current final proposed positions. The undersigned thereby expresses no preference as to this issue and it therefore will be given no weight one way or the other in final analysis in determining the more appropriate total final package offer.

CONCLUSIONS

Each party presented cost of living data and argued the impact and erosion of inflation on the real earnings of the teachers. The parties differed on the proper index to be referenced in this case. If one takes the term of the prior contract as the period to be reviewed in that respect, one would run from July 1 through June. The July issue of the Consumer Price Index which covered the June figure, reveals that for all urban consumers in the Milwaukee area which includes Milwaukee, Ozaukee, Washington, and Waukesha Counties, that the percentage increase for the year ending June 1980 was 15.3%. If one considers Kewaskum to be included in the small metro areas, the increase is shown to be 12.9%.

In the judgment of the undersigned, the consideration to be given the Consumer Price Index in this case is one that must yield to several other considerations. First, the District presented evidence to the effect that they had derived the total increase which they were prepared to offer for this school year on the basis of the voluntary wage and price guidelines. They contend that those guidelines suggest a limit of 10.5%. They contend that by virtue of the final offer, that they have in fact exceeded the guidelines which they sought to stay within. The second reason that the undersigned would subordinate the Consumer Price Index consideration to other factors concerns the level of percentage settlements that in fact have been arrived at in other districts. Undoubtedly the Consumer Price Index did receive consideration and play a part in the negotiations between the parties in all other districts. The percentage settlements that were then arrived at at such other districts can reasonably be presumed to have taken into consideration the cost of living increase and the level of settlements would in effect reflect the amount of consideration that other districts have given to that factor. In the final analysis, it would seem that the comparison as to the relative standing of the salary structure in this District is more relevant through comparison with other districts so as to determine their reasonable and relative comparative standing. Such consideration, of course, does include those other individual factors which go into determining the level of settlement which in fact would include the cost of living increase.

This case then comes down to that of assessing the totality of all issues that are comprised in each of the two final offers and make a total judgment and determination as to which is the more reasonable.

Final tabulation reveals that of the seven issues presented, the Association's final offer has been found to be somewhat more reasonable and/or justified based on the particular considerations applicable to each such issue and the District's final proposal is found to be slightly preferred as to one issue, namely, the

overall monetary increase and salary schedule issue, and that two issues are of a nature that no preference has been estab-lsihed one over the other.

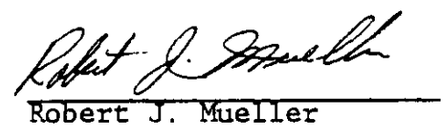
Aside from the numbers game apparently favoring the Association's final package offer, the arbitrator is of the judgment that on the basis of an overall evaluation, that the Association's final offer is the one that in totality is the more reasonable. The single issue that was credited to the District, being that of the salary schedule and increase, was one that contained conflicting considera-tions and one that in many facets favors the Association position while in others it favors the District. The final judgment whereby the undersigned indicated slight favorability to the District's final offer on such issue, is just that, slight. There are elements of the District's final offer that do not address or meet some of the comparability tests. While it is deficient in those areas, the factor that does favor the Board's offer concerns the level of other settlements and the dollar amount of such settlement. In the final analysis, however, the arbitrator is of the considered judgment that the balanced weighing of the varying issues and considerations applicable to each as taken in totality, calls for a finding that the final offer of the Association is only slightly the more reasonable.

It therefore follows on the basis of the above facts and discussion thereon, that the undersigned renders the following decision and

AWARD

That the final offer of the Association is found to be the more reasonable and is hereby selected and directed that it be incorporated into the written collective bargaining agreement as required by statutes.

Dated at Madison, Wisconsin this 5th day of February, 1981.



Robert J. Mueller
Arbitrator