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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ARBITRATION OPINION AND AWARD

In the Matter of Arbitration

Between

ELKHORN AREA SCHOOL DISTRICT

And

WALWORTH COUNTY PUBLIC EMPLOYEES, AFSCME, LOCAL 1925

Interest Arbitration
Case XI No. 28262
MED/ARB-1266
Decision No. 19093-A

Mediator-Arbitrator

William W. Petrie
1214 Kirkwood Drive
Waterford, Wisconsin 53185

Hearings Held

Elkhorn, Wisconsin
January 18, 1982
March 25, 1982

Appearances

For the Employer

Gerald O. Neinfeldt
District Business Manager
ELKHORN AREA SCHOOL DISTRICT
Administrative Service Center
The 1887 Building
Elkhorn, Wisconsin 53121

For the Union

Robert Chybowski
District Representative
WISCONSIN COUNCIL 40 AFSCME
30203 Poplar Drive
Burlington, Wisconsin 53105

BACKGROUND OF THE CASE

This is a statutory interest arbitration proceeding between the Elkhorn Area School District and the Walworth County Public Employees, AFSCME, Local #1925.

The parties' prior labor agreement expired on June 30, 1981, after independent negotiations had failed to result in a renewal agreement; the Union filed a petition with the Wisconsin Employment Relations Commission on June 24, 1981, alleging the existence of an impasse between the parties, and requesting the initiation of statutory mediation-arbitration pursuant to Section 111.70(4)(cm)(6) of the Municipal Employment Relations Act. The matter was preliminarily investigated, after which the Commission on October 30, 1981, issued certain findings of fact, conclusions of law, certification of results of investigation and an order requiring mediation-arbitration of the dispute. On November 10, 1981, the Commission issued an order directing the undersigned to act as mediator-arbitrator, in accordance with the provisions of the Act.

Preliminary mediation took place between the Mediator and the parties on January 18, 1982, culminating in an inability to reach agreement. The undersigned determined that a reasonable period of mediation had taken place, determined that it was appropriate to move to arbitration, and so notified both parties and the Commission in writing on February 5, 1982. An arbitration hearing took place on March 25, 1982, at which time both parties received a full opportunity to present evidence and argument in support of their respective positions. Both parties closed with the submission of post-hearing briefs, after which the record was closed by the Arbitrator on April 24, 1982.

THE FINAL OFFERS OF THE PARTIES

At the beginning of the arbitration hearing, both parties confirmed their mutual agreement to certain modifications in their respective final offers. The renewal labor agreement is to be effective between July 1, 1981 and June 30, 1983, with the only remaining impasse items consisting of the timing and the amounts of certain deferred general wage increases during the contract term, and the Union's demand for partial payment of unused, accumulated sick leave for certain categories of terminating employees.

The Union's final wage offer consists of the following deferred increases.

(1) An across the board increase of 65¢ per hour for all full time employees, effective July 1, 1981, with an additional 9% general increase effective July 1, 1982.

(2) The following across the board increase for all part time employees, effective July 1, 1981: Class I, 40¢ per hour; Class II, 43¢ per hour; Class III, 43¢ per hour; Class IV, 53¢ per hour. It also recommended a 9% general increase for all part time employees, effective July 1, 1982.

The Employer's final wage offer consists of the following deferred increases.

(1) Across the board increases for each category of full time employees, of 45¢ per hour effective July 1, 1981, 10¢ per hour effective January 1, 1982, and 45¢ per hour effective June 30, 1982.

(2) Effective July 1, 1981, the following across the board increases for part time employees: Class I, 30¢ per hour; Class II, 30¢ per hour; Class III, 38¢ per hour; Class IV, 53¢ per hour.

(3) Effective July 1, 1982, the following additional

increases for part time employees: Class I, 27¢ to 31¢ per hour; Class II, 29¢ to 32¢ per hour; Class III, 32¢ to 35¢ per hour; Class IV, 33¢ to 36¢ per hour.

The Union proposed that the following provision be added to those contract provisions which currently provide for sick leave for full time and for part time employees:

"Upon termination of employment, except for discharge for just cause, the employee shall be paid for the current value of fifty percent (50%) of his/her accumulated sick leave."

The Employer proposed no change in the current sick leave language.

THE STATUTES

The merits of the dispute are governed by the provisions of the Wisconsin Statutes, which in Section 111.70(4)(cm)7 direct the Mediator-Arbitrator to 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, excused time, insurance and pensions, medical and hospitalization benefits, and 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 or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties, in the public service or in private employment."

POSITION OF THE UNION

In support of its final offer, the Union introduced a total of thirty-nine separate exhibits, and presented a variety of arguments.

(1) In connection with its wage offer it emphasized the comparison criteria, and argued basically as follows:

(a) It submitted that the most persuasive comparisons are with other public sector units, in the same area served by the Elkhorn School District or in nearby areas.

(b) It argued that comparisons of absolute wage increases are more valid than percentage increases, due to allegedly low wages in certain

bargaining unit categories in the past; in this connection it cites the fact that the parties are in substantial agreement with respect to wages, where the percentage increases are the greatest.

(c) It submits that certain cost data computations and percentage analyses submitted by the Employer exaggerate its position; in this connection, it argues that they are useless for comparison purposes, that they assume that all employees stay for the duration of the new agreement, and that they improperly include pay increments in the computations. In the latter context, it submits that incremental increases reflect mutual agreement of the greater worth of an employee with the requisite experience to qualify for the incremental increases; stated another way, the quality of the services rendered improves with the longer service of the affected employees, and does not represent a real cost.

(d) It submits that Union Exhibits #2 through #15 reflect wages paid to nearby, public sector food service workers. Since all full time maintenance/custodial personnel are paid according to the same pay schedule, it suggests that comparisons should be made with groups of classifications as they currently exist in other employers' wage structures.

(e) It argues that the most significant custodial and maintenance comparisons are those which involve City of Elkhorn employees; in this connection it cites the fact that both labor agreements cover the same time period, both cover public sector employees, both bargaining units are in the same city, blue collar employees in both units are drawn from the same labor market, both have similar costs for goods and services, and each group of employees is supported by nearly the same set of taxpayers.

In addressing the above comparisons, it submits that the Employer's final wage offer would entail a substantial loss of ground during the duration of the renewal agreement, while the loss under the Union's final offer would be less; it also argues that longevity pay under the City of Elkhorn agreement is superior to that of those in the bargaining unit, alleging a 50% increase in the City of Elkhorn under its 1981-1983 agreement.

(f) It argued that Walworth County wages should also be a persuasive comparison, in light of the fact that the City of Elkhorn is the County Seat; in this connection, it emphasized wages paid by the Lakeland Nursing Home, by the Lakeland Hospital, and within the Walworth County Courthouse,

(g) While not agreeing that comparison with other school districts should be the primary one, it cited comparison data with Lake Geneva Schools, Whitewater Schools, with Fontana Schools, with City of Walworth Schools, with East Troy Schools, with Delavan-Darien Schools, with Genoa Schools, with Williams Bay Schools, and with Burlington Schools. It also suggested that certain school district comparisons cited by the Employer substantiated the Union's final wage offer.

(h) It challenged the relevancy of certain Employer submitted exhibits dealing with unemployment in general, and with layoffs in certain nearby school districts, submitting that these exhibits were insufficient to generate any question of inability to pay; in the same vein, it presented a newspaper article from the Janesville Gazette dated September 15, 1981, and referencing certain increases in salary authorized for Elkhorn School District Administrators.

(i) It challenged the validity of certain Employer presented community profile data, on the basis of the exclusion from the data of any reference to AFSCME represented employees.

(j) It argued that certain Employer cited data relating to a recent three year labor agreement with Village of East Troy employees, was actually favorable to the Union's position in the case at hand.

(k) While it acknowledges that the Consumer Price Index in the past few months has not continued to increase at a double digit basis, it emphasizes the lack of cost-of-living escalation in the contract, and argues that the employees in the bargaining unit have not kept up with cost-of-living increases during the past several years.

(2) In connection with its demand for sick leave payout upon termination, it presented the following primary arguments:

(a) That a cash payout of earned accumulated sick leave is both fair and equitable on its face, in that it is an earned benefit.

(b) That even a payout of one-half of accumulated sick leave will create an extra incentive to use the benefits carefully. That such a provision will cause a drop in the use rate, which will counter the Employer's argument that the current custodial use rate of 65%, is the highest of all employee units.

(c) That relevant comparisons support the position of the Union; in this connection it submitted exhibits showing that some form of payout was a common feature of sick leave provisions for certain other public sector labor agreements in Elkhorn, in Walworth County in general, and in certain nearby school districts.

In summary, the Union submits that its position is more reasonable than that of the Employer, and requests the Arbitrator to adopt the Union's final offer for incorporation into the 1981-1983 agreement of the parties.

POSITION OF THE EMPLOYER

In support of its final offer, the Employer introduced a total of seventeen Employer Exhibits, and presented a variety of additional arguments.

(1) Initially, it submits that the Union did not select comparable public sector employees in its analysis of wage rates. In this connection it emphasized the following considerations:

(a) Two of the Union's suggested comparables, the State of Wisconsin and the County of Walworth, are not engaged in the process of education.

(b) It distinguishes many of the Union's nine suggested school district comparisons on the basis of community size and/or pupil population.

(c) It submitted that all eleven of the Union suggested comparables use pay differentials for various classifications, for full time employees; in light of the fact that there is a flat rate paid by the Employer for all full time employees, regardless of classification, it argues that the Union presented no valid comparables for full time custodial-maintenance employees.

(d) It cites the "performing similar services" reference in Section 111.70(4)(cm)(7)(d), in support of the argument that only employee units which have a focus of bargaining that is directed toward custodial maintenance and food service employees should be considered as comparable.

In this connection, it argues that rates paid for custodial maintenance and food service employees in bargaining units that include higher paying positions which require advance education and training, should not be used for comparison purposes; it submits that the rates paid for custodial workers in such units are inflated by their ability to reap the benefits bargained for in the larger unit. The Employer submits that only homogeneous units of custodians-maintenance and food service personnel should be considered in making the requisite statutory comparisons.

(e) It further submits that the Union's comparables are deficient in that they include no private sector employers in the same or comparable communities.

(2) It submitted that an analysis of comparable public and private sector employers supported its final offer, rather than that of the Union. In this connection, it presented the following arguments:

(a) That the parties have agreed since 1976 that all full time custodial-maintenance employees shall be classified and paid on an equal basis, thus recognizing that the various job titles are relatively equal and warrant no pay differentiation.

(b) That the most persuasive comparisons should be made with employees performing similar services for public sector educational institutions; further, that other employees performing similar services for non-educational public sector employers provide less valid comparisons.

(c) It urged primary consideration toward comparisons with other employee units where the focus of bargaining was directed toward school custodial-maintenance and school food service; in this connection, it reiterated the argument that employees who were members of larger units tended to benefit from being included in bargaining for units of higher skill.

(d) It submitted that semi-rural employers should furnish the primary comparison group, with less consideration given to employers influenced by urban or adjacent urban areas.

(e) With the above selection criteria utilized, it

suggested primary consideration of fourteen other comparable school districts within the Southern Lakes Conference and comparable communities; within these parameters, it suggested the following comparison conclusions for full time and part time custodial and maintenance employees:

(i) It suggested that the Class I category in the collective agreement was most comparable with the Assistant Custodian category for other employers. On this basis it submitted that the hourly starting rate in the Employer's final offer was higher than five other districts and lower than two others, that the hourly one year rate was higher than three other districts and lower than only two, that the hourly maximum rate was higher than three districts and lower than six others.

(ii) It suggested that the part time custodial employees comparisons under the Employer's final offer showed that the hourly starting rate had two districts lower and four higher, the hourly one year rate ranked below four other districts, the hourly maximum rate was higher than four comparable districts and lower than four others.

On the basis of the above comparisons, the Employer contended its offer was comparable, in that it was generally higher than the lowest rate, with one exception, and generally a fair offer.

(f) Using the same employer group as referenced immediately above, it cited the following comparisons on the basis of the Employer's final offer for part time food service employees holding the Class I/Clerk's Helper-Cashier, the Class II/Cook-Bookkeeper, and the Class IV/Head Cook/Baker classifications:

(i) In Class I, its starting rate would rank above one other employer and below five others; its one year rate would be the lowest, with four other districts paying more; and its maximum rate would have three districts lower and four higher.

(ii) In Class II, its starting rate would have two districts lower and four higher; its one year rate would have one district lower and four higher; and its maximum rate would have three districts lower and five districts ranked higher.

(iii) In Class III, its starting rate would have two districts lower and three higher; its one year rate would have one district lower and three higher; and its maximum rate would have one district lower and five ranked higher.

On the above basis, it contended that its final offer is fair and equitable in that, with one exception, it ranks higher than the lowest rate paid by comparable districts, and is generally average. In this connection it also emphasized that it provides for ten paid non-work days in lieu of vacations and holidays, which is not uniformly provided by other districts.

(g) In addressing attention to what it characterized as less comparable employers, the Employer emphasized the following considerations:

(i) It concluded that full time custodial maintenance should be given some consideration, but cited difficulty in obtaining and compiling valid comparison data relating to the part time food service positions.

(ii) It suggested, in general, that Walworth County settlements would reflect percentage wage increases of 7% for 1982 and 6.5% for 1983; it additionally suggested that certain concessions were involved in reaching some of the settlements.

(iii) It submitted a community profile compiled by the Elkhorn Chamber of Commerce which reflected hourly rates for an unskilled Janitor/Watchman to be \$3.35 - entry level, \$4.50 - average, and \$4.50 - high.

(iv) It submitted a U.S. Bureau of Labor Statistics Area Wage Survey for Milwaukee, Wisconsin dated May, 1981, which indicated the average hourly wage rate of \$4.96 for Janitors, with a middle range of \$3.35 to \$6.00.

(v) It provided local private sector wage data for the Assistant Custodian classification from three employers; the wage data showed starting rates of \$4.25, \$5.90 and \$4.51 per hour, with maximum rates of \$5.50, \$6.50 and \$4.75 per hour.

(vi) It cited the Custodian rates for City of Elkhorn employees, ranging from a \$5.87 minimum on July 1, 1981 to a \$7.27 maximum for two years of service, effective July 1, 1982; but it argued that the Custodian rate was affected by its inclusion in a unit with other skilled and semi-skilled employees.

(vii) It also urged consideration of the fact that both Walworth County and the City of Elkhorn subcontract certain cleaning and custodial functions.

(3) It submitted that administrative salaries currently being paid in the District, and recent increases thereto, should not be considered by the Arbitrator.

(4) In connection with the Union's proposal for a partial payment for unused sick leave upon termination, it argued that no other group of District employees receives such a benefit. In this connection it particularly emphasized the potential impact upon bargaining with other District employees of such a concession. It also particularly referenced other Walworth County comparisons and certain external comparisons, in support of the suggested conclusion that there was no statutory basis for payment for unused sick leave upon termination.

(5) On an overall basis, the District cited the adverse economic conditions facing the School District, including declining enrollment, declining cost-of-living, and the necessity of future staff layoffs. In support of these arguments, it presented exhibits dealing with student projections for the 1982-1983 school year, with recent Consumer Price Index data, and with unemployment data for Walworth and surrounding counties.

In summary, the Employer alleged that its final offer was the more reasonable of the two before the Arbitrator, based upon the comparison criterion, the present state of the economy, the lack of payment for unused sick leave within the District, the allegedly adverse impact of adopting the Union's final offer upon current expenditure levels and current personnel levels, and the alleged failure of the Union to show functional similarity between employees in its comparisons, and its failure to cite private sector comparisons.

FINDINGS AND CONCLUSIONS

During the course of these proceedings, the arbitrator has considered all of the arbitral criteria described in Section 111.70 (4)(cm)7 of the Wisconsin Statutes. Primary attention has been directed, however to those criteria which were particularly emphasized by one or both of the parties, which included the following:

(1) The comparison criteria as referenced in sub-paragraph (d);

(2) The cost-of-living criterion as referenced in sub-paragraph (e);

(3) The interests and welfare of the public and the ability to pay criteria as referenced in sub-paragraph (c);

(4) Changes in certain circumstances during the pendency of the proceedings, as referenced in sub-paragraph (g).

The Comparison Criterion

Although the statutory criteria were neither ranked by the Legislature, nor otherwise weighted in importance, there is no doubt that the comparison factor is the most extensively used, and the most persuasive factor in interest arbitration. This point is very well described in the following extract from the book by Elkouri and Elkouri:1./

> "Without question the most extensively used standard in 'interest' arbitration is 'prevailing practice'. This standard is applied, with varying degrees of emphasis in most 'interest' cases. In a sense, when this standard is applied the result is that disputes indirectly adopt the end results of the successful collective bargaining of other parties similarly situated. The arbitrator is the agent through whom the outside bargain is indirectly adopted by the parties."

Similar points are well made by Irving Bernstein in his excellent book on the arbitration of wages. 2./

> "Comparisons are preeminent in wage determination because all parties at interest derive benefit from them. To the worker they permit a decision on the adequacy of his income. He feels no discrimination if he stays abreast of other workers in his industry, his locality, his neighborhood. They are vital to the union because they provide guidance to its officials upon what must be insisted upon and a yardstick for measuring their bargaining skill. In the presence of internal factionalism or rival unionism, the power of comparison is enhanced. The employer is drawn to them because they assure him that competitors will not gain a wage-cost advantage and that he will be able to recruit in the local labor market. Small firms (and unions) profit administratively by accepting a ready-made solution; they avoid the expenditure of time and money needed for working one out themselves. Arbitrators benefit no less from comparisons. They have 'the appeal of precedent and... awards based thereon are apt to satisfy the normal expectations of the parties and to appear just to the public'."

The enunciation of the relative importance of comparisons as an interest arbitration criterion, does not alone point the way toward the resolution of the impasse. The application of the comparison factor to the dispute at hand, requires the Arbitrator to preliminarily address certain factors.

(1) The parties continued to differ with respect to which of the various comparisons offered by them should be the most persuasive to the Arbitrator. Comparisons cited in the various exhibits and arguments, included those with other District employees, other public and private sector employees in general, and other school districts.

(2) The parties to the agreement have mutually adopted a flat hourly wage rate structure for what would more typically be regarded as four separate and distinct classifications; beginning in July 1976, a single wage grade (Class I Hourly) has been used for all full time custodial maintenance employees categorized as Assistant Custodians, Custodian- Groundsman, Utilityman, Head Custodians and Building Engineers. In comparing the pay rates for these categories of employees with those paid by employers who treat the categories as separate classifications with differing pay levels, obvious problems exist.

(3) The bargaining unit in which the dispute exists is a rather limited one, containing only full time custodial-maintenance employees, and four part-time classes of employees: Class I - Cooks Helpers, Class II - Cooks, Bookkeepers, Class III - Part-time Custodians and Class IV - Head Cook and Baker, Preparation Site.

The Union presented wage comparisons with certain comparable classifications included in larger bargaining units, containing other, higher paying classifications. The Employer suggested that such comparisons are invalid, due to the argument that the low paying positions in such bargaining units benefit from a wage standpoint, by their inclusion in the larger unit.

(4) The Union questioned whether a cents per hour or a percentage increase should be given primary significance in the application of the comparison criterion. In this connection, it submitted that the percentage increase was rather deceiving, due to the relatively low wages paid to various of the part-time employees in the bargaining unit.

In addressing first attention to which of the various comparisons should be regarded as the more persuasive, it should be noted that the statute does not prioritize the various possible comparisons, but rather defines the possibilities in very general terms. Interest arbitrators, however, have generally emphasized the relative importance of the intraindustry comparisons which, in the case at hand, would translate into comparison with other comparable public sector school districts; the fact of, and the basis for arbitral preference for intraindustry comparisons is described in the following terms by Bernstein.3./

"a. Intraindustry comparisons. The intraindustry comparison is more commonly cited than any other form of comparison, or, for that matter, any other criterion. More important, the weight it receives is clearly preeminent; it leads by a wide margin in the first rankings of arbitrators. Hence there is no risk in concluding that it is of paramount importance among the wage-determining standards.

* * * * * *

A corollary of the preeminence of the intraindustry

comparison is the superior weight it wins when found in conflict with another standard of wage determination. The balancing of opposing factors, of course, is central in the arbitration function, and most commonly arises in the present context over an employer argument of financial adversity....."

Bernstein goes on to describe the arbitral application of the intraindustry comparison criterion in the face of contrary arguments related to difficulty of payment.4./

"The Wisconsin electric cooperative case of 1950 entailed a related and more challenging issue. The Dairyland Power Cooperative was generally regarded as the bellwether of the rural electrification movement. Its function was to supply power to farmers whose location rendered them unprofitable prospects for the private utilities. 'A significant social purpose was thus served,' the arbitration board observed. 'Not only the farmers but the economy as a whole benefited.' Dairyland, however, was inherently a high-cost operation. Widely spaced consumers required large construction outlays for distribution. More important was the uneven demand of dairy farmers as contrasted with urban customers. The former concentrated the power load in the evening hours, necessitating a plant potential far in excess of what could be used at other times. Finally, Dairyland felt constrained to charge lower rates than its competition to justify itself as a cooperative.

On the other hand, the Electrical Workers insisted upon a comparison with the privately-owned Northern States Power Company. The two operations served the same general area and had similar investments. Employees of both lived in the same communities and had identical jobs. Yet, Northern States wage rates were substantially higher. Here the board faced not only a plea of financial difficulty but also the force of a laudable social objective. Despite these considerations, 'the Board believes that Cooperative can make no valid claim to special wage treatment...Wages, like materials, are a cost of doing business and Dairyland must pay the fair market price.' The award, therefore, narrowed the differential with Northern States."

Although the source and the cited case are three decades old, the underlying principles are still valid today; intraindustry comparison criterion, will normally take precedence over certain other arbitral criteria.

While both parties presented additional comparison data, dealing with the wages paid to certain other public and private sector employees, the information was not comprehensive in all respects. The District, for example, submitted some non-specific community profile data, certain BLS data from the Milwaukee area, additional data from three private, local employers relative to their use of an assistant custodian classification, and certain County labor settlement projections for 1982 and 1983. The Union presented certain wage history data for the Custodian Classification in the City of Elkhorn, which tended to show some decline in custodian pay in the unit, and also cited certain additional general public sector comparison data.

While the general comparison data cited above has been carefully considered by the Arbitrator, it falls far short of the persuasive value of the school district comparison data described above, and cannot be assigned determinative weight in the resolution of the dispute at hand.

What then of the questions relating to comparisons between bargaining units that are not similar in their makeup, and the validity of comparison issue raised by the parties' combination of the several full time classifications into a single Class I pay level?

(1) While the Employer argued that comparisons were only valid when they were made between similarly constituted bargaining units, the Arbitrator can find no persuasive precedent or rationale for such a determination. The statute directs consideration of wages paid to employees performing similar services, without reference to union representation or to bargaining unit makeup.

(2) While the Employer and the Union have mutually decided to combine into a single pay grade (Class I), the Assistant Custodian, Custodian-Groundsman, Custodian-Utilityman, Head Custodian and Building Engineer classifications, this does not detract from the validity of comparing the wages paid to employees performing these custodial/maintenance functions, with those performing the same functions for other school districts. When faced with this type of situation, and depending upon the availability of data, it may have been more meaningful for the parties to have determined the weighted average paid to employees performing the functions combined in Class I versus the weighted average paid to the various employees in the classifications performing the functions for other, comparable school districts.

In looking to the intraindustry comparison group, evidence was introduced by either or both of the parties relative to wages or benefits in sixteen other school districts within an approximate twenty-five mile radius of the Elkhorn District. Both parties cited the districts of Burlington, Delavan-Darien, East Troy, Whitewater and Williams Bay, while the Employer cited Fort Atkinson, Jefferson, Milton, Mukwonago, Salem, Waterford and Wilmot, and the Union cited Fontana, Genoa, Lake Geneva and Walworth. In light of the fact that no extensive rationale was advanced by either party in favor of accepting or excluding any of the referenced districts, the Arbitrator has determined that all of them should be included in the intraindustry comparison group to which primary consideration should be addressed.

Despite having determined the primary group for comparison purposes, the Arbitrator must observe that the consideration of the wage data submitted by the parties, and the application of the intraindustry comparison criterion, is somewhat difficult, due to the lack of information relative to the wage history of the comparable employers. If the Arbitrator were dealing with a situation where there had been complete uniformity in wages for the various classifications, between the appropriate employers, the current wage information would be sufficient to arrive at a well based decision relative to which was the more appropriate of the two final wage offers. In the situation at hand, however, the wages have not been uniform, and it is impossible to definitively address valid comparison considerations without information relative to wage history, including the size of the wage increases granted by or negotiated with other comparable employers.

Illustrative of the normal desirability of wage history, is the following hypothesis. Assume that a union's final offer would make the unit employees the highest paid among ten employers, while an employer's final offer would make them the third highest paid. If the employer had historically been a wage leader in the affected classifications within the comparison group, the hypothetical union's final offer would probably be the more appropriate of the two final offers; on the other hand, if the employer had typically been the third or fourth highest paying of the ten employers, its final offer would be favored!

Despite the lack of wage history data in the comparison group, it is possible to evaluate the potential impact of the implementation of either of the two final wage offers.

(1) In the Assistant Custodian Classification, adoption of the Employer's final offer would place the employees' pay above four other districts and below ten others; adoption of the Union's final offer would place the employees above six other districts and below seven others.

(2) In the Custodian Grounds Classification, adoption of either final offer would place the employees' pay above two other districts and below three others.

(3) In the Head Custodian Classification, adoption of either final offer would place the employees' pay above one other district and below eleven others.

(4) In the Building Engineers Classification, adoption of either offer would place the affected employees' pay below five other employers.

On the basis of the data referenced above, it appears that the overall full time custodial wages paid to those in the bargaining unit are somewhat below average, particularly in the higher paying classifications.

In its post-hearing brief, the Union suggested that the percentage increases offered by the Employer for those part time employees at the bottom of the wage structure, seemed more significant than was really the case; in this connection, it emphasized the argument that these employees were starting at a very low hourly rate, and deserved a larger increase than was offered by the Employer. While the hourly rates for those in the Cooks Helpers, Cooks and Bookkeeper classifications in Class I and Class II may seem low on various bases, the comparison data supplied by the parties shows the rates to be quite competitive.

(1) 1981-1982 wage data was supplied for the Cooks Helpers classification by the Delavan-Darien, the East Troy, the Fort Atkinson, the Jefferson, the Mukwonago, the Whitewater and the Williams Bay school districts; the average hourly wage is $4.095, which compares with an Employer offer of $4.10 per hour and a Union offer of $4.23 per hour.

(2) 1981-1982 wage data was supplied for the Cook and Bookkeeper classifications by the Delavan-Darien, the East Troy, the Fontana, the Jefferson, the Lake Geneva, the Mukwonago, the Walworth, the Whitewater and the Williams Bay school districts; the average hourly wage for these districts is $4.40 per hour, which compares with an Employer offer of $4.25 and a Union offer of $4.38 per hour.

On the basis of the above, it must be concluded that the wage comparison data for the part time classifications does not definitively favor the position of either party.

The Cost-of-Living Criterion

Both parties cited and relied upon the cost-of-living criterion in support of their respective positions.

The Union acknowledged that the Consumer Price Index in the past several months had not continued to increase on a double digit basis, but it emphasized the lack of cost-of-living escalation in the current and in past labor agreements, and it argued that the employees had not kept up with cost-of-living increases over the past several years.

The Employer cited the recent decline in the rate of inflation along with certain other economic considerations facing the District. In addition to a declining rate of increase in the Consumer Price Index, it cited declining enrollment in the District, adverse

economic conditions in general, increasing unemployment in the area and the probability of future layoffs of District employees.

Cost-of-living considerations in recent years have played a rather significant role in the interest arbitration process, due to the rather large recent rate of upward movement in the Consumer Price Index. It must be remembered, however, that there are certain limitations upon the degree of consideration that an arbitrator can give to past movement in the index, as opposed to present or future movement. This concept is described in the following excerpt from Bernstein's book: 5./

> "Base period manipulation...presents grave hazards. Arbitrators have guarded themselves against these risks by working out a quite generally accepted rule; the base for computing cost-of-living adjustments shall be the effective date of the last contract (that is, the expiration date of the second last agreement). The justification here is...the presumption that the most recent negotiations disposed of all the factors of wage determination. To go behind such a date,....would require a re-litigation of every preceding arbitration between the parties and a re-examination of every preceding bargain concluded between them..."

Since the parties are currently involved in the renewal of a prior labor contract which was effective between 1979-1981, the Arbitrator is limited to consideration of movement in the Index subsequent to the last time the parties went to the negotiating table. No information was introduced into the record, dealing with either the amount of the last negotiated increases, or with the 1979 negotiations history; such information might have allowed the Arbitrator to determine how much, if any, of the last negotiated increase was designed to offset future increases in the cost-of-living. Under the circumstances, while the Arbitrator is well aware of the major increases in the cost-of-living since 1979, and the significant slackening in the rate of increase during 1981 and 1982, it is difficult to quantify these factors. In light of these factors and the closeness of the parties' final wage offers, the cost-of-living criterion cannot be given definitive weight in these proceedings.

The Question of Payment Upon Termination for Unused Sick Leave

What then of the comparison information addressed by the parties in connection with the Union's demand for payment for unused sick leave upon termination?

The Employer resisted the proposal largely on the basis of the fact that no other district employees had such a benefit, and the rationale that if it were granted to this single, small bargaining unit, it would undoubtedly be adopted as a bargaining goal in its other unit. The Union logically feels that the practice must start at some point, and in some unit of employees.

The Union presented comparison data indicating that some form of payment for unused sick leave was currently in use by various other public sector employers in the geographical area, for certain of their employees; it cited the City of Elkhorn, the City of Delavan, Walworth County, Burlington School District, Williams Bay School District, Genoa City School District, Walworth School District, Fontana School District, Muskego School District, and the State of Wisconsin.

In looking to those sixteen districts considered primarily comparable for wage purposes, only Burlington Schools extend a severance payoff for unused sick leave to custodial personnel and food handlers. The Muskego-Norway District (not in the previously cited group), also extends a form of payment for unused sick leave to certain retirees, including custodial employees. Of the remaining comparable school district employers, some extend

the benefits to teachers, and some to staff support personnel, but the overwhelming majority of the group do not have such a benefit for their custodial and food service employees. Accordingly, it cannot be said that the position of the Union is supported by comparison with the practices of other school districts for similar employees.

When an interest arbitrator is faced with the demand to significantly modify past practices, or to add new language or new or innovative benefits, he will normally tread carefully. This factor is very well described in the following, frequently referenced excerpt from an interest arbitration decision by Professor John Flagler:6./

> "In this contract making process, the arbitrator must resist any temptation to innovate, to plow new ground of his own choosing. He is committed to producing a contract which the parties themselves might have reached in the absence of extraordinary pressures which led to the exhaustion or rejection of their traditional remedies.
>
> The arbitrator attempts to accomplish this objective by first understanding the nature and character of past agreements reached in a comparable area of the industry and in the firm. He must then carry forward the spirit and framework of past accomodations into the dispute before him. It is not necessary or even desirable that he approve which has taken place in the past but only that he understand the character of established practices and rigorously avoid giving to either party that which they could not have secured at the bargaining table.

Over sixty years ago, John R. Commons and John B. Andrews urged the application of the same principle, in a mediation context.7./

> "He acts purely as a go-between, seeking to ascertain, in confidence, the most that one party will give and the least that the other will take without entering on either a lockout or a strike. If he succeeds in this, he is really discovering the bargaining power of both sides and bringing them to the point where they would be if they made an agreement without him."

The reluctance of interest neutrals to innovate or to plow new ground is much less pronounced in public sector disputes than in the private sector. In his treatise on public sector interest arbitration, Arbitrator Howard S. Block distinguishes between the above referenced view in the private sector, and the perceived need for greater innovation in public sector disputes.8./

> "...As we know, a principal guideline for resolving interest disputes in the private sector is prevailing industry practice--.....
>
> * * * * * *
>
> ...the public sector neutral, I submit, does not wander in an uncharted field even though he must at times adopt an approach diametrically opposite to that used in the private sector. More often than in the private sector, he must be innovative; he must plow new ground. He cannot function as a lifeless mirror reflecting pre-collective negotiation practices which management may yearn to perpetuate but which are the target of multitudes of public employees in revolt."

The undersigned has had past occasion to apply the Block rationale in public sector interest disputes, but only where a persuasive basis has been made for a departure from past practice or for the introduction of an innovative change. In the case at hand, however, there has been no persuasive case made for the adoption of the payment for unused sick leave upon termination. While the Union cited some comparisons, and presented certain

equitable arguments, the Employer also argued convincingly that the impact of such a change in benefits upon other District employees would be formidable, and submitted that the economic times militate against any adoption of such new benefits.

Based upon the lack of a convincing case, the Arbitrator has preliminarily concluded that the application of the statutory arbitral criteria does not support the introduction of a new benefit providing for the partial payment of unused sick leave upon termination. While public sector interest neutrals are more receptive than their private sector counterparts to adopting innovative approaches to negotiations impasses, no convincing case has been made for the addition of the benefit in question.

Summary of Preliminary Conclusions

As referenced in greater detail above, the Arbitrator has reached the following summarized preliminary conclusions:

(1) In connection with the wage impasse between the parties:

(a) The most persuasive comparison data is that which compares the wages paid in the bargaining unit with those paid in comparable school districts, but the lack of wage history information somewhat detracts from the probative value of the information in the record. An examination of the wages paid to comparable employees by other districts shows that full time custodial wages paid in the bargaining unit are somewhat below average, thus somewhat favoring the position of the Union. An examination of comparable part time wages does not favor the position of either party.

(b) For the reasons specified above, the movement in the Consumer Price Index since 1979, cannot be assigned definitive weight in the resolution of the impasse.

(2) In connection with the impasse relative to partial payment for unused sick leave for certain types of terminations, no persuasive basis has been established for the addition of this benefit. A consideration of the statutory criteria clearly favors the position of the Employer.

(3) While certain changes in the economy and in the collective bargaining climate have taken place during the pendency of these proceedings, these criteria cannot be assigned determinative weight in the resolution of the impasse.

(4) No basis has been established for determinative weight to be assigned to either the interests and welfare of the public or to the ability to pay criteria.

Selection of Final Offer

In consideration of the entire record before me, including the preliminary conclusions referenced above, the Arbitrator has determined that the final offer of the Employer is the more appropriate of the two final offers.

While the wage offer of the Union was somewhat favored by the referenced full time wage comparisons with other school districts, no persuasive statutory basis has been established which would support the addition of payment for unused sick leave upon termination. In light of the closeness of the parties' final wage

offers in the full time classifications, and in consideration of the implications arising from the adoption of the change in payment for unused sick leave, the final offer of the Employer is the more appropriate of the two offers before the Arbitrator.

1./ How Arbitration Works, Bureau of National Affairs, Third Edition - 1973, page 746.

2./ The Arbitration of Wages, University of California Press, 1954, page 54.

3./ Ibid. pages 56-57. (footnotes omitted)

4./ Ibid. pages 58-59. (footnotes omitted)

5./ Ibid. page 75. (footnotes omitted)

6./ Des Moines Transit Co. 38 LA 666.

7./ Principles of Labor Legislation, New York, Harper & Bros., 1916. page 125.

8./ Criteria in Public Sector Interest Disputes, Reprint No. 230, pages 164-165, Institute of Industrial Relations, UCLA, 1972.

AWARD

Based upon a careful consideration of all the evidence and argument, and pursuant to the various arbitral criteria provided in Section 111.70(4)(cm)(7) of the Wisconsin Statutes, it is the decision of the Impartial Arbitrator that:

(1) The final offer of the Employer is the more appropriate of the two final offers;

(2) Accordingly, the Employer's final offer, herein incorporated by reference into this award, is ordered implemented by the parties.

WILLIAM W. PETRIE
Mediator-Arbitrator

June 6, 1982