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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE THE MEDIATOR-ARBITRATOR

* *

In the Matter of the Arbitration Between	*	Case XT No. 26802
Rosendale-Brandon Education Association	*	Decision No. 18375-A MED/ARB-880
and	*	
Rosendale-Brandon School District	*	OPINION AND AWARD

* *

Appearances:

For the Employer: James K. Ruhly, Esq.,
Melli, Shiels, Walker and Pease,
Madison, Wisconsin

For the Association: Gary L. Miller, UniServ Director,
Winnebagoland UniServ Unit-South,
Fond du Lac, Wisconsin

BACKGROUND

On September 22, 1980, the Rosendale-Brandon Education Association (referred to as the Association) filed a petition with the Wisconsin Employment Relations Commission (WERC) pursuant to Section 111.70(4)(cm)(6) of Wisconsin's Municipal Employment Relations Act (MERA) to initiate mediation-arbitration. The Association and the School District of Rosendale-Brandon (referred to as the Employer or School District) had begun negotiations on February 26, 1980 for a successor to a collective bargaining agreement which was due to expire on June 6, 1980 but they failed to reach agreement on all issues in dispute for this professional staff bargaining unit.

On January 12, 1981, following an investigation by a WERC staff member, the WERC determined that an impasse existed within the meaning of Section 111.70(4)(cm)(6)(a) and that mediation-arbitration should be initiated. On January 27,1981, the undersigned, after having been selected by the parties, was appointed by the WERC as mediator-arbitrator to resolve the impasse. She met with the parties at 4 P.M. on February 26, 1981 in Rosendale, Wisconsin, to mediate the dispute. When mediation efforts proved unsuccessful, the undersigned, according to prior agreement with the parties, proceeded to hold an arbitration meeting (hearing) as required by Section 111.70(4)(cm)(6)(d) commencing at 5:30 P.M. on the same day. No citizens' petition was filed pursuant to Section 111.70(4)(cm)(6)(a). At the arbitration meeting (hearing), the parties were given a full opportunity to present evidence through testimony and exhibits. Briefs and reply briefs were subsequently filed and exchanged.

ISSUE AT IMPASSE

The sole issue upon which the parties were unable to reach agreement concerns fair share. Both parties' final offers contain fair share proposals. The final offer of the Association is annexed hereto as Appendix A and the final offer of the Employer is annexed hereto as Appendix B.

STATUTORY CRITERIA

In resolving this dispute, the mediator-arbitrator is directed by Section 111.70(4)(cm)(7) to consider and give weight to the following factors:

a. The lawful authority of the municipal employer.
b. Stipulations of the parties.
c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.
e. The average consumer prices for goods and services, commonly known as the cost-of-living.
f. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
h. Such other factors not confined to the foregoing which are normally and traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

POSITIONS OF THE PARTIES

The Association

In its oral and written presentations, the Association points out a number of differences between its fair share offer and that of the Employer. A key difference is that the Association's proposal provides for a full fair share (i.e., no exemption for any present bargaining unit member). The Association also notes the following differences: the indemnification obligation, treatment of the status of the fair share agreement upon expiration of the collective bargaining agreement, the standard for judicial review for disputes over portions of the fair share contractual language, a "lump sum" option, plus a number of other language differences.

The Association supports its final offer by arguing that its language is legal and consistent with legislative intent and public policy as ennunciated in decisions of the Wisconsin and the United States Supreme Courts and arbitration awards under MERA. In addition, the Association submits comparability data to support its offer. It notes that six of the eight school districts within the Wisconsin Flyway Athletic Conference, all six contiguous districts and 14 of 17 school districts within its CESA have fair share agreements similar to the Association's final offer language herein. It also presents comparability evidence that many of the specific provisions found in the Employer's final offer are not found (or not frequently found) in comparable school districts.

In addition to extensive general and specific comparability data, the Association offers further justification for its full fair share proposal by emphasizing the benefits received by all in the bargaining unit and by noting that its current membership is approximately 90%. That percentage has been consistent or even greater for the years since 1973-74 when the Association became the exclusive bargaining representative. Since no member of the public nor bargaining unit appeared in opposition to the Association's full fair share, the Association concludes that, for all the above reasons, its proposal in this regard is more reasonable.

Finally, the Association cites one arbitrator who supported the selection of a fair share offer on the basis of several additional statutory criteria, cost of living and total compensation, since representation costs have been increasing and free riders have forced these increasing costs upon members who thus have been adversely affected financially.

For all the above reasons, particularly comparability, the Association believes that its final offer should be selected.

The Employer

The Employer begins its arguments by noting that the dispute in this proceeding is over the scope and form of the fair share provisions submitted by the parties since both parties are proposing versions of fair share agreements. The School District identifies the major differences between the parties as follows: exemption for non-members, time frames for implementing changes in authorized fair share amounts, inclusion of additional indemnitors and broader liability under the indemnification clause, status of fair share deductions after contract expiration but prior to reaching agreement on a successor agreement, and a contractual requirement that the Association maintain an expedient and fair rebate procedure.

To support its grandfather clause exempting present nonmembers, the Employer challenges the comparability data interpretation of the Association. It notes that if the School District's proposal is selected, the Flyway Athletic Conference will be evenly divided on this issue, assuming no changes from language in the 1980-81 collective bargaining agreements on this issue in the seven other districts. Moreover, the Employer notes that the Association's data does not disclose whether school districts currently with full fair share agreements also had initial agreements containing grandfathering clauses which were then deleted as a result of subsequent bargaining. Further, the Employer points out that the percentage of unit members who belong to the Association has been higher in the past. For all these reasons, the Employer believes that its grandfathering proposal is more reasonable since it is an attempt to move cautiously in a controversial area, "to get (its) feet wet before deciding whether to dive in entirely." In the view of the School District, its grandfather provision minimizes disruption and animosity and protects the interests of nonmembers in a situation where the Association has failed to demonstrate the need to override these values and interests.

On another of the issues, the indemnification clause, the Employer points out that only $20 of the current total annual dues of $205 goes to the local Association; $49 goes to the UniServ Unit, $91 to WEAC and $45 to NEA. Accordingly, in addition to the Association, the UniServ Unit and WEAC should become indemnitors in view of the limited resources of the Association which offer insufficient protection for the Employer. This insufficiency is further increased under the Association's proposal since there is more likelihood of challenges by those required to make involuntary payments. The absence of these additional indemnitors may expose School District taxpayers to financial expenditures which are an unfair burden since it is the Association and its affiliates which will benefit from fair share, not the public. The Employer notes there is some comparability support for its indemnification proposal within the Athletic Conference.

The School District supports its proposal which states that fair share deductions will not be made after the contract's expiration until a successor agreement requires otherwise by noting that this language clarifies the situation while the Association's silence produces uncertainty and does not assure what the Association wants (i.e., continued fair share during the hiatus). As for the rebate procedure, the School District believes that its contractual requirements for a fair and expedient procedure is far superior to the Association's oral expressions that current rebate procedures (produced as exhibits) meet these standards. It further rejects Association proposals for a "lump sum" payment alternative, requiring a list of employees covered by the fair share deduction with each remittance to the Association without cost, and for notification no later than 10 days following employment changes in or out of the District as without sufficient rationale.

Finally, the Employer argues on behalf of its de novo judicial review provision (contained in paragraph H) as being appropriate primarily because it covers areas where traditional arbitrators have little expertise and which deserve close judicial scrutiny since sensitive first amendment issues may be present. In view of these important policy considerations, the Employer rejects the comparability data presented by the Association as an inappropriate standard to resolve this issue.

The Employer concludes that comparability data, particularly that of the Flyway Athletic Conference, does not compel the selection of the Association's final offer herein as the Association has argued. On the contrary, the Employer believes that its proposal is more reasonable since it proceeds cautiously, minimizes problems and hostilities, while responding significantly to the Association's expressed desire for improved union security. If future experience demonstrates the need for elements of the Association's proposal, the Employer believes that it has already exhibited its willingness to meet proven needs. Accordingly, its final offer herein which incorporates improved union security in the context of sensible public protections should be selected.

DISCUSSION

The parties have resolved all but one issue for their 1980-82 collective bargaining agreement. The remaining issue is fair share. Both parties' final offers contain a fair share proposal but a close reading of the parties' language reveals several major and a number of minor differences. In the judgment of the undersigned, the most critical difference concerns the scope of coverage. The Association's final offer is a full fair share while the School District's proposal contains a grandfathering provision (see paragraph D). Other major differences are to be found in: 1) the indemnification provisions (see Association's paragraph F and Employer's paragraphs F and G); 2) the Employer's proposal for de novo judicial review of certain fair share arbitration awards (see paragraph H); and 3) the effect of contract termination upon the continuation of fair share deductions (see Employer's paragraph I). In the arbitrator's view, all other differences between the parties' proposals are of lesser importance in this proceeding. Thus, what appears to be a simple, single issue impasse dispute has several significant complications which merit discussion.

Putting aside for the moment the critical issue of coverage (i.e., the grandfathering provision contained in paragraph D of the Employer's final offer), the arbitrator will first consider the three subissues which she has labelled major. As for indemnification clause differences, two separate issues should be noted: one concerns which organization or organizations will be specified as indemnitors and the other concerns the expansion of the indemnification promise to include "good faith" actions (or nonactions) by the School Board which are ultimately found to be in noncompliance with the terms of the agreement. In both areas, the Employer is attempting to decrease any ultimate liability that the School Board might have for certain types of fair share litigation. These attempts are understandable even though the situations where these additional protections are significant might be exceedingly limited particularly under the Employer's final offer. Since the UniServ Unit and the WEAC will be beneficiaries of fair share deductions under either final offer, it is not unreasonable to suggest that they be named as indemnitors, as proposed by the Employer, even though few employers elsewhere have succeeded in including (or perhaps failed to propose) such protections. A similar rationale exists for the expansion of the indemnification promise to include "good faith" School District actions or nonactions even in the absence of significant comparability data to support such a proposal. While these provisions may not be a perceived need or priority in other bargaining relationships, this Employer should not be faulted for its caution (or foresight) in seeking such protections herein.

The second major subissue concerns de novo court review on questions concerning scope, interpretation, and application of paragraphs E, F, G and H. Here, the Employer's cautiousness is less understandable. First, the Employer has a significant role in the selection of an arbitrator and may seek names of arbitrators and the appointment of an arbitrator with particular expertise in and sensitivity to issues wihin the disputed area. Second, if the Employer believes

that any arbitration award is contrary to constitutional or statutory law, federal or state, a broad scope of judicial review is available under current law for public sector awards. Third, the Employer has not offered a special rationale for special treatment of arbitration disputes in this area; it has not sought similar treatment for other difficult substantive areas arbitration disputes elsewhere in the contract. Since exclusions from general arbitration procedures are rare and special treatment of special topics such as proposed herein by the Employer is equally rare and since there are several existing protections which the Employer may utilize to provide the equivalent of the protections sought herein, the requirement for advisory arbitration for certain fair share implementation disputes provides few, if any, positive benefits and certainly is awkward and burdensome. Thus, the Association's arguments against the inclusion of paragraph H are persuasive.

The third subissue in dispute concerns the Employer's language (contained in paragraph 1) which states that if there is a hiatus between the expiration of this agreement and the negotiations of a successor agreement, absent any additional agreement between the parties, fair share deductions shall not be continued. There was some indication at the hearing and in its brief that the Association believes that in the absence of such language, fair share deductions would continue to be made. A literal reading of Section 111.70(3)(a)(6) casts some doubts upon this assumption or understanding of the Association. If the Association wishes to assure the continuation of the fair share deduction, a contractual obligation to do just that is clearly preferable to contractual silence which may have the opposite legal effect. The Employer's proposed language removes any doubt as to what would happen. In the judgment of some, it also codifies the existing state of the law in regard to the continuation of fair share deductions under these circumstances. Such contractual clarification is certainly more desirable than ambiguity or uncertainty arising from contractual silence.

Of the three subissues discussed above, the arbitrator has noted that she believes that the Employer's positions on two (indemnification and status of fair share deductions upon contract termination) are to be preferred while the Association's position opposing de novo judicial review as proposed by the Employer is more reasonable. However, consideration of the most significant issue in this controversy has been put aside and must now be discussed and resolved. As the arbitrator has already indicated, she believes that the most critical issue in this dispute concerns the coverage of fair share. The parties agree that eight members of the bargaining unit (approximately 10%) will be subject to fair share deductions if the Association's proposal is selected while these bargaining unit members would not be affected by the fair share agreement if the Employer's proposal were to be selected. Comparability data suggests that in the Athletic Conference, among contiguous districts, and within the CESA district, full fair share is more commonly found than fair share agreements with grandfather provisions. (It is not known whether all of the districts currently implementing a full fair share agreement started out with that form of fair share or whether there has been an evolutionary process.)

In addition to comparability data, it is relevant to this arbitrator that since its selection as exclusive bargaining representative the Association has maintained a high level of voluntary membership which has been very close to its present 90% (or greater). The final argument which must be considered as strong support for the selection of full fair share is that the Wisconsin legislature acknowledged the problem of "free riders" when it amended MERA to permit the negotiation of fair share agreements as mandatory subjects of bargaining. In this way, the Legislature (which requires under MERA that the bargaining representative selected by a majority must represent exclusively all members of the bargaining unit) recognizes that this exclusive statutory representation might properly require (if agreed to) a financial contribution from non members who benefit from the representation efforts of the exclusive bargaining agent. Thus, the Association's role is no longer that of a strictly private institution but it has been given by statute some attributes of a quasi-public institution. This quasi-public role is recognized in statute and case law alike. This is the primary public policy rationale for any type of fair share agreement and, more particularly, for the full fair share agreement as proposed by the Association herein. Although grandfathering,as proposed by the Employer, is not unreasonable, the arbitrator concludes that under the circumstances herein, the Association's full fair share

more closely approximates the public policy in Wisconsin as reflected in MERA and the statutory criteria governing this proceeding.

AWARD

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

Dated: May 26, 1981
Madison, Wisconsin

June Miller Weisberger
Mediator-Arbitrator

FINAL OFFER OF THE ASSOCIATION

ARTICLE , FAIR SHARE AGREEMENT

A. The Association, as the exclusive representative of all employes in the bargaining unit, will represent all such employes fairly and equally and all employes in the bargaining unit will be required to pay, as provided in this Article, their fair share of the costs of representation 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.

B. This fair share agreement shall be implemented within thirty (30) days after the commencment of the 1981-82 school year. Effective upon this commencement date, or thirty (30) days after the date of initial employment of any employe hired into the bargaining unit after the implementation date, the Employer shall deduct from the earnings of all employes in the bargaining unit, in equal installments, the amount of money certified by the Association. Monies so deducted will be forwarded to the Association Treasurer within thirty (30) days of such deduction.

C. The Employer will provide the Association with a list of employes from whom deductions are made with each remittance to the Association.

D. The Association agrees to certify to the Employer 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 Employer of any change in the amount of such fair share costs thirty (30) days before the effective date of the change.

Appendix A

E. The Association shall provide employes who are not members of the Association with a written, internal mechanism within the Association which allows such employes to challenge the fair share amount certified by the Association to the Employer under paragraph D., above, and to receive, where appropriate, an immediate rebate of any monies determined to have been improperly collected by the Association under this Article.

F. The Association does hereby indemnify and shall save the Employer harmless against any and all claims, demands, suits, or other forms of liability, including court costs, that shall arise out of or by reason of action taken or not taken by the Employer, which Employer action or nonaction is in compliance with the provisions of this Article, and in reliance on any lists or certificates which have been furnished to the Employer pursuant to this Article; provided, however, that the defense of 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 or preclude the District from participating in any legal proceedings challenging the application or interpretation of this Article through representatives of its own choosing and at its own expense.

G. As individuals subject to this Article leave or enter the employment of the District during the school year, the Employer will provide the Association with a list of such changes as soon as practicable, but in no case shall such notification occur later than ten (10) days after such employment changes.

H. Nothing in the foregoing shall prevent Association members, or those subject to fair share payment, from transmitting dues/payments directly to the Association treasurer in a lump sum payment. In the event a lump sum payment is made to the Association, the Association treasurer will promptly notify the Employer.

FINAL OFFER OF THE EMPLOYER

ARTICLE X -- FAIR SHARE

A The R-BEA, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, R-BEA members as well as those who choose to not belong to the R-BEA, fairly and equally, and all employees 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. No employee shall be required to join the R-BEA, but membership in the R-BEA shall be made available to all employees who apply consistent with the R-BEA's constitution and bylaws. No employee shall be denied R-BEA membership because of race, creed, color, sex, handicap or age.

B This fair share agreement shall be implemented within thirty (30) days after the commencement of the 1981-82 school year. Effective upon such implementation date (or thirty (30) days after the date of initial employment for employees hired into the unit after commencement of the 1981-82 school year), the District will deduct from the earnings of all employees in the bargaining unit, in equal installments, the amount of money certified by the R-BEA in a sworn statement as representing each unit employee's share of the costs of collective bargaining and contract administration (see paragraph C, below). Monies so deducted will be forwarded to the R-BEA officer designated on the sworn statement, within thirty (30) days of such deduction. The Employer will maintain a list of employees for whom deductions are made. The Association may review such list and/or secure, at its expense, copies thereof from time to time. Additions to or deletions from such list shall be reflected on such list by the District as soon as practicable. Failure to maintain or update such list shall not relieve either party of its obligations under this Article.

C The R-BEA will certify to the District for purposes of any fair share deduction only such costs of collective bargaining and/or contract administration as are authorized by law. In establishing such amount, relevant decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction will be complied with. Changes during a school year in such authorized amount will be certified to the District by the R-BEA without delay.

D. Unit members who were not members of the R-BEA during the 1979-80 school year and who are not members of the R-BEA on the date of signing of this master contract, shall be exempt from the operation of this fair share provision until such time as they may choose to join. This exemption does not apply to an employee hired after the date of signing this master contract.

Appendix B

E. The R-BEA shall provide employees who are not members of the R-BEA with a written, expediant and fair interr mechanism (within the R-BEA) which allows such employe to challenge the fair share amount certified by the R-BEA to the District under paragraph C, above, and to receive, where appropriate, an immediate rebate of the monies determined to have been improperly collected by the R-BEA under this Article.

F. The R-BEA, the Winnebagoland UniServ Unit (WUU), and the Wisconsin Education Association Council (WEAC), individually and jointly, do hereby indemnify and hold the District and its Board of Education harmless against any and all forms of liability that may arise out of, or by reason of, action taken or not taken by the Board and/or its agents in good faith pursuant to this Article, whether or not such action or nonaction is thereafter determined to be in compliance with the terms hereof. Provided, however, that any such liability shall be, during litigation regarding same, under the exclusive control of the indemnifors and their attorneys (except that any issue regarding the good faith of the Board and/or its agents shall be under the exclusive control and direction of the District's counsel at the expense of the indemnifors), and provided further that this paragraph #6 shall not be read or construed so as to exclude or prevent the District from tendering its own defense through its own attorneys, at its own expense except as hereinabove otherwise provided.

G. The signatories to this master contract on behalf of and for the R-BEA warrant to the District that they have the authority to bind the WUU and the WEAC, as well as the R-BEA, as herein required.

H. Questions as to scope, interpretation and/or application of paragraphs E, F, G and H of this Fair Share Article shall be subject to adjudication by a court of competent jurisdiction. In the event an arbitrator renders or issues a determination as to any such question, with or without the consent of the parties, such determination shall be advisory only and subject to de novo judicial determination by a court of competent jurisdiction. Nothing herein, however, shall preclude the parties from expressly waiving in writing the right to de novo judicial determination of such question(s), in which event the arbitrator's determination shall be final and binding unless contrary to the laws or constitutions of the State of Wisconsin and/or the United States.

I. Unless and until a successor written agreement requires otherwise, fair share deductions will not be made by the District after the expiration date set forth in this contract.